*THE WRITER'S FREE INTERNET EDITION – VOLUME III*

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# THE U.S. CONSTITUTION AND MONEY

## Corruption and Decline

by

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EAST AMHERST

2010

**DEDICATED**

**To**

**NORMAN AND ROBERT**

*True Brothers*

# PREFACE

This is Volume III of *The Writer's Free Internet Edition Series*. Volume I has not been written yet. Volume II is *Essays on American Empire.* This volume is a summary of Edwin Vieira Jr.'s *Pieces of Eight: The Monetary Powers and Disabilities of the U.S. Constitution.* I composed this book's thirteen chapters between March and June of 2010, writing them sequentially as I worked through Vieira's masterwork for the second time.

Upon my first reading of Vieira's two-volume work, I recognized its importance to our knowledge of both the U.S. Constitution and money. Wanting to understand it thoroughly, I decided to write a summary. This served a broader purpose. I saw that the book was out of print and, even if it were in print, was long and technical. I believed that the presentation of the book's contents to a broader audience would benefit from condensation, distillation, and from the unified perspective of someone like me who is versed in finance. Yet I did not want to water down the content. The result is what you have before you. It contains a summary but it is more than a summary. I have integrated the content, which at times required reordering and going beyond that content into my own research and formulations; and I have also pared down that content without losing Vieira's central arguments, observations, and findings.

Why devote some months to such a project? This is part of a larger quest of mine to understand money and banking to my satisfaction and to be able to communicate what truths about money and banking that I think are firm, the reason being that this field is subject to a high degree of confusion and disagreement. My personal motivation was, in part, that I found that I could not invest properly without becoming more expert in this and related fields. I have worked on the money project off and on since 2005 without it yet

culminating in a single book with my thoughts on the subject; I've produced several articles along the way with preliminary ideas and conclusions.

Money and banking is an area connected to large social and political ideas and to government. It is one of the major areas so to be connected. That is a major reason why it occupies the attention of many observers and critics of existing political arrangements. Money and banking is an area connected to the economic travails of the past few years and connected as well to many issues of corporate, public, and investment finance, both domestic and international. These are other reasons why I believe Vieira's work and the subject are worthy of intensive study. And beyond these is the fact that money is a constitutional matter. We can learn much about government and the Constitution by examining the conjunction of money and the Constitution.

Vieira's political philosophy differs very greatly from mine. In the face of what I see as irreconcilable differences in the views of Americans, I believe that choice in government on a non-territorial basis (panarchy) is the only reasonable solution that preserves peace and the rights of all, while furthering justice and opening avenues to prosperous developments. Panarchy means that those who wish to continue living with and under the existing U.S. government can choose to do so, while those who wish to choose other governments can do so without dividing up territory into separate bordered jurisdictions. Vieira, by contrast, believes in the law represented by the Constitution. He accepts the Union. He wants change within the Union. He documents the ways in which successive U.S. governments have undermined that Constitution in one important area, which is that of money. He calls for reforms to restore the righful constitutional money. He would keep the territorial U.S. government intact for all Americans but on a reformed basis that obeyed the Constitution. Naturally, this would call for other important reforms beyond the area of money.

In his book on money, Vieira does not entirely spell out his concept of a proper constitutional Union and government. That was not his purpose, and it would take him several more volumes, such as his new work on militia. I am somewhat sympathetic to the outcome that he prefers, which is a dissolution of the corporatist nature of existing government and its replacement by a greatly reduced and well-controlled government If it could be done and this is what most Americans wanted, it would be a vastly different arrangement than the current one. It would, in my opinion, result in a large but probably only temporary improvement. Would it work out in the long run? I don't think so.

At best, the game of growing government would restart because government would still be needlessly coercive. I do not endorse minarchism. Would a vastly reduced government be a step toward panarchy and choice in government or would it be an obstacle? This depends on what is in the hearts and minds of people. I believe that any single and exclusive government over a territory and one that has the power to tax remains an oppressive entity that will tend to get more oppressive over time. I think that any government that purports to govern all of America, even if it starts out small as did the government in 1789, will accrete power over time. It will be an obstacle to panarchy.

After completing this book and seeing in more detail what government had done and how it had done it in the area of money alone, I became more convinced than ever that implementing what constitutionalists like Vieira conceive to be a correctly interpreted Constitution is such an uphill struggle with such uncertain outcomes, none of which gets to a truly consensual constitution, that going for panarchy is a direction more likely to eventuate in a significantly improved situation. A properly-interpreted U.S. Constitution that gives rise to a well-governed territorial society, in which the U.S. government has tax and other powers, is a mythical construction. It has never existed, and I doubt that it ever can exist. Such a government, that forces people to pay taxes, is, in my view, inherently evil, inherently prone to become more evil, and inherently a government that produces wrong results.

The differences in political philosophy between Vieira and me did not influence my summary of Vieira's work in any important respect of which I am aware. Regardless of philosophy, his work challenges the justifications of those who believe in a living Constitution. It challenges those who believe in judicial supremacy. It challenges Americans who have failed to preserve their liberties. It challenges those who believe that fiat money is constitutionally-allowable. It challenges those who believe that the Federal Reserve System is constitutionally-allowable. It challenges the government's gold seizure. It points out serious shortcomings and fatal flaws in many Supreme Court and lower court decisions. It points out serious shortcomings in the political workings of the nation. So, no matter what one's political philosophy is, the knowledge that Vieira has given us is valuable.

No doubt, people who support fiat money, central banking, the living Constitution, and judicial supremacy will try to ignore Vieira's work and my summary. Failing that, they will attempt to re-interpret what has happened and

downplay past events and decisions. They will try to justify the status quo. They will defend the government's subversion of the Constitution by all sorts of irrelevant considerations. No defense will stand up against Vieira's work. It is too well documented and argued. I will demonstrate this throughout this book. That is the most important reason why his work on constitutional money is so significant. He has provided us with a factual and interpretative legal framework that any further rational argument or proposals cannot ignore. I can only hope to have done justice to that framework in placing it before you in such forms that make it as clear as possible while maintaining its essential truth and integrity.

Michael S. Rozeff, East Amherst, New York.

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CHAPTER I

# Money and the Dollar in the U.S. Constitution

## Introduction

This chapter outlines what the U.S. Constitution's clauses and references to money mean. It examines constitutional money from a legal perspective. It does not examine money and banking from an ethical, economic, or political point of view. The idea is simply to set down in the clearest terms possible what kind of money is legal in the U.S., according to the Constitution, and what kind of money is not.

My source of information on this subject is Dr. Edwin Vieira, Jr.'s 1,722 page opus *Pieces of Eight.* The second edition appeared in 2002, and all references in this article are to the second edition. This article summarizes the first 177 pages of Vieira's work. I have found it necessary at times to insert explanatory material in order to provide a self-contained narrative. All errors in interpretation of his work are solely mine.

Vieira's book (in two volumes) may be found in law and other libraries, but it is out of print. Even if it were in print, it would not provide everyday reading for most Americans because it is long and complex. Vieira summarizes and extracts from his work in his many articles and talks. This chapter adds to and endorses that work. It summarizes a small portion, far from all, of what Vieira conveys to us concerning the U.S. Constitution and money.

Dr. Vieira is a lawyer who specializes in constitutional law. He has argued or briefed cases before the Supreme Court. He holds four degrees from Harvard. This does not suffice to make his work authoritative. It is the work itself that does that. *Pieces of Eight* goes into the legality and constitutionality of all the major issues and cases in American monetary history. It analyzes them in detail with ample excerpts from original documents. It contains the highest level of scholarly citation, footnotes, and referencing that anyone might demand. Its arguments are masterly and logical.

The knowledge of the Constitution and money that is conveyed in *Pieces of Eight* is separate from taking a particular political position on the Constitution. None is taken here, not on its viability, nor its validity, nor on anarchism vs. minarchism, nor on what should or should not be done about existing conditions and constitutional violations. All positions on the political spectrum, of which there are many, may possibly benefit from understanding

what the Constitution says is the law of the land and what is not. Whoever wishes reform of money within a constitutional framework will have to come to grips with the understanding of the system that Vieira conveys.

**Vieira's View of Constitutional Meaning**

Vieira begins by spelling out and justifying his view of constitutional interpretation in general. This preliminary is absolutely essential. For example, the Constitution uses the term "dollar" in several places. What is a dollar? The Constitution was drawn up with great care. We have to presume that the framers knew what was meant by a dollar. Vieira therefore asks the question: What is a dollar? Those who propose a *living* Constitution say that each generation or each Supreme Court or government defines the dollar as they see fit, and each definition is constitutional. By contrast, the *original meaning* concept says instead that the dollar means what the average educated person of the time when they were being asked to ratify the Constitution thought it to mean. It turns out that the constitutionally legal meaning of the dollar that is found by looking at its original meaning is something quite definite. We today are then legally bound by that meaning. It turns out then that a Federal Reserve dollar bill is legally (by constitutional law) not a dollar at all.

One finds original meaning by examining the language and logic of the Constitution, the then-contemporary meaning of words, the legal precedents prior to its passage, the then-current legal and political understanding, and history.

What if it is the case, which it is, that we are not acting in accordance with the constitutionally legal meaning? What if our government is giving us an unconstitutional money and/or WE THE PEOPLE accept such a money as constitutional when it is not? Then the possibility of legal reform opens up. But if a convincing case is made for what a constitutional dollar is, then it constrains *everyone*. It constrains both those who support unconstitutional money and money laws and monetary reformers who support new alternative measures. Both face legal requirements that cannot be ignored.

Vieira does not subscribe to the notion of a living Constitution, that is, a document whose words, language, and ideas are perpetually reinterpreted by successive generations, in ways that are foreign and hostile to the document's original intent. He subscribes to the idea that the Constitution has an original meaning or original intent that holds unless and until the Constitution is

amended to alter that meaning.

Why is original meaning important and essential? We need to understand the original meaning of what the Constitution says, for that tells us how it should have been construed and applied from the beginning. In turn, that enables us to see how it may have been or has been misapplied by our governments and us Americans in the past so as to give us an unconstitutional money and monetary system. If we do not maintain the doctrine of original meaning, then we have no objective way to evaluate the constitutionality of laws.

Vieira connects both the Articles of Confederation and the Constitution legally to the Declaration of Independence. For details, see his article Bedrock of the Constitution. His legal view is that WE THE PEOPLE ratified the Constitution through special state conventions. In so doing we put it forward for ourselves, as its preamble declares. We meant it, among other things, to protect our rights as affirmed in the Declaration. We created a federal system of government in which states had certain powers, and certain other powers were enumerated and lodged in the government we call the United States of America or just the United States or the federal government. In all of this, the earthly power and sovereignty rests with WE THE PEOPLE. Governments are our agents to serve our purposes according to this compact, and we ourselves pledged to live by this compact, only changing it by the amendment procedures in the document itself and not by either legislative law or judicial rulings or executive actions.

**Arguments for Original Meaning**

Let's now go through the arguments that support interpreting the Constitution by reference to its original meaning and not adhering to the living Constitution idea.

To begin with, the doctrine of original meaning is logically necessary if the Constitution is to act as a constraint on government action. The Constitution is supposed to give rise to a government that protects the rights that are declared in the Declaration. To determine if a law is unconstitutional and infringing on rights or if the government is doing something it has no warrant to do, we *have to* refer to the meaning of the Constitution, i.e., we have to refer to its original intent or meaning. If we deny that such a fixed meaning is present or, at our pleasure, read new meanings into the Constitution that are not there, then we are denying that there is an objective check and balance that

we are using to protect our rights. If we do that, then we are denying both the legal legitimacy and the practical efficacy of the Constitution as an instrument that institutionalizes the fixed principles of the Declaration that found the nation.. This means that those in government are being empowered or allowed to pass any laws they wish to pass, including laws that abrogate our rights. And so unless there is original meaning, we end up with the contradiction that we have a Constitution that is really not a Constitution that protects rights.

Four more arguments support the doctrine of original meaning. One is that in 1787 this doctrine already existed for hundreds of years. The second is that since the Constitution was new in 1787, it could have had no meaning to Americans of the time but what its original intent was. Third, as time passes and more and more of the Constitution's provisions have to be understood more explicitly, any doctrine other than original intent creates legal confusion; for if subsequent generations adopt ever-changing standards of construing the Constitution other than original meaning, then instead of the Constitution being the controlling law, such things as fashion, whim, power, interest groups, and fads become the controlling law. Such a process denies the Constitution. Fourth, the Supreme Court itself, up until the late 1900s, repeatedly, in case after case after case, acknowledged the concept of original meaning.

One more argument favoring a Constitution of fixed meaning is that since all government officials take oaths of affirmations "to support the Constitution," there must be something fixed to "preserve, protect and defend." One cannot support, preserve, protect, and defend only the procedures of government. The Constitution is not an empty shell or blank check whose legal content is filled in by lawmakers and compliant courts. It enumerates specific powers as well as involves specific disabilities or absence of powers, and these are designed to protect rights.

## Living Constitution Faulty

The concept of a living Constitution that is prevalent today is actually anti-Constitutional or anti-rights in nature, i.e., at bottom it is a totalitarian concept. If what the Constitution means changes depending on changing political, social, economic, and cultural fashions, ideas, and agendas, then this simply denies the Constitution, overturns it, and creates confusion. Government becomes a government of men, not of fixed laws and rights. The concept of a living Constitution turns judges into governors and determiners of rights as

they see them or invent them, as opposed to protectors of known rights and laws established in the Constitution and Declaration of Independence. If the meaning of the Constitution is whatever the latest Supreme Court says it is, according to no fixed meaning but according to whatever factors determine the living Constitution, then no one can ever contend that the Court is wrong or has made an incorrect decision according to any fixed set of constitutional precepts and principles. Instead, everyone is forced into arguments on other arguable grounds, such as social conditions. These grounds are not constitutional in nature. If the Constitution's meaning is not fixed but depends in theory or practice on errors, biases, and interests, then the government, due to its power, will reflect the worst in people, their "folly, avarice, ambition, and the lust for power." (p. 28) Government becomes totalitarian; it gains the power to legislate on everything and anything, with no fixed bounds.

If conditions require constitutional change, the appropriate means is to amend the Constitution. If instead Federal justices override the Constitution by their decisions, the result is incoherence and chaos. These undermine the objectives of the Constitution by producing rights violations, insecurity, and injustice. The living Constitution is illegitimate.

**Criticisms of Judicial Supremacy**

Another modern doctrine must be debunked as well, and that is the doctrine of judicial supremacy. In ascertaining the original meaning of the Constitution in regard to money and banking, we do not defer blindly or only to Supreme Court judgments and interpretations. There are many good reasons why we do not. A partial list follows.

First, the "supreme Law of the Land," in the words of the Constitution, is the Constitution itself, as written, not that which is handed down as a Supreme Court interpretation thereof and surely not the latter when the interpretation goes against the Constitution. The Constitution is fixed in meaning and content. The Constitution is not a living Constitution, that is, it is not what justices *say* it is at any given time or what they make of it at that time.

Second, observers of judges have long held that "ignorant, confused, or power-seeking judges often misapply or subvert the laws." (p. 41) This is as true today as ever. Supreme Court judgments contains errors, misjudgments, and faulty statements of many kinds. We are under no obligation to accept them.

Third, quoting Vieira (p. 42):

> "Judicial decisions, that is, can never be a *source* of constitutional law, from which anyone can unfalteringly induce or deduce even a correct, let alone a binding, interpretation of the Constitution. For judicial decisions are only the result of some courts' having applied certain preëxisting legal principles, rightly *or wrongly* in the adjudication of particular cases or controversies."

The concept behind these ideas is that the law and its principles are known. William Blackstone made clear that judges judge according to the known law and customs of the land. They are not deputed to pronounce new laws "but to maintain and expound the old." If they overrule precedents, they do not pretend to make a new law but "to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." "So that *the law* and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it may sometimes happen that the judge may *mistake* the law."

Fourth, the Constitution itself does not grant the Supreme Court a monopoly or a final say on what the Constitution means. It does not say that Supreme Court decisions are part of the supreme Law or any law at all. It grants it only a judicial power in given cases brought before it. Specifically, the Constitution says that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Further, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ..." This is not a broad-reaching power of judicial review or judicial supremacy, where such power binds other branches of government, such as is claimed by modern courts. In Massachusetts v. Mellon, 262 U.S. 447, 488 (1923), the Court spelled out the older moderate and more accurate constitutional position:

> "The functions of government under our system are apportioned...The general rule is that neither department may invade the province of the other...We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such

> an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."

Fifth, in their deliberations, the framers had many and varied views as to the notion that the federal judiciary is supreme in spelling out and interpreting the law of the Constitution. The historical record does not indicate that they meant the Court to have the final or definitive say about what the Constitution means or whether or not a law is constitutional.

Sixth, the Supreme Court has never directly addressed all the pertinent issues concerning money and banking, so that we cannot rely solely on its rulings on cases that have come before it. The Court has not ruled on (i) what a dollar is, (ii) the lawfulness of issuing (emitting) legal tender paper that is not convertible (redeemable) in silver or gold, (iii) the lawfulness of the government's 1933 seizure of gold, (iv) the lawfulness of making the notes of a private bank into obligations of the U.S. and legal tender, (v) the lawfulness of allowing private banks to have discretion via an administrative agency to draw money from the Treasury without a Congressional appropriation, and (vi) the lawfulness of the Federal Reserve system. In order fully to understand what the Constitution says in regard to money, we have to analyze many matters like these ourselves.

### Common Law Background

Numerous Supreme Court decisions specify that pre-Constitutional English common law is a highly relevant means to understand provisions in the U.S. Constitution. Blackstone's *Commentaries* was the "standard legal treatise among Americans." (p. 67.)

Blackstone taught concerning English monetary matters and powers that the precious metals (gold and silver) are used as money, or that money consists of precious metals, both as a standard of account and as a medium of exchange. English law equated money with coin and coin with silver and gold. Silver and gold coin are also called specie. The Crown had the power to coin money, which meant stamping it and fixing its metallic content. The phrase used at the time was "fix the value." This did not mean fixing the price. It meant fixing the weight or metal content of a coin. True money was undebased coin, meaning coins whose metal weight was not altered by the Crown. Foreign

coins were fixed in value by comparing their metal weights to the domestic standard. This was called also regulating their value. In this way, foreign coins could circulate along side domestic coins. From 1603 to 1816, England had a silver standard and circulated both silver and gold coins (bimetallic media of exchange). The common law denied the Crown (Executive) the power to compel loans from the people. Government borrowing had to be consensual.

**Bills of Credit**

Prior to the Revolution, the American colonies by and large did not coin money or regulate the value of foreign coin, although there were at times such efforts, but Parliament forbade them in 1707. For media of exchange, the Colonies used specie, commodities (such as tobacco), book credits or advances made by merchants, and paper currencies. The coins were mostly Spanish and Portuguese coins. The paper went by the name *bills of credit.* A bill of credit was a debt instrument, issued or emitted, that promised redemption in the future, not in money itself, but in a value equivalent to a certain amount of specie or money. For example, an early bill issued in 1690 by the government of the Massachusetts Colony reads

> "No (419) 20S This Indented Bill of Twenty Shillings due from the Massachusetts Colony to the Possessor shall be in value equal to money & shall be accordingly accepted by the Treasurer and Receivers subordinate to him in all Publick payments and or any Stock at any time in the Treasury. Boston in New England February the third 1690 by Order of the General Court."

The bill of credit was not money but made equal in value to money (coin) in paying taxes to the Treasurer. Hence, it could circulate as a medium of exchange. Its market value would depend on supply and demand. It would depend, among other things, on how great an amount was issued by the government in comparison to taxes receivable and to the demand to use it as a medium of exchange in the population.

Another such bill emitted on February 4, 1736 reads

> "This Bill of Six Shillings and Eight Pence Due from the Province of the Massachusetts Bay in New England to the Possessor thereof Shall be in Value equal to One Ounce of coin'd Silver, troy weight, of Sterling Alloy, or Gold Coin at the Rate of Four Pounds eighteen

> Shillings p' Ounce; and shall be accordingly accepted by the Treasurer or Receivers Subordinate to him in all Payments..."

The term *legal tender* refers to a means of payment that by law has to be accepted as payment for debts. The reach of legal tender varies. It may apply to public payments only, as for taxes and fees; or it may be extended to privately made debt contracts as well. The Colonial bills of credit were usually legal tender for public payments, and sometimes made legal tender for private payments.

Bills of credit had two kinds of backing. The first, already discussed, is that they were good for paying taxes and fees to issuing authorities. Secondly, colonial governments issued bills backed by mortgages on land. The colonial governments ran land banks.

These colonial bills of credit tended to be over issued by the colonial governments. They therefore tended to depreciate against silver and gold, that is, it took more and more of them to buy a given amount of silver or gold as their value sank. The extent of the depreciation varied among issuers. They also became a bone of contention between the colonial governments and Parliament. In 1740, Parliament forbade these emissions. A statute was passed that required the bills to be paid in "lawful Money", meaning specie. In 1751, Parliament passed another such act (renewed in 1763), again forbidding any further emissions of bills of credit and also forbidding their being legal tender in any "private Bargains, Contracts, Debts, dues or Demands whatsoever." (p. 76.)

Starting on September 5, 1774, the colonies convened a Continental Congress, the first of two. These governed until 1781 when the Articles of Confederation were adopted. Congress then convened as the Congress of the Confederation until 1789, at which time the U.S. Constitution came into being. The American Revolutionary War or War of Independence dates from the Battle of Lexington on April 19, 1775 (brought about on the previous day) to September 3, 1783, when the Treaty of Paris was signed.

From 1775 to 1779, Congress emitted bills of credit. These typically were issued by The United Colonies or the United States. They carried various small denominations such as Five Dollars or Thirty Dollars. The Bill read something like the following:

> "This Bill entitles the Bearer to receive THIRTY Spanish milled Dollars, or the value thereof in Gold or Silver, according to a Resolution passed by Congress at Philadelphia, Sept. 26th, 1778."

The Spanish milled Dollar was a silver coin carrying the name Dollar and having a weight in silver of approximately 368 to 374 grains of fine silver. It was also known as "Pieces of Eight". Divided into 8 parts or bits, two bits were a quarter, slang still used today.

The Spanish milled Dollar, as we shall see, became the money unit or dollar of the United States or what the word Dollar means as used in the Constitution. It was not defined within the Constitution. We have to go to various surrounding documents, reports, recommendations, etc. in order to see this, but already in the promises made in these bills of credit, we have evidence of what was meant by a dollar.

These bills of credit were meant to circulate as a paper medium of exchange or as paper money. They could be passed from hand to hand: payment was to the bearer; no endorsement was required; the denominations were low; there was usually no interest paid on them; they usually carried no maturity date; and they were not issued with the many terms that attach to debts. The bills of credit were "paper money." Money itself was precious metal, and a precious metal was also used to define the money-unit. But there is a firm economic distinction between paper money and money (specie.) Paper money is a liability of the issuer. Its features distinguish it from debt, but like debt it is a liability. As such it is a promise to pay in money or in something of equivalent worth to the money it specifies as the units being promised. Paper money cannot be defined until there exists some real asset that has value or is a standard. Hence, paper money is a derivative whose value depends on the many factors that influence the probability of payment and also the value of the gold and silver that it may promise to pay. Money (gold and silver coin) is not a liability or debt of any kind, and it is not a derivative. It is an asset whose value depends solely on what it itself as gold and silver is worth. Paper money and coin are only both termed money because they both are being used as a convenient medium of exchange.

Congress never paid off on these bills of credit; it defaulted on its promises. They became worthless for several reasons. They were not accepted by the Congress or the States as payment for dues and taxes, and so they lacked a tax foundation. Congress had no power to tax in order to pay them off, and the

States made no credible commitments to supply the necessary specie. Furthermore, they were issued in very large quantities. By 1781, Congress had devalued them by 75 to 1 and eventually declared them not to "be current." They were worthless as currency. They were a paper money that became worthless. Money itself, gold and silver coin, might fluctuate in value to some extent but the likelihood of its losing all of its value is extremely small.

The period from 1783 to 1787 was one of great economic and monetary instability. A depression set in after the prior inflation of these bills of credit. Unemployment rose, agriculture and real estate collapsed, and rates of interest were high. Trade fell off sharply.

### Regulating the Value of Coin and the Spanish Dollar

The Articles of Confederation (1781) were to contain a provision, Article IX, for regulating the value of coin struck (minted) by authority of Congress or the states:

> "The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States..."

This power to set "value" and regulate alloy means only a power to establish a standard weight of metal in a coin across all the states, so that a dollar has the same weight ("value") of metal across all regions. Congress took on an authority to determine the unit of account function of money. This is not a power to control the issuance of coin or determine its price in market exchange or monopolize its issuance or supply; for people could bring metal to mints and have it struck into coin form, or they could privately melt down coin and use it for other purposes.

Prior to the Articles, Congress had begun to develop a metal coinage system. A committee of Congress in 1776 recommended that the value of dollars and other coins of silver and gold should be regulated

> "by declaring the precise weight and fineness of the s'd Spanish milled dollar...now becoming the Money-Unit or common measure of other coins in these states, and by explaining the principles and establishing the rules by which...the said common measure shall be applied to other coins...in order to determine their comparative value..." (p. 88.)

The committee provided a table of values of various coins relative to the Spanish milled dollar.

In 1777, a committee of Congress recommended forming a mint and coining gold and silver bullion "into money, of such value and denominations as shall hereafter be ordered by Congress." Also, "That any person who will bring gold and silver to the mint may have it coined on their own account."

In 1785, Congress considered a plan to make the Spanish milled dollar "the Money-Unit." And it noted that "the Dollar...has long been in general Use. Its Value is familiar." Congress then "Resolved, That the money unit of the United States of America be one dollar," but did not yet determine its silver content. In 1786, the Congressional Board of Treasury calculated that the "Money Unit or Dollar will contain three hundred and seventy five grains and sixty four hundredths of a Grain of fine Silver," and "will be worth as much as the New Spanish Dollars."

The Articles allowed Congress various powers if a majority of States approved them. These included the authority to "coin money" and "regulate the value thereof." Article IX of the Articles of Confederation also provided the United States in Congress with authority "to borrow money, or emit bills on the credit of the United States..." The money was gold and silver. The money-unit was a specific weight of fine silver. The Congress regulated the value of coins it did not mint, i.e., determined their metal content relative to the standard unit. And the Congress allowed a free market in coins by opening the mint to private conversions of metal to coins.

The main changes to come in the Constitution that replaced the Articles were to remove the power to emit bills of credit, to forbid the states to coin money, and to make nothing but gold and silver a legal tender. In addition, the dollar received a somewhat different silver content definition.

## Constitution's Money Provisions

The U.S. Constitution, approved by the Convention in 1787 and ratified in 1788 by nine states, contains seven major provisions having to do with money.

Congress shall have Power "To borrow Money on the credit of the United States[.]" Article I, Section 8, Clause 2.

Congress shall have Power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures[.]" Article I, Section 8, Clause 5.

Congress shall have Power "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States[.]" Article I, Section 8, Clause 6.

A tax was allowed "not exceeding ten dollars for each Person" on the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit..." Article I, Section 9, Clause 1.

Article I, Section 9, Clause 7 reads in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law..."

Article I, Section 10, Clause 1 reads in part: "No State shall...coin money; emit bills of credit; make any Thing but gold and silver coin a Tender in Payment of Debts..."

And Amendment VII reads in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

**Meaning of Money in the Constitution**

We can grasp the meanings of these provisions at various levels of understanding and depth of analysis. No matter how deep the arguments go, the conclusions will be the same. Let's start with the simplest arguments.

What is the Money that these articles refer to? We have seen already that without exception in the years preceding the Constitution, Money means specie, coin, gold and silver coin, and nothing else. When Congress is given the power to coin Money, there is no mistaking the continuation of that meaning because it is metal that is made into coins. Similarly, we have seen that regulating the value of other coins, like the foreign coins mentioned, means a procedure of establishing a standard coin by its metal weight, finding the weight of metals in other coins (their "value"), and settling their relation to the standard. Congress subsequently did this in the Coinage Act of 1792. Congress may punish the counterfeiting of current coin of the United States, a further indication that by the term money is meant coin, and another

indication is the article that prohibits the states from making any thing but gold and silver a legal tender. Since tenders are the making of payments, this underscores that creditors could only be made by states to accept payments in gold and silver. Metallic money would be the only possible legal tender that a state could declare.

Even without going into depth, there is no little or no doubt that the Constitution sets up a system of metallic money (or hard money or commodity money).

Congress is nowhere empowered to issue or emit bills of credit, which was allowable under the Articles of Confederation. After debate in the Constitutional Convention of which we have the record (pp. 145-152), the phrase allowing this power was consciously struck out. Recall that these bills of credit were promises of various kinds, such as promises of value equivalent to money or promises eventually to redeem in money (gold and silver); they were not literally money but they were designed as paper money. This shows again that the Constitution meant to create a hard money system.

Instead of funding itself by emitting bills of credit or paper money, a power that was disabled and thus forbidden, Congress was given the power to tax and the power to borrow. It was empowered to borrow Money on the credit of the United States. This means to borrow coin since Money is lawfully supposed to be coin under the Constitution. It also means that the borrowing is to occur in a free market in which lenders lend to the U.S. on its credit as a worthy borrower that will repay the loan. Forced loans are not empowered.

**Meaning of the Dollar**

In *What Is A Dollar?*, Vieira summarizes and excerpts his longer work. The bottom line is this:

> "Thus did the first Congress - which knew what the *Constitution* meant if any Congress ever did - rigorously apply the Constitution's mandate: It determined as a fact 'the value of a Spanish milled dollar as the same is now current,' and thereby permanently fixed the constitutional standard of value, or 'money of account,' as a unit of weight consisting of 371.25 grains of fine silver in the form of coin. It coined American 'dollars' as 'Money', containing this intrinsic value of silver."

Dollars are mentioned in two places in the Constitution. As explained above, just two years prior, in 1785-6, a previous pre-Constitutional Congress had designated the dollar as the money-unit and identified it with a Spanish silver dollar with a known weight of fine silver. Other evidence overwhelmingly, one might say definitively, supports the conclusion that this is what the dollar meant in the Constitution.

Queen Anne's Proclamation of 1704 regulated all other current foreign coins in proportion to the rate set for various pieces of eight. There was variation among these coins in silver weight that settled down over time. Sumner notes that it was not a definite unit in 1704 but that it became so between 1728 and 1772:

> "...but in practice a Spanish piece of eight always was a discharge for 6 shillings colonial, whatever the laws might say. Seventeen-and-a-half pennyweights worth 4 s. 6 d., put for 6 shillings colonial, gave 386.694 grains pure silver as 6 shillings. The same amount, assumed to be sterling fine, gave 388.5 grains. At 6 s. 8 d. per ounce, 6 shillings colonial would be 399.6 grains of pure silver. As we have just seen, the milled dollars of 1728 and the following years were down to 377.4 grains fine contents. This last was, therefore, the definition of the ultimate money of reference, 1728-1772."

Robert Morris, Superintendent of the Office of Finance, in a letter dated January 15, 1782 states that there

> "can be no doubt therefore that our money standard ought to be affixed to silver...there is hardly any which can be considered as a general standard, unless it be Spanish dollars."

Thomas Jefferson (July 24, 1784) in his money plan endorsed the Spanish dollar as a money-unit. After listing three conditions that included a convenient size coin, with parts and multiples in easy proportions, and having value near that of known coins, he concluded "The Spanish dollar seems to fulfill all these conditions." "If we adopt the Dollar for our Unit," he recommended four coins. The second coin was "The unit or Dollar itself, of silver." The others were a gold coin worth ten dollars, a tenth of a dollar coin in silver, and a one hundredth of a dollar coin in copper. He strongly favored the dollar over the pound, observing that "Happily, the dollar is familiar to...all." Due to the small variation in silver weight in the Seville, Mexico, and

Pillar pieces of eight, he recommended taking a sample and assaying them to find an average. He recommended to Congress that it instruct a committee to prepare an ordinance with one principle being

> "That the Money Unit of these States shall be equal in value to a Spanish milled dollar containing so much fine silver as the assay, before directed, shall show to be contained, on an average, in dollars of the several dates in circulation with us."

On April 8, 1786, the Board of Treasury reported to Congress. It noted first that Congress "by their Act of the 6th July last resolved, that the Money Unit of the United States should be a Dollar, but did not determine what number of Grains of Fine Silver should constitute the Dollar." The Board "made our calculations accordingly." It determined that

> "The Money Unit or Dollar will contain three hundred and seventy five grains and sixty four hundredths of a Grain of fine silver. A Dollar containing this number of Grains of fine Silver, will be worth as much as the New Spanish Dollars."

Congress adopted this standard on August 8, 1787 as "the money Unit of the United States." Hence, on the eve of the Constitution, we know what was meant by money and the dollar. The unit of money was a coin with a fixed weight of silver equal in weight to the Spanish dollars of the time. However, no coins were issued of that weight. The weight was subsequently slightly adjusted downward (to 371.25 grains) in 1792, and that settled once and for all what became the permanent weight of the constitutional standard of value.

After the Constitution was adopted, Alexander Hamilton made his *Report on the Subject of a Mint.* He recommended that the dollar be the money unit and that it contain 371.25 grains of fine silver. The Coinage Act of 1792 stated that "the money of account of the United States shall be expressed in dollars or units." It defined the "DOLLARS or UNITS [as] of the value of a Spanish milled dollar as the same as is now current, and to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure...silver."

Vieira makes a subtle point (p. 194) about the dollar. Before the time and by the time that the Constitution was enacted, the framers and past Congresses already recognized the Spanish dollar as money. They did not *make* it into money or authorize its use as money. The market already had been using it for

decades. The market already recognized the value in the Spanish dollar due to its silver content. The framers did not create a value by assigning the *name* dollar to an arbitrary coin made of base metal. They decided that U.S. dollar coins would have a certain weight of silver so that they would match the existing value of a Spanish milled dollar. That made such a coin and weight into an official U.S. unit of account. The Coinage Act of 1792 is a statute or legislative enactment that defines the statutory dollar of 1792 as "the value of a Spanish milled dollar as the same as is now current," and the latter is the value of a constitutional dollar. The 1792 statute does not make the dollar into money by labeling the coin as a dollar, but by identifying it with, as nearly as they could, the same fixed weight of silver that gave value to the Spanish milled dollar of the time. This means that the dollar designated in the Constitution existed before the 1792 Act and, as we have seen, before the Constitution was even adopted.

To a certainty, we know what a constitutional dollar was and still is, namely, a certain and fixed weight of pure silver (371.25 grains). We know that the U.S. adopted a silver standard by its Constitution.

The original meaning of the Constitution with respect to money has not altered since its adoption because the provisions relating to money have not been amended, nor have other amendments weakened them or changed their substance. The constitutional money of the U.S. was and still is a silver standard dollar or coin or unit of this weight of silver.

Although the U.S. has, constitutionally, always had a single metal standard and never had a dual monetary standard, the Congress has exercised its power to regulate the coinage so as, at times, to promote the circulation of gold coins. A silver standard by no means rules out a parallel coinage of gold because the Constitution gives Congress the power to regulate the value of gold and foreign coins, by which is meant establish their weights relative to the standard dollar of silver. Done properly, both silver and gold will be money. Done improperly, Gresham's law will come into play, and one metal will disappear from circulation.

**Legal Tender, Borrowing, and Counterfeiting**

We may now consider several remaining constitutional money issues.

What constitutional power does government have regarding making money

legal tender? Since the states have the reserved power to declare that gold and silver, and nothing else but gold and silver, are legal tender, the Constitution approves of or allows one or more states' making gold and silver legal tender for their states. The U.S. government has no explicit or delegated power to make gold and silver a legal tender. If it has any implicit legal tender power, as, for example, through the regulation of commerce, then that power cannot conflict with the states' reserved power, which means that any such legal tender power of the federal government is restricted to making gold and silver into legal tender. For if the federal government could make one thing like copper a legal tender and a state had made silver a legal tender, then a constitutional dilemma would occur since the Constitution is the supreme law of the land. This means that Congress cannot make something into legal tender that the states cannot themselves make into legal tender.

What constitutional power to emit bills of credit does the Constitution grant? The states are specifically forbidden or disabled from issuing bills of credit by Article I, Section 10, Clause 1. As noted above, the framers debated allowing Congress to continue the power to emit bills that it had under the Articles of Confederation, but in drafting the Constitution they changed the language by eliminating the phrase "emit bills on the credit of the united states" that was in the Articles. Hence, they saw to it that the federal government has no constitutional power to emit bills of credit or paper money, as these bills are also termed. The vote in the Convention was 9 states to 2 to eliminate the phrase "and emit bills" from appearing after "To borrow Money". The final language is that Congress shall only have Power "To borrow Money on the credit of the United States", which is Article I, Section 8, Clause 2.

The only possible argument in support of Congress still having a power to issue paper money or bills of credit, despite what the Constitution says, is by way of mis-construing the borrowing of money on the credit of the United States to include emitting bills. A superficial economic argument to that end is to say that emitting a bill of credit is like issuing non-interest bearing bearer debt in small denominations that lack a maturity date. But borrowing *money* involves receiving coin now in exchange for paying it back later with interest on a specified date. The coin received is already in existence. By contrast, emitting a bill involves no receipt of coin. It involves creating a paper instrument to function as money. It is an addition to the media of exchange. Furthermore, if the government pays people, for example, with bills of credit, they provide goods and services to the government, not money. That exchange is not empowered by the Constitution. It is also not necessary to the exercise

of a Congressional power since the Congress is equipped with powers to tax and borrow. If it can borrow on its credit, there is no need to issue paper money on its credit. This bars invoking the "necessary and proper" proviso.

Possibly Congress might pay people using bills of credit that it declares to be legal tender. This is unconstitutional in two ways. The first is that if Congress has any legal tender capacity, it is to make gold and silver legal tender and nothing else. Second, forcing people to accept bills because they are made legal tender is a forced loan. Congress is not empowered to make forced loans. It can only borrow, and only borrow on the credit of the United States. Borrowing on credit means borrowing on the basis of trust in lenders that the borrower will repay; to force a loan is not to borrow on credit.

Congress shall have Power "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States[.]" Article I, Section 8, Clause 6. Among other things, this clause has interest in its relations to the other clauses. It recognizes two and only two categories of financial items that can be counterfeited, which means that they are mutually exclusive and cover all possibilities. They are securities, a class that includes the evidence of borrowing, and coin, which is money. The Constitution here underscores that money is to be coined, money is to be regulated in value, and money is to be borrowed. Money is not a security and securities are not money. Borrowing money is not the same as creating money, as by issuing a bill of credit; and coining money is not the same as borrowing. The Constitution is all of one piece and consistent in its provisions regarding money.

## Conclusion

The U.S. Constitution's provisions on money are clearly written, well-defined, consistent, and well-thought out. The result has no little beauty and simplicity. The Framers asked WE THE PEOPLE to commit (or not) to a specific set of monetary principles and not to others. Certain powers and disabilities are spelled out. The constitutional monetary system is a hard money or metallic money system as opposed to a system of government-issued paper. It is a free market system in which the government does not control the money supply, but opens the mint to private coinage.

In this system, the federal government has several specific roles. One is to mint coins of a known weight of metal. Another is to regulate the value of other coins, including foreign coins, so as to be of proportionate worth based on

their metal content as compared to the standard constitutional dollar, which is a silver standard coin as the money-unit or unit of account. The system envisages gold and silver coins as media of exchange and such coins, properly regulated, being the sole legal tender.

The Constitution outlaws the emission of bills of credit (paper money) by both state governments and the federal government. Only gold and silver coin may be made legal tender. Congress may not levy forced loans.

The Ninth and Tenth Amendments to the Constitution make clear that the monetary powers and disabilities that constrain government do not foreclose lawful or traditional rights of the People. The governmental money system is that which the government *must* use as it goes about its business, if it is to behave constitutionally. Hence when people interact with government as in the payment of taxes, they are obligated to use the money that the Constitution requires the government to use. For their private transactions, they may choose whatever media of exchange they want to and contract with them as they see fit. They are masters of their own forms of legal tender in private transactions if they spell them out in contracts.

The money and money system of today's government are entirely divorced from gold and silver in any form. The system uses a combination of paper money and electronic credits created by the Federal Reserve system. This system is evidently unconstitutional.

The remainder of Vieira's exacting work provides a comprehensive account of the legislative enactments and Supreme Court decisions and non-decisions that produced this astounding transformation from a constitutional into an unconstitutional system that is its polar opposite. He examines such major turning points as:

1. The First and Second Banks of the United States.
2. The first emission of government legal-tender paper currency in 1862.
3. The establishment of the Federal Reserve System in 1913.
4. The gold seizure and abrogation of gold contracts in 1933 that demonetized gold domestically.
5. The 1971 demonetization of gold internationally.
6. The 1968 demonetization of silver.

Vieira provides an extensive account of the Federal Reserve and its

unconstitutionality. He closes the work with a roadmap to the reconstruction of America's constitutional systems of money and banking.

March 16, 2010

Chapter II

## Coinage Acts and Treasury Notes: 1789-1860

### Introduction

This chapter continues to summarize Edwin Vieira, Jr.'s major work, *Pieces of Eight The Monetary Powers and Disabilities of the U.S. Constitution.* Chapter I of the summary can separately be found and read in my scribd archive.[1] A direct link is here. This article covers pp.179-259 of the book, which is part of the material he provides on the years 1789-1860. All page references shown in parentheses are to Vieira's book.

This chapter, somewhat more than Chapter I, freely translates, summarizes, and augments Vieira's work as opposed to outlining it rigidly. In order to clarify and support the exposition, I incorporate a certain amount of integrative and explanatory material, while making every effort to be faithful to the substance of Vieira's work. Certainly most of what appears is extracted in one way or another from the pages of *Pieces of Eight.*

In pp. 1-177 of his 1,722 page book, Vieira makes a detailed case that the Constitution allows only a hard money (specie, silver, gold) system and disallows government issues of paper money at either the state or federal levels. The strength of his case is that it logically integrates and makes understandable a wide variety of evidence by showing the consistency of each piece of evidence with other pieces and with the provisions in the Constitution, the latter necessarily being terse but powerful statements.

Vieira doesn't let the matter rest at the year 1789, because for such a critical issue as the nation's monetary system, it is important (p. 181) "to eradicate any even colorable dispute or doubt as to the meaning of these constitutional provisions."[2] The evidence that Vieira brings to bear for the years 1789-1860

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[1]It can be downloaded only by joining scribd, which is a painless and harmless procedure, and one which then allows access to millions of documents that can be downloaded. Membership produces no junk e-mails or other invasions that I know of.

[2]There are students of the Constitution alive and well in today's law schools that are proposing and publishing in major law journals doctrines of what the Constitution allows that diametrically oppose Vieira's work. For example, see Natelson's article on paper money and

is critical in bolstering and confirming the hard money case and rebutting the modern misinterpretations that aim to justify a system of state money, state paper money, irredeemable money, and state power that finds no support in the original meaning of the U.S. Constitution.

The areas addressed in this article are the Coinage Acts of the 1790s and mid-1800s and the government's issues of Treasury Notes. I do not yet cover the incorporation of the First and Second Banks of the United States and certain Supreme Court decision that focused on the emission of bills of credit by states.

### Hamilton's Report in 1791

Alexander Hamilton, Secretary of the Treasury, provided Congress, at its request, on January 28, 1791 with a *Report on the Subject of a Mint*. It is also known as *Report on the Establishment of a Mint.* Congress used this as a basis for the Coinage Act of 1792, accepting some and rejecting other recommendations.

The first important aspect of the report from the perspective of understanding the constitutional meaning of money is that it presumes and thus sustains, affirms, and exemplifies five of the main principles of money that are embodied in the Constitution:

(i) that money is silver and gold,
(ii) that the dollar is the money-unit of the U.S.,
(iii) that the dollar is to be defined by metal content by weight,
(iv) that the government will coin silver and gold money, and
(v) that the Congress will regulate coin value.

The second important aspect is that Hamilton's presumptions continue those not only in the Constitution but those preceding the Constitution in the Continental Congress and in Blackstone's treatment of the common law. And third, Hamilton's position as a Framer, Founding Father, and first Secretary of the Treasury adds considerable weight to his treatment of money and its constitutional meaning.

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coinage. He advances the unbelievable claim that "ascribing a purely metallic meaning to 'coin' creates serious textual difficulties."

Hamilton nowhere questions any of these five underlying ideas, nowhere denies them, and nowhere proposes or even hints at paper money. The entire discussion revolves around the fine points of implementing the hard money system. Hamilton had his own ideas and preferences on that score. Hamilton settled upon a dual coinage of both a silver and gold dollar in a ratio near 15-1, and if one were to be chosen, he preferred gold. Congress later chose only a single dollar standard and made it silver; yet by mandating a 15-1 ratio to gold, it effectively attempted to place a dual standard into operation.

Hamilton refers to the Spanish milled silver dollar as the standard indirectly when he writes of "the dollar originally contemplated in the money transactions of this country, by successive diminutions of its weight and fineness," and when he concludes that "the actual dollar in common circulation has evidently a much better claim [than the ancient dollar] to be regarded as the money unit," since those actual dollars were the Spanish milled dollars. Also the latter appears obliquely when he writes of a dollar with 368 to 374 grains of fine silver

> "...that the sum in the money of account of each State, corresponding with the nominal value of the dollar in such State, corresponds also with 24 grains and 6/8 of a grain of fine gold, and with something between 368 and 374 grains of fine silver,"

and again clearly when he reviews a prior Congressional resolution:

> "The suggestions and proceedings, hitherto, have had for object, the annexing of it emphatically to the silver dollar. A resolution of Congress, of the 6th of July, 1785, declares that the money unit of the United States shall be a dollar; and another resolution of the 8th of August, 1786, fixes that dollar at 375 grains and 64 hundredths of a grain of fine silver."

And again in several other places:

> "The denominations of the silver coins contained in the resolution of the 8th of August, 1786, are conceived to be significant and proper. The dollar is recommended by its correspondency with the present coin of that name [the Spanish dollar] for which it is designed to be a substitute, which will facilitate its ready adoption as such, in the minds of the citizens."

> "As it is of consequence to fortify the idea of the identity of the dollar, it may be best to let the form and size of the new one, as far as the quantity of matter (the alloy being less) permits, agree with the form and size of the present. The diameter may be the same."

The "present coin of that name" is the Spanish milled dollar. Hence, Hamilton continues the identification of the constitutional dollar as a coin whose value in silver grains will match the extant circulating Spanish milled dollar. His report explicitly rejects the pound as a standard.

One of the misfortunes of history is that although Hamilton in a limited way recognized the best course of regulating the value of coins of different metals, which was a floating price of one metal against the other's fixed standard weight, he didn't promote this idea and Congress didn't legislate it:

> "There can hardly be a better rule, in any country, for the legal, than the market proportion, if this can be supposed to have been produced by the free and steady course of commercial principles. The presumption, in such case, is, that each metal finds its true level, according to its intrinsic utility in the general system of money operations."

The market exchange ratio could have been attained by fixing one metal as standard and letting the other float. The legal ratio would then be defined in a contract as the ratio of the standard to the price of the other metal on a specified date or dates.

At the time, this kind of thinking was simply not on the table. Furthermore, Hamilton's thinking was conditioned by his belief, which he cites, that the ratio of silver to gold had remained stable at near 15-1 for the prior 75 years.

Hamilton's report is notable in stating that it is "inadmissible" to defray mint expenses by a "reduction of the quantity of fine gold and silver in the coins." This degradation (or debasement) is "disapproved" and "condemned" strongly. He goes into the negative effects of the resulting "general revolution in prices" concluding that

> "There is scarcely any point, in the economy of national affairs, of greater moment than the uniform preservation of the intrinsic value of the money unit. On this the security and steady value of property essentially depend."

As for the regulation of value, in addition to his discussion of the appropriate ratio for silver and gold, several other statements are pertinent:

> "The immense disorder which actually reigns in so delicate and important a concern, and the still greater disorder which is every moment possible, call loudly for a reform. The dollar originally contemplated in the money transactions of this country, by successive diminutions of its weight and fineness, has sustained a depreciation of five per cent., and yet the new dollar has a currency, in all payments in place of the old, with scarcely any attention to the difference between them. The operation of this in depreciating the value of property, depending upon past contracts, and (as far as inattention to the alteration in the coin may be supposed to leave prices stationary) of all other property, is apparent. Nor can it require argument to prove that a nation ought not to suffer the value of the property of its citizens to fluctuate with the fluctuations of a foreign mint, and to change with the changes in the regulations of a foreign sovereign. This, nevertheless, is the condition of one which, having no coins of its own, adopts with implicit confidence those of other countries.

Hamilton is endorsing a fixed standard dollar and for coins to be minted that hew to that standard.

> "The unequal values allowed in different parts of the Union to coins of the same intrinsic worth, the defective species of them which embarrass the circulation of some of the States, and the dissimilarity in their several moneys of account, are inconveniences which, if not to be ascribed to the want of a national coinage, will at least be most effectually remedied by the establishment of one — a measure that will, at the same time, give additional security against impositions by counterfeit as well as by base currencies."

Hamilton is endorsing, as is provided for in the Constitution, the regulation of value of the coinage so that a given coin has a given and known value. How was this to be done?

> "It may, nevertheless, be advisable, in addition to the precautions here suggested, to repose a discretionary authority in the President of the United States, to continue the currency of the Spanish dollar, at a value corresponding with the quantity of fine silver contained in it, beyond

> the period above mentioned for the cessation of the circulation of the foreign coins."

Apart from asking for an authority to the President that already reposed in the Congress, Hamilton shows here that he understood and adopted the regulation of value idea as setting the value of a coin (here the Spanish dollar) to correspond with the weight of silver it contained. Thus if a Spanish dollar contained 3/4 of the silver in the standard U.S. dollar ($), then it became worth $0.75.

**Coinage Act of 1792**

This is the first of a series of such statutes. The ones covered here go from 1792 to 1857. In this 65-year period, Congress authorized only the coining of metal as "Money" (p. 241). It did not change or deviate at all from the constitutional value standard, which was the silver dollar. It hewed to its weight and fineness established in the 1792 Act. It used that standard to regulate the value of other coins, including gold and foreign coins. It didn't debase any coin by making it a legal tender in excess of its metal content. And it didn't claim any monetary powers other than these exercised.[3]

Vieira concludes that "This consistent legislative construction of Article 1, Section 8, Clause 5 decisively fixes its meaning."

Let us examine a few of the more important particulars. The Coinage Act of 1792 said that "the money of account of the United States shall be expressed in dollars or units." These were defined in terms of weight as "of the value of a Spanish milled dollar as the same as now current, and to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard silver."

Here we have a definitive Congressional recognition of the dollar as the lawful U.S. money-unit or unit of account, and we have its definition as a physical weight of silver, namely, 371.25 grains of pure silver. The new U.S. dollar standard is to be of the value of the Spanish milled dollar, then current, that is, then accepted and passing in payments as a medium of exchange or as

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[3]It came as close as it could to emitting an issue of bills of credit in 1815. This issue was not contested at the time, but in 1844 a similar issue was dramatically renounced by Congress.

currency. This recognition once again supports the conclusion that the *original and fixed meaning* of the constitutional dollar, pre-dating this statute, is this weight of silver. This standard is therefore unalterable except by constitutional amendment.

Congress did *not* follow Hamilton's recommendations for a dual silver-gold standard, but it did authorize the minting of various gold coins called "Eagles." The Eagles were not gold dollars, and the Act nowhere mentions gold dollars. They were valued *in terms of dollars.* Section 9 called for "EAGLES – each to be of the value of ten dollars or units..." Congress fixed "the proportional value of gold to silver in all coins which shall by law be current as money within the United States" at "fifteen to one, according to quantity in weight, of pure gold or pure silver."

All the gold and silver coins issued by the mint were made "a lawful tender in all payments whatsoever, those of full weight according to the respective values herein declared, and those of less than full weight at values proportional to their respective weights." Here we have several things. We have statutory recognition that to "regulate the Value" means to assess and declare weights of metal so that a statement can be made of their worth in terms of the standard money-unit or silver dollar.

Second, we have a legal tender law. This particular legal tender law does relatively less harm than the modern variety involving fiat money because it fixed the payments in metal; and they had to be in coins whose metallic weights corresponded with their dollar values relative to the standard dollar. Furthermore, Vieira relates that " nothing in that or any other statute (until the 1930s) precluded individuals from entering into gold- or silver-clause contracts specifying which of the metals would be their exclusive medium of payment." This allowed people to protect themselves against unexpected or undesired changes in the market exchange ratio between gold and silver. They could negate any possible harmful effects of the dual legal tender status of both silver and gold. Nevertheless, because the law fixed the ratio of silver to gold at 15-1 for legal tender purposes and the market ratio appreciated, the law had the far from beneficial effect of driving gold coin out of circulation.

Third, we have what I call linkage. The powers that are linked together in the Constitution are linked in this statute. Only gold and silver can be legal tender constitutionally, and Money can only be gold and silver, so that the only possible legal tender money is gold and silver. Furthermore, Congress has the

power to regulate the coin values so that they are fairly related to the standard, and only if they do that regulation appropriately (either by a fixed or floating method) can those coins be legal tender. Hence the statute speaks of a lawful tender only of gold and silver and in the next breath speaks of their proper valuations. These comments emphasize that when Congress divorces the legal tender power from money that is properly regulated silver and gold coin, as it eventually did and continues to do today, it acts unconstitutionally.

Importantly, Congress opened the mint to free coinage.[4] Section 14 reads

> "*And be it further enacted*, That it shall be lawful for any person or persons to bring to the said mint gold and silver bullion, in order to their being coined..."

This provision created a free market in metallic money. The demand curve for gold bullion might come from such uses as jewelry and coins. The supply curve might come from scrap and mines. The equilibrium amount of coins produced from bullion depends in this situation on factors beyond government control. The mint merely acts as a convenient operation to create the coins from bullion. In this situation, the U.S. government had no control over the money supply. This was and is constitutional since there is no enumerated power granted to Congress to control the amount of coinage being used by the people.

### Coinage Acts of 1834, 1837, 1849, 1853, and 1857

The Coinage Act of 1834 passed against a background in which gold coins had been driven from circulation due to the gold appreciation in price against the silver standard combined with the Coinage Act of 1792's mandated 15-1 legal tender ratio being too low as compared with the market ratio. Had gold simply not been made legal tender at that ratio and gold coins simply stamped with weight and fineness, this would not have happened.

The background also included a large growth of bank paper money and the Jacksonian movement to disestablish the second Bank of the United States.

The reports and debates that accompany this Act's passage one-sidedly

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[4]Prof. Antal E. Fekete has quite rightly been a strong advocate of the monetary reform of opening the mint to "the free and unlimited coinage of gold on private account."

continue to presume the monetary framework laid out in the Constitution and enacted into law by the Coinage Act of 1792. Congress was regulating the value of gold and other coins by reference to the constitutional standard of value, which remained the silver dollar. The silver content of the standard was not changed. No competing gold standard dollar was enacted; the Senate rejected such a proposal. Instead, Congress set the value of the gold eagle by reference to the silver standard, using a 16-1 ratio. Congress (p. 224) "declared that gold coins minted before the effective date of the Act should be valued thereafter at their intrinsic values according to the revised ratio." Congress debated but did not adopt the floating price or rate method that was recommended by the House Select Committee on Coins.

The Coinage Act of 1837 contained no innovations. It stated precisely the metal content of the dollar and the eagle. Vieira (p. 235): "Thus, the Coinage Act of 1837 was a further Congressional confirmation of the constitutional principles first applied in 1792."

The Coinage Act of 1849 for the first time created a gold dollar coin that contained one-tenth the gold in the ten-dollar eagle defined in the Coinage Act of 1837 and earlier. The reasons for this coin are unknown, as the Director of the Mint did not think it was in demand, besides having disadvantages. The Coinage Act's language continued to make clear that this coin was not a new standard and not a dollar, neither "a" dollar nor "the" dollar by saying that it would have the value of one dollar.

Gold discoveries in California and Australia drove down the price of gold at this time. Silver coins ceased to circulate. The Coinage Act of 1853 was passed to correct this situation.

This Act contains a feature that suggests a partial break with the constitutional silver standard. The Act authorized half dollar coins that contained only 172.8 grains of pure silver, rather than half of the 371.25 standard, which would have been 185.625 grains. This was a debasement of about 7 percent. On the other hand, Congress limited the legal tender character of these coins by allowing their use only for payments of five dollars or less. It also prevented a profitable arbitrage. It forbade people from melting down old silver dollars, getting the 371.25 grains of bullion, keeping 25.65 grains for themselves as profit, and turning in the remaining 345.6 grains to get two silver half dollars. It did this by simply disallowing people from bringing in silver bullion to be minted into half dollars.

The Act also called for "a coin of gold of the value of three dollars", "conformably in all respects to the standard of gold coins now established by law." Here Congress continued the careful distinction between a gold dollar, which it was not creating, and a coin with the value of three standard silver dollars. Therefore, this Act did not create a gold standard. It continued the historic constitutional silver standard.

The Coinage Act of 1857 repealed "all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts." This breaks with the constitutional power of Congress to "regulate the Value...of foreign Coin." The contribution of foreign coin to the money supply may have been small by this date, in which case the termination of foreign coin as legal tender would not have been serious. Private citizens could still import foreign coin, melt it down for bullion, and get it recoined at the U.S. mint into American coin. There are added costs to doing this, to be sure, but the world market in gold and silver remained.

**Regulation of Value: The Floating Solution**

Knox v. Lee (1870) is the Supreme Court case that opened the floodgates to legal government issue of bills of credit (paper money) and eventually Federal Reserve notes by ruling that the Civil War issues of legal-tender greenbacks were constitutional.[5] Vieira discusses the legal tender cases in a later portion of the book. In this chapter, we focus on one facet of the money issue, namely, the Congressional regulation of coin value that is empowered by the Constitution in Article I, Section 8, Clause 5. This technical matter is of great importance because it was introduced into the Knox v. Lee case as a means by which the Court (falsely) justified a Congressional power to issue legal-tender

[5]The legal tender cases are where we find a sea change in constitutional interpretation. See here. These are the cases in which Congress is given a free pass to fashion an unconstitutional monetary system and *much else*. Natelson tells us that Robert H. Bork and others argue that these Supreme Court decisions are super-precedents, "now so central to the social order that the Supreme Court must follow them even if they were wrongly decided from an originalist standpoint." Bork argues that "it is to late to overrule...the decision legalizing paper money" as reversing such precedents would "plunge us into chaos." Vieira strongly disagrees. He provides, as has Ron Paul, a roadmap back to sound money. I believe that Bork is wrong. These decisions produce a chaotic system. We get more and more economic and monetary chaos as a consequence of these decisions. There is no choice but to overturn these precedents in one way or another.

paper money, even though such a power is unconstitutional.

Let's review what is meant in the Constitution by the regulation of value of coins. This is clearly an historical source of misunderstanding and/or critically flawed reasoning. It will be shown conclusively that important errors revolving around this are to be found in the highly important legal tender cases in the 1870s. The various Coinage Acts between 1792 and 1857 reflect an excellent understanding of regulation of value, but the later Supreme Court opinions do not.

The regulation of value comes under the general heading of bimetallism, which revolves around issues of keeping both silver and gold in circulation and the setting of one or two standards by legal measures. These problems were not resolved satisfactorily in the $19^{th}$ century. The attempt to have a dual silver and gold standard and to set their ratio of exchange by law ran into repeated difficulties in which one or the other metal disappeared from circulation. In addition, this promoted confusion among lawmakers and the people, and it encouraged interest groups who favored one or the other metals or banking interests that favored paper money.

Today, however, if money were again metal, the issues raised by bimetallism could be entirely and easily avoided. The solution has two simple parts if government is to be involved. There can be only one workable standard economically speaking, if both metal coins are to circulate. Re-establish the constitutional single standard, which is silver.[6] A standard simply is a unit of account that declares what a dollar ($) is, namely, 371.25 grains of pure silver. No one is required to use any specific medium of exchange. Nothing other than gold and silver becomes legal tender constitutionally, but people may contract in any media of exchange they prefer, thereby establishing their own legal tender. To keep both metals in circulation, Congress can act constitutionally by minting coins in the non-standard metal (gold) *without a dollar designation* but stamped with their weight alone. The value of these gold coins will then float or fluctuate with market forces. This assures that they will circulate along with silver. This is *the floating price solution.* One metal floats in a market price quoted in terms of the standard and fixed dollar ($), i.e., against the other metal that defines the dollar ($) as a particular fixed

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[6]Changing to a gold standard legally requires constitutional amendment. Gold might be preferable as a standard due to its more stable price.

weight of metal.[7]

Vieira repeatedly proposes this solution to the regulation of value and to all the problems of bimetallism. He refers to legislators or reports that propose it but without acceptance by Congress. In the 1830s, the Select Committee on Coins recommended this. I have found one such especially clear case. On April 28, 1832, Rep. Verplanck offered an amendment

> "And also to inquire into the expediency of making silver the only legal tender, and of coining and issuing gold coins of a fixed weight and pureness, which shall be received in payments of all debts to the United States at such rates as may be fixed from time to time, but shall not be otherwise a legal tender."

His remarks clarified that he was proposing a floating gold price based on average bullion prices over moving periods of time:

> "Mr. VERPLANCK, in offering his amendment, stated that it offered, as he thought, the only plan which could secure the advantages both of a gold and silver currency combined with uniformity, which the fluctuating relative value of the two metals prevents when both are made legal tenders at a fixed and unchanging proportion. The fixing upon one metal as the sole standard to regulate contracts, seems to promise security upon long contracts, and makes that metal (as commerce and convenience have already done) the basis of our circulation. The regulation by Congress of the value at which a pure and unchanged gold coinage shall be received at the treasury, (founded of course on the average market price of gold bullion,) gives an authoritative declaration of its temporary worth to the people, as well as secures it a real value for the time, so that American gold coin would probably pass at that value, instead of being, like foreign coin, under the control of the broker."

Verplanck was entirely correct. Another example is in Vieira (p. 220), who quotes a Congressional debate from June 21, 1834. Rep. Clooney is speaking:

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[7]A. K. Kelly has shown that this *is* a solution. It is both feasible and consistent with the mathematics and economics of prices. See A. K. Kelly, "A Comment on the Price Level in Classical Monetary Theory," The Canadian Journal of Economics 7, No.2, (May, 1974), 321-325.

> "The gentleman from New York [Mr. Selden] contends that it is inexpedient to establish what has sometimes been called the double standard of value, because the legal [market is meant here] relative value of the two coins is liable to be changed by a variety of causes beyond the reach and power of legislative control. Amongst these causes he has enumerated the difference in the supplies of the two metals from the mines...and the great diminution or increase in demand for one of the precious metals in preference to the other...He, and those of his faith, also contend that it is impossible to maintain both metals in circulation together, because the fluctuations in their relative value, which no legislation can prevent, will drive from circulation that metal which becomes the most valuable in commerce...Hence they conclude that one metal alone can be made the standard of value in any country; that for this purpose public and mercantile convenience unite in favor of silver; that gold may and ought to be coined merely with the view to ascertain its fineness and weight and stamped by public authority..."

Clooney went on to speak against a floating price for gold, somehow fearing that it would not be used as money if its price floated, believing that it should be used as money, and, in particular, citing 2,000 years of history to the effect that its value relative to silver was quite constant.[8] Unfortunately, Congress did not choose to regulate the value of gold coin via the dynamic solution of those like the Select Committee, Verplanck, and Selden. Instead, it continued to establish fixed legal ratios by law, as is illustrated next.

**Regulation of Value: The Fixed Ratio Method**

The Constitution says that Congress shall have power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures[.]" Article I, Section 8, Clause 5. What does regulating the "Value" mean? It means implementing a method of relating the values of coins in terms of the standard dollar such that the coins exchange at values that are proportioned to the market values of their metal contents. Congress has the choice of implementing the regulation by setting legal fixed ratios (altering them periodically) or by setting floating prices at the Treasury based on recent market prices. It chose fixed ratios, and in doing so it invariably ran into Gresham's law.

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[8]He underestimated the profit motive that arises from even a small discrepancy between the legal and market exchange rates.

Suppose the standard called the dollar ($) is 100 grains of pure silver. The standard is unchanging. Suppose that a coin circulates in the economy, any coin from the past or from any land, and that it contains 50 grains of silver. Congress regulates by declaring that the coin's value in terms of the standard is one-half of a dollar (a fixed exchange rate), and at that value is legal tender. This allows people to use these coins in exchange by counting them, rather than weighing them. Two of these coins have the value of and may exchange for one coin minted to have the value of the dollar.

Consider a slightly more complicated case. Suppose that Congress had issued a gold coin with the value of a dollar at one time in the past. Call it an Eaglet. Suppose it contained 5 grains of gold, and the silver standard dollar is the unchanging weight of 100 grains of silver. This is a 1 to 20 ratio. Congress made both 5 grains of gold and 100 grains of silver into legal equivalents for payment purposes, in effect trying to set a dual standard even though there is only one standard.

Suppose that at present, due to market forces of supply and demand, 4 grains of gold exchange in the market for 100 grains of silver, which is a 1 to 25 ratio. Gresham's law comes into play. People will not pay dollar obligations in these gold coins; they will pay using the silver coins, and the gold coins will be withdrawn from circulation. The reason is that the Eaglet has become worth $1.25 in silver since 5 grains of gold exchange for 125 grains of silver. It therefore is advantageous to pay dollar obligations in silver dollars that contain a lower amount of silver than the silver that one could obtain with a gold dollar. Colloquially speaking, it pays to use the cheaper or less expensive coins and to hoard or export or find other uses for the more expensive metal coins.

Now, Congress gets the Eaglets back into circulation (for awhile until the market ratio alters again) by regulating their "Value". Done properly, and Congress did it properly in the Coinage Act of 1834, this involves no unfairness to anyone whatsoever. It issues a new Eaglet gold coin with the value of a dollar at the current market ratio and makes this the new legal ratio. Such a coin will contain 4 grains of gold, not 5 as in the old coins. This is 25 cents per grain of gold. The old Eaglets that have 5 grains and are also stamped a dollar are then decreed to pass in payment at a legal tender rate of $1.25, which makes their gold content also 25 cents per grain. The older Eaglets can also be brought to the mint and reminted into new Eaglets of lower gold content. The person will receive 5 coins for every 4 brought in.

## Fairness to Creditors: Example

Suppose that a contract called for payment of 100 dollars, which means 100 silver dollars worth of metal. If paid with 100 silver dollars, the contract is fulfilled without legal prejudice to debtor or creditor. The debtor has the option of paying in gold. Since gold has appreciated, he will pay in silver. But if he irrationally pays in gold with 5 old Eaglets, the creditor gains because he gets the value of 125 silver dollars via 25 grains of gold. If he pays with 5 new Eaglets, the creditor gets the value of 100 dollars via 20 grains of gold. Less gold is paid but the contract is fulfilled without loss to the creditor.[9] The new exchange ratio *also* allows him to pay 4 old Eaglets. They contain 20 grains of gold that have the value of 100 dollars. In all cases, the creditor is not harmed. In the two last cases, he is paid fewer grains of gold (20) than the prevailing rate when he contracted and *if the debtor would have paid gold at the maturity of the contract*, but their value is still 100 silver dollars, which is what he contracted for. He did not contract for payment in Eaglets but in dollars. He willingly assumed the risk of a gold price change.

At the option of the contractors, the contract might have defined payment as (i) 5 Eaglets, or maybe (ii) 100 dollars in Eaglets, or maybe (iii) 100 dollars in gold coin of the U.S., or maybe (iv) 5 Eaglets of the present weight and fineness, or (v) 100 dollars in gold coin of the U.S. of the present weight and fineness.

In cases (i), (ii), and (iii), there is no specification of present weight and fineness. The debtor will surely deliver 5 new Eaglets rather than 5 old Eaglets. The creditor still receives the value of 100 dollars in silver. The newly fixed ratio does not abrogate the contract in any way. It fulfills it. If the result is not what the creditor wanted or expected, that is not the Constitution's fault or that of the Congress in regulating coin value to the constitutional standard. The creditor has no cause for legal complaint. If he wanted to assure payment in old Eaglets, then he should have contracted for them as in the next two cases.

In cases (iv) and (v), the creditor has specified the receipt of 5 Eaglets of the present, meaning when the contract was made. The debtor has to pay 5 old

[9]Less gold would have been paid anyway because gold had appreciated and it is rational to fill the contract by paying silver since the contract allows the debtor the option of paying in either silver or gold.

Eaglets in this case. The creditor has no cause for legal complaint and neither does the debtor.[10]

### Knox v. Lee on the Coinage Act of 1834

In Knox v. Lee (1870), the Supreme Court grievously erred in its misunderstanding of this Act. The Court asserted wrongly that the Coinage Act of 1834 imposed a loss on creditors.[11] A critical passage read

> "By the Act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six percent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six percent less gold than was required to pay them before."

The new regulation did not take weight from the old coins or from the dollar standard. It introduced a new gold coin with a lower gold content. This most assuredly did *not* subject creditors to a corresponding loss. The debts required just as much gold to pay them as before the regulation. This has been explained above using simple numbers in the section with the example of fairness to creditors. The following few paragraphs demonstrate this by showing the arithmetic of the 1834 Act, after which the important matter of the

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[10]There are even more possibilities than these. The contractors can agree to payoffs at the legal tender ratio at the time the payments come due, or they can specify a payment in some other medium, or they can specify payment at prices to prevail in the future. They can also specify periodic contract settlement terms along some time schedule, like daily settlement or longer. Furthermore, they can hedge against the contractual future payments by doing transactions outside the contract, at the time of contracting and thereafter. The possibilities are very broad. In all of this, the problem they are contracting around is the risk of change in prices relative to the standard; and that risk includes the timing and extent of adjustments that Congress may make to align gold and silver values. The key fact concerning this risk is that contractors can set any terms they want to. This is why Congress works no harm when it changes the ratio. Contractors can specify payment in grains of silver or grains of gold or a mixture. Anyone who agrees to a contract payable in grains of gold can protect against any gold price change caused by a market change or a change in the legal ratio by the appropriate contract terms.

[11]This is but one of a number of erroneous arguments in the legal tender cases. By the 1930s, the legal situation had worsened in that the Supreme Court simply refused to hear certain cases concerning gold.

bearing of the Court's error on its conclusions is discussed.

Vieira's technical discussion of gold coin adjustments (pp. 225-231) in the 1834 Coinage Act shows that the Congress made adjustments precisely to maintain no interference in private contracts. Here is a summary of the arithmetic that eluded the Supreme Court.

The 1792 Eagle, which was a ten dollar gold piece, contained 247.5 grains of fine gold. The coin was an alloy of 11 parts fine gold to 1 part alloy material. This produced a standard gold coin of 270 grains.[12] (Note that 247/270 = 11/12.)

The 1834 Eagle contained 232 grains of pure gold. This coin contained a different alloy ratio. It was 9 parts fine to 1 part alloy material. This produced a standard gold coin of 258 grains. (Note that 232/258 = 9/10.)

The Act contained a key provision that gave the Court trouble. It specified the rate at which the older gold coins would be receivable in payments:

> "SEC. 3. And be it further enacted, That all gold coins of the United States, minted anterior to the thirty-first day of July next, shall be receivable in all payments at the rate of ninety-four and eight-tenths of a cent per pennyweight."

The weight refers to the overall weight of the old coins, which was 270 grains. There are 24 grains per pennyweight. This means there are 270/24 pennyweights in one coin. Each has the lawful value of 94.8 cents. This produces a value of (270/24) x 94.8 cents = 1066.5 cents = $10.665.

The 1792 Eagle had 247.5 grains of pure gold. Hence, each grain is to be received in payments at a value of 1066.5 cents/247.5grains = 4.3091 cents per grain of fine gold.

The new 1834 Eagle is a ten dollar gold piece with 1000 cents and 232 grains of fine gold. This is to be received in payments at a value of 1000 cents/232 grains = 4.31034 cents per grain of fine gold.

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[12]The words "standard gold" appear in the Act. They refer to ordinary or alloyed gold suitable for ordinary use. They do not refer to a gold standard.

The difference between the gold payments in the two coins is trivial and within minting error. It is less than 3 hundredths of one percent. Furthermore, it is in the creditor's very, very slight favor to be paid in the new Eagles.

The main point is that the Congress knew exactly what it was doing in bringing the coins into equality so that the creditors would be paid the same amount of fine gold for a given dollar debt. There was no loss imposed on them.

Having erred on what the Act did, the Court went on to assert wrongly that the Congress had taken private property in the case of its constitutional management of money, and if it had done that in 1834, the legal tender laws that introduced paper money (greenbacks) in 1862 were also within its constitutional power. The Court wrote

> "The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the Fifth Amendment? And has anyone in good faith avowed his belief that even a law debasing the current coin by increasing the alloy would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted?"

The Court had found or devised what it thought it could use as a basis for justifying a Congressional power to emit bills of credit (paper money). It is evident from other portions of Justice Strong's exposition, which extolled government power, that this is what the majority was aiming for in the first place. Section 3 of the Coinage Act of 1834 provided it with a basis for spinning the matter its way, even as it mangled the truth of the matter.

Furthermore, what possible merit is there in arguing that if Congress had done something wrong in 1834, that it was entitled to do it again in 1862? Is it a rule of justice that one accepts unconstitutional behavior because there is precedent for it? It is not, as Vieira (p. 181) makes clear. In his and the Court's words within the single quotation marks:

> "...the gloss government officials have placed on the Constitution is inconsequential in comparison to how they should have construed it according to its language and to correct rules of interpretation. [See The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443, 458 (1851).] For if

> 'a bold and daring usurpation might be resisted, after [long and complete] acquiescence,' [see McCulloch v. Maryland, 17 U.S. 316, 401 (1819)] surely a mindless '[g]eneral acquiescence cannot justify departure from the law.' [See Smiley v. Holm, 285 U.S. 355, 369 (1932).] '[W]hen the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged.' [See Fairbank v. United States, 181 U.S. 283, 311 (1901).] '[N]either the antiquity of a practice nor *** steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.' [See Williams v. Illinois, 399 U.S. 235, 239 (1970).] '[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.' [See Walz v. Tax Commission, 397 U.S. 664, 678 (1970).]"

Justice Strong went on with error after error:

> "Other statutes have from time to time reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six percent less in weight and in market value, or to a smaller number of silver dollars."

Of course, the Congress *never* altered the quantity of silver in the dollar. If and when it reduced the official rate at which a silver coin could be received in payment of a dollar obligation, it did so in order to assure that the actual silver content of that coin, which could be diminished by wear and other causes, corresponded with the payment value of the coin. In other words, the Congress was regulating coin value in a constitutional manner. And when Strong said that a creditor who was owed "a thousand dollars...was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage," he was dead wrong. The creditor who contracted to be paid "one thousand dollars" without any other qualification was not entitled to gold and not

entitled to gold coin of the weight when the contract was signed. He was entitled to either silver or gold coin at the option of the debtor, and he was entitled to "dollars" which means silver dollars; and he was also subject to the Constitution which allowed Congress to regulate coin values in a just way that was in accordance with due process of law and the Fifth Amendment. And, as shown earlier, Congress imposed no six percent loss in market value on creditors whatsoever.

The importance of these Supreme Court errors and misjudgment is that the Court used them as an example of a legislative power to debase the coinage, implying that the debasement is constitutional, when it is not, as debasement is both an unjust regulation of value and an uncompensated taking under the Fifth Amendment.[13] Knox v. Lee is one of the rulings that lays the groundwork for the gold seizures and gold-clause abrogations in the 1930s. The Court argued that if in the Coinage Act of 1834 the Congress acted constitutionally by debasing the coinage and by effectively abrogating contracts, then why could it not do the same with the legal tender laws that supposedly justified paper money issues (the greenbacks of 1862)? And subsequently courts could use this constitutional foundation to help justify Roosevelt's gold seizure.

The accretion of an unconstitutional money power in the hands of Congress occurred by a bootstrapping or self-generating and self-sustaining dynamic on the part of the Supreme Court. Once it had the first misjudgment in the official record, subsequent Courts cited it as a given and spun out further elaborations and misjudgments based on it. For example, in Juilliard v. Greenman, 110 U.S. 421 (1884), the Court reaffirmed the constitutionality of legal-tender paper currency. Perpetuating the myth and errors of the Strong Court, it erroneously wrote

> "So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the Act of June 28, 1834, c. 95, and with regard to silver by the Act of February 28, 1878, c. 20) issue coins of the same denominations as those already current by law, but of less intrinsic value than those by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value."

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[13]The Coinage Act of 1792 provided the death penalty for any mint officers or employees who fraudulently debased the coins. See also Hamilton's strong disapproval of debasement.

Congress in 1834 did *not* issue new coins of less intrinsic value as those older coins that were current. They had a lower weight of gold but the same value per grain in payments of obligations (to within three hundredths of one percent.) Congress did *not* enable debtors to pay off their debts with a lower amount of gold using coins of less real value.

**Issuance of Treasury Notes: 1812-1861**

Congress has the constitutional power to authorize the Treasury to borrow Money (gold and silver coin). In borrowing, the Treasury emits or issues debt securities.[14] These evidence the debts incurred and provide the terms of the loan.

The Congress does not have the power to authorize the Treasury to emit Bills of Credit, i.e, issue paper money.

The problem that has arisen historically is that the Treasury may try and has tried at times, with or without the approval of Congress, to fund the government by issuing paper money disguised as U.S. Notes. Eventually, it has made some of these issues.

Vieira reviews this history (pp. 241-259). Another available and useful review to complement his is that by John Jay Knox, first appearing in 1885. The latter contains long excerpts of an important House Committee Report that saw through the Treasury artifice in 1844 and rejected it as unconstitutional.

Telling the difference between debt and hard money like specie is easy. Silver and gold are tangible assets with no corresponding liability, whereas debt is some person's liability or a promise to pay an asset like silver or gold upon redemption. Telling the difference between debt and paper money is not quite as easy because paper money is one kind of debt. It too is the liability of some person or entity and a promise to pay something upon redemption. Paper money is a particular kind of debt with features that other kinds of debt do not ordinarily have. The differences between paper money and ordinary debt have to be spelled out. Some debts may share certain features with paper money and

[14]Today these are called Treasury bills, notes, and bonds. The Treasury bills are not to be confused with the bills of credit whose emission is denied in the Constitution. The bills of credit had features that made them paper money. These features are lacking in today's U.S. Treasury bills.

not all debts share the same features, but if an issue of debt has mostly features that characterize a medium of exchange such that people are induced to use it as such, then it is paper money. The latter is Chief Justice Marshall's test in Craig v. Missouri (1830): "...'bills of credit' signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

To determine this, use the duck test. "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."

Vieira (p. 454) mentions three criteria, any one of which suffices. The legislature intends the paper to circulate throughout society as a medium of exchange (whether it is actually suitable for that purpose or not.) The paper is suitable as a circulating medium of exchange, whatever the legislative intent. The paper actually circulates as a medium of exchange, whatever the legislative intent or its suitableness in theory.

I add a series of test questions, none of which is perfect in distinguishing paper money from ordinary debt; but taken together, each provides clues as to an issue's suitability as money.

Do the securities in the issue carry large denominations, like $1,000 (in today's purchasing power)? Then they are likely to be ordinary debt, not money. Most paper money is in small denominations of $50 or less. But of course some paper money is of large denomination, so we ask more questions.

Do the securities carry a rate of interest? If yes, then they are likely to be ordinary debt, not money. But an issuer might place a token or low interest rate on the debt so that it looks like ordinary debt.

Are the securities registered and transferable by endorsement? If yes, then they are likely to be ordinary debt. If the paper is easily transferred hand-to-hand, that makes it suitable for paper money. But bearer bonds do exist. Furthermore, checks that are transferred by endorsement are a form of paper money.

Do the securities have a specific redemption date in the future? If yes, then they are likely to be ordinary debt, not paper money. Debts pay off later in time. Paper money usually, not always, carries a pledge or assurance or words to the effect that it can be redeemed at any time. This is true even in the case

of Federal Reserve notes that promise conversion into something called "lawful money."

Are the securities a forcible legal tender? Then they are likely to be paper money, since ordinary debts are not legal tender. Note that not all paper money is made into a forcible legal tender, so that this criterion is sufficient but not necessary.

If we jump ahead to the Act of July 17, 1861, a number of securities were authorized. One part allowed consisted of Treasury Notes that did not bear interest, were payable on demand, and were transferable by delivery. These features are like those of a private bank note, which is a bank's paper money. The denominations were 5 to 50 dollars. $50 was a lot for the time, but $5 much less so. These notes were made legal tender after awhile. It's clear that these notes walk like, swim like, and quack like paper money. In all relevant particulars, they are paper money. These notes were an unconstitutional emission of bills of credit.

In 1843, the Treasury proposed notes bearing a nominal (1 penny per $100) interest rate with a one year maturity but payable in coin at par upon presentation. The Committee of Ways and Means rejected the request:

> "But if a mere nominal rate of interest be charged for the purpose of aiding in an object not contemplated by the law or authorized by the Constitution, then such nominal rate of interest is a mere pretext to cover a perversion of law, and a violation of the Constitution. The nominal rate of interest is so very small as hardly to admit of computation; and for all practical purposes, the notes may be regarded as carrying no interest; whilst the endorsement, that they will be paid at sight, at either of the depositories of the Treasury, in the city of New York, imparts to them the character of ordinary bank paper, calculated and intended to circulate as money, in the hands of citizens. It is an emission of paper, on the public credit, to be circulated as money, like bank notes."

Two features of the duck test approach were sufficient to conclude that this issue was no ordinary debt but was paper money.

The Committee went on sternly to lecture the Secretary of the Treasury about the meaning of the Constitution. What they say in 1843 strongly supports

Vieira's entire thesis of what the Constitution's original meanings are, in those of its articles and clauses that refer to money, as judged from sources at 1789 and earlier.

> "The power to borrow money on the credit of the United States was unanimously given, whilst the power to emit bills of credit was *refused* – was struck out of the plan proposed, by a vote, in convention, of nine States to two. And yet the Secretary of the Treasury contends that because there are no express words of prohibition, as there are applied to the States, that Congress may exercise the power incidentally or appertinently to the power of borrowing money...It was thought that it was too late to undertake to revive the exploded federal doctrine of claiming power because it had not been expressly forbidden. And it is a matter of equal surprise that, at this late day, it should be seriously maintained by any federal officer, that bills of credit (a paper currency) may be supplied to the country under cover of the granted power to borrow money."

Moving backward again, to the Act of February 24, 1815, we find that several different notes are authorized. The Congress left it up to the Secretary of the Treasury to issue notes that could have denominations less than $100, payable to bearer, transferable by delivery alone, and bearing no interest. The notes were not made legal tender. These features alone suggest that any such issues would be paper money.

However, there was one more feature, which was that "the holders of the said Treasury notes not bearing an interest, shall be entitled to receive therefor, the amount of the said notes, in a certificate or certificates of funded stock [meaning government bonds], bearing interest at seven percentum per annum..." When converted, the notes could be reissued. These notes were convertible at par into an instrument paying a rather high rate of interest. This provided a strong incentive to convert. In effect, the notes were a kind of rights issue or marketing device to issue longer term bonds. The Treasury did in fact reissue them several times. The Secretary of the Treasury in his 1815 report suggested that although the small treasury notes were convenient for common use, they "would be converted into stock almost as soon as they were issued." Knox reports that this was the case. The small notes commanded a premium because of the conversion feature, and the amount of 7 percent bonds issued grew to almost three times the amount of small notes issued.

My conclusion is that this issue came close but, because of the conversion feature that removed them from circulation, did not cross the constitutional line in the sand that the U.S. government may not issue bills of credit.

Other Treasury issues between 1812 and 1860 have typical features of ordinary debt. None were designed to circulate as a medium of exchange and none were made forcible legal tender. The typical issue might be an interest-bearing security with a maturity of one year that could be transferred only by endorsement showing delivery and assignment.

Between 1812 and 1860, the Treasury followed the Constitution by borrowing Money via issues of genuine debt instruments. In 1815 it made a note issue that might have been a disguised money issue. Close examination reveals that it was not paper money. In 1844, the Treasury made a more clearcut attempt to issue paper money disguised as debt, but Congress firmly rejected it as unconstitutional. The first time that the Treasury gained Congressional authorization for such an emission of bills was in 1861. This was a transition to the subsequent greenback issues.

Vieira concludes

> "In sum, aside from an isolated instance in 1815, which aberrant precedent the House of Representatives repudiated in principle in 1844, no evidence supports the notion that Congress consistently, or even on a single occasion without doubt as to its authority claimed a power to 'emit bills' before the Civil War."[15]

**Veazie Bank v. Fenno (1869)**

Chief Justice Chase in 1869 wrote two majority opinions on two aspects of constitutional money, bills of credit *per se* and the legal tender quality of bills of credit. They are in spirit irreconcilable. In Veazie Bank v. Fenno, his *dicta* say that bills of credit are constitutional. In Hepburn v. Griswold (quickly overturned by Knox v. Lee), the Court ruled against the legal tender aspect of bills of credit.

The statements in Veazie Bank v. Fenno have to be read to believe that they

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[15] I argued that the conversion feature of the 1815 issue prevented it from being even an aberrant precedent, so that Vieira's conclusion can be strengthened.

could even have been made:

> "It cannot be doubted that under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them, to make them receivable in payment of debts to itself, to fit them for use by those who see fit to use them in all the transactions of commerce, to provide for their redemption, to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers until recently were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.
>
> "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."

How could the Chief Justice possibly, as a legal matter, think that "Congress may constitutionally authorize the emission of bills of credit" when the entire history of the government up until 1862, the year when he himself decided to issue greenbacks, said otherwise? It belies any degree of accuracy to have said that "These powers until recently were only partially and occasionally exercised." They had *never* been exercised partially or occasionally, until 1862, and then their constitutionality had to be very much in doubt.[16] What we have here is not even a half-hearted justification, but the thinnest of word soups in which floats Chase's aim for the government to provide a currency for the entire country.

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[16]Chase was writing as a Republican architect of a national system of money that he constructed via the National Bank Act of 1864. The Constitution, which meant WE THE PEOPLE and their rights, played a part in his thinking well below his other State and banking interests.

## Conclusion

The evidence associated with the coinage acts and with the issuance of U.S. debts, covering the period 1789-1860, provides ample verification of the constitutional meanings that were already present in 1789. These are explained on pp. 1-177 of *Pieces of Eight* and summarized in chapter I. In brief, they are

(i) that money's constitutional meaning is silver and gold and nothing else,
(ii) that the dollar is the money-unit of the United States,
(iii) that the dollar is defined by a silver weight of 371.25 grains of pure silver,
(iv) that the government will coin silver and gold money,
(v) that the Congress will regulate coin value,
(vi) that the only possible legal tender, if there is any, is silver and gold,
(vii) that the government may borrow money, and
(viii) that neither the federal nor the state governments may emit paper money (bills of credit).

More generally, these provisions give rise to a monetary system in which the supply of hard money (metal coins) is not controlled by any government. The government sets a monetary standard and runs an official mint that is open to coinage of U.S. coins by individual persons or groups of persons at their will. This system does not preclude competition from privately struck coins, so long as they are not passed as counterfeits or purport to be U.S. coins, or from paper money issued by banks.

The reports, debates, legislative actions and language that accompany the coinage acts up to 1860 and the government's borrowing via Treasury notes to a high degree show that the constitutional principles and the constitutional system so described remained in place up until 1860.

## CHAPTER III

### Cases on State Bills of Credit:

### Prefatory Remarks

This chapter continues to expound Edwin Vieira Jr.'s two-volume book, *Pieces of Eight: The Monetary Powers and Disabilities of the U.S. Constitution.* This part covers pp. 352-370 and 391-454. As in Chapter II, although the core effort is to summarize Vieira's work, the result is a rather free translation in which I do not attempt to capture, and probably could not do so if I tried, all of the many threads and emphases of Vieira's arguments. Some of his work is omitted, other of it is amplified. I introduce arguments and integrating material of my own as well as arrange the result in a form that aims to make the arguments flow logically and understandably. I hope that even those who have access to his work will find these chapters useful as a supplement, containing an addition to the subject matter of the U.S. Constitution and money.

### Introduction

The individual states are explicitly disabled in the Constitution from emitting bills of credit (paper money).[17] What are bills of credit? Chief Justice Marshall defined bills of credit as follows.

> "To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood."

Justice Story wrote:

> "...when bills of credit are spoken of, the words mean negotiable paper, intended to pass as currency or as money, by delivery or endorsement.

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[17]Article I, Section 10, Clause 1: "No state shall...coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payments of Debt..."

> In this sense, all bank notes, or, as the more common phrase is, bank bills, are bills of credit. They are the bills of the party issuing them, on his credit, and the credit of his funds, for the purposes of circulation as currency or money."

The states may constitutionally charter private-sector banks that issue bank notes (paper money).[18] These private banks have always been termed "state" banks, due to the incorporation coming from the state. However, they are not state-controlled, not state agencies, not entities of the state, not part of the state, and not departments of the state.

An indirect route to emitting state bills of credit exists. The incorporation of state banks creates the possibility of unconstitutional actions by states, if the states create a state bank that *they own*, control, or otherwise enable to emit bills of credit by various legislative means of state.[19] Such an institution, by looking very much like a chartered private state bank, might get away with emitting bills of credit even though the state is behind the institution and issuance procedure. A number of states followed this route of creating banks that were agents of the state. This created constitutional issues. The main cases we consider involve Missouri, Kentucky, Arkansas, and Tennessee.

On November 29, 1820, the legislature of Kentucky established the Bank of the Commonwealth of Kentucky as the exclusive property of the commonwealth; the legislature chose its president and directors. On June 21, 1821, the legislature of the State of Missouri passed "An act for the establishment of loan offices, etc." to issue loans in the form of low-denomination certificates good for paying taxes. In 1823, the state of Alabama established the Bank of the State of Alabama using funds of the state in its Treasury. On November 2, 1836, the legislature of Arkansas chartered the Bank of the State of Arkansas. The whole capital was subscribed by the state,

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[18] State constitutions also may allow the states to regulate those banks and issues due to their broad impact on their citizens. The proper handling of paper money issues by private fractional-reserve banks remains an unresolved problem to this day.

[19] A surviving example of a state-owned bank is the Bank of North Dakota. A snippet of history of the state-owned banks is here. The author writes "While the experience of these banks owned and managed by the state were for the most part disastrous, a few stand out as conspicuously successful."

and the state appointed the president and directors of the bank.

These banks gave rise to Supreme Court cases in which the Court ruled on the constitutionality of the notes, certificates, paper money, coupons, warrants, and/or bills of credit issued by the banks. In addition, we touch on cases that involve Tennessee, Texas, and Virginia.

Vieira's review of the cases involving state bills of credit leads him to conclude that the Supreme Court (p. 391) had a "tendency to digress further and further from sound constitutional doctrine in the monetary area as time progressed." Further (pp. 449-450):

> "The foregoing discussion should prove to even the most skeptical reader the self-contradictions and absurdities Justices of the Supreme Court have historically embraced in order to salvage paper-money schemes for the States...All this perfectly exemplifies the 'living' Constitution in action: The judges first decide for themselves that some 'very important and necessary power' of government must be sustained in the teeth of the Constitution, and then achieve this end through double-talk sheltering behind the supposed 'finality' of 'judicial review'. Thus, this set of cases highlights why such irresponsible 'judicial review' is utterly destructive of constitutional government by WE THE PEOPLE."

**Craig v. Missouri (1830)**

At the outset, in *Craig v. Missouri* (1830), the Marshall Court ruled against the state and overturned the lower court decision that said that the state of Missouri's loan offices were constitutional:

> "A majority of the Court feels constrained to say that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the Constitution of the United States."

After Marshall's death in 1835, the Supreme Court reversed this position in similar cases from the other states. Justice John McLean delivered the majority

opinion in the cases involving Kentucky, Alabama, and Arkansas.[20]

*Craig v. Missouri* (1830) was the last case on state bills of credit that showed a strict construction of the Constitution. Missouri passed a statute in which the state issued $200,000 of interest-bearing certificates at two percent in amounts of $0.50 to $10. These they used to pay civil and military employees of the state. They were made payable for the taxes and fees due to any state, county, or town in Missouri at state loan offices. The loan offices could lend them to state citizens on mortgage or personal security at rates no higher than six percent. The state also leased salt springs on condition that the salt miners would be paid in these certificates.

Apart from the interest-bearing feature, it is evident that Missouri created a paper money and a banking organization intended to promote its circulation. The money was given a tax foundation through the set-off feature.[21] The Constitution forbids any and all bills of credit issued by states, whether they have a tax foundation or not, whether they are legal tender or not, whether they carry interest or not, whether there is a fund to redeem them or not, whether the issuers can be sued or not, and so on. The prohibition is absolute.

The Missouri certificates were indeed bills of credit. The denomination of the bills and their set-off capability in receipt of taxes and debts to the government gave them currency, and they were placed into circulation by the government

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[20]Ironically, Justice McLean was appointed by Andrew Jackson, who came to be a foe of all paper money. He was highly "politically conscious" and sought the presidency on several occasions. "McLean emerges as a nationalist who was well aware of the needs of the business community." He was also a "judicial activist." Finkelman writes "While on the bench, McLean became increasingly nationalistic, reflecting his growing Whig proclivities." McLean is best known for his dissent in the Dred Scott case.

[21]Set-off has a respectable financial and legal history of hundreds of years. It means that the issuer accepts liabilities he has issued to pay what is owed him. Someone who owes taxes to the state can set-off or cancel the taxes payable by submitting to the state some certificates he owns that indicate the state owes the holder money. The two debts then cancel one another. This set-off capability provides the certificates with a value (a tax foundation to the value) and gives them currency since many people owe taxes. Set-off via a tax foundation is a way to create a paper money or liability money that has value and circulates as a medium of exchange or currency.

in several ways.[22]

Some members of the Court thought that bills of credit necessarily had to be legal tender. The Marshall Court correctly ruled that that feature was not necessary due to the phrasing of the Constitution (see note 1 above) which separates them by semi-colons. Historically, not all bills of credit were made legal tender:

> "The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden."

As it happens, the Missouri certificates had partial legal tender quality because they had to be accepted by certain people (like state employees and salt miners) and governments (like towns).

Having found that the state violated the Constitution, and under the principle that "[A] promise made in consideration of an act which is forbidden by law is void," the Court ruled that "the note itself is utterly void."

Marshall's clearly-written opinion in this case is easy to understand and contains many valuable insights that clarify the constitutional provision that states may not emit bills of credit. I quote.

> "What is a bill of credit? What did the Constitution mean to forbid?
>
> "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a state engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit,' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which

[22] One might also examine some of the tests listed in Chapter II of this series.

> paper is redeemable at a future day. This is the sense in which the terms have been always understood.

Here Marshall distinguishes borrowing on credit from emitting a bill of credit. Borrowing involves an *inflow* of money (specie) now in exchange for an outflow of money later, while emitting a bill of credit involves *no inflow* of money now but instead the issuing of paper (called by such names as certificates, warrants, notes, or bills) now that is and is meant to be circulated as money (a medium of exchange) and provided with features that enable it to be so circulated.

> "At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent, and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution, we were driven to this expedient, and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and 'bills of credit' signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all; the people declared in their constitution, that no state should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation."

Here Marshall defines the bill of credit again as a paper medium designed to serve in exchange via its circulation; and he places it in its historical context of having been abused and led to economic ruin, such that the Framers prohibited its future use constitutionally.[23]

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[23]The paper money issues produced a classic boom-bust cycle of an inflation in prices accompanied by speculation that ultimately led to a deflation in prices and a contraction in business activity. The Austrian theory of business cycles explains this process.

Vieira (pp. 396-410) discusses the dissents by Johnson, Thompson, and McLean. Among other arguments, both Johnson and Thompson insisted that bills of credit by definition had to be pure (that is, unbacked) fiat currency. Johnson: "...for the objection to a mere paper medium is, that its value depends upon mere national faith..." Thompson: "[t]he natural and literal meaning of the terms [Bills of Credit] import a bill drawn *on credit merely*, and not bottomed upon any real or substantial fund for its redemption..."

This argument fails for several reasons. First, the Constitution forbids bills of credit, no matter what the source of credit, whether a redemption fund, gold, or pure faith and trust. Second, bills of credit historically were often bottomed on various assets or credible promises of such. In 1751, Parliament required that certain "Paper Bills of Credit" be backed by "an ample and sufficient Fund." Third, credit is not given or received on the basis of faith. It is given on the basis of the expectation of repayment, and that, in turn, is based on specific signals that the expectation is justified. The credit of a Bill of Credit can flow from the existence of a credible fund, or from the expectation that the state will receive the credit as payments for taxes and fees, or simply because the state has met its obligations in the past and has ample taxing power.

Thompson's reason for his dissent was extra-constitutional. It was to make sure that state-chartered banks that issued paper money would be allowed to remain operating. Thompson argued that to prohibit Missouri's bank was to prohibit "all notes of banks established under the authority of a state." This exaggeration is false.[24] Missouri did not own and operate the state-chartered banks. They were private businesses; they were not agents or subdivisions of the state.[25] But the fact that he made this argument reveals his agenda.

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[24]In the 1837 *Briscoe* case involving Kentucky, Justice Story was to write "But it has been argued that if this bank be unconstitutional, all state banks founded on private capital are unconstitutional. That proposition I utterly deny. It is not a legitimate conclusion from any just reasoning applicable to the present case. The Constitution does not prohibit the emission of all bills of credit, but only the emission of bills of credit by a state, and when I say by a state, I mean by or in behalf of a state, in whatever form issued. It does not prohibit private persons or private partnerships or private corporations (strictly so called) from issuing bills of credit."

[25]If a state passes enough laws that encourage the currency of a private bank's notes, however, then this situation changes. A state cannot make paper money a legal tender, but it might require them in its own transactions or it might guarantee them in certain ways.

McLean began his dissent with an historical summary of the evils produced by the bills of credit that confirms Marshall's:

> "During that most eventful period of our history, bills of credit formed the currency of the county, and everything of greater value was excluded from circulation. These bills were so multiplied by the different states and by Congress that their value was greatly impaired. This loss was attempted to be covered, and the growing wants of the government supplied, by increased emissions. These caused a still more rapid depreciation, until the credit of the bills sunk so low as not to be current at any price. Various statutes were passed to force their circulation, and sustain their value, but they proved ineffectual. For a time, creditors were compelled to receive these bills under the penalty of forfeiting their debt, losing the interest, being denounced as enemies to the country, or some other penalty. These laws destroyed all just relations between creditor and debtor, and so debased a currency produced the most serious evils in almost all the relations of society. Nothing but the ardor of the most elevated patriotism could overcome the difficulties and embarrassments growing out of this state of things."

But McLean then asserted: "It will be found somewhat difficult to give a satisfactory definition of a bill of credit." He mentioned several different bills of credit with differing features and tacitly confessed his inability to see what they had in common. He went on to conclude that the bills of credit meant by the Constitution had to have exactly the same features as those issued during the Revolution:

> "The character of these bills, and the evils which resulted from their circulation, give the true definition of a bill of credit, within the meaning of the Constitution, and of the mischiefs against which the Constitution provides."

This being the case, the Missouri certificates did not qualify. McLean professed to see no difference between Missouri setting up loan offices throughout the state with the express purpose of circulating *newly-issued* certificates and a state's writing a check for money it owed that is payable by the treasurer. It is true that a check can be endorsed and serve as a medium of exchange. But McLean professed not to see that a bill of credit creates a new debt and new money, whereas a check for money owed pays off an existing debt with existing money.

McLean noted that the certificates contained no promise of redemption on their face: "...there was no promise on their face to pay at any future day..." Instead, the "credit" of these bills was *too good* for them to be bills of credit, because they could be used immediately to pay taxes. But, why shouldn't credit depend in some cases on the set-off feature, and doesn't this feature enhance the circulation of the bill as money? Here, McLean introduced irrelevant distinctions, and he ignored Colonial examples of bills of credit in which the bills were a legal tender to the colonies. Indeed, Parliament in 1773 passed a statute (p. 409) allowing the colonial bills to be "a legal tender to the publick Treasurers...and in no other Case whatsoever."

Here is his complete argument:

> "Can any certificate or bill be considered a bill of credit within the meaning of the Constitution to which the receiver must not give credit to the promise of the state? Must it not literally be a 'bill of credit?' Not a bill which will be received in payment of public dues when presented, but which the state promises to redeem at a future day.

McLean ignores two facts. The holder of the Missouri certificates who used them to pay taxes would always exercise them in the future, i.e., the time of redemption was at the holder's option. The distinction he is making between payment when presented and future redemption is not viable. And if he is saying that colonial bills could not be redeemed for taxes, that was not always true. Second, the holder of a certificate is in fact depending on the state's credit via its promise to redeem the certificate for taxes. The certificate is a liability of the state that involves an obligation and a promise to meet it. McLean, however, restricted the notion of credit:

> "The credit refers to a future time of payment, and not to the confidence we feel in the punctuality of the state in paying the bill when presented."

This is false now and was false when McLean wrote it. Today the whole notion of credit-worthiness and credit ratings shows that better or worse credits depend, not merely on their futurity, but on the possibilities of repayment and default. In 1856, a banking text tells us:

> "The merchant...by buying on credit...pledged his future industry. The actual money was to be obtained by his future labor, skill, and judgment

> in selling the goods and obtaining the money for them from those who wanted them, out of which the actual payment should be made. Now, this system of buying goods with a 'promise to pay' is called the SYSTEM OF CREDIT."[26]

The futurity of payment is indissolubly linked to a promise to pay and confidence in the pledge of repayment due to the future industry and efforts of the borrower. No one rationally becomes a creditor without such an assessment and a belief in repayment. Otherwise, the loan is a gift.

Why did Mclean put forward this long series of faulty arguments? He makes his reason plain enough in his opinion, and it has nothing to do with the Constitution itself but with (a) ends he sought, and (b) the spirit of the Constitution. McLean justified the means (certificate issues) by the ends (debt relief) in these words:

> "The object was a benign one, to relieve the citizens from an extraordinary pressure, produced by the failure of local banks, and the utter worthlessness of the currency. Without aid from the government, the citizens of Missouri could not have paid the taxes or debts which they owed to the state, in a medium of any value."

But if the state wanted to restructure the debt or taxes owed it or provide some forbearance, it could have done so on an individual basis without creating paper money. Instead, the state's loan offices created a money circulation for whoever might get a loan "to be secured by mortgage or personal security." To achieve its ends, the state chose an unconstitutional means of providing debt relief.

McLean added

> "As the spirit of that provision was to protect the citizens of the states against the evils of a debased currency, and as the act under consideration, so far as it operated upon the people of Missouri, had no tendency to produce this evil, but to relieve against it, the spirit of the Constitution was not violated. Was the act of Missouri against its letter?"

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[26]See p. 50 of volume 2 of *The Theory and Practice of Banking,* by Henry Dunning Macleod, 1856, London: Longman, Brown, Green, and Longmans.

This is an anti-constitutional or living Constitution attitude and argument. He is saying that he as judge will decide if an act is constitutional or not. He is basing his judgment, not on what has been done by those involved in the case and what the Constitution allows or disallows, but on whether or not their actions produce or tend to produce evil or not. As a criterion, he invokes the spirit of the Constitution, which as a malleable thing open to many interpretations and speculations. This is hardly a basis for considered judgment. The Constitution has *already* articulated its spirit in no uncertain terms. It has provided the rule by which to decide whether or not bills of credit tend to produce evil or not: It has prohibited them. Why invoke the spirit of the document when we have the document itself and the body of law to which it relates? The answer is that the judge wishes to judge on some other criteria, has the power to do so, and will do so unless he fears that some sanctions, checks, or balances will be forthcoming to hold his feet to the fire.[27]

After commenting in even greater detail than above on the dissenting opinions presented in *Craig*, Vieira concludes (p. 410)

> "After wading through the illogic, historical illiteracy (real or feigned), and sheer sophistry of these dissenting opinions, one wonders if he has not been transported to a Legal Bedlam. But worse was yet to come."

**Briscoe v. Bank of Kentucky (1837)**

In 1820, the Kentucky legislature established a bank that was *fully owned* by the Commonwealth of Kentucky. Its capital came exclusively from the state and the legislature annually chose the president and directors of the bank. Any unappropriated funds of the state at the end of a legislative session went into the bank. All the interest earned by the bank reverted to the state. All bank dividends went to the state. The bank officers gave bonds to the state, not the corporation. They took an oath of office. They could be removed by the legislature. The bank issued ordinary bank notes and made loans, which were to be negotiable and payable as money, to order or to bearer. The bank notes circulated as paper money. They would be received for taxes and dues owing to government. Anyone owed money by Kentucky courts had to accept the bank notes as legal currency if they wanted to be paid right away; otherwise

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[27]Judges who do this are not living up to their oath to uphold the Constitution. Article 3, Section 1 allows their removal under mild conditions: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,..."

payment was delayed for two years. Furthermore, Kentucky had no debt. The notes were not to borrow money for the state. The enabling Act said that the bank had the purpose of "discounting paper and making loans."

All of this makes it perfectly clear that this bank with its emission of bills is in violation of the Constitution, as it involves an emission of bills of credit by the state through its agent, the Commonwealth Bank of Kentucky. Or, as Vieira put it (p. 411):

> "On these clear-cut facts, one would be hard put under *Craig* to deny that, were the Bank the State's agent or *alter ego*, the Bank's notes were 'Bills of Credit'. For they fit the paradigm *Craig* had established...Moreover, on the facts of *Briscoe*, the notes could not be defended as mere evidences of State debt necessary and proper in the exercise [of] the government's power to borrow..."

Hence, the case of Briscoe v. Bank of Kentucky (1837) should never have been heard by the Supreme Court due to the correct decision of a lower court that Kentucky had emitted bills of credit and due to the prior *Craig v. Missouri* case. But the Court took up the matter. It heard this case and reversed the lower court decision with McLean writing for the majority. Incredibly, the Court ruled (a) that the Bank was not an agent of Kentucky and (b) that it had not issued bills of credit.[28]

Justice Story, who dissented, wrote

> "The bills or notes of the bank were to circulate as currency. That is so palpable on the face of the charter as not to have been even questioned

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[28]This is relevant at the national level. It suggests that the federal government may, under this ruling, use the same ruse to issue paper money indirectly under the name of a bank that it controls. The Federal Reserve is such a bank that issues paper money, and that paper money has been given currency by federal government laws that (a) make it legal tender, and (b) make it an obligation of the U.S. Treasury. The Federal Reserve Banks have stock that is owned by member banks, but the government has such important ties to the system that it has a high degree of control over it. It created the central bank and can alter it at any time. The Federal Reserve Board, whose members are appointed by the government, states "As the nation's central bank, the Federal Reserve derives its authority from the U.S. Congress." The Congress has given the bank a certain degree of independence that it can revoke or alter at any time. The Federal Reserve Board sees itself as "independent within the government."

> at the argument. They were, then, stripped of mere technical forms, the bills of the state, issued by the agent of the state, on the exclusive funds of the state, for the benefit and profit of the state, to circulate as currency within the state, and without any other responsibility than that of the state. In what respect then do they differ from bills of credit of the state? I can perceive none."

The majority through McLean argued that the bank was distinct from the state in its scope of action:

> "Were these notes issued by the state?
>
> "Upon their face, they do not purport to be issued by the state, but by the president and directors of the bank. They promise to pay to bearer, on demand, the sums stated.
>
> "Were they issued on the faith of the state? The notes contain no pledge of the faith of the state, in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.
>
> "But these funds, it is said, belonged to the state, and the promise to pay, on the face of the notes, was made by the president and directors, as agents of the state.
>
> "They do not assume to act as agents, and there is no law which authorizes them to bind the state. As in perhaps all bank charters they had the power to issue a certain amount of notes, but they determined the time and circumstances which should regulate these issues."

McLean's position is ingenious. The bank emits the bills of credit, not the state. The bank is not the state's agent. Why not? The connections between state and bank and how it came into being are inconsequential, because the credit of the bank depends on its operations, not those of the state. The bank officers are really not agents of the state. And since the bank is not the agent of the state, the state cannot be said to have emitted the bill of credit.

But who says that a state may not, in issuing bills of credit, allow their credit to hinge in part on the operations of a bank that it has commissioned?

McLean's argument is sophistry. At bottom, he is saying that for the state to emit bills of credit, the state's treasurer must sign the notes. No other officials deputed by the state may do so without the selfsame notes *not* being bills of credit. McLean lists many differences between a state bill of credit emitted *sans* a bank and *cum* a bank but none prove, because they cannot, that the state's relations to the bank were not as listed at the outset, including full ownership, appointment of officers, etc. The manner in which the bank's bills achieved their credit-worthiness no doubt differs from how the state would have attained the credit-worthiness of bills introduced without a bank. The one depends in part on the bank's operations and the other does not. It does not follow, as is necessary to McLean's argument, that the bank officers are really not agents of the state. This only shows that they perform in a different way than other agents might perform. Differences like this and others that can be described do not erase the fact that the bank still was the state's handiwork placed into operation by its appointed and funded agent, with instructions as to how to proceed to place paper money into circulation. McLean would have us look at superficial differences and deny purpose and meaning in the state's actions and control over the bank.

Justice Story saw through the emptiness and nonsense in McLean's arguments:

> "In the first place it is said that they were not issued on the credit of the state, and that the state is not responsible, directly or indirectly, for their payment. I confess, until I heard the argument at the bar, I had not supposed that any such proposition would be maintained or could be maintainable. If these bills were not issued on the credit of the state, on whose credit were they issued? It is said, that they were issued on the credit of the corporation; and what is the corporation? A mere metaphysical being, the creature and agent of the state, having no personal existence and incapable *per se* of any personal responsibility. The president and directors constituted that corporation and were its sole members, and they were not personally liable. The official legal entity, called the president and directors, might be sued. But what then? The capital stock was not vested in them so as to be liable to be taken in execution in a suit against them. Could a creditor of the corporation seize or sell the public land, on his execution against them? No one pretends that. Suppose the state should choose, as it well might, to assume the whole agency and funds of the corporation to itself; could the creditor have any redress against the state? It is admitted, that he could not have any redress, because the state is not suable."

In arguing that the bank's bills were not the state's bills of credit, McLean made distinctions that do not hold up as constitutional imperatives. Bills of credit need not rest solely on a state's credit, as he suggested. The amounts need not be fixed by law, as he suggested. If there is a fund to redeem them, that does not make them any less emissions of the state. And if the bank has separate funds that provided some support to the bills, that does not negate that the State still played a significant role in the emission.

In two more places where McLean argued that the bills were not bills of credit, he outright erred. He attempted to argue that the bank's bills were unlike those that Maryland issued in 1769. The Maryland bills were issued by persons who could "be sued" and they entitled the bearer to "gold and silver." Then McLean wrote that

> "But a slight examination of the respective acts will show that the bills authorized by them were emitted on the credit of the colonies, and were essentially different from the notes in question. The holders of these [Kentucky] bills could not convert them into specie; they could bring no suit."

This was not so. On the matter of being sued, Judge Thompson observed

> "There is an ample fund provided for their redemption, and they are issued by a corporation which can be sued and payment enforced in the courts of justice in the ordinary mode of recovering debts."

On the matter of gold and silver, Justice Story discussed the bank's charter:

> "These bills or notes are, by subsequent sections, authorized to be made payable to order or to bearer and to be negotiable accordingly, and they are declared to be receivable at the treasury and by public officers in all payments of taxes and other debts to the state, and for county levies, and are to be payable and redeemable in gold and silver."

There is very little vagueness when it comes to forbidding states to emit bills of credit. But McLean paved a way to his own ends, writing: "The definition of the terms 'bills of credit,' as used in the Constitution of the United States, if not impracticable, will be found a work of no small difficulty." His real concern was to preserve and protect, not the Constitution, but state incorporated banks and paper money:

> "That by the Constitution the currency, so far as it is composed of gold and silver, is placed under the exclusive control of Congress, is clear, and it is contended, from the inhibition on the states to emit bills of credit, that the paper medium was intended to be made subject to the same power. If this argument be correct, and the position that a state cannot do indirectly what it is prohibited from doing directly be a sound one, then it must follow as a necessary consequence that all banks incorporated by a state are unconstitutional...This doctrine is startling, as it strikes a fatal blow against the state banks, which have a capital of near $400,000,000 and which supply almost the entire circulating medium of the country."

Here is a fallacious slippery slope and straw man argument. States are forbidden from issuing bills of credit by the Constitution. The Constitution does not prohibit private banks from issuing bills of credit. States allow private banks to incorporate that operate independently of the state. This does *not* imply that the states are issuing bills of credit. McLean's own arguments may be turned against him. At the time he writes, such private corporations are not legal agents of the state, or the state has no legal responsibility for their actions. The private banks, not the states, issue bank notes and promise to redeem them, with no recourse to the state. The market assesses the credit of the bank and prices its notes accordingly. The private bank does not carry the credit risk of the state. The private bank and its capital-suppliers are in complete control of their business affairs.

The dissent of Justice Story sweeps aside the notion that bills of credit are an ambiguous thing:

> "If we look into the meaning of the phrase, as it is found in the British laws, or in our own laws, as applicable to the concerns of private individuals or private corporations, we shall find that there is no mystery about the matter; and that when bills of credit are spoken of, the words mean negotiable paper, intended to pass as currency or as money, by delivery or endorsement. In this sense, all bank notes, or, as the more common phrase is, bank bills, are bills of credit. They are the bills of the party issuing them, on his credit, and the credit of his funds, for the purposes of circulation as currency or money. Thus, for example, as we all know, bank notes payable to the bearer (or, when payable to order, endorsed in blank), pass in the ordinary intercourse and business of life, as money; and circulate and are treated as money.

They are not, indeed, in a legal and exact sense, money; but, for common purposes, they possess the attributes, and perform the functions of money. Lord MANSFIELD, in Miller v. Rice, 1 Burr. 457, speaking on the subject of bank notes, observed, ‘that these notes are not like bills of exchange, mere securities, or documents for debts, and are not so esteemed; but are treated as money, in the ordinary course and transactions of credit and of business, by the general consent of mankind; and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.’ And, indeed, so much are they treated as money, that they pass by a will which bequeaths the testator's cash, or money, or property.”

“Such, then, being the true and ordinary meaning applied to bills of credit, issued by banks and other corporations, that they are negotiable paper designed to pass as currency and issued on the credit of the corporation, there is no mystery in the application of the same terms to the transactions of states. The nature of the thing is not changed; the object of the thing is not changed, whether the negotiable paper is issued by a corporation or by a state. *Mutato nomine, de te fabula narratur.* A bill of credit, then, issued by a state is negotiable paper, designed to pass as currency and to circulate as money. It is distinguishable from the evidence of debt issued by a state for money borrowed or debts otherwise incurred, not merely in form, but in substance. The form of the instrument is wholly immaterial. It is the substance we are to look to; the question is whether it is issued, and is negotiable, and is designed to circulate as currency. If that is its intent, manifested either on the face of the bill or on the face of the act, and it is in reality the paper issue of a state, it is within the prohibition of the Constitution. If no such intent exists, then it is a constitutional exercise of power by the state. This is the test -- the sure and in my judgment the only sincere test -- by which we can ascertain whether the paper be within or without the prohibition of the Constitution. All other tests which have hitherto been applied and all other tests which can be applied will be illusory and mere exercises of human ingenuity to vary the prohibition and evade its force. Surely it will not be pretended that the Constitution intended to prohibit names and not things; to hold up the solemn mockery of warring with shadows, and suffering realities to escape its grasp. To suffer states, on their own credit, to issue floods of paper money, as currency, and if they do not call them bills of credit, if they do not give them the very form and impress of a promise by the

> state or in behalf of the state, in the very form so current and so disastrous in former times, then they are not within the prohibition."

Then, after providing an extensive historical review of bills of credit that possessed many and varied features and illustrate why McLean's distinctions and approach are untenable, Story notes

> "This historical review furnishes a complete answer to every argument which has been used on the present or on former occasions, which made the nature of bills of credit depend upon any other quality than the simple one of being for money, and negotiable, and designed to pass as paper money or paper currency."

But Justice Story wrote in dissent. The majority ruled with McLean.

**Darrington v. Bank of Alabama (1851)**

*Darrington v. Bank of Alabama* (1851) illustrates the further depths to which Supreme Court error can sink. The Court again ruled that the paper money issues of a state-owned bank, operated by state appointees, were not state-emitted bills of credit.

The Bank of Alabama was capitalized by state funds and a loan of state bonds. The charter's preamble (p. 364) had as one aim "to secure to the community the benefits as far as may be, of an extended and undepreciating currency." This was an open admission that the state was funding the bank for the purpose of emitting bills of credit, that is, a paper medium intended to circulate widely as currency. It made no difference to the Court's decision.

McLean pointed out, not that it affected his decision, that the legislature elected the president and all the directors, and that "the credit of the State was pledged for the ultimate redemption of the notes of the bank...the State of Alabama was the only stockholder...The bills...were made payable on presentation..."

In *Briscoe*, McLean made a point of arguing that the bank's notes were not the state's notes:

> "Were they issued on the faith of the state? The notes contain no pledge of the faith of the state, in any form. They purport to have been issued

> on the credit of the funds of the bank, and must have been so received in the community."

In *Darrington*, the bank's notes were guaranteed by the state in the charter. There *was* a state pledge *in some form*. A user of the funds now had a state *credit guarantee* that was something like today's deposit insurance. The notes in this case were *not* bottomed solely on the credit of the funds of the bank.[29] McLean countered:

> "That some reliance may have been placed on the guarantee of the eventual payment of the notes of the bank by the state may be admitted. But this was a liability altogether different from that of a state on a bill of credit. It was remote and contingent. And it could have been nothing more than a formal responsibility if the bank had been properly conducted. No one received a bill of this bank with the expectation of its being paid by the state."

Here he contradicted himself. He began by admitting that people may have relied on the state guarantee, and he ended by saying that no one receiving the bills expected the gurantee to be exercised. It surely was a contingent guarantee, but he could not know how remote it was in people's minds. He could not know that the people gave it zero weight or thought it was totally redundant. The very opposite is more logical in light of the poor record of such banks. How did he know that people thought the bank would be "properly conducted" when so many banks had been improperly conducted? If the state guarantee was redundant, why did the state make it? Wasn't it because there was in fact some non-negligible probability that the bills of credit might depreciate? Didn't the state do this in order to assure the circulation of these bills of credit, i.e., in order to give them a greater credibility? Without the guarantee, it is quite likely that people would have expected that the bank might have some chance of failure and might have depreciated the bills at any hint of trouble.

McLean and the Court were prepared by this time to make even stronger statements than 14 years earlier:

> "It is impossible to say that bills thus issued come within the definition

[29]Even if it were, the arrangement would still be unconstitutional. Keep in mind that we are working within McLean's own distinction that we earlier argued was itself untenable.

> of bills of credit. The agency constituted, not only managed the bank, but were made personally liable under certain circumstances. The directors, though elected by the legislature, performed their duties under the charter, and, like all other directors of banks, derived their powers and incurred their responsibilities from the law under which they acted.
>
> "It is not perceived that their action was not as free as those of directors who are elected by individual stockholders."

The Court was now absolutely certain that the bank's bills were not state-emitted bills of credit, terming any other conclusion as "impossible." If so, it should have been possible to provide reasons subject to no doubt. But the reasons adduced for this statement were extraordinarily weak and unpersuasive. Of course it is true that the agency constituted managed the bank. What else would one expect? But we learn in the same breath that the state *constituted* that agency, which McLean ignores. Personal liability for notes does not make them any the less notes of the state, for the state can allow itself to be sued if it wishes or can establish the ground rules of lawsuits against its agents. In fact, by allowing this, the state provided a further ground for achieving the circulation (currency) of the bills of credit. Liability is a matter directed at making the bills of credit current but having no bearing on whether or not these bills are caused to come into being by the state. The directors derived their powers and undertook their duties under the law, but what else could one expect? This is no reason for concluding that the bills issued cannot possibly be state bills of credit.

The directors, we are told, acted as freely as directors act who are elected by private stockholders, and not by the state. This statement says that they were not constrained in their decisions or interfered with by the legislature any more than the legislature interfered with the decisions made by directors of private banks, which was nil. But is this the criterion for deciding whether their emissions were state-fostered and state-caused and state-induced bills of credit? McLean in this statement has treated the bank and its directors as if *they already existed as an institution.* He entirely ignores the fact, that he mentioned a few sentences earlier, that the state *constituted* the bank as an agency. The directors had no freedom whatsoever to issue any bills at all without the state's having created the bank in the first place. Hence, in the perspective that matters for the case, which is the state's responsibility for the bills of credit, the directors of the Bank of Alabama certainly were *not* freely

undertaking the actions they did as compared with the directors of private banks.

We come now to another distinction that requires more elaboration than has been given above. McLean relied heavily in this case and in *Briscoe* on the idea that a corporation and/or its officers might be sued, whereas a state cannot be sued without its consent. He thought that difference was enough to jettison the idea that the banks created and owned by the state were issuing bills of credit on behalf of or as agent of the state.

Vieira points out (p. 357) that states enact tort-claims statutes that allow suits for "any of its agents' negligence..." and that the objective is to allow redress for negligence that is otherwise unobtainable because of the sovereign immunity. The possibility of a bank being sued is not different; it is what the state allowed to happen.

Justice Story in *Briscoe* addressed the point as well. In the first place, he mentioned that bills of credit were issued by Maryland in 1733 and 1769 that allowed suits against the appointed trustees or commissioners who were the agents of Maryland. Next, he noted that if the officers could not be personally sued but the corporation could, the creditors would have no recourse. The bank belonged to the state and the state could not be sued. Then, looking beneath the corporate veil, in this passage he denounced the majority's reasoning in no uncertain terms:

> "Suppose the state had authorized its treasurer, in his official capacity and without any personal liability, to issue these very bank bills, saying, "I, A. B., as treasurer, promise to pay,", &c., and the whole proceeds of these bills were to be for the benefit of the state, and they were to be paid out of the funds of the state, in the treasury; could there be a doubt that the state would, in truth, be the real debtor? That they would be issued on its credit? That the state would, in conscience, in common honesty, in justice be responsible for their payment? If this would be true, in such a case I should be glad to know in what respect that case substantially differs from the one before the Court. It is precisely the very case, and in the same predicament, as the bills of credit issued by Maryland in 1733 and 1769. There, the commissioners were created a corporation, and were to issue the bills, and were authorized to sue and be sued, and no one ever dreamed, and least of all, the state itself, that they were not the bills of credit of the state. If a state can, by so simple

> a device as the creation of a corporation as its own agent, emit paper currency on its own funds, and thus escape the solemn prohibitions of the Constitution, the prohibition is a dead letter. It is worse than a mockery. If we mean to give the Constitution any rational interpretation on this subject, we must look behind forms and examine things. We must ascertain for whose benefit, on whose credit, with whose funds, for what purposes, of currency or otherwise, the instrument is created and the agency established. Whether it be the issue of a treasurer of a state or of a corporation of a state or of any other official personage must be wholly immaterial. The real question must be in all cases whether in substance it is the paper currency of the state."[30]

A final passage is worth citing in which Story noted that even if the state could not be sued, holders would have a case *in equity*.[31]

> "It is said that the bills are not taken on the credit of the state because the state has not promised, in terms, to pay them. If it had so promised, the state not being suable, the holder could here have no redress against the state. But I insist that in equity and in justice, the bills must be treated as the bills of the state, and that if the state were suable, a bill in equity would lie against the state, as the real debtor; as the real principal. And I say this upon principles of eternal justice, and upon principles as old as the foundations of the common law itself. How can it be truly said that these bills were not taken on the credit of the state? Were they not to be paid out of the proceeds of the public lands and other property of the state? Were they not receivable in payment of debts to the state, for the very reason that they were the issues of the state, for its own benefit? And was not credit given to the state upon this very ground? It has been said at the argument that funds were provided for the payment of the bills by the provisions of the charter, and therefore no credit to the state ultra these funds can be inferred. But surely the case of the old colonial bills of credit answers that position.

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[30]The dissent is all too accurate as dissents are wont to be. Overturning the Constitution on money is "worse than a mockery". It is a case of "rational interpretation on this matter" being sacrificed to other interests.

[31]By Article III, Section 2, "The judicial Power shall extend to all Cases, in Law and Equity..." Equity refers to a body of law and courts that fall outside or beyond the common law jurisdiction.

> They had funds assigned for their redemption; they in many cases had mortgages upon loans authorized to be made, as they are in the present charter; and yet the legislature called them bills of credit."

The strength of Story's arguments on this matter are matched by that of his convictions.

**Woodruff v. Trapnall (1850)**

*Woodruff v. Trapnall* was decided in 1850. This case is a little different. It turns on whether or not a provision in the charter of a state-owned bank to receive the bank's notes for taxes was a contract made by the state or a law that the state could repeal. The Court ruled that the state had made a contract and that it must accept the now worthless notes as payment. The case shows to what lengths the Court would go to support issues of paper money by state-owned banks. Justice McLean again wrote the majority opinion.[32]

The state of Arkansas started up the Bank of the State of Arkansas in 1836 by contributing all of its capital. It appointed the president and directors. Again we have a state-owned bank issuing bills of credit. By 1847 this bank was insolvent and its notes all but worthless.

Woodruff was the bank treasurer. He was bonded to pay "lawful money of the United States". In 1840, action was taken against him to recover funds that he had handled in 1838. In 1847, he lost the case and was ordered to pay $3,359 plus costs. He tendered the worthless notes of the Bank of Arkansas. The state of Arkansas refused them. When the bank was set up, the legislation required that the state accept the notes in payments of all debts due it; that changed in 1845 when another statute required par funds [undepreciated money] or treasury warrants of the state. Woodruff then sought to make the state accept the funds by a writ of mandamus. The Supreme Court of Arkansas refused and Woodruff took the case to the Supreme Court as plaintiff.

The Court, following *Briscoe*, rejected the argument that the notes of the bank were unconstitutional state emissions and thus void. In support of this opinion, McLean stated, as he had earlier, that "The bills of this bank are not made payable by the State." This followed his earlier ruling that the bank was not the state or the state's agent. In flat contradiction to this, the rest of his opinion

[32]Some of the arguments of the opposing lawyers can be found here.

stated that the state had made a contract through the charter provision on redeeming the notes for taxes due and had to accept "its currency".

The McLean Court ruled that Arkansas had to accept the notes. McLean contradicted himself, that being necessary in order to arrive at the decision that he wanted to reach, which was, as Vieira puts it (p. 430) to see to it that "*the paper currency must be allowed – yea, forced – to circulate."* McLean pointed out that

> "The notes of the bank in circulation at the repeal of the twenty-eighth section, if made receivable by the state in discharge of public dues, may so far resuscitate them as that in the course of time they will find their way into the treasury of the state, where in justice and by contract they belong...It would be a most unwise policy for a state to improve its currency through a violation [of] its contracts..."

Whereas in *Briscoe,* the bank was made out to be separate from the state and its bills not the state's by any possible connection, here the opposite is expressed.. The phrase "for a state to improve *its* currency" (emphasis added) appears. This currency *is* the state's, McLean says.

Furthermore, in arguing that the state had a contract, McLean identified the state closely with the bank in another way:

> "It is a contract founded upon a good and valuable consideration; a consideration beneficial to the state, as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank."

In *Briscoe*, McLean had argued that the susceptibility of the bank's directors to being sued showed that the bank notes were not state-emitted. In *Woodruff*, the directors could not be sued. McLean summarily swept this aside by inventing an imaginary liability:

> "And although the directors are not expressly made liable to be sued, yet it is not doubted they may be held legally responsible for an abuse of the trust confided to them."

In *Briscoe*, the state's guarantee was said to be "remote and contingent," and he had written that "No one received a bill of this bank with the expectation

of its being paid by the state." In *Woodruff*, the charter provision becomes a contract and a binding guarantee:

> "It is a continuing guaranty by the state, that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a state."

In *Briscoe*, the bank was not the agent of the state. In *Woodruff*, it is, as McLean writes:

> "The bank belonged to the state, and it realized the profits of its operations. It was conducted by the agents of the state, under the supervision of the legislature."

Woodruff's bond required him to pay judgments in "lawful money of the United States." That alone undermined his case. The Court's majority ignored this.

Justice Grier (and two other Justices) dissented.[33] Grier noted that Woodruff had 7 years (between 1838 and 1845) to pay in notes of the bank and didn't. He wryly observed that now he claimed a

> "...a right to satisfy the execution by handing over that which is not money. If this claim be not just, it has at least the merit of novelty, as it is certainly without precedent either in the courts of England or America."

The Court's majority judgment was incongruous:

> "The Constitution of the United States forbids any state 'to make anything but gold and silver a tender in payment of debts;' yet it is claimed that this Court has the power to compel a state to accept payment of a judgment for $3,000 lawful money of the United States in worthless paper of a broken bank"

Vieira asks (p. 430) how the Court could have viewed "the State as the bank and the bank as the State in *Woodruff*, but not in *Briscoe* or *Darrington*. His

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[33]Grier's entire dissent is well worth reading as it blows the majority opinion out of the water, but it is beyond the scope of this article.

answer is that the Court had a concealed motive, which was to support paper currency, in the face of the constitutional restriction on its issuance.

**Furman v. Nichol (1869)**

In *Furman v. Nichol*, Mr. Justice Davis delivered the Court's opinion. It contains some striking passages in which the Court very clearly identifies the Bank of Tennessee with the state of Tennessee, so that the bank's bills of credit are those of the state, and yet the question of the unconstitutionality of the bank's notes never even comes up. By this time, the Court was openly comfortable with its subversion of the Constitution.

Little further comment is needed except to quote Davis:

> "The State of Tennessee, through its legislature, in 1838, thought proper to create a bank 'in its name and for its benefit.' It was essentially a state institution. The state owned the capital and received the profits; appointed the directors, and pledged its faith and credit for its support. This would seem to have been enough to establish the credit of the institution on a firm basis and to inspire confidence in the value of its notes, so that they would obtain a free circulation among the people as money. But the legislature, in its anxiety to insure for these notes a still greater confidence of the community, went further and provided that they should be receivable at the treasury of the state, and by all tax collectors and other public officers, in all payments for taxes and other moneys due the state.
>
> "It will be readily seen that nothing could have been better calculated to accomplish the purpose the legislature had in view than the incorporation of this guaranty into the charter of the bank. It assured the free circulation of their notes, gave them a credit over the issues of other banks, and furnished a security to those who held them against any serious loss if, in the vicissitudes of trade, the bank itself should become embarrassed, for annually they would be enabled to use the notes at their par value in the payment of their taxes."
>
> "The state was engaged in banking, and like other corporations engaged in the same business, desirous of using all legitimate means to increase the profits of the enterprise. The profits of a bank of issue depend in a great measure on the ability of the bank to keep its currency afloat. The

longer the bills are withheld from redemption, the greater the remuneration to the corporation. Every additional guaranty thrown around the bills, affecting their security and increasing the uses to which they can be put, affords necessarily additional inducements for the people in whose hands they fall to keep them and not return them to the counter of the bank for redemption in specie. What so natural as that the intelligent legislators of 1838, knowing all this, should say to every person discounting a note or taking it in the ordinary transactions of life,

> "'If you will not return this note for redemption, we will take it from you for taxes. It is true you can demand specie for the bills, and so can the state demand specie for taxes, but if you will forego your right, the state will do the same and consent to receive from you, in lieu of specie, for the taxes due her, the notes of the bank.'
>
> "In such a transaction, the benefit is mutual between the parties. The bank gets the interest on the notes as long as they are unredeemed, and the holder of the bills has a ready and convenient mode of paying taxes."

His statement that "The state was engaged in banking" and that it was doing everything it could to "keep its currency afloat" shows an acceptance of a blatant contradiction with the Constitution.

### Houston & Texas Central Railroad v. Texas (1900)

The *Houston & Texas Central Railroad v. Texas* case completes the evisceration of *Craig v. Missouri.* The state-emitted bills of credit were warrants payable to the state for taxes, fees, and dues. The record shows clearly that they were intended to circulate as money. Justice Peckham, presenting the Court's majority opinion, made it equally clear that the facts of the case were not pertinent:

> "Whether an act provides for the issuing of warrants that were intended to circulate as money is in reality a question of law arising upon the construction of the legislative act, and a finding by the court that warrants issued under and by virtue of certain acts of the legislature were issued with such intention is in the nature of a legal conclusion, and not a finding of fact, and therefore it can be reviewed by this

> Court."

Saying that the matter was "a question of law" and "in the nature of a legal conclusion" meant that the Court would decide the intent of the legislature without being constrained by any facts of the case. For example, we learn from Justice Henry Brown's dissent that

> "...the warrants were in the form of bank notes, printed upon peculiar paper, such as is ordinarily used by banks for their circulating notes, and contained a brief and unconditional promise of the state to pay the amount to a party named, or bearer, and were declared on their face to be receivable for public dues."

Peckham responded

> "We have been referred to no act making provision for the size, shape, or color of the paper to be used for the warrants, and such size, etc., cannot be regarded as evidence of any weight as to the intent on the part of the legislature that they should circulate as money; nor does the depleted condition of the treasury or the scarcity of a circulating medium necessarily or properly induce to that conclusion. That the size of the warrant, both as to amount and shape, might somewhat facilitate a holder, upon occasion, to discharge a debt and in that way use it as money is not at all sufficient, or indeed any proper, evidence of an unlawful intent on the part of the legislature."

It's cutting the matter awfully fine to expect the legislative act to promulgate the appearance of the warrants, and if this were the only fact disregarded by Peckham, we might see the matter as ambiguous; but it is by no means the only fact he brushed aside. And he *entirely* disregards facts like these. Here he says that the physical nature of the warrants cannot have "any weight" and is not even "any proper, evidence" as to the legislative intent. No weight whatsoever?

What other facts did Peckham and the Court disregard? Texas had passed a law taxing all forms of money, and the warrants were included in the list:

> "Also on December 16, 1863, another act was passed, section 2 of which reads as follows:

> "'A tax of one-half of one percent shall be levied and collected in kind on all specie, treasury notes of the Confederate States of America, treasury warrants of the State of Texas, and bank notes held or owned in this state, and all foreign bills of exchange and certificates of deposit, and other evidences of money upon deposit or secured beyond the limits of the state, owned by persons residing therein, shall be known as specie, and thereon shall be levied a tax of one-half of one percent in specie.'"

Peckham replied

> "The Act of December 16, 1863, is not the slightest evidence on the subject. It simply provided for taxing specie, treasury notes of the Confederate States, treasury warrants of the state, and bank notes held or owned in the state...The fact that treasury warrants were mixed up in such an act for the purpose of taxation with specie, bills of exchange, certificates of deposit, etc., has not the slightest tendency to prove the intent that the warrants should circulate as money."

Did the Texas legislature place the warrants in the list by accident or at random? Again, notice the strong language in saying "not the slightest evidence."

Not to prolong this critique, let's note that there were *many* other facts that Peckham and the Court intentionally disregarded. Justice Brown cited some:

> "I concur in the conclusion of the Court, but from so much of the opinion as holds that the treasury warrants in question were not bills of credit within the meaning of the Constitution of the United States I am constrained to dissent.
>
> "It is admitted that these warrants fulfill all the conditions of bills of credit except, as it is said, they were not intended to circulate as money. I am unable to concur in this view of the intent of the legislature. By the Act of February 14, 1860, authorizing interest-bearing warrants on the treasury, it was expressly provided that these warrants should not circulate as money, but might be assigned. This act was repealed, however, in 1862 by another act providing that warrants should be drawn for legal claims against the state, and payment made if there were money in the treasury but if not, the comptroller was authorized

> to issue warrants payable to the party entitled to payment, or bearer, which warrants should be of such proportions of the claim as were required by the holder, one tenth of the whole amount of which might be issued in warrants of one dollar each, and the residue in warrants of five dollars or more each. There was an omission in this act, which appears to me extremely significant, of the proviso of the former act that such warrants should not circulate as money. By another act, approved the following day, it was provided that treasury warrants of the state, not bearing interest, should be receivable 'as money' in the payment of taxes, office fees (including fees for patents), and land dues payable in the general land office of Texas, and all other dues to be collected for the state, with certain specified exceptions. By another Act of December 16, 1863, the comptroller was authorized to receive from the railroad companies indebted to the special school fund all interest on their bonds that might be or might thereafter become due in state treasury warrants. This act was amended May 28, 1864, by providing that the act of 1863 should not apply to railroad companies which refused to receive these bonds or treasury warrants at par for freight or passage at the prices or rates established by law.
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> "The railway companies were thus compelled to receive these warrants as money from their patrons in order to be able to avail themselves of them in payment of interest upon their bonds."

### Conclusion

Vieira's conclusion to this portion of the history of the U.S. Constitution and money has been made known above, which is that neither the living Constitution nor the finality of judicial review deserve respect and that both have been destructive of constitutional government.

The reader is entitled to draw his own conclusions about the meaning of a Court that can and has been so destructive of the Constitution. Many interpretations are possible concerning the Constitution itself, the operation of checks and balances, constitutional government, the fallibilities and limitations of men and of representative government, the unused checks and balances remaining in the Constitution, the ways to rectify the situation, and so on.

My purpose in this article has not been to discuss any of this but to present a partial but important picture of American legal history with respect to the state

emission of bills of credit, based upon Vieira's comprehensive work. The Supreme Court cases are accessible. Many of them are quite readable to non-lawyers. It is not all that difficult to grasp what has been said and done, but it takes a degree of time, commitment and effort. Vieira has lightened the load for us, and my purpose has been to lighten the load still further without sacrificing the crucial content of the history.

# CHAPTER IV

## First and Second Banks of the United States

### Introduction

This chapter summarizes pp. 260-351 of Edwin Vieira Jr.'s legal history of the U.S. Constitution's monetary powers and disabilities contained in his book *Pieces of Eight.* All page references in parentheses are to his book.[34] Our concern here is primarily with the constitutionality of the first and second Banks of the United States and secondarily with their political-financial nature. This leads into a discussion of the necessary and proper clause and the *McCulloch v. Maryland* opinion of John Marshall.

In 1791 and 1816, Congress incorporated a Bank of the United States (BUS), each with twenty-year charters. Did it have constitutional authority to do so? Were the emissions of bills of credit by the two banks acts of the national government and thus unconstitutional?[35]

We shall see that Congress had no authority to incorporate anything, a bank included, so that the acts that set up the first and second BUS were unconstitutional. Vieira argues that the banks were structured so that their emission of bills of credit was not an act of the national government. Given that the banks existed, he concludes that their emission of bills was not unconstitutional.

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[34]This article has the usual disclaimer. While relying heavily on *Pieces of Eight,* it does not summarize everything in the book nor all of Vieira's views and arguments. Neither does it claim to reproduce all of his positions and emphases. The main effort hews closely to Vieira, but in order to produce a self-contained, compact, and coherent account of the most important constitutional and financial issues, I introduce arguments and analyses that are not in Vieira's book.

[35]The Constitution (p. 261) provides "no 'banking' powers [to government]: no power to loan; no power to create a paper currency or a deposit currency, redeemable in precious metals or not; no power to employ fractional reserves; and *a fortiori* no power to delegate such nonexistent powers to private parties..."

**Original Constitutional Meaning and Incorporation**

There is no explicit power to incorporate banks or any enterprises in the Constitution. On that there is agreement. We must look to the original meaning and implied powers of the Constitution to determine if the framers meant the federal government to have such a power.

The power to incorporate enterprises goes back to English law. The pre-constitutional law explained in Blackstone's *Commentaries* says that this power was primarily executive in nature and lodged in the king, although parliament confirmed his incorporations via statutes. Also, parliament at times originated incorporations that required the king's assent. This provides guidance to constitutional meaning. If the framers had wanted the legislature (Congress) to have this power, it probably would have enumerated it as a legislative power, since it involved a break with the power of the Executive in English law.[36]

The Articles of Confederation gave Congress no power to incorporate, but Congress, in the stress of war and problems of financing war, incorporated the Bank of North America in early 1781, promoted by Robert Morris, who was Superintendent of Finance of the United States, and by then Lieutenant-Colonel Alexander Hamilton who was George Washington's trusted aide-de-camp.[37] This was the first private commercial bank in the country. Incorporation at that time was not open to all under general incorporation laws; it was a governmental franchise with certain legal privileges and goals. This initial act met with resistance in late 1781 at a new session of Congress. The federal incorporation was withdrawn and replaced by charters from individual states. From 1783 onwards, the Bank operated in Philadelphia under a

[36]This discussion presumes legal continuity and legal change within legal continuity. There is ample reason for this. Legal systems and traditions go back for hundreds and thousands of years. Even when there is a revolution, the new legal order may continue important elements of the old. The framers worked within *some* legal order, and Blackstone was the common source of law at the time. Marshall, in his 1819 opinion on the BUS constitutionality, alludes to English law: "If we look to the origin of corporations, to the manner in which they have been framed in that Government from which we have derived most of our legal principles and ideas..."

[37]In 1782, Hamilton left the military, became a lawyer in New York, became assistant to Robert Morris, and was elected to the Continental Congress. Hamilton publically endorsed the Bank of North America, writing as the "Continentalist."

Pennsylvania charter.[38] This history suggests that the framers were well aware of the question of a power to incorporate. Because incorporation was not a routine event granted to anyone, but a political act, it suggests that, if no federal power to incorporate is in the Constitution, the framers intended none. The states had this power and used it. Evidently, it was reserved to them under the Tenth Amendment.

During the Federal Convention in which the Constitution was drafted, a power to incorporate to be vested in the Legislature was considered in two separate clauses.[39] One read "To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent." The other read "To grant charters of incorporation." Neither of these made it into the final draft of the Constitution. This is further evidence that the framers intended that the federal government have no power to grant incorporations.[40]

In addition, an attempt by Madison to get the first version passed in a more limited context of public transportation also failed. The Constitution gives Congress the power "To establish Post Offices and Post Roads." But in the Federal Convention at which the Constitution was drafted, the subject of adding a power to cut canals was also debated. We have the notes of both

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[38]See Edwin J. Perkins, *American Public Finance and Financial Services, 1700-1815*, pp. 113-114.

[39]See pp. 321-322 of Volume 2 of Max Farrand's *The Records of the Federal Convention of 1787,* available here.

[40]I note that this is one of several critical cases in which holding a secret convention whose mission lacked a clear legal basis had the effect of creating an ambiguous foundation for the country's government. Debate after the Convention could not substitute for an official record of debates and arguments made during the drafting of the Constitution. The entire framework of the Convention and what it did were not above board, since it went beyond its appointed task. In addition, important constitutional ambiguities in specific clauses were built into the process of government from the outset. All of this was bound to lead to a series of shakeouts over many years in which politics built up the actual institutions of government. If the foundation of the Convention itself and the document it drafted had been more secure and known, aided by a documentary record of Convention proceedings, debates over constitutional legitimacy and meaning might have been more productive. WE THE PEOPLE might more broadly have understood the document's meaning. These debates continue to this day, Vieira's and the current work included.

Madison and McHenry on this.[41] The McHenry note says that Franklin's motion on canals led to Virginia introducing a motion "To empower Congress to grant charters of incorporation in cases where the U.S. may require them and where the objects of them cannot be obtained by a State." This is followed by a single word: "Negatived."

Madison records that he made the motion "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." This motion was in general terms, even though his specific purpose was to assure "an easy communication between the States." Delegates understood its general nature because Mr. King and Mr. Mason worried that such a measure would encourage those who wanted a Bank and mercantile monopolies. Mr. Wilson favored the power. The members decided not to pursue a general power of incorporation. They dropped Madison's motion. He records "The motion being so modified as to admit a distinct question specifying & limited to the case of canals," the vote was 3 for and 8 against adoption.

The debate shows that, on balance, the framers regarded incorporation and banking as a political hot potato that they preferred to avoid in light of their goal to get the Constitution ratified. Incorporation and banking were issues that were intertwined with attitudes toward banks and banking that vented in politics. Madison's notes quote Mr. King on this score:

> "The States will be prejudiced and divided into parties by it – In Phila[delphia] & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities..."

Mr. Wilson "did not think with Mr. King that the power in that point of view would excite the prejudices & parties apprehended." This difference of opinion was resolved by excluding the power. In fact, Mr. King's concern had a substantial basis. For many years, the Bank of North America was involved in significant political disputes over its existence and policies.[42]

Subsequently, on Feb. 2, 1791, in the Congressional debate on the incorporation of the First Bank of the United States, Rep. James Madison

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[41]Volume 2 of Farrand has Madison's notes on pp. 615-616 and McHenry's on p. 620.

[42]See Perkins, op. cit., pp. 131-133.

"well recollected that a power to grant charters of incorporation had been proposed in the general convention, and rejected."[43] This is consistent with his and McHenry's notes.

The fact that these proposals for charters of incorporation were put forward and debated is evidence that the framers thought it was necessary to spell the power out if it were to be constitutional. Their thinking was consistent with the prevailing pre-constitutional law and the Articles, in that the power had to be lodged somewhere. Leaving the power of Congress to incorporate enterprises out of the Constitution was intentional. It meant that the framers reserved it to the states. At this point in his exposition, Vieira concludes (p. 265)

> "And that the proposals were voted down proves that the Constitution contains no authority, express or implied, for Congress to incorporate in general, or specifically to incorporate banks."

The conclusion that the Constitution contains no power of the Congress to grant incorporations is inescapable. If subsequent governments wished to change this situation, the legal means to do so was available: amend the Constitution.

The matter of federal (Congressional) incorporation didn't end with such a neat, logical, and legal solution. Hamilton thought that banking was a sound and innovative way to advance an economy and nation. He wanted a *national* bank, and he had his own ideas about what the Constitution allowed. Congress in 1791 debated and approved a statute, which he drafted, that incorporated the first Bank of the United States. Washington solicited advice from Hamilton, Jefferson, Knox, and Randolph, who were in his cabinet. He signed the bill. After the second BUS was incorporated, several cases made it to the Supreme Court in which Chief Justice Marshall, writing for the Court, found the Bank of the United States constitutional.[44] Before discussing this material on the

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[43]See p. 40 of Matthew St. Clair Clarke and David A. Hall's *Legislative and Documentary History of the Bank of the United States*, dating from 1832, available here. This volume contains the entire debate over the 1791 banking bill. It's recommended reading to witness the arguments from an early debate in Congress between the advocates of limited and unlimited government.

[44]Congress has by now chartered all sorts of federal corporations including Fannie Mae, the FDIC, railroads, utilities, banks, businesses, construction companies, savings and loans, and

constitutionality of the banks, let's address the question of whether or not the bank's bills of credit were those of the federal government.

**Federal Bills of Credit?**

Given that the BUS was instituted, did it emit bills of credit that can be attributed to the federal government? Was it unconstitutional for that reason? Vieira argues that the bills of credit were not those of the federal government; they were constitutional. This argument applies to both the first BUS (1791-1811) and the second BUS (1816-1836).[45]

What were the bank's features that the Congress debated and passed? The preamble to the Act of February 25, 1791 aimed at an institution "conducive to the successful conducting of the national finances; [that] will tend to give facility to the obtaining of loans, for the use of the Government, in sudden emergencies; and will be productive of considerable advantage to trade and industry in general."[46]

The bank was to be very large. The bank was to be capitalized by sale by subscription of not more than 25,000 shares of stock at a price of $400 per share to be sold in Philadelphia by a committee of 3 persons appointed by the President of the U.S. Subscriptions were opened on July 4, 1791 and oversubscribed. Installment payments were allowed; by July 1, 1793, all $10 million was paid in. This was a very large capital. It exceeded the combined capital of the 5 existing state-chartered banks ($3 million), the 8 insurance companies ($3 million), and the 32 canal and turnpike companies in 1800 ($3 million.)[47]

The United States government subscribed to a 20 percent ownership position. No other owner could exceed a 4 percent position. However, voting rights were by law dispersed: no owner, including the U.S., could have more than 30

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credit unions. See here.

[45]The charters of the two banks are similar, differing mainly in size. The second BUS went on for another 5 years as a private bank after its charter expired.

[46]A source to the online content of this and other monetary acts is here.

[47]See David J. Cowen, "The First Bank of the United States and the Securities Market Crash of 1792," *Journal of Economic History*, vol. 60, no. 4 (Dec. 2000), 1041-1060.

votes. Hence, the U.S. by no means had voting control of the bank.

The stock, except for that purchased by the U.S., was to be paid for by 1/4 specie and 3/4 public debt in certain issues paying 6 percent. The $2 million subscribed by the U.S. would be borrowed from the bank, to be repaid over a 10-year period or prepaid at the option of the U.S. The bank assets by mid-1793 were therefore approximately $2 million specie, $8 million public debt, and a loan to the U.S. of $2 million.

Offices could be established anywhere in the U.S., but the bank's growth or reinvestment of earnings was limited by its 20-year life and by two other provisions: The property held by the bank could not exceed $15 million, and it could not borrow more than $10 million in excess of deposits unless authorized by Congress. Consequently, earnings were mostly paid out as dividends.

The bank could sell the public debt securities that had been paid in for its stock, but "shall not be at liberty to purchase any public debt whatsoever..." No loan to the U.S. could exceed $100,000.[48] These provisions meant that the bank could not further build up its debt holdings of public debt by monetizing the government debt. Bypassing this provision was easy, however. By lending to private parties who bought government debt on margin, the bank, if it chose to, could support the government bond market indirectly.

The bank could issue notes payable to bearer. The U.S. would accept in payments all bills and notes of the bank that were payable on demand in gold or silver. This provided currency to the bank's notes. However, the bank's notes were kept at a $5 minimum and did not circulate freely at the retail level.

The bank was given a monopoly. The law pledged that no other bank would be created by Congress for the life of this bank.

Vieira argues (pp. 336-339) that the banks were not agents of the government, so that their emissions of bills were not federal bills of credit. He points to the following undisputed facts present in the charter. The federal government had a minority interest in the stock (20 percent.) It had no voting control. It did not appoint the bank's officers; they were chosen by all the stockholders, and the

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[48]This seems to mean no loan exclusive of the large amount of 6 percent public debt securities that were held.

government position allowed it only 30 votes. The government in the charter effectively relinquished control.[49] The banks had the privileges and powers of a corporate enterprise. They could sue or be sued in state courts or in any court. The bills and notes issued by the bank were obligatory on the bank as on any person. The denominations of bills and notes were kept high in the second Bank. The second Bank could not suspend or refuse payment in gold and silver. There was not full legal tender status accorded to the banks; but the U.S. would accept bills payable on demand in specie as payments to the U.S. As noted above, the banks had limits placed on their activities. The charters also called for auditing and access to the banks' books by either the Treasury or a committee of Congress. Vieira concludes (p. 339)

> "In sum, the Banks of the United States were private corporations the United States chartered to perform certain public financial functions as well as to engage in gainful private activity. Fully four fifths of their stock belonged to private individuals...And they and their directors and officials were amenable to suit in national and State courts throughout the country. The Banks' bills, notes, and other obligations were binding and enforceable against the corporations (not against the government), were payable in gold and silver without delay (in the case of the second Bank), and were not legal tender for any private debt, or for any debt the national government owed. Moreover, the Banks' directors were personally liable for excessive corporate debts; and all its officials were subject to heavy damages for extending excessive loans to domestic or foreign governments."

### Hamilton's *Report on a National Bank*

Hamilton promoted the BUS in his *Report on a National Bank.*[50] Several pages of the report provided the exact and detailed provisions that appeared in the statute that Congress passed. In effect, Hamilton wrote the bill that passed, which means that he had support for his views in Congress.

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[49] In the second Bank, the government appointed 20 percent of the directors.

[50] This report and his and Jefferson's reports [edited] on the constitutionality of such a bank are here. See Clarke and Hall cited in note 7 for the complete documents: Hamilton's report, pp. 15-35, his letter to Washington (pp. 95-112), Jefferson's letter (pp. 91-94), and Edmund Randolph's letter as well.

Vieira's main comments on the report are as follows. Hamilton was promoting a large fractional-reserve bank that would increase the supply of credit and currency while also being liable to abuse. The bank would replace the constitutionally outlawed system of currency finance (government-issued bills of credit) that had played a role in the nation's finances from an early date.[51] A private bank would gain control over the country's money and credit. Such a bank's viability depends on the confidence of depositors and those who use the bank's notes as money. Hamilton's argument that the bank would increase the economy's capital via monetary expansion is faulty. It leads (p. 273) to "the wasteful boom-and-bust business cycle."[52] Hamilton praised the ability of the bank to be a source of loans to the government. He did not mention the bank's "encouraging governments to spend and incur debt." Hamilton argued that bank credit would lower interest rates, ignoring the possibility that inflation would raise interest rates. Hamilton played down that banks encourage overtrading, i.e., speculation, and ignored the John Law episode in France, while placing more weight on the banking history in other lands and citing its benefits.

Hamilton's unconstitutional views surfaced briefly when he wrote "...that it is immaterial what serves the purpose of money, whether paper, or gold and silver..." In his opinion, the Constitution disabled the states but not the U.S. from issuing paper. But he went on to point out very clearly the evils of government-produced paper emissions and argued that instead a private bank should be allowed to issue bills of credit. Its emission, he argued, would be limited by market demand, whereas a government's issues face no such

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[51]Currency finance is the system of government-issued paper money or bills of credit backed by various kinds of things, such as land, mortgages, specie, and payment as taxes. Vieira (pp. 265-266) notes that currency finance resulted in inflation and even hyperinflation during the War of Independence. However, he says "it was not a system of unmitigated political and economic evil." Here he cites Ferguson, "Political Economy, Public Liberty, and the Formation of the Constitution," 40 *William & Mary Quarterly* (3rd ser.) 389 (1983) and other sources on Colonial paper money. The colonial paper "avoided a long-term public debt." Its depreciation effected a widespread and gradual inflation tax. "Importantly, 'currency finance' did not contribute to excessive and potentially corrupt political-economic linkages between the government and private financial interests."

[52]Vieira consistently criticizes fractional-reserve banking as susceptible to serious abuse, as causing wealth redistribution, as inflationary, and as causing the boom-bust cycle. His analysis is that of the Austrian-school economists, Ludwig von Mises and Murray Rothbard whom he cites.

constraint. Vieira points out that before that check might operate, a bubble might occur that, when burst, would throw the economy into depression.

Last, Vieira explains that Hamilton presented a contradictory argument. He was selling the bank as a public aid while also saying that the public interest could not be committed to private hands and admitting that such a bank would be prone to abuse and speculation. And yet the government could not control the bank and make it subservient to the government without running into the problem of government's excessive emissions of money. Hamilton's only solution was to have the government take a 20 percent interest. Consequently, the first BUS really was a private corporation financed in part by the government, not under government control, and yet whose construction and characteristics made it into a proto-central bank.

### Observations on Hamilton and the BUS

Hamilton wanted to kill several birds with one stone and did.[53] Hamilton had multiple goals. He wanted to make a strong national government and Union that could defend itself. He wanted a republican empire. He wanted paper money and bank credit in the economy. He liked the idea of what banks do. He thought that they stimulated commerce. He knew that they run into trouble by making bad loans and over-stimulating and that this can affect the broad economy, but he downplayed this because he wanted a means of supporting the government finances when it needed to raise money quickly. He may also have thought that he could use his personal influence or government power to make the BUS act conservatively. He wanted a permanent national debt so that the government would be a prime credit risk and find a ready market for its debt. All of these goals he could achieve simultaneously in the first Bank of the United States, even though imperfectly. As a means of defense and a strong economy, Hamilton favored a single concentrated power over decentralization. A large national bank also fit in with this vision. The Congress, as might be expected since its members ran for office in that government and acted within the seed of its nascent power, sided with Hamilton.

Jefferson's vision emphasized liberty and rights secured by government power that was divided, checked, balanced, and dispersed. This concept led to an emphasis on states and localities being the main governments and the federal government existing mainly for purposes of defense and foreign affairs,

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[53]This section and the next are not summaries of Vieira's work.

governing on only specific limited roles within the domestic economy. A central government could lead the way on defense, but with militia being an important component. A diversified and decentralized economy would provide a strong foundation. Jefferson's concept of power led to the states checking the federal government and the branches of the federal government checking one another. This led to Jefferson's efforts at nullification, to his emphasis on the Tenth Amendment, to his opposition to the Banks of the United States, to his emphasis on militia, to his opposition to national debt, and to the important Kentucky Resolutions.[54]

Hamilton recognized that the rivalry between the two visions did not end with the Constitution. The Constitution was ambiguous enough to allow a war over its meaning to be fought. He fought on, as did Jefferson. With the national bank, Hamilton won a signal victory. In the long run, partisans of central banking won a victory with the National Banking Acts and with the Federal Reserve. They didn't win the war. The war over banking is not over and neither is the war between liberty and empire.

There were economic alternatives to Hamilton's national bank. Paper money and a credit system could have been achieved via banks chartered at the state level, and this did occur. The states' banks could stimulate commerce as much as a single federal bank, and they did. They too could have made loans to government. And, beyond banks, a set of intermediaries could have risen to market government securities. That is exactly what happened in 1813.[55]

Hamilton's goal of being able to borrow in emergencies and for purposes of

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[54]The Constitution contains elements of both visions. The anti-federalists pointed out its dangers to liberty and centralizing tendencies. If read strictly and enforced, the Constitution's capacity to be stretched is limited; but its ambiguities open the door to loose construction. If the people and states had followed up on the Kentucky Resolutions, they may have checked the accretion of national power and better defined institutional constraints on government under the Constitution. They may still do so today. Slavery and the identification of slavery with states' rights undermined the anti-federal (really anti-national) vision for a long time. Many movements are afoot to reclaim this vision. It is logical that they be anti-central banking.

[55]Treasury secretary Gallatin negotiated with an underwriting syndicate led by Stephen Girard, John Jacob Astor, and David Parish to market $10.1 million of government debt. The government's own marketing efforts were not conducted well. The underwriters did better and at a lower cost to the government. They knew how to recruit other independent firms, brokers, and banks to sell the bonds.

war was really after a capital market or set of intermediaries that could market large amounts of government debt or could create a market where such debt could be sold. The government needed wholesalers who could sell the debt to retailers, or who combined a wholesale-retail distribution network. This was not a business model that entered the thinking of the time or at least his thinking. He thought that one large bank could serve that and his other purposes that included commerce. And so the BUS was what Hamilton pushed for and got.

**An Early Bubble**

At the very inception of the BUS, an episode occurred that reveals the perils of such a system at work. The problem of bank credit redeemable into specie is the over-extension of loans whose values can drop and lower the value of the bank's notes, thereby precipitating a run on the bank. A bank can only succeed by being conservatively run in order to assure that its loan values are substantial enough to maintain parity between the value of its notes and specie. However, there are bound to be individual cases of reckless and/or mistaken lending, and there are bound to be shocks to the entire economy that endanger bank solvency across many banks.

A very large bank can provide loans to the security and money markets so that speculators can buy government debt; the bank itself doesn't have to make direct loans to the government. For example, government securities today have margin requirements of 1 to 9 percent. One may put down a 5 percent payment and borrow the other 95 percent, with the bond as collateral. We know from Cowen's paper (see note 14) that at its inception the first Bank proceeded to make very heavy loans to speculators in government bonds, that their prices were 20-27 percent above par coincident with these loans, and that when the bank failed to renew these loans, prices came back to par. We know that this was enough to ruin William Duer and others who had speculated heavily. It is a fair inference that the purchases were made on margin. Had they not bought on margin, they would not have been forced to sell.

Hamilton knew intimately about these market mechanics. He had close relations with the BUS. The Treasury building in Philadelphia was 100 yards away from the bank building. Hamilton had explained to the directors in December of 1791 that

> "There are various arrangements necessary to be made between the

> Government and the Bank of the United States, which will better be treated in personal conference than by writing. I request therefore that such proceedings as may appear proper to the Directors for that purpose may be adopted."

He was informed in mid-January of 1792, by several persons, of the bank's large loan advances to bond buyers. Jefferson also knew and complained of it in a letter. Hamilton became concerned with the speculation and that new banks were being planned. They presumably would be issuing derivative (fractional-reserve) money based on such assets as the notes of the BUS. In a letter dated January 18, 1792, he wrote

> "I have learnt with infinite pain the circumstance of a new Bank having started up in your City. Its effects cannot but be in every view pernicious. These extravagant sallies of speculation do injury to the Government and to the whole system of public Credit, by disgusting all sober Citizens, and giving a wild air to everything. It is impossible but that three great banks in one City must raise such a mass of artificial Credit, as must endanger every one of them & do harm in every view."

This was not the first time that Hamilton had worried about banking competition. In 1784, the possible entry of a new Bank of Pennsylvania caused depositors to withdraw specie from the Bank of North America. It then contracted its loans. A Hamilton letter showed that he had changed his mind about the new bank: "On a superficial view, I perceived benefits to the community, which, on a more close inspection, I found were not real." Morris put it this way: "The struggle to get such capital places these institutions in a degree of opposition to each other injurious to them all."[56] This experience suggests another reason why Hamilton might have disfavored a competitive banking and credit system and favored a dominant monopoly national bank.[57]

One more excerpt of a Hamilton letter written on February 10, 1792 is revealing:

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[56]See Perkins, op. cit., pp.128-129.

[57]The tendency to want to control matters by government power sometimes reflects an over-emphasis on short-term developments, negatives, and pain combined with the impatience to let matters take their course, let people learn, and let private market institutions come to reflect that learning.

> "The state of things however requires unusual circumspection. Every existing bank ought within prudent limits to abrige [sic] its operations. The superstructure of Credit is now too vast for the foundation. It must be gradually brought within more reasonable dimensions or it will tumble."

Like the sorcerer's apprentice, Hamilton was confronted with how to rein in his creation.[58] The market check on the BUS' notes was, in fact, operating. They had gone to a discount, and the bank itself was curtailing loans – but not before credit had been over-expanded and not without the risk of an outright crash rather than a gradual decline.

So here we have an early event that underscores all of the concerns raised by Vieira and others: the intimate connections of such a bank and government, the problem of the government being able to control such a bank, the proclivity of the bank to inflate, the follow-on effects of the bank in stimulating other banks, and the effect of the bank's loans on asset prices. In this case, the bubble was small. The effects were confined to a few speculators. The drop in government bond prices did not produce an economy-wide depression. The situation in other instances has been much worse because they involved widespread speculation over many years, many banks, and many assets including stocks and real estate.

**Opinion of Alexander Hamilton on the Constitutionality of a National Bank**

Does the U.S. have constitutional authority to erect corporations? In his advisory report to Washington, Hamilton says it has.

Vieira finds it strange that Hamilton did not address the question of where the power to incorporate rested, in the Executive or in the Congress. He points out that Hamilton construed the necessary and proper clause loosely; if the bank [or any end] were rationally related to an enumerated power, was not forbidden, and did not violate a State's or individual's right, then, for Hamilton, it was constitutional. Hamilton's denial that the bank was a monopoly because states could charter banks is disingenuous. The Constitution

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[58]Little has changed. Central bankers are still talking about how to prick the speculative bubbles that they help create in conjunction with various government programs and legal measures.

provided no way to justify a bank monopoly. Hamilton denied that the Federal Convention had withheld the federal power to incorporate. He rejected examining the understandings of the framers without explaining why their views were not pertinent and valuable to an understanding of the Constitution when controversy arose:

> "...whatever may have been the intentions of the framers of a constitution, or of a law, that intention is to be sought in the instrument itself...If, then, a power to erect a corporation, in any case, be deducible by fair inference from the whole, or any part, of the numerous provisions of the Constitution of the United States, arguments, drawn from extrinsic circumstances regarding the intention of the convention, must be rejected."

Hamilton's argument that a bank was related to the power to tax by providing a medium of exchange in which taxes could be paid, proves "too little, and far too much," Vieira says. It's too little because the charter made that medium acceptable only if it were payable in gold and silver on demand, of which there were many possible sources. This cannot justify incorporating a bank.

It proves too much because if the government has the power to enable tax payments through starting a bank, then it has many unenumerated powers over the economy in order to generate taxes.

Hamilton went on to assert that the U.S. can emit bills:

> "The appointment, then, of the money or *thing* in which the taxes can be paid, is an incident to the power of collection. And among the expedients which may be adopted, is that of bills issued under the authority of the United States."

The U.S. government, however, is constitutionally disabled from emitting bills, as shown in the first article in this series. Hamilton continued by describing a government bank, of all things, whose "constitutionality of all this would not admit of a question." The bank, run by government officials, would emit bills, receive specie deposits, and make discounts on good collateral. Further, the funds would be "specifically vested in the officers who were to have the direction of it, and in their successors in office..." But, in fact, none of this is constitutional either. The government is not empowered to emit bills, not empowered to lend money, and not empowered to be a depository for money

other than what it collects via taxes and borrowing. And there is no authority to vest public money in officeholders.

Next, Hamilton went on to relate the bank to the power to borrow money, especially when taxes were insufficient, slow to be collected, or there was a war emergency. He asked "of whom could it be borrowed, if there were no public banks?" The obvious answer is from state banks, incorporated and unincorporated, and underwriting syndicates, which usually were partnerships and unincorporated, that reached the public and foreign investors. It's quite far-fetched to think that the government's borrowing power entails setting up a credit system so that the government can borrow. If this is the case, then what does the taxing power entail? Does it entail directing enterprise or setting up enterprise so that the people can earn enough to pay taxes? Hamilton's argument about the implied power of setting up a bank incident to and contingent upon the power to borrow leads directly to an unlimited scope of government.

Hamilton goes on to ask what the government would do if there were no banks to make loans but interested private parties offered to arrange them if they could be incorporated. "Can it be believed that a compliance with this proposition would be unconstitutional?" Yes, it can. It is what the Constitution says. Hamilton seemed to believe that the Constitution could not ban what he thought to be expedient. Furthermore, such incorporation could be obtained at the state level, which Hamilton has banished from view. And last, incorporation is not necessary in any event for banking organizations to form privately.

Hamilton understood well what a bank does:

> "For the simplest and most precise idea of a bank, is, a deposite [sic] of coin or other property, as a fund for *circulating a credit* upon it, which is to answer the purpose of money."

A bank brings into commerce assets that otherwise lack liquidity. The bank verifies their value and signals their value to others by a willingness to issue liquid credits (bills of credit), which are its liabilities, against the collateral of these assets, on the condition that they may be cashed in for specie at any time

or nearly any time.[59] The bank's verification of asset value, which links to its reputation for care and probity, is indissolubly linked to its willingness to allow its depositors to withdraw cash on demand. Whatever merits or demerits this business model has as a means of credit creation, Hamilton's arguments about a bank's expediency, i.e., his non-constitutional arguments, never address a central issue, which is why there should be a very large and dominant government-created monopoly bank, as opposed to state banks that compete, not only with each other but also with other methods of finance and other financial intermediation possibilities.

Hamilton related the bank also to the regulation of commerce.[60] Jefferson argued that a bank could not be federally incorporated or erected by relating it to the commerce clause because the latter referred to the *regulation* of commerce, not creating a commercial participant or subject of commerce. Further, Hamilton's rationale that the bank was of advantage *to* trade was not a regulation *of* trade. If it were a regulation, it was one that intruded into the area of regulating a state's internal commerce, not commerce among the states.

Hamilton's only answer to Jefferson was addressed to the internal commerce issue. There he argued "But what regulation of commerce does not extend to the internal commerce of every State?" Hamilton saw the limitation of the commerce clause to regulation "among the several States" as meaningless.

As with the taxing power, so with the regulation of commerce. If Congress has an implied power to form a bank under the commerce clause, then what is to stop it from all sorts of other manipulations, controls, and interferences in all sorts of other businesses? It is not hard to concoct rationales that relate such controls to this and other powers. Once Pandora's Box is opened, the evils are

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[59]The problems of this arrangement surface when the bank's judgments are faulty, in which case loans go bad; when it extends loans too far, which amounts to the same thing; and when loan values fall, which can happen either because of economic shocks or because the banking system itself has, for a variety of reasons including government stimulus, overextended its credit. Unless the bank has ample reserves, a run on the bank collapses it. The weakness of a given bank is that it cannot convert *all* its bills of credit into specie when demands to do so cluster unusually. The weakness of a system of such banks, especially when it is influenced by government, or connected to government and itself causing legal measures that the banks desire, is that it results in boom-bust cycles.

[60]Article 1, Section 8, Clause 3: Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

released.

Near the close of his opinion, Hamilton argued that the relation of the enumerated powers to the government finances implied

> "That it is the manifest design and scope of the constitution, to vest in Congress all the powers requisite to the effectual administration of the finances of the United States. As far as concerns this object, there appears to be no parsimony of power."

Then he went a step further:

> "Little less than a prohibiting clause can destroy the strong presumptions which result from the general aspect of the Government. Nothing but demonstration should exclude the idea that the power exists."

In this sentence, Hamilton explicitly shreds the Constitution. In his vision, nothing remains of enumerated powers to the federal government with all other powers reserved to the states and people. Article 1, Section1 seems to be merely an empty phrase to him: "All legislative Powers herein granted shall be vested in a Congress of the United States..." The Constitution explicitly grants certain powers. He ignores the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Vieira at this point (p. 289) concludes his discussion of Hamilton's opinion:

> "Of course, the whole concept of a government *limited* by *enumerated* powers stands on its head if the enumerated powers can be mystically aggregated to generate *un*enumerated powers the assumed existence of which only an explicit prohibition can refute. A constitution to which that rule of construction applied would need a near-infinite list of prohibitions to negate all the imagined powers that wily lawyers could generate from even a short list of enumerated powers phrased in language of any generality.
>
> "In sum, Hamilton's legal arguments on behalf of a national bank in effect transmogrified the Constitution from the charter of a limited government to a prescription for a government with totalitarian powers

> over the nation's economy, right down to the most local transactions in intrastate commerce."

## Opinion of Thomas Jefferson on the Constitutionality of a National Bank

Jefferson's note to Washington is much briefer and to the point than Hamilton's. His overriding position is that the proposed bill creating the BUS trenches on powers reserved to the States and the people under the Tenth Amendment:

> "The incorporation of a bank, and other powers assumed by this bill have not, in my opinion, been delegated to the U.S. by the Constitution."

The Federal Convention had rejected the incorporation power. Recall that Hamilton's response to that rejection was that such accounts were unreliable and, in any event, to be disregarded.

Despite Hamilton's hand-waving, the weight of the evidence supports Jefferson's position. Jefferson went on

> "I. They are not among the powers specially enumerated, for these are
>
> "1. A power to *lay taxes* for the purpose of paying the debts of the U.S. But no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, it's origination in the Senate would condemn it by the constitution."

This is indisputable. At best, Hamilton argued that it would facilitate the payment of taxes.

> "2. 'to borrow money.' But this bill neither borrows money, nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first to lend them two millions, and then borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please."

No money is borrowed, apart from the government selling debt to the BUS to finance its stock purchase; but that's part of the deal, not the reason for it, and it's structured as a purchase by the government of the bank stock, not as borrowing money. Afterwards, the BUS is under no obligation to lend to the government as Hamilton wished.

> "3. 'to regulate commerce with foreign nations, and among the states, and with the Indian tribes.' To erect a bank, and to regulate commerce, are very different acts. He who erects a bank creates a subject of commerce in it's bills: so does he who makes a bushel of wheat, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby. To erect a thing which may be bought and sold, is not to prescribe regulations for buying and selling."

Hamilton didn't answer this objection.

> "Besides; if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every state, as to it's external. For the power given to Congress by the Constitution, does not extend to the internal regulation of the commerce of a state (that is to say of the commerce between citizen and citizen) which remains exclusively with it's own legislature; but to it's external commerce only, that is to say, it's commerce with another state, or with foreign nations or with the Indian tribes. Accordingly the bill does not propose the measure as a 'regulation of trade,' but as 'productive of considerable advantage to trade.'"[61]

Hamilton would eviscerate the Commerce clause.

Jefferson went on:

> "2. The second general phrase is 'to make all laws *necessary* and proper for carrying into execution the enumerated powers.' But they can all be carried into execution without a bank. A bank therefore is not *necessary,* and consequently not authorised by this phrase."

This is true. The Treasury eventually instituted a sub-treasury system with its own handling of specie, orders, and bills. Furthermore, the Treasury could use

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[61]The term "it's" appears in the original instead of "its." That was common in 1791.

the services of state banks.

**Congressional Debate on First BUS**

The debates had two focal points: the worth of the bank to the government in practical terms, and whether or not the bank was appropriate as an applied power under the Necessary and Proper Clause:

Much of the discussion of the bank's utility to the government mirrors the pros and cons described earlier in the context of Hamilton's report and opinion. The main points and my assessments of them follow.

1. Madison: The bank's paper would tend to replace gold and silver. This point is accurate.[62]

2. Madison: The bank would expose the economy to a bank run. This point is accurate.

3. Ames: The bank is indispensable in times of emergency. The framers did not think so, because they devised a hard money system and left the development of the credit system to others. The only reason that the BUS would be useful to government in an emergency is through inflationary finance. It could not make large loans directly to the government, but the bank might issue bills of credit to borrowers who then could buy government debt issues. Pro-bank advocates like Ames and Hamilton made it clear that the bank was a potential engine of wartime inflationary finance, although they didn't use this terminology. The notion of using the bank in emergencies was probably a strong selling point for them, even though the framers eschewed it.

4. Jackson and Giles: The bill creates a monopoly that benefits the corporation, its officers, and stockholders. This point is accurate. Of course, it has other possible baleful effects.

5. Ames: The bank forces its currency on no one. This is inaccurate. The government, acting for the society, forces everyone to accept the bills by the provision that the government accept them for payments.

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[62]Today it's not clear what media of exchange will survive in a free market. Electronic credits based on specie are now possible.

The debate over the meaning of the Constitution contains some interesting arguments. Madison's exposition is especially masterful and enlightening.[63]

1. Ames and Sedgwick: A liberal construction is natural and safe because the most orderly governments in Europe have banks considered to be indispensably necessary. The framers didn't see it that way, not with the evils of hyperinflation fresh in their minds. Besides, didn't the colonies just shake loose of a major European government? Why imitate its bank? American government is not European government.

2. Lawrence and Gerry: The similar Bank of North America was authorized under the Articles. But that authority was quickly denied in favor of state incorporation.

3. Madison: The power of incorporation was denied at the General Convention. This was accurate.

4. Lawrence: Nothing in the Constitution is expressly against it and therefore no prohibition should be construed. This argument, like Hamilton's, turns the Constitution upside down, i.e., destroys it. The framers delegated particular powers, all others are prohibited to the federal government. Even the Supreme Court has repudiated Lawrence's interpretation on many occasions.

5. Ames: Congress has already legislated beyond the letter of the Constitution. Maybe so, but as Giles replied, there is no constitutional authority provided by the former usages of Congress. They should be corrected.

6. Madison: The incorporation power is "a distinct, an independent, and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it, and not being included, could never be rightfully exercised." This point harks back to Blackstone's commentary on incorporation power not being "an accessory or subaltern power" as Madison put it. Therefore, it cannot be deduced as a means of executing another power. This is a sophisticated abstract legal argument.

7. Madison: "To say that the power to borrow involves a power of creating the ability, where there may be the will, to lend...is as forced a construction as to say that it involves the power of compelling the will, where there may be the

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[63]It is reproduced in full here. It can be found in his writings, which are available online.

ability to lend." This is a subtle rebuttal to Hamilton's argument relating the bank incorporation to the borrowing requirements of the government. Hamilton proposed that the government had the power to create a lending facility (the bank) so that it could facilitate borrowing, while presuming that there were willing lenders who needed to be mobilized through the bank. Madison suggests that if the government has that power, then it has the power to force people to lend who have the means to lend, but are unwilling, for that too facilitates government borrowing. If the one power is implied, so is the other. But the latter power, which is one of forced loans, is clearly nowhere made constitutional.

8. Madison: The body of the Constitution itself disproves a broad construction of the Necessary and Proper Clause. In what way? The argument has two parts. Madison argues that the "power proposed to be exercised," which is the power to incorporate, "is an important power."[64] It cuts across the powers of individual States and the U.S. government in significant ways, and for this reason it cannot be an implied power of the U.S. government. If this were to be a U.S. power, the Constitution would have to enumerate it.

> "As a charter of incorporation, the bill creates an artificial person, previously not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed. It is, although not precisely similar, at least equivalent to the naturalization of an alien, by which certain new civil characters are acquired by him. Would Congress have had the power to naturalize, if it had not been expressly given?
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> "In the power to make by-laws, the bill delegated a sort of legislative power, which is unquestionably an act of a high and important nature...the only restraint on the by-laws, that they were not to be contrary to the law and the constitution of the bank...what law was intended? If the law of the United States, the scantiness of their code would give a power, never before given to a corporation, and obnoxious to the States, whose laws would then be superseded, not only by the laws of Congress, but by the by-laws of a corporation within their own jurisdiction. If the law intended was the law of the State, then the State might make laws that would destroy an institution of the

[64]In the debate, he argued this after arguing against the broad constitutional interpretation in the bill. I've reversed the order.

> United States.
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> “The bill gives a power to purchase and hold lands: Congress could not purchase lands within a State, ‘without the consent of its Legislature.’ How could they delegate a power to others which they did not possess themselves?

In addition to a relation to State laws, it relates to other important rights:

> “It takes from our successors, who have equal rights with ourselves, and with the aid of experience will be more capable of deciding on the subject, an opportunity of exercising that right for an immoderate term.[65]
>
> “It involves a monopoly which [a]ffects the equal rights of every citizen.[66]
>
> “It leads to a penal regulation, perhaps capital punishment – one of the most solemn acts of sovereign authority.[67]

This leads Madison to conclude

> “From this view of the power of incorporation exercised in the bill, it never could be deemed as an accessory or subaltern power, to be deduced by implication, as a means of executing another power.[68] It was in its nature a distinct, and independent, and substantive prerogative, which, not being enumerated in the constitution, could never have meant to be included in it, and, not being included, could never be rightfully exercised.”

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[65]The bill contains no provision to alter it, repeal it, or modify it while the bank exists.

[66]Section 12 states that “No other bank shall be established by any future law of the United States, during the continuance of the corporation hereby created...”

[67]Section IX of section 7 of the bill to incorporate the BUS states that if the directors surpassed the debt limit allowed, they “may be prosecuted to judgment and execution.”

[68]The bill’s advocates deduced the power to incorporate or found it as an implied power as something necessary and proper under the enumerated power of the government to borrow Money.

Madison's remarks are helpful to legal amateurs, which includes most of us. Most of us today take incorporation for granted and do not understand its legal meaning and implications to the full. It is apparent that even members of Congress in 1791 and Hamilton either looked at it rather superficially, or simply ignored it in order to pass what they wanted to pass.

Granted that the power to incorporate is a principal power,

> "The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.
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> "Congress have power 'to regulate the value of money,' yet it is expressly added, not left to be implied, that counterfeiters may be punished. They have the power 'to declare war,' to which armies are more incident than incorporated banks to borrowing, yet it is expressly added, the power 'to raise and support armies,' and to this again, the express power, 'to make rules and regulations for the government of armies' – a like remark is applicable to the powers as to a navy.
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> "The regulation and calling out of the militia are more appertinent to war, than the proposed bank to borrowing; yet the former is not left to construction.
>
> "The very power to borrow money is a less remote implication from the power of war, than an incorporated monopoly bank from the power of borrowing – yet the power to borrow is not left to implication.
>
> "It is not pretended, that every insertion or omission in the constitution is the effect of systematic attention. This is not the character of any human work, particularly the work of a body of men. The example cited, with others that might be added, sufficiently inculcate, nevertheless, a rule of interpretation very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power."

I would explain Madison's argument in the following way. Madison points out that the power to declare war is a broader and more paramount power than that of raising and supporting armies, yet the latter, which is closely related to war and very necessary to it, is expressly added in the Constitution. Similarly, the

document spells out another necessary, related, and subsidiary power "to make rules and regulations for the government of armies." Why are these incident powers expressly added? The reason is to designate which government, State or U.S., is to raise armies. This expression is *necessary* to defining the respective roles and powers of each within a federal scheme of government; the handling of the military is a key issue as between the States and the U.S. government. These explicit powers are necessary and proper for the government and union as a whole. They are not and could not possibly be left to construction under the Necessary and Proper clause. The latter refers to laws and powers drawn from the nature of each enumerated power, not to what is necessary and proper for the government as a whole in relation to the states.

Powers that are subsidiary to broader enumerated powers are themselves enumerated when they are necessary to the very nature of the division of powers between the States and the U.S. government, which itself is the essential purpose of the Constitution. If the Constitution does not leave these incident (related) but necessary government powers to be implied by overarching express powers via the Necessary and Proper Clause, it would also not leave an important power, namely the power to incorporate, to be implied by and deduced from the express powers as being necessary and proper to their execution. Since the powers that are necessary and proper to the execution of the enumerated powers are drawn from each of them, it is only by trivializing the power of incorporation can it conceivably become an implied power that is necessary and proper to borrowing. In reality, the importance of the power to incorporate means that one cannot draw it from the power of borrowing. If borrowing required a national bank, especially an incorporated bank, then the Constitution would have spelled out the enabling power expressly because it is an institution that involves State-U.S. relations. Constitutionally, incorporation is on a par of importance with the borrowing power; and it is not made or expressed as necessary to it, either explicitly or implicitly.

Giles, attempting to hold back the tide of broad construction of the Necessary and Proper Clause warned, as had the anti-federalists prior to ratification, that broad construction

> "teem[ed] with dangerous effects, and would justify the assumption of any given authority whatever. Terms are to be so construed as to produce the greatest degree of public utility. This public utility, when decided on, will be the ground of Constitutionality. Hence, any measure may be proved Constitutional which Congress may judge to be useful.

> "...the arguments adduced in favor of the measure, from whatever source they arise, if pursued, will be found to rush into the great one of expediency, to bear down all Constitutional provisions, and to end themselves in the unlimited ocean of despotism."

**Committee of Ways and Means Report on Second BUS**

Vieira (pp. 306-335) excerpts and comments upon a major Congressional report on the chartering of the second BUS.[69] The relevance of this report for the Constitution and money lies, not in raising new constitutional issues or arguments, but in placing the attitudes of the report's majority and minority on display so that we may gain greater insight about our system today. The majority committee view supported the BUS.

Then, as today, the members of Congress are telling stories or providing narrative interpretations of the economy and its recent past, in order to justify their positions.[70] Let us examine some of what the majority report contains.

It starts off with a distortion, which is the Congressional "power of regulating the common currency..." One may usefully consult Vieira's article online on regulating the value of money or my earlier chapters in this series. The Constitution doesn't speak of regulating "currency", but of regulating the value of money, which is coin. The use of the term currency is intended to bring paper money under the wing of specie where it does not constitutionally belong.

Next, the report argues that the national bank is constitutional on the ground that "all the departments of Government" with the "authority" of "common

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[69]The majority report, dated April 13, 1830, is available online here and here. The minority report, dated February 9, 1832, is here.

[70]In my opinion, then, as now, the advocates of large government display noticeably lower economic literacy, less respect for the Constitution, and a marked tendency to mix a stew of facts, omissions, inaccuracies, errors, partial truths, exaggerations, false theories, glimpses of truth, contradictions, gaps in logic, and partisan politics.

consent" have said so. This is inaccurate. It ignores the protests of the anti-bank contingent and party, and it ignores those in the government who, even at that time, were against the bank. Andrew Jackson and his supporters said otherwise.

But even if there were not this opposition, the report asserts that what the government says the Constitution says is what the Constitution actually says. This mixes up the authority of government with the meaning of the Constitution. Actually, they are two different things. The government's view of the Constitution is no more authoritative than that of people outside of government who may comment on the Constitution. The government's power and ability to make things happen, be they constitutional or not, doesn't mean that the government determines what is constitutional or not. The Constitution does, as an objective document. Its objective meaning can be accessed, assessed, and evaluated by people outside or inside government.

Next, and we are still on the report's first page, the report suggests that those who now protest the BUS do so out of "party excitement and prejudice," i.e., politics. It continues this theme over and over again throughout the report. This kind of accusation can still be heard daily and even by the minute. Someone who disagrees with someone else is said, by that someone else, not to have any reasonable grounds for disagreement. He is said to be expressing a partisan opinion that can be dismissed as mere bias and prejudice. An accusation of this type itself is a partisan attack.

Next, there is an appeal to the authority of George Washington, who signed the bill creating the first BUS. Can't we count on him "to give a just construction to the constitution"? Well, actually, we cannot. He's an interested party, within the government. He has his own agenda. Hamilton has been his protégée. Perhaps Washington wants to assure the government's survival in war and sees a national bank as an expedient move. Perhaps he views government finances at that point as so critical that he endorses the bank. Perhaps he is a much stronger advocate of a national government than he is of a federal system with strong states' rights. Liberty demands vigilance and continual monitoring of officials. Acceding to the authority and say-so of officials in government is antithetical to jealously guarding liberty.

Going on, we find the report suggesting that the national bank caused prosperity (a shift from a prostrated to a solid financial condition) and that in its absence, there was disarray. Here we find a superficial attribution of cause

and effect when there are at best, one or two observations. Even then, the committee has had to choose facts selectively in order to say there is a correlation. This story-telling is unscientific.

We are then told how badly the nations' finances became "in less than three years after the expiration of the charter," a period which just happened to coincide with the War of 1812 that lasted until 1815. The "circulating medium" became "so disordered," the "public finances so deranged," and the "public credit so impaired," that "the only measure by which the public credit could be revived," and "the fiscal resources of the Government redeemed" was to restore the national bank. This is an exaggeration. It was not the only means and the bank's absence was not the only cause of the problems. The derangements were produced by the war and by a financial system unprepared for that war whose development had been discouraged by the presence of a dominant bank that was now gone. The war caused serious economic dislocations. Exports and imports fell by 90 percent. Prices rose sharply, as in all war situations, and as domestic industries such as cotton rushed to produce orders once filled by British manufacturers. The government's borrowing demands escalated sharply. With the BUS gone, new banks rushed to fill the vacuum with a variety of new bank notes. If there had never been a BUS in the first place, an alternative system would have long since been developed. Any system would have been subject to the shocks produced by the war.

Furthermore, the government's Treasury at first ineptly tried to sell its bonds without any marketing. It announced a price and awaited orders. They were slow to come. Madison refused to raise their yields. In 1813 the government allowed a sales commission to agents, at the rate of 25 cents per hundred dollars. One-third of the issue sold. Finally, Gallatin brought in a syndicate of underwriters who marketed the rest. The overall cost was 17 cents per $100. The Treasury then reverted to direct sales and, with varying degrees of success, placed a number of issues. This episode illustrates what might have occurred from 1791 on, in the absence of the BUS.

Treasury was able to borrow to finance the war, without the BUS, in what turned out to be a respectable financing performance. What the Committee refers to as derangement and impairment seems to be that the government had to work at it and had to pay 7 to 9 percent at times when the fortunes of war turned against the U.S. There is actually no assurance that it could have done much better even had the BUS existed. At one point, a consortium of east coast banks loaned a wealthy merchant named Jacob Barker $5 million for his

purchase of government bonds.

Thus, when the Committee refers to this episode as “ruinous” and a “fatal experience” only saved by the new bank charter in 1816, this is the development of a simple myth into which to fit the rough outlines of past events.

The “circulating medium” presents a different aspect. The problem here is not gold and silver, which was meant to be official money, but the inflation of bank notes. Re-instituting a national bank that is just as subject to spates of excessive credit creation, only on a larger scale, as any state bank, does not resolve the problem of controlling inflation. When the U.S. reached the furthest development of that system with the Federal Reserve, it only exacerbated inflation.

Having extolled the utility of the BUS, the Committee turned to its constitutionality. Here it ventured onto entirely new ground, when it argued that the power to create the bank was implied in the Congressional power to coin money and regulate the value thereof. Here it sought to generalize the meaning of coin money and regulate its value to mean “the power of regulating the circulating medium.” Coin was to mean currency. Regulating the value was to mean ensuring a “currency of uniform value.” Of course, one cannot simply replace what the Constitution says by these terms without drastically altering the money system, since currency includes money-substitutes that are not Money (coin).

This argument is another example of a living Constitution approach, which means that one interprets the Constitution in a somewhat plausible way but nevertheless in a manner that is unfaithful to what it actually says; rather than following the legal procedure of amending the document. But since the Constitution’s treatment of the money system is an integrated whole, piecemeal re-interpretation runs aground. What, for example, is to become of the provision that no thing but gold and silver coins are to be officially made a tender for debts; and what is to become of the disability to emit bills of credit?

The confusion and economic ignorance of the Committee amplified in its next set of statements concerning the non-uniform values of the bank notes of individual banks, as against the silver standard. We know that banks that extend more notes than users require and/or extend bad loans that undermine

the value of the notes find that their notes fall in price against the metal standard, i.e., the notes become worth less in Money (silver in gold) than their purported or nominal dollar values. These phenomena give rise to non-uniform note values. The Committee saw this as an evil that should be corrected because the government was receiving different real amounts of revenue even though their nominal values were the same. Of course, the non-uniform values were the market's form of correction that the government was ignoring in its collection of revenues. What the government could have done to equalize value of its receipts at different places in the country is either demand that all payments be in metal, which is its constitutional requirement, or else, if it insisted on receiving the paper notes, to value them at the same discounted rate as the market, or else, notify everyone that it would only receive notes if they were at par. The Committee saw things differently:

> "The currency of the country consisted of the paper of local banks, variously depreciated...Now it was in vain for Congress to regulate the value of coin, when the actual currency, professing to be its equivalent, bore no fixed relation to it. This great and essential power of fixing the standard of value was, in point of fact, taken from Congress and exercised by some hundreds of irresponsible banking corporations...Congress ...has the power... to restore the disordered currency; and the Bank of the United States was not only an appropriate means...but...the only safe and effectual means that could have been used."

Congress fulfills its obligation by regulating coins. That fully prevents disorder in official Money (coin), which is not in vain at all; for people who want to, can then transact without disorder in coin or in coin-substitutes. The regulation also provides a standard against which people can value bank notes. Bank notes are not Congress' problem. If people want to use bank notes, and banks privately create bank-money substitutes or derivative money using various assets, including coin, as an asset backing, Congress has no obligation or explicit power to make them all uniform in value under the coinage clause.[71] It's not at all clear what is to be gained by trying. By marking the bank notes down in value, the market already is imposing a way of ordering the notes. What appears to be disorder is order, because the price discounts of the notes have adjusted to their values. But suppose that the Congress did attempt to

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[71]It might find such a power under the Commerce clause, Vieira suggests, if it decided that such regulation was a matter of regulating commerce among the states.

make all bank note values uniform, why would it need to work through the BUS, which is simply another large bank whose notes can also fall should it manage its affairs badly? The Congress can simply require that it will only receive bank notes that are at par.

The Committee next justifies that the U.S. government may incorporate the BUS.

"The power of creating a corporation is one of the lowest attributes, or, more properly speaking, incidents, of sovereign power." This suggests that, despite its absence from the Constitution, the power is nevertheless present somewhere in the U.S. government. If so, where is it? Is the U.S. a government that *per se* automatically inherits or possesses sovereign powers merely because it has been brought into being? This is a theory of government power that is alien to the concept of a limited constitutional government formed by a People who depute it to carry out certain tasks and not other tasks. The Committee continued

> "The chartering of a bank, for example, does not authorize the corporation to do any thing which the individuals composing it may not to without the charter...Mr. Girard established a bank in Philadelphia, without a charter, which was in very *high* credit within the sphere of its circulation; and it cannot be doubted that he might have formed a banking co-partnership with the principal capitalists in the other commercial cities of the Union, of which the bills would have had a general credit in every part of the country, particularly if the Federal Government had provided that these bills should be received in discharge of its dues."

Perhaps so, but the reason that Mr. Girard did not form such a nationwide bank was because he faced competition from the BUS, and that was because Congress had entered and strongly influenced the banking market. The U.S. did not merely issue a charter in which the BUS filled in the blanks with provisions of its own choosing. The Congress *established* the BUS. The specific provisions that Congress created are highly material, but what is even more material is that the bank was of *a particular and strongly political* origin and subject to the resulting political and economic forces. Mr. Girard and others like him would no longer undertake the kinds of enterprises that they may have in the bank's absence. They would no longer act in the same way, see the same opportunities, expect the same future events, plan the same,

invest the same, and manage the same. The political economy set into motion when Congress set up the BUS was a very different and more politicized political economy, with very different incentives for growth and innovation, than might have appeared in a more nearly free market. The Committee then and Congressional committees today fail to appreciate the ramifications and importance of their actions, which strongly influence the political economy of markets, sectors, and the overall set of economic exchanges.

> "The only material particular in which the charter of the Bank of the United States confers a privilege upon the corporation, apparently inconsistent with the State laws, is, the exemption of the individual property of the corporators from responsibility of the debts of the corporation."

When the Committee wrote the above, it vastly understated the consequences for the development of the monetary and credit system when Congress created the BUS. *Jacta alia est.* The Rubicon is crossed, and there is no going back.

> "But, if the community deal with the bank, knowing that the capital subscribed alone is responsible for its debts, no one can complain either of imposition or injury..."

If the Committee subscribes to this argument, which is a reasonable one, then what is its complaint concerning the discounts attached to the paper issued by various state banks? The price of the notes reflect their reduced chances of recovering its nominal value in Money (coin.) We learn later from Vieira (pp. 1084-1086) that from early dates in England (1816) and the U.S. (1825) and for many court cases thereafter, the depositors in banks loan their money to the banks. In *Bank of the United States v. Bank of Georgia*, the Court noted (with Justice Story writing)

> "...it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It is clearly not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account and deposited as such, so that according to the course of business and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia and became the property of the bank."

Vieira notes (p. 1084) "From an early day, English and American courts have understood banking as fundamentally a system of loans or credit transactions, rather than bailments."[72] By the Committee's own logic, those who hold bank notes have simply experienced one of the possible bad outcomes that they contracted for when they loaned money to the bank.

The committee in several passages depicts and grapples with the problems of banking, large fluctuations in the value of bank notes, and the boom-bust cycle with which these were associated. Ordinary banking that involves accepting deposits and making loans is necessarily a fractional-reserve business. For all practical purposes, banking *is* the same as fractional-reserve banking. The committee's solution is a national bank. But a national bank differs in no significant qualitative respects from the state banks to which the committee attributes a variety of economic ills, injuries, disorders, evils, and difficulties. And being larger and nation-wide, it may make the problems worse. Vieira observes (p. 324)

> "To be sure, it might be said that the committee had in mind only fractional-reserve banks that had 'the power of suspending specie payments', which the second Bank of the United States lacked. Yet history shows that, again and again when fractional-reserve banks have overextended themselves, the government has licensed suspension of specie payments."

The charter of the second BUS allowed Congress to enact laws concerning the recovery of Money (specie) if the BUS came to a pass where it refused payment. This provision meant that depositors did not know what Congress might do for them to handle their claims if the BUS ran into problems and suspended payments in coin. Congress might have followed a policy of forbearance and simply allowed the suspension for an indefinite period of time. That is what Parliament did in the case of the Bank of England, the suspension of specie payments lasting from 1797 to 1820. This is what state governments in the U.S. usually did. And, Vieira observes,

> "But a national suspension of specie payments did take place on a far larger scale when the entire Federal Reserve System suspended payments in gold in 1933, a suspension that remains in effect to this day."

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[72]See also here.

In recommending a national bank as a solution to the problems it raised, the committee therefore was recommending no solution at all. It was kicking the can. It was favoring the *status quo*. Its unconstitutional solution and the thinking that justified it would eventually lead to a far worse credit system built on no specie at all but on irredeemable fiat currency issued by the central bank known as the Federal Reserve.

The Committee was not addressing central banking, for the country at that time had none. It was not addressing a national fiat currency that could not be redeemed. There was none. The bank notes of individual banks were not fiat notes either. Banks promised redemption and notes were priced on that basis. The Committee was addressing fluctuations of currency (bank note) values and of business activity that were associated with fractional-reserve banks and banking. It wanted the national bank to regulate currency values by policies that forced banks of issue to bring their notes up to par so that the currency supply, which consisted of a multiplicity of different bank notes, had uniform value. It wrote

> "Human wisdom has never effected, in any other country, a nearer approach to uniformity of the currency, than that which is made by the use of the precious metals."

Even if this is true of hard asset money, there is no reason why all the credit instruments being used as currency and that promise to pay one dollar have to sell at one dollar. This is certainly not the case for even the highest grade bonds, and it need not be the case for the bills of banks. Value may well be far more constant in using specie as currency, but the choice of using specie as currency is up to people in the market. Many people choose bank notes. It is very convenient much of the time to use credit instruments like bank bills or bank notes as currency, even on a fractional-reserve basis where specie is the redemption medium and even when suspensions may occur. These instruments are *derivatives* or *contingent claims*, whose value depends on a number of factors, including the value and risk of the loans the bank makes. It is reasonable to suppose that market participants price these claims rationally as contingent claims, and the evidence from the period 1838 to 1863 suggests that they did.[73] People used publications and other aids to learn the values of

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[73]See Gary B. Gorton, Pricing Free Bank Notes, *Journal of Monetary Economics* 44 (1999) 33-64. "Previous research indicates that wildcat banking was not a prevalent problem during the Free Banking Era. The reason for this may be that market participants could discipline

various bank notes, one of these being *Van Court's Counterfeit Detector and Bank Note List*.

The fact that bank notes are likely to be rationally priced clears away some Committee concerns, but it does not address the fact that government regulations and laws influence some of those risks. As Gorton notes

> "State banking systems varied in allowing branch banking, in providing state insurance, and in allowing 'free banking' in that entry into banking was less restrictive. (Free banking states required the deposit of state bonds against money issuance. Chartered banking states required a license from the legislature to operate, and imposed reserve and capital requirements.) Also banks in some states were members of formal or informal private bank associations which regulated members."

Hamilton and the Hamiltonians, which include the committee, sacrificed the constitution and the market for what they conceived to be the practical benefits of a national bank and a national government-influenced system of credit. Their belief was "If the Bank of the United States were destroyed, and the local institutions left without its restraining influence, the currency would almost certainly lapse into a state of unsoundness." They precluded competition among state banks and among state political systems. They did not envision the havoc that might prevail if a badly governed national system went as awry as a state bank might. They did not take into account that a single system might be less resilient to shocks than a set of more independent systems exposed to different factors rather than all exposed to one or a small set of factors.

**The Minority Report**

The minority committee report begins, in so many words, with a warning

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banks by pricing factors that affected risk and via the contractual redemption option. Properly pricing risk means that a bank which set out to overissue notes would obtain a market price of zero on its notes. The contract device of the redemption option may have allowed note holders to run on banks which attempted to add risk. This paper has investigated whether note markets functioned in this way. Taking account of the redemption option, and the affects of technological change on this option, the above results are quite suggestive of the ability of market participants to price bank risk."

against a living constitution:

> "We cannot concede the principle that the constitution of the country should change with the change of political parties, when clearly understood; nor be broken down by the array of legal decisions, and the names of great men, whose opinions may vary, from time to time, according to circumstances. It was designed for a far nobler purpose – a safeguard and guaranty of rights on the part of the weak, against the oppressions of the strong.
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> "In this point of view, we have looked upon it as an instrument of delegated powers only, conferring nothing more than what is expressly granted upon its face, or clearly necessary to carry into effect any one of the specified powers."

It points away from the authorities, like Washington, who favored the bank to other patriots of the revolution and convention members who

> "believing that the constitution was a grant of specific powers, saw at once that this fatal admission, depending upon construction altogether, would lead to others still more dangerous, and finally end in consolidation, or a Government unlimited as the Parliament of Great Britain. The tendency seemed to be to give that form and structure to the Federal Government in a course of legislation, which had failed to be adopted in convention, and this they most fearfully apprehended, not without cause, for we find the alien and sedition laws were afterwards passed, deriving their existence from the same power of implication so justly condemned by the American people as acts of usurpation..."

The minority continued. The government prosecuted the War of 1812 without the aid of the bank, and the bank would have been unable to prevent the currency depreciation as it almost suspended specie payments in 1818 shortly after it had been newly-capitalized. The BUS is subject to a bank run just as occurred in 1797 to the Bank of England as "Like causes will always produce like effects." The war changed the minds of some previous bank credits, but they were impatient, for "The danger was, however, over, and these evils would have been corrected in a short time by commerce and internal trade resuming their accustomed channels." The BUS was not responsible in causing state banks to resume specie payments. The States were seeing to that, and the Treasury began "to receive only the notes of specie-paying banks for all debts

to the Government." The U.S. Treasury can and should always refuse "in the collection of the revenue, the notes of all banks failing to pay specie; which would prove as salutary a check against excessive issues as any supposed agency of the bank..." The minority pointed to the power of the States to regulate paper currency and away from the non-existent federal power to do so. It raised the alarm over the great potential for political corruption from a bank of this size and influence.

### Fractional-Reserve Banking

Vieira discusses fractional-reserve banking here and in a number of places. One of the more extensive passages appears later in his discussion of monetary reforms (p. 1548):

> "Finally, Congress would attack the problem of fractional-reserve banking. At least three schools of thought exist with respect to this reform: *First*, that fractional-reserve banking is *inherently and inescapably fraudulent*, because every banker knows or should know that he cannot possibly redeem his notes or cash out his customers' deposits on demand when he maintains only fractional reserves that cannot also be replenished on demand...On this understanding, under the aegis both of the Commerce Clause and of sections 1 and 5 of the Fourteenth Amendment, Congress would outlaw fractional-reserve practices, and instead require bankers (notwithstanding more permissive State laws) to maintain 100% reserves against all liabilities subject to redemption or payment on demand.
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> "*Second*, that fractional-reserve banking is not inherently fraudulent, *if (and* ***only*** *if) the bankers fully and in a timely fashion disclose to the holders of their notes and to their depositors that, in fact, although they promise to redeem or pay 'on demand', they will be unable to perform those contracts if demands exceed the reserves they can mobilize.* On this understanding, Congress would outlaw only those fractional-reserve practices lacking such disclosure. For, with complete transparency, only entrepreneurs and speculators who, for reasons satisfactory to themselves, knowingly and voluntarily accepted the risks of the bankers' default would employ fractional-reserve notes and deposits.
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> "*Third,* that even if not inherently fraudulent or typically

> misrepresented in practice, fractional-reserve banking nonetheless poses serious long-term risks to the community, and therefore ought to be strongly discouraged. For example, Congress could conclude that, because fractional-reserve banking promotes the ruinous cycle of 'booms and busts', it constitutes a clear and present danger to America's economic stability, *precisely because shortsighted entrepreneurs and speculators will predictably employ it to profit from 'booms' while passing on the costs of 'busts' to society as a whole.* On this understanding, Congress would employ the Taxing Power to impose a debilitating financial burden on banks that emit notes or create demand deposits based on fractional reserves."

The conflict between views one and two disappears if property rights in bank accounts are clarified and people know what they are. There can be 100% reserve accounts, and there can be less than 100% reserve accounts. They can coexist. Money that is specie and money based on liabilities can coexist. The third view, which is that fractional-reserve banking poses a systemic risk to the general welfare and should be taxed out of existence, can't be reconciled with a free market in which there are several different kinds of bank accounts and several different kinds of media of exchange arising from these accounts. This view precludes fractional-reserve based money.

The 1830 Committee report makes the point that the notes of the BUS are everywhere received at par, whereas specie payments require transportation costs that effectively make specie have non-uniform prices at different locations. This fact helps explain why people in the market demand and supply specie-substitutes. In this day and age, one can deposit specie and use electronic debits and credits to transfer it almost costlessly, although there are costs of maintaining the bullion deposit that are non-trivial. A uniform currency can be attained by this means without bank money issued against loans and specie assets.

It will take an open market with monetary freedom to see what forms of currency and credit survive. There are at least 5 kinds of possible media of exchange. They include tax-founded money from governments, a fractional-reserve bank's notes, specie-based notes from deposit banks, local clearing systems, and shop-based credits issued by large retailers and other businesses. The market at present is closed to competition and innovation due to the presence of the Federal Reserve System and the government's unconstitutional control over money and credit.

## *McCulloch v. Maryland (1819)*

In 1819, the constitutionality of the second BUS reached the Supreme Court in the case of *McCulloch v. Maryland*. This ended the debate over constitutionality of federal incorporation. Chief Justice Marshall delivered the ruling that the "Congress has power to incorporate a bank." What was his reasoning?

I will paraphrase his ruling and major statements:

– The bank has been around for a long time. The contest between the parties is running out of steam. Even those most strongly against it are giving in lately. Many legislatures have recognized it. There is no daring usurpation of liberty here, nor even a great threat to liberty. The power [to borrow] being given, it's in the national interest to "facilitate its execution," not hold it up by "withholding the most appropriate means." Unless the words "necessary and proper" vigorously impel us to withhold a "choice of means", we shouldn't do it.

– We are asked to withhold this means of action because erecting a corporation is a sovereign power and not expressly given to Congress. We'd better be careful not to prevent this choice of means because there may be other cases where erecting corporations is useful as a means. If someone says an appropriate means should be unavailable to the government, the burden of denying it is on his shoulders. As to the sovereignty, erecting a corporation is not a great power like the purse and the sword. It's a means to an end. It's really not that big a deal.

– Now, what about the word "necessary" in "necessary and proper"? What the phrase means to do is to provide a general permission that Congress also has the power to pass laws to make its major powers effective. It means to enlarge the scope of action, not restrict it. If it had wanted to be more restrictive, it would have said something like "absolutely necessary and proper" or "no laws shall be passed but such as are necessary and proper." To dwell at length on the meaning of this phrase is a frivolous enterprise. It must be done, but to judge all powers based on a strict interpretation is unwise and imprudent.

Marshall judged that the context of the phrase "necessary and proper" and its placement after the enumerated powers allowed for a loose construction. But he went further and said that necessary didn't mean necessary; it meant

absolutely necessary, which he asserted was stronger than necessary.[74] Let BK = bank, and GB = government borrowing. In mathematics, BK is necessary for GB when not-BK guarantees not-GB. Is a bank necessary for government borrowing? Does not-bank guarantee not-government borrowing? Hamilton thought so, or at least argued so, but clearly the government can borrow without there being a national bank. Government borrowing does not have to have a national bank in order to occur. Is it true that if a government is borrowing, then that government is employing a national bank? Of course not. Is if GB, then BK, a true statement? No, because GB can and often does occur without BK occurring.[75]

If we consult a thesaurus, we shall find that necessary has very close to the mathematical meaning. There is a place in Marshall's opinion where he himself uses the word "necessary" in the mathematical and thesaurus sense of required, essential, mandatory, and crucial. He writes:

> "This clause, as construed by the State of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy."

He says that the selection of means by a legislature is a useful right, and then he adds that it is a necessary right and that the framers could not have intended to abridge or almost remove (annihilate) this right. In other words, the selection of means is a *sine qua non* of legislation. If there is no choice of means (CM), there is no real legislative power (LP). Not CM means not LP, which is to say, CM is necessary for LP. And so Marshall himself inadvertently uses the word necessary in a way that he denies is being used in the Constitution.

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[74]The adjective absolutely is logically redundant. It merely emphasizes the necessity.

[75]The tax argument is even less plausible. Government taxation and collection of taxes does not require a bank. Neither does the regulation of coin value require a bank. Even obtaining a medium of exchange in a war emergency does not require a bank. If the government is restricted from emitting bills of credit, a bank comes closer to being necessary for government borrowing; which is why this argument is stronger than others that were made. But the bank still is not the only means of government borrowing, as issues marketed to the public (like war bonds) are feasible. Actually, it is not even clear that the BUS sufficed for government borrowing. It didn't have to lend to the government or lend to those who bought government securities.

Toward the close of his opinion, Marshall defers to the legislature:

> "But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power."

This is in line with anti-federalist predictions. The anti-federalists expected that the necessary and proper clause would lead to a vast expansion of government powers. Old Whig, No. 2 foresaw clearly the implications of the clause:

> "Under such a clause as this can any thing be said to be reserved and kept back from Congress? Can it be said that the Congress have no power but what *is expressed?* 'To make all laws which shall be necessary and proper' is in other words to make all such laws which *the Congress shall think necessary and proper,*--for who shall judge for the legislature what is necessary and proper?--Who shall set themselves above the sovereign?--What inferior legislature shall set itself above the supreme legislature?"

Marshall and the Court refused to set themselves above the legislature in this matter, as Old Whig expected.

Old Whig also said in 1787 almost exactly what Marshall said in 1819 about the two alternative and both reasonable constructions of the clause, one being to restrain the exercise of the powers, and the other being to enlarge them:

> "Was it thought that the foregoing powers might perhaps admit of some restraint in *their* construction as to what was necessary and proper to carry them into execution? Or was it deemed right to add still further that they should not be restrained to the powers already named?– besides the powers already mentioned, other powers may be assumed hereafter as contained by implication in this constitution. The Congress shall judge of what is necessary and proper in all these cases and in all other cases; – in short in all cases whatsoever."

Marshall, seeing the two possible readings, restrain or enlarge, chose enlarge – but in different words. He chose, in the next passage, removing all doubts

that Congress had the right to legislate on a "vast mass of incidental powers", in order to make the government under the Constitution have teeth:

> "Its terms purport to enlarge, not to diminish, the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted.
>
> "The result of the most careful and attentive consideration bestowed upon this clause is that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the Government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble."

Old Whig concluded that, in the face of the ambiguity in the clause, Congress would be its own judge. Consequently,

> "Where then is the restraint? How are Congress bound down to the powers expressly given? what is reserved or can be reserved?"

Federal Farmer, No. 4 saw that, under the necessary and proper clause, all it would take to explode any constitutional restraints on power would be an unwise and imprudent Congress:

> "In making laws to carry those powers into effect, it is to be expected, that a wise and prudent congress will pay respect to the opinions of a free people, and bottom their laws on those principles which have been considered as essential and fundamental in the British, and in our government. But a congress of a different character will not be bound by the constitution to pay respect to those principles."

Brutus, No. 1 foresaw the course of history:

> "And are by this clause invested with the power of making all laws, *proper and necessary,* for carrying all these into execution; and they may so exercise this power as entirely to annihilate all the state governments, and reduce this country to one single government. And

> if they may do it, it is pretty certain they will; for it will be found that the power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way. Besides, it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way. This disposition, which is implanted in human nature, will operate in the federal legislature to lessen and ultimately to subvert the state authority, and having such advantages, will most certainly succeed, if the federal government succeeds at all. It must be very evident then, that what this constitution wants of being a complete consolidation of the several parts of the union into one complete government, possessed of perfect legislative, judicial, and executive powers, to all intents and purposes, it will necessarily acquire in its exercise and operation."

For completeness, I add those extracts of Marshall's opinion that I paraphrased earlier, each followed by brief comments.

> "To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable."

If this is so, Marshall never proved it or even defended it. It does not comport with the meaning of the word "necessary."

> "It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end."

This is a red herring. It's a true statement, but irrelevant to the case because "necessary" does not mean "any which might be appropriate."

> "The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the Judicial Department, in cases of peculiar

> delicacy, as a law of undoubted obligation.
>
> "It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.
>
> "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation to which the Constitution gave no countenance."

Here is where he deferred to the history of the legislative enactments. He framed the main concern, as it was in this particular case, as between a State's rights and those of the U.S.

> "The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.
>
> "Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential, to the beneficial exercise of those powers."

Here he began to interpret the necessary and proper clause expansively by invoking the general welfare as an overriding criterion; or by saying that the Nation wants Congress to execute the powers given to it and does not mean to

restrict it from choosing the most appropriate means. In the tradeoff between restraint and limitation versus using the power to get something done, Marshall chose the latter.

> "But it is denied that the Government has its choice of means, or that it may employ the most convenient means if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation is one appertaining to sovereignty, and is not expressly conferred on Congress.
>
> "...if the Government of the Union is restrained from creating a corporation as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty, if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects. The Government which has a right to do an act and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means that one particular mode of effecting the object is excepted take upon themselves the burden of establishing that exception."

This is where he suggests that Congress may want to use incorporation as a means elsewhere.

> "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is

> therefore perceived why it may not pass as incidental to those powers which are expressly given if it be a direct mode of executing them."

This important passage reveals that Marshall thought that incorporation was not as important as the critics of the bank bill (Jefferson, Madison) had made it out to be. In this, he may have been influenced by the development of the distinctly American corporate law since 1791. The State of New York passed a general incorporation law in 1811 with which Marshall must have been familiar.[76] By 1819, 128 general incorporations had occurred and 29 by the older method of a special act of the legislature.

> "The word 'necessary' is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress in each case that only which is most direct and simple.
>
> "Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable."

Marshall didn't support this assertion. It appears to be unsupportable.

> "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 with the letter and spirit of the Constitution, are Constitutional."

This is Marshall's bottom line. The word "necessary" has been transformed into "not prohibited."

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[76]See W.C. Kessler, "A Statistical Study of the New York General Incorporation Act of 1811," *The Journal of Political Economy* 48, No. 6 (Dec. 1940), 877-822.

> "That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that Government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a Constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in Government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever would have found a place among the enumerated powers of the Government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

Marshall claims that English law has no warrant for enumerating a power to incorporate. This is not so, as Vieira has shown in his discussion of Blackstone.

Marshall produced one passage that is really quite anti-constitutional or leads to anti-constitutional outcomes:

> "This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

Vieira's critique (pp. 346-347) of this passage is incisive. The Constitution has a great many specific prescriptions and proscriptions. The Constitution proscribes aggressive wars of conquest. The preamble calls for "the common defence." The War Power in Article I, Section 8, Clause 11 grants power "To

declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water". Compare *Fleming v. Page (1850)*:

> "The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.
>
> "A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treatymaking power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war."

The Constitution proscribes suspension of habeas corpus with certain exceptions, bills of attainder, *ex post facto* laws, and titles of nobility. Th enumerated powers prescribe specific means. States have certain absolute disabilities. The Bill of Rights contains many prohibitions. The Constitution disables the government from emitting bills of credit.

It is no great stretch to conclude that the framers, by omitting the power of incorporation, intended a prohibition of that power. This may, in some situations, deprive the legislature of immediate or easy access to some means by which to avail itself of its experience and exercise its reason, but the appropriate and prudent resolution of that, which maintains the Constitutional protection of rights and prevents the growth of tyranny, is not to rewrite the Constitution legislatively or executively in an *ad hoc* fashion. It is to *amend* it.

### Breaching the Constitution with a National Bank

I conclude with a few reflections of my own.

Regardless of the fact that the government did not control the BUS and emit the bank's bills, four aspects of the bank can't be ignored. One was its sheer size; second, that it was a federal monopoly; third, that its notes were payable for debts and taxes owed to the government; fourth, that it could operate in any state. What these provisions did was to create a dominant bank whose bills of credit were then dominant. Its notes became acceptable everywhere, even if people used other media of exchange for small transactions. Furthermore, the bank's size and market power enabled it to perform some central banking functions vis-a-vis state banks.[77] In this way, Congress created a national monetary system that rivaled the system of specie. Congress *created a national credit system*.

The alternative was a more decentralized institutional development through state chartering and eventually general incorporation. Sooner or later, the private sector (the market) would have developed credit institutions, probably involving paper money (bills of credit) and other means of clearing and set-off.[78] Market developments occurred even in the presence of a large national bank, but they took on a size, shape, dynamic, and form that were conditioned on that bank's presence and on the subsequent national and state banking regulations as well as the politics of banking. The most fundamental issues of free market dynamics have to do with incentives, organizational forms, and innovations that overcome problems that develop and are recognized along the way. The time horizons of entrepreneurs and the areas to which they direct their attention are influenced by the introduction of a government-sponsored institution like this. Expectations alter with the introduction of the political means mingling intimately with the economic means. The directions taken by the profit and cost-reduction motives are altered. The entire course of future development can be shaped by the precedents that are established. Every economy is a *political* economy. The greater the emphasis on the political, the less likely become the free market dynamics.

The national credit system instituted via the BUS was a fateful step, and it clearly was *not* the step that was allowed by the Constitution. That compact arranged for a sound foundation of *Money* as silver and gold. To the extent that a sound credit system intermingles and requires sound money, which it does,

[77]Perkins, op.cit., p. 250, refers to it as a "quasi-central bank."

[78]Von Mises discusses the prevalent use of fiduciary media clearing and set-off in *The Theory of Money and Credit*, (1953), pp. 281-286.

the U.S. government's official money would have been sound. If the market wanted to produce money-substitutes, that was its business. The Constitution surely did not attempt to institute a credit system via banks or in any other way. It took for granted that this was a function of forces beyond the U.S. government, for it presumed that the borrowing power meant that lenders could be found. The Constitution did not envision that the U.S. government would *create* or instigate a credit market for the entire nation.

The appropriate means of changing this structure was through constitutional amendment. Perhaps the votes by states were not there to accomplish that, but they were there in the Congress, where only a majority is required. Then the nation should have done the legal thing and abided by its Constitution, and this would also have been the right thing in practical terms, because it would not have saddled the country with an historical development by which both sound *money* and sound *credit* have both given way to a fragile and unjust system. Furthermore, it is only by a breach of the Constitution that this could have occurred and been maintained. In order to justify such a breach in the face of the Constitution's clear meaning, proper constitutional interpretation *had to be thwarted and distorted.* The Supreme Court in giving its approval to a national bank *had* to undermine the Constitution by stretching its meaning in one or more respects. This could only work to undermine the entire concept of a limited government that is restricted by the Constitution to its enumerated powers and works within a federal system that involves the states and the people. The national bank was thus an important opening wedge in shattering the Constitution and altering the revolutionary nature of the Constitution.

# CHAPTER V

## The Bimetallic System, 1873-1900

### Introduction

This book is summarizing the lengthy and out-of-print work by Edwin Vieira, Jr., *Pieces of Eight: The Monetary Powers and Disabilities of the U.S. Constitution.* The current U.S. money and the Federal Reserve System are both unconstitutional. The results are serious losses of liberty and well-being. If we want to return to a constitutional money and monetary system, then we must understand what is allowed and what is not allowed under the Constitution. When we know these, we can avoid making presumptions and statements that undercut our aims. We can avoid distractions. We can avoid being drawn into unwinnable arguments or side issues. We can avoid being led up blind alleys. When we are sure of our ground, we can find the strongest arguments against those who defend the existing system. We can undercut the opponent's ground. Knowing the history of how we got where we are will help us to devise an appropriate strategy to find our way back and avoid the failings of the past.

We are following the second revised edition dated 2002, and all page references in parentheses are to that book. In the previous chapter, we completed Book One of *Pieces of Eight* (pp. 1-454). All errors, omissions, mis-emphases, misinterpretations, and needlessly cloudy exposition in bringing this work to you are solely mine, and, as I find them in reading further, they will be corrected.

The story continues with the years between 1862 and 1913. There are always several perspectives going on simultaneously. They include the constitutional (legal) one that is Vieira's main concern, and the political-economic issues, which are a secondary, related, and important focus, and which also tend to be more controversial and confusing. Following Vieira, we divide the overall period into overlapping sections to be covered in separate chapters. This chapter examines a part of what occurred in the period 1873 to 1900. The main topic is the bimetallic system, with some attention paid to paper currency issues.[79]

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[79]After this come national paper currency issues between 1862 and 1884, silver and gold certificates, the national banking system, and the start of the Federal Reserve System.

In some ways, it is not hard to grasp the overall picture. Congress at all times could have easily regulated the value of coins so that both gold and silver coins remained in circulation within a bimetallic system that was based upon the single constitutional silver standard. It could have minted gold coins of a known weight and fineness but *without* a dollar designation on them. This was the reasonable thing to have done in order to disable Gresham's law, by removing any fixed legal ratio between silver and gold. The two metals could both have been legal tender, but with a floating gold price the legal tender law would not have operated to bring Gresham's law into operation and drive one or the other metal out of the money supply.

This floating price solution (see Chapter II) was recognized and articulated by more than one member of Congress but never put into practice. Congress attempted to keep both metals circulating as coins by the fixed price method of regulating the value of the gold and foreign coins. It did not succeed very well. As a consequence of that failure, Gresham's law came into play, so that at various times, silver coins disappeared from circulation or gold coins disappeared from circulation. Political pressures in the mid and late 1800s built up among government officials, debtors, creditors, importers, exporters, bankers, paper money advocates, and those in the mining industries. These made headway as the knowledge of, and willingness to implement, constitutional meanings and methods waned

Political forces made silver and gold money into a political and economic football, in which wealth redistribution possibilities could be legally enforced by Congressional laws on the gold and silver standards, on legal tender, on free or less free coinage, on government purchases of silver, and so on. Thus, political-economic actions were encouraged by increasingly disordered views of constitutional provisions, and the former encouraged distorted constitutional views.

After 1837 or so, and certainly after 1849 when gold came into greater supply, gold's price fell in terms of silver. This caused silver coins to disappear from circulation. New silver discoveries in 1859 pressured silver prices. After 1873, silver's price fell markedly.

None of this pushing and hauling over silver and gold delivered a knockout blow to the bimetallic coinage system (p. 559):

"For, accidentally or not, in 1900 the coinage system rested squarely on

> *both* silver *and* gold, with the 'standard silver dollar' still at its proper constitutional 'Value' of 371-1/4 grains of fine metal.
>
> "Perhaps more interestingly yet, the policy of maintaining parity between silver and gold coinage was left unchanged even by the Federal Reserve Act of 1913, which provided in pertinent part that'[n]othing in this Act * * * shall be construed to repeal the parity provision or provisions contained in [the Act of 14 March 1900].'"

The "seeds of radical change in monetary policy" were sown "with the emission in 1862 of the Greenbacks, which were the first national paper currency declared to be 'lawful money and a legal tender...'" They were sown in provisions of the coinage acts that created a parallel system of paper money certificates.

**Brief Review of the Constitutional Dollar**

In order to understand when Congress adhered to constitutional meanings and when it did not, let's be reminded that (p. 457)

> "...the [contemporary] monetary system of the United States is the very antithesis of what the Founders contemplated and the Constitution embodies, what Congress first established in 1792 and then maintained (albeit betimes in a confused form) for over a century until 1900 until the *débâcle* of the 1930s, and even what the Supreme Court sustained (albeit perhaps inadvertently) in *Knox v. Lee* and *Perry v. United States* among other decisions."

Let's remember that the Constitution has a fixed meaning that is governed by the then-contemporary understanding of its words and terms. The Constitution, in particular, uses the word *dollar* in two places. There is no doubt, as shown in Chapter I, that what is meant by *dollar* was the then-current Spanish milled silver coin known as a dollar:

> "*The 'dollar' in the Constitution*. Both Article 1, Section 9, Clause 1 of and the Seventh Amendment to the *Constitution* refer explicitly to the 'dollar' - in the one case, permitting 'a Tax or duty * * * not exceeding ten dollars for each Person' the States saw fit 'to admit' prior to 1808; and, in the other, guaranteeing trial by jury '[i]n suits at common law, where the value in controversy shall exceed twenty dollars.' The

> *Constitution* does not define this 'dollar.' But, in the late 1700s, no explicit definition was necessary: Everyone conversant with political and economic affairs knew that the word imported the silver Spanish milled dollar."[80]

The constitutional *dollar* is a specific coin that pre-existed the Constitution. The term "dollar" has a fixed meaning in the same way that other terms in the Constitution have fixed meanings, like vacancies, years, nine, and citizens. Hence, (p. 135)

> "An interpretation of the term "dollar[ ]" signifying merely the *label* the Constitution gives to *whatever* Congress decides to make the monetary unit, if consistently applied to other undefined terms in the document, would render the Constitution nonsensical."

We have earlier shown that the framers used the term dollar with the understanding that everyone would understand it to mean the Spanish milled coin, in the same way that everyone would understand what a "year" is. The government can no more legally alter what a dollar means in the Constitution than it can redefine a "year" as being 10 revolutions of the earth around the sun, and thereby legally extend the terms of representatives from 2 years to 20 years.[81]

The Coinage Act of 1792 is a statute that further verifies, adopts, and follows through on this constitutional meaning by providing that the government open a mint for the *free* transformation (see Section 14) of silver, gold, and copper bullion into coins of silver, gold, and copper of particular weights. Free coinage, along with the silver dollar and bimetallism, are three pillars of a constitutional monetary system and money. A fourth pillar is the disabling of bills of credit as money.

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[80]See Vieira's online *What Is A "Dollar"?* Knowledge of this silver dollar appears in many accounts of monetary history. It is its *constitutional* status that came to be pushed aside, ignored, forgotten by economists and politicians alike, disrespected, and disestablished.

[81]This point cannot be emphasized enough. It is the appearance of the word dollar in the Constitution, which is the supreme law of the land, changeable only by amendment, and the clear history surrounding what the dollar means, that together preclude changing its meaning by statute. A comparable case would be for a prophet to change the meaning of an important term in one of the Ten Commandments.

Section 9 of the 1792 Act defines

> "DOLLARS or UNITS – each to be of the value of a Spanish milled dollar as the same as is now current, and to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure...silver."[82]

The DOLLAR in this statute, passed several years after the Constitution was ratified, is a U.S. silver coin of specific weight of pure silver (371.25 grains), that weight being chosen so as to be *of the value of* the Spanish milled dollar, the latter dollar being the same dollar to which the Constitution refers. This law codifies what Robert Morris and Thomas Jefferson recommended in 1782 and 1784, respectively, which was to create an official or statutory money-standard (or money-unit) as the basis of coinage, and to have that standard correspond with what already was in wide use, namely, the silver Spanish milled dollar.

All of this placed the nation on a constitutional silver standard that has never changed, since the Constitution has never been amended to change it. The medium of account of the U.S. is silver, and the monetary unit of account is a dollar with 371.25 grains of pure silver.[83]

The dollar was not defined in terms of gold. It was the other way around: coins of gold were defined in terms of the dollar. Thus, the 1792 Act called for coining

> "EAGLES – each to be of the value of ten dollars or units, and to contain two hundred and forty-seven grains and four eighths of a grain of pure...gold."

Notice the careful use of the words "of the value of ten dollars," which mean having a weight of gold in one EAGLE chosen to be equivalent in value to the fixed weight of silver in ten (silver) dollars.

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[82]"As is now current" means that which is in circulation as a medium of exchange.

[83]A medium of account is a good that is used to create a standard by which the prices of other goods can be expressed or accounted. A unit of account is a certain measured amount of the medium of account.

## Brief Review of the Bimetallic System

The Founding Fathers chose silver as the medium of account and the silver dollar as the money-unit. That made the silver coin of a certain weight of pure silver become the gauge or measure against which prices could be cited.[84] That made the silver dollar the standard measure of value. That did not mean that only silver was usable as money in the sense of a medium of exchange. It is perfectly feasible to have many kinds of money in the sense of media of exchange that are predicated on and related to a given money standard. In particular, Congress minted gold and copper coins and intended that they circulate. Foreign coins also were part of the money supply. Congress has the constitutional responsibility to regulate the values of all of these metal coins (see Chapter II) so that they remain current (in circulation). In Section 16 of the Coinage Act of 1792, Congress, implementing the Constitution's provision that nothing but gold and silver be a legal tender, made all the gold and silver coins struck at the Mint "a lawful tender in all payments whatsoever."

Thus, while the U.S. has a silver *standard*, unalterable except by constitutional amendment, it had also at that time and until 1932, a bimetallic monetary *system* (ignoring copper).[85] In all the coinage statutes that made gold and silver legal tender (up until the restrictions of the New Deal), nothing prevented individuals from contracting to receive a particular metal or metals. Therefore, it is incorrect to say that the legal tender provisions in the coinage acts created or tried to create a *de facto* bimetallic *standard*. A bimetallic contract that specifies the delivery or payment of either a gold dollar or a silver dollar does not mean there is a bimetallic standard.

The regulation of non-silver coins, domestic and foreign, to the silver standard occurred in the various coinage acts:[86]

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[84]Since the Spanish silver dollar was already in wide use, the market had already selected it as a standard. This recognition made it easy to introduce the U.S. silver dollar coin with the same average weight of pure silver as the Spanish milled dollar.

[85]Many observations on the bimetallic system appear in various Congressional reports between 1830 and 1834. They can be read online here, here, here, here, here, here, and here.

[86]The complete coinage laws through 1894 are here. Also see here for all of these laws through 1909; some are edited.

1792: set a 15-1 ratio of gold to silver.
1834: set a 16-1 ratio of gold to silver.
1837: set a 15.99 ratio of gold to silver.
1849: authorized for the first time a gold dollar at a 15.99-1 ratio.
1853: reduced fractional silver coins to subsidiary status.
1857: repealed the currency of all foreign silver and gold coins and eliminated their legal tender status.

**The Coinage Act of 1873**

Certain portions of the pre-1873 coinage acts contained provisions of doubtful constitutionality, such as reducing the status of fractional silver coins and repealing the currency of foreign coins, but the Coinage Act of 1873 is (p.458) "*the first arguably unconstitutional coinage Act in American history.*" This appears first in Section 14, which reads "That the gold coins of the United States shall be a one-dollar piece, which,...,shall be the unit of value." Section 67 went on to repeal all other acts and portions of acts "inconsistent with the provisions of this act." In this language, the 1873 Act acted as if the past coinage acts didn't exist and as if the constitutional history and standing of silver had never happened. It acted as if Congress could simply legislate a change in the money standard from silver to gold.

The 1873 Act was clearly anti-silver in major respects, for it went on with other provisions that diminished silver's role as money. The gold coins were made legal tender for *all payments of any size*. Silver coins were legal tender only for payments *less than five dollars.* Silver coins to be coined in the future were authorized in Section 15, but the old silver dollar was not among them. There was instead a "trade-dollar" of 420 grains; this provision aimed at foreign trade. Section 25 ended free coinage by introducing coinage fees, *and* it made the fees higher for silver, consistent with the anti-silver content of the act. Pre-1873 silver dollars remained in circulation and were legal tender; they were not called in. Hence, silver was not demonetized in the aggregate, but on the margin.

The Congress could, by legislative enactment, neither logically nor constitutionally alter what a dollar means within the Constitution. The **duty** of the Congress under the Constitution is to promote the general welfare by free coinage of specie brought to the mint, using a silver dollar standard. This had been implemented since 1791 and had become a tradition, with which the Coinage Act of 1873 broke. In *United States v. Marigold (1850)*, the Supreme

Court, referring to provisions of an Act of Congress of March 3, 1825, spelled out this idea of a duty or public trust.[87]

> "They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfill that trust on the part of the government -- namely the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value...The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power.
>
> "Whatever functions Congress are by the Constitution authorized to perform they are, when the public good requires it, bound to perform, and on this principle, having emitted a circulating medium, a standard of value indispensable for the purposes of the community, and for the action of the government itself, they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency."

Other arguments for free coinage are presented later.

Vieira concludes that "the Act was also plainly unconstitutional in terminating coinage of the constitutional 'dollar[]'". But he makes the significant point (p. 460) that it did *not* demonetize silver or end bimetallism, even though it discriminated against silver. Its unconstitutionality didn't extend that far, for the pre-1873 silver coins were not called in. They had been coined as full legal tender Money and they remained so, because the Act stated that "this act shall not be construed to affect any act done, right accrued, or penalty incurred, under former acts, but every such right is hereby saved." Citing several Supreme Court rulings, Vieira backs up this point with the Court's rule of construction that "a statute should always be read to avoid constitutional questions." Furthermore, we will find later that the Act of Sept. 26, 1890 that

[87]An article documenting the decline of the concept of public trust is here.

repealed the 1873 Act did not contain the "saving" clause just quoted. Even the purported new *statutory* gold standard was not necessarily (or under all circumstances) inconsistent with the *constitutional* silver standard, because the gold coins might have been struck without dollar designations.

Vieira characterizes the Congressional debates on this act as uninformative about the bill's important changes, while illustrating the lack of knowledge (ignorance) of the participants.[88] He cites many unreasonable statements made in the halls of Congress.

Senator Sherman said the bill "does not adopt any new principles." Reps. Kelley viewed it as a "careful codification of the Mint laws, making a very few, if any, essential changes." Rep. Hooper said that it retained "all that is valuable in existing laws," and only added new provisions that "appear necessary." None of this was true.

Rep. Stoughton misconstrued the Act of 1849 by saying that it had intended to make gold the unit of value, when in fact it said nothing of the sort. He justified a gold standard by noting that the value of silver fluctuates with supply and demand. But so does gold, and is that a constitutional source of power to change the standard? He allowed as how "Gold is practically the standard of value among all civilized nations," which meant "the time has come in this country when the gold dollar should be distinctly declared to be the coin representative of the money unit." Besides being a false statement, the disability to change the standard, due to the U.S. Constitution, doesn't change with what other countries are doing, be they called civilized or uncivilized.

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[88]See Allen Weinstein, "Was There a 'Crime of 1873'?: The Case of the Demonetized Dollar ," *The Journal of American History* 54, No. 2 (Sept. 1967) 307-326, for further details of what the important players may have been thinking. It appears that with gold having replaced silver in circulation, some, ignoring the Constitutional status of silver, began to think that gold should be the standard. International moves by other countries in that direction had an influence. Sheer ignorance and error played a large part too, such as revealed in Treasury Secretary Boutwell's recollection: "...I thought it wise to select one of them as a standard..." But one of them already was a standard; it was a matter of regulating the value of the other. The very influential Director of the Mint (H.R. Linderman) gave an account here. According to Weinstein, Linderman was "a devoted Anglophile" and gold-standard man, who persistently argued that "British commercial prosperity was founded in large measure on economic advantages which the English derived from their gold-based currency."

Rep. Hooper mentioned that the silver dollar was worth more than the gold dollar coin and suggested that the Spanish dollar had more than 371.25 grains of silver. He followed with the *non sequitur* that "the gold dollar should be declared the money unit." Not only that, he ignored that it was the job of Congress to *regulate the value* of the gold coin; and he ignored that in 1791 the Congress had made an effort to match the American dollar to the *then current* Spanish milled dollar which, through wear and tear, had a slightly lower weight of silver than what Hooper asserted it should have had.

Rep. Potter thought it would be "wise" to have gold be the single legal tender coin and to change the "weight and value of the silver dollar," but he ignored any constitutional issues involved in making these changes. "Moreover, neither he nor anyone else in Congress appreciated that, even from a purely practical perspective, such sweeping changes were quite unnecessary..." (p. 465).

The debate over the further abandonment of free coinage was more pointed and extensive. Senator Cole made the insightful point that since the coins passed through the hands of everyone, the government should bear the cost as it always had up until 1853. Those who converted bullion into coin should not be assessed the cost. Senators Sherman and Morrill defended coinage charges, on the grounds that it was a tool to manipulate the import and export of coins. Sen. Thurman pointed out that the since the Constitution disables the States and individuals "of any power to coin money...it follows that it is the duty of the Government to exercise this power and to furnish the people with coin." Anything less he termed "a vicious policy and inconsistent with the spirit of the Constitution." No one explained what "legal-historical reason...overrides the teaching of *pre*-constitutional English law and the Founding Fathers' understanding of the concept [of free coinage] as embodied in the Coinage Act of 1792... (p. 471).

**The Act of February 28, 1878**

In the Act of January 14, 1875, Congress mandated the redemption of paper greenbacks with coin, making no distinction between silver and gold. This was a plus for silver. The Joint Resolution of 1876 removed legal tender status from the "trade-dollar," leaving no silver dollar with a clear legal tender status. This was a negative for silver. These actions were followed by a far more significant statute that rehabilitated silver.

The Coinage Act of Feb. 28, 1878 was "An act to authorize the coinage of the

standard silver dollar, and to restore its legal-tender character."[89] The restored silver dollar was the same as that in 1837, namely, of 371.25 grains of pure silver. All new and old silver dollars of this kind were made "a legal tender, at their nominal value, for all debts and dues public and private, except when otherwise expressly stipulated in the contract." This basically restored the constitutional situation (p. 474) "roughly to the situation in 1849." Vieira views the 1873 and 1878 statutes as not necessarily irreconcilable, if one takes the silver dollar as restored to its constitutional role as a standard and the gold dollar of 1873 as a supplementary statutory standard.[90]

Unfortunately, the Act of 1878 went on to innovate in several ways that (p. 474) "did not...conform to strict constitutional standards." The return of free coinage of silver, which had passed the House, didn't survive the final bill. Instead, the new law authorized the Secretary of the Treasury to *buy* (with gold or certificates convertible into gold) \$2 - \$4 million worth of silver bullion at the market price and coin it into silver dollars. This was an attempt to drive up the price of silver by market manipulation, as the gold-silver price ratio was much higher than 16-1.[91] If the Congress had regulated the value by the usual means, it would simply have lowered the amount of gold in the gold dollar.

Free coinage means that the government does not influence the money supply. It is entirely determined by the actions of individuals who decide to get bullion coined by the mint or melt coins down into bullion for other uses. By contrast, this law meant that the government was introducing new silver coins at a rate of its own choosing and thereby affecting the money supply.

The second innovation (p. 475) that "lacked any obvious constitutional warrant" was Section 3 of the Act:

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[89]This is also known as the Bland-Allison Act.

[90]Ambiguity in contradictory laws is handled by rules of statutory interpretation, such as if two laws conflict in a way that cannot be reconciled, then the later of the two is favored. The 1878 Act did not repeal the 1873 Act, so matters are left to implication. In that case, the later overrules the earlier only where they are repugnant to one another. When there is no clear irreconcilability or repugnancy, then the later act continues the earlier. This is why Vieira sees them as complements.

[91]This was probably a futile effort. The world market for these metals was probably too large for any single buyer to change the relative prices. Gold kept rising in price relative to silver.

> "That any holder of the coin authorized by this act may deposit the same with the Treasurer or any assistant treasurer of the United States, in sums not less than ten dollars, and receive therefor certificates of not less than ten dollars each, corresponding with the denominations of the United States notes. The coin deposited for or representing the certificates shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and, when so received, may be reissued."[92]

The Constitution nowhere (p. 475) licenses "any power for the government to act as a deposit banker for privately owned coins, even on the basis of 100% reserves; or to 'emit bills', even redeemable in silver." The reissue language meant that the government was creating a permanent paper money supplement to specie.

Third, the Act told the President to convene an international conference in order possibly to establish an internationally common ratio between gold and silver. Here Congress deferred to foreign forces and to the Executive, while abdicating its responsibility to regulate the value of coins.

### Congressional Debates on the Act of 1878

Congressional confusion on the constitutional and economic issues ranged from extremely high to almost nil, depending on the speaker. Senator Christiancy came in at the low end of confusion. He proposed and offered as an amendment (p 500) what he termed "the only perfect mode of exercising the constitutional power of 'regulating the value of money'" that would keep both gold and silver in circulation as legal tender. He was correct. It *is* the only such perfect method that is constitutional, although he would have had the standard as gold when it should have been silver, and he would needlessly have stamped the non-standard metal coins as "dollars." He proposed the *floating method*:

> "All this can be done by leaving the gold coinage as it is, the legal standard and a legal tender, at its present standard value, making all our silver coinage and even stamped bullion a legal tender at the

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[92]See National Monetary Commission, compiled by A. T. Huntington and Robert J. Mawhinney, *Laws of the United States Concerning Money, Banking, and Loans, 1778-1909*, 1910, p. 580. This resource is online here. It is a comprehensive collection of laws.

> comparative value which they shall bear to gold in the market; in other words, its *real* value."

To achieve this he proposed a sound practical pricing method, which was to determine a price that would prevail for payments made in the forthcoming month, by finding an average world market price 3 to 5 days before the month began.[93] His amendment was *rejected*.

At the other extreme, we have a number of senators who were clueless concerning the history of the silver standard and the fact that such a standard was constitutionally *in place*. Sen. Davis thought the 1792 Act made a "double standard of gold and silver." Sen. McDonald thought that the standard silver dollar was "but one...of our national coins." Sen. Sargent viewed the silver coin as "a solecism." Sen. Windom struggled with knowing "just how many grains of silver should compose the silver dollar." So did Rep. Monroe who thought the "obligation rests upon us to choose that weight of silver which...promises to bring the silver dollar promptly to par with gold." No one objected when Rep. Shallenberger saw the task as "changing, one way or the other, our national unit of values." Rep. Eames thought that "the question therefore is, whether that standard shall be gold or silver." All of these responsible elected officials and more were ignorant of the fact that the constitutional dollar was a silver coin with 371.25 grains of pure silver, and that this was the standard.. They were thrashing around in the dark.

In between these extremes, senators made comments containing a mixture of constitutional sense and nonsense. Senators Coke and Withers and Rep. Steele all made the excellent point that Congress has a duty freely to supply coinage of both silver and gold, the legal reason being that the States may make gold *and* silver a legal tender, and since the national government has the exclusive

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[93]This could be done today almost by the minute using the internet and market prices. For physical gold, some dealers use 15 minute intervals. With gold, silver, and paper currency markets already highly active throughout the world, there already exists a partial dual metal and paper currency system that provides a stepping stone to a restoration of a constitutional system that uses metal as official money. Vieira's detailed treatment of all the legal steps that might be taken to that end, and that include proper handling of the gold stock and separating the Federal Reserve from government linkages, comes toward the end of his work. The proper constitutional system presumably will not preclude, indeed will allow and encourage, a variety of privately generated monies and money and credit instruments.

right of coinage, it cannot use that power to impair the "absolute recognition in the Constitution of the right of the States to make both gold and silver coin a tender..." and "as long as that right is recognized and the exclusive power to coin money for their use resides in the National Government, so long must of necessity the duty of that Government be to coin both gold and silver."

On the other hand, Sen. Coke wrongly thought that Congress could make a coin and call it a dollar; he thought that Congress could not declare what coins shall be legal tender, even though all this means, under the Constitutional system of money, is that the coins have a metal content appropriate to their dollar designation; and he was wrong to say that the Constitution "establishes the bimetallic standard" when it establishes a bimetallic system.

There were those who wanted silver coins restored into circulation who made the strategic mistakes of either accepting the gold standard or calling for a double standard. What they should have done is attacked the gold standard as unconstitutional, asserted that only a single standard could possibly work, and called for a properly regulated bimetallic *system*. Sometimes they misunderstood and/or misinterpreted the meaning of a standard. Sen. Wallace, who gave a detailed history of American coinage, advocated a double standard, when what he meant was to keep both metals in circulation.

The problem of Gresham's law was recognized, albeit implicitly, as anyone could see that one or the other metal was being driven out of circulation. A variety of *ad hoc* and unworkable solutions were proposed, but when Sen. Christiancy came up with the correct solution, it was rejected. And he himself offered a number of other confused views, such as that if a standard silver dollar were to be fixed, then "...let us proceed as our fathers proceeded, to fix it at what we believe [is] its true, actual, relative value as compared to gold." The 1792 Act didn't mention gold at all in reference to the DOLLAR or UNIT.

### Three More Actions

First, the Supreme Court misread the 1878 Act in *Juilliard v. Greenman (1884)*:

> "So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the Act of June 28, 1834, c. 95, and with regard to silver by the Act of February 28, 1878, c. 20) issue coins of the same denominations as those already current by law, but of

> less intrinsic value than those by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value."

As shown in an earlier article, Congress didn't debase gold coins in 1834. The 1878 Act restored the traditional silver dollar at its traditional weight. The trade-dollar, which indeed was heavier, was not a legal tender coin at all in 1878, so it was (p. 505) "a merely *subsidiary* coin."

Second, the coinage Act of June 9, 1879 made some changes for coins of less than one dollar in denomination (fractional coins). Earlier, in the Act of Feb. 21, 1853, Congress had reduced the silver content of fractional coins to 93.1 percent of the silver in the standard silver dollar coin. It had therefore constrained the legal tender status of these coins for payments less than five dollars, so as to retain the constitutional status of silver and protect those receiving payments from this diminution.[94] It had also stopped minting them on demand; instead the treasurer of the Mint determined their production. Vieira calls these coins *subsidiary* coins.[95]

The subsidiary coinage Act of 1879 allowed people to bring fractional silver coins to the mint in multiples of twenty dollars and get them exchanged into "lawful money," which constitutionally and by statute meant silver and gold coin. (By statute only, lawful money was also legal-tender United States Notes.) This enhanced the protection afforded to holders of small coins by giving them the option of converting the coins into a legal tender medium.

Third, the over-weight and non-legal-tender trade-dollar, by the Act of March 3, 1887, was terminated. It was not needed once the 1878 Act resumed coinage of the standard silver dollar.

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[94]This affirmed the English common law principle (p. 507) that "a coin with full legal-tender character must also have full intrinsic value relative to the monetary standard."

[95]The reason for this change was that gold's price had fallen, making it profitable to melt the small silver coins down and export them; the market exchange ratio of 15.5 ounces of silver to 1 ounce of gold was below the legal ratio of 16-1. Adjusting the silver content of the fractional coins down kept them in circulation. Since the content of the (silver) dollar could not be constitutionally changed and Congress did not adjust the value of gold coins, silver dollars tended to disappear from circulation for years on end. This appears to have induced many people, including Congressmen, to think or at least say that the nation was on a gold standard.

## Act of July 14, 1890

This is also known as the Sherman Silver Purchase Act of 1890. This Act was plainly unconstitutional by authorizing the emission of bills of credit (paper money). What allowed it to pass as if it were constitutional were two Supreme Court cases known as the legal tender cases, to be discussed in a subsequent chapter. These are *Knox v. Lee* (1871) and *Juilliard v. Greenman* (1884), which affirmed the constitutionality of government emission of bills of credit, despite the constitutional prohibition.

The Act called for the Treasury to issue full legal tender United States Notes (paper money) in denominations of one to a thousand dollars. They were to be placed into circulation by buying up to 4.5 million ounces of silver bullion each month at a price of no more than one dollar (measured in gold) for each 371.25 grains of pure silver.[96] For the first year, the government was to coin 2 million ounces of the silver purchased. This Act repealed the relevant silver purchase provisions of the 1878 Act.

The notes were redeemable in silver or gold coin at the government's discretion.[97] The notes could be reissued, again adding to a permanent paper money circulation. Redemption on demand was loosely left up to the regulations of the Treasury and its discretion to produce coin. Since the Treasury could redeem the notes with either silver or gold, their pricing had to reflect that option. Since one or the other metal might have departed in the market from the legal ratio, investors had to speculate on what metal they would receive as payment.[98]

One phrase of the Act read "...it being the established policy of the United States to maintain the two metals on a parity with each other upon the present legal ratio, or such ratio as may be provided by law."[99] This was accurate. It

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[96]This is the same as 1.2929... dollars per troy ounce.

[97]Unlike the Act of 1900, no earmarking of specie to be held in an untouchable reserve fund occurred in this Act. This is what tips these notes over into the category of bills of credit as opposed to the virtual warehouse receipts for coin in 1900.

[98]The subsequent Act in 1900 that decided the matter in favor of gold is discussed below.

[99] The legal ratio of 16-1 meant that silver legally was $1.2929 an ounce and gold was legally $20.69 an ounce. In the market, an ounce of gold was able to buy about 20 ounces of

reaffirmed the Constitution and the practice of bimetallism based upon the Constitution. The power to "regulate the Value" of coin in Article I, Section 8, Clause 5 connects to the States' reserved power to make both gold *and* silver a legal tender. The latter cannot be made effective unless the national government regulates value so as to keep both metals in circulation as Money, which an appropriate legal ratio is supposed to do by reflecting the market's parity. All the coinage acts up to and including 1873 held to that bimetallic policy. Thus, Congress has an implied duty under the Constitution to maintain gold and silver money in circulation, and this long-established policy was recognized by Congress in this statement about parity.

The complex mandates in the Act concerning buying and coining various amounts of silver prevented a free market in silver. Free coinage was absent. That would involve individuals bringing silver bullion to the mint at their discretion and getting it coined into silver dollars. This part of the Act severed a constitutional tradition and duty.

Congressional debates exhibited the same range of constitutional and historical knowledge as in passing the 1873 and 1878 Acts. Many were confused. A variety of unconstitutional and tangential arguments were made that failed to address the legality of the proposals. Arguments sometimes came close to recognizing constitutional realities or even did recognize them, and yet then retreated. For example, Rep. Bland said (p. 521) that "the great principle of coinage should have been retained...I find but one provision in the Constitution giving us any authority over gold and silver, and that is to coin it into money." Yet he and others let the matter drop there, rather than pursue what *must* be done in order to do their duty. Rep. Williams told his colleagues clearly:

> "remember [ ] that the silver dollar of 371 1/4 grains of pure silver had been the dollar of the Constitution, the dollar of our fathers since 1792...Let us return to the requirements of the Constitution and pursue the old plan which our fathers had followed for nearly a hundred years, and during all that time the silver dollar was the best of money."

Rep. Moore spelled it out:

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silver. The price of gold in the market, against legal silver $, was 20 x $1.2929 = $25.86. If the gold dollar were the standard, then the price of silver in the market, against legal gold $, was 0.05 x $20.69 = $1.03. Hence silver could be said, under a gold standard, to be a 1.03/1.2929 = a 0.797 dollar.

> "...silver has been money always, and is now the constitutional unit of our money. Congress has no more power to demonetize it than it has to pass an *ex post facto* law."

### Another Three Actions

The Act of Sept. 26, 1890 is quite important. In Sec. 1, it stopped coining the three-cent nickel piece, the three-dollar gold piece, and the one-dollar gold piece. Sec.2 said that these coins would be withdrawn from circulation as fast as they were paid in. Sec. 3 "That all laws and parts of laws in conflict with this act are hereby repealed."

This ended the gold statutory unit of value created in 1873, because in that Act, the "one-dollar [gold] piece...shall be the unit of value." In contrast with the 1873 Act, there was no "saving" clause. The statutory, but not constitutional, short-lived gold standard, already turned back by the Act of 1878 and the Silver Purchase Act of 1890, was gone. This, of course, raised no constitutional issues, and the constitutional standard silver dollar was the only coin with statutory recognition.

On November 1, 1893 (see here at p. 77), Congress repealed the silver purchase portion of the Silver Purchase Act of 1893. It left intact the continued coinage of silver coins from bullion on hand. Furthermore, the Act plainly and strongly enunciated the bimetallic policy that had begun in 1792:

> "And it is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payments of debts. And it is hereby further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts."

The Act of June 13, 1898 (see here at p. 606) directed the coinage of standard silver dollars in the amount of at least $1.5 million a month.

## The Coinage Act of 1900

The Act of March 14, 1900 (see here) swung back to an attempt to legislate a gold standard. The Act referred to Sec. 3511 of the Revised Statutes of the U.S., which states "The gold coins of the United States shall be a one-dollar piece, which, at the standard weight of twenty-five and eight-tenths grains, shall be the unit of value..."[100] The coin itself is the statutory standard. All coins were to be kept at parity with this standard of value. With the silver dollar being 371.25 grains, the ratio to 23.22 grains of pure gold became 15.99. The constitutional silver standard remained in place along side the statutory gold standard. After all the years of *sturm und drang,* with the free silver and other movements, and after 108 years of monetary history, or even longer if one goes back to Queen Anne's silver standard proclamation in 1704, traditional American bimetallism in 1900 survived in almost the same form, despite the evident attempt to alter the standard. The legal-tender quality of silver was left untouched.

However, gold made inroads in another way. The government legislated that it would redeem its bonds, notes and greenbacks in gold. When the U.S. decided to pay off these notes in gold, whose price had risen, bondholders and bankers benefited at the expense of taxpayers.

The Act innovated in another respect – more paper money. The Treasury would "receive deposits" of gold and silver coin and issue gold and silver certificates in corresponding amount. And

> "...the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purposes."

Since the Treasury was charged to retain the coins, do nothing else with them, and pay them out on demand, the certificates became warehouse receipts for coin.

The Act called for parity but didn't specify how parity was to be accomplished. It specified that "it shall be the duty of the Secretary of the Treasury to

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[100]With 480 grains per troy ounce and 23.22 grains of pure metal in the standard weight gold coin, this made gold 480/23.22 = 20.67 dollars per troy ounce. No gold coin was actually authorized to be produced, and none had been produced since 1890.

maintain such parity." Congress again shirked its duty. The primary constitutional duty lay with Congress to regulate the value, not with the Treasury.[101]

## Insights from Debates

The remarks of Sen. Chandler suggest that the bill aimed at stabilizing the price relation between silver and gold by giving the Treasury the legal options of redeeming silver for gold and vice versa and entering the market directly, and he thought this would enforce a gold standard and eliminate silver as a standard. If this market manipulation succeeded, which is unlikely, it would have made silver and gold equivalents at the parity price, thus reinforcing bimetallism. Others thought that the bill conferred no such power. Still others thought that it conferred a vast power on the Treasury.

The Congressmen's rhetoric wandered in confusion in the realm of market manipulation of prices to maintain parity. The reason was that they had abandoned the straightforward method of coining silver brought to the mint into standard coins and then declaring to the world on an ongoing basis how much gold was an equivalent to the silver. Given the constitutional imperatives, the best method of doing that regulation was and is by continual reference to the changing market prices, a method that follows the market and does not interfere with it in what is likely to be a futile effort to maintain a fixed relation. The next best method was a periodic declaration, but Congress had not done this in the past and had not prevented Gresham's law from coming into play.[102]

The battle between silver and gold standards didn't get to the heart of the struggle. Sen. Stewart alluded to the economic impact of the government's option to pay off its debts with the metal of its choice. If it chose to pay in the more expensive metal, it conferred a benefit on creditors. The deeper reasons

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[101]How was he supposed to maintain parity? Was he to buy and sell silver and gold in an attempt to stabilize the market ratio of prices at the legal ratio? This would prove impossible with any significant change in prices, as no market participant, even the government, can control such a large market.

[102]The entire matter might be settled by Constitutional amendment that allows the markets to work to produce the money that people want to use and places government out of the reach of political influences that gain from the manipulation of money.

for the silver-gold turmoil were political-economic, the surface indication of which was a battle between silver and gold standards. The battle revolved around debtors and creditors, inflation and deflation, and paper money vs. specie. The position of interest groups such as bankers and farmers in all of this was critical as they influenced Congress. Who was going to pay off what debts and in what currency?[103] What contracts had people made? Would they be held to them when Congress altered policies?

Rep. Kerr alluded to the contractual issue:

> "...it [a gold standard] will remove all doubt as to the kind of money in which the interest-bearing obligations and the demand notes of the Government are to be paid, by putting it in express terms...that they are to be paid in...gold coin."

Under normal circumstances, individuals willing to write the payment medium into their contracts didn't need the gold standard. They could use gold-clauses or silver-clauses. If the government as debtor retained the option to deliver the metal of its choice, creditors would price the debt obligation accordingly by taking that option into account.

The New Deal administration and Congress created extraordinarily abnormal circumstances. They made any metal standard worthless by expropriating gold, outlawing gold-clause contracts, terminating gold coinage, abandoning the maintenance of parity by any means, and devaluing the gold dollar of 1900. Rep. Kerr could not have foreseen such incredible unconstitutional changes. But Congresses between 1862 and 1900 were wending their way to such changes by not addressing the constitutional issues that faced *them*.

For example, Rep. Dolliver asked his fellow lawmakers

> "...to make known by law, without quibble, uncertainty, or evasion, exactly what the dollar of the United States is, what the word means, what is to be understood when the name of the standard coin is used."

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[103]See the U.S. Monetary Commission's Report of 1877 at page 11 and pages 91-101 for a statement of the issues involved. A technical finance treatment of the option is Peter M. Garber, "Nominal Contracts in a Bimetallic Standard," *American Economic Review* 76, No. 5 (Dec. 1986) 1012-1030.

If Congress could *by law* say what a dollar is, it could only do so unconstitutionally, and if it had the power to say what a dollar is, then it could say *by law* what this and many other terms in the Constitution mean and rewrite the Constitution unilaterally. This kind of thinking by Dolliver and others, however well-intentioned, was premised on an assumption about Congressional power, and an assumption about the Constitution's restrictions or lack of them or pliability of them, that could only end up in the New Deal's filing of the Constitution in the dead letter office.

A similar example was Rep. Levy who cited Jefferson's advice that "we must then say with precision what a dollar is," and then, not knowing that the Founding Fathers had *already said it*, and made it constitutional, thought that Congress was doing well now to define the standard unit of value. He proved that a little knowledge is a dangerous thing.

Sen. Bate knew even more. He recited how a commission appointed by President Washington obtained an assayer who got 1,000 Spanish milled dollars, cleaned them, extracted the fine silver, weighed it, divided by 1,000, and determined the weight was 371.25 grains. He concluded that 'they made that 371 1/4 grains the 'dollar of account,' the 'unit of value,' and it has been so ever since." Vieira here notes that Bate and no one else realized the meaning of this account's failure to mention gold, which was (p. 540) "that the absence of gold in this chronicle disqualified that metal as the monetary standard."

Sen. Allison completely falsified history. He argued that Congress could make the dollar what it wanted to because

> "The standard of value of 1792 is not proclaimed in the statute of 1792. There were two kinds of dollars to be coined under that statute, one of silver and one of gold."

But in fact the Act of 1792 carefully defined the silver dollar and *did not create a gold piece denominated in dollars.* It created in Sec. 9 gold "EAGLES – each to be of the value of ten dollars..." They are not said *to be* dollars, but to have enough gold so as to be *of the value* of ten dollars, which have to be, if the grammar of the English language means anything, something distinct from the EAGLES, namely, the silver dollars that form the standard.

Sen. Morgan's confusion was different, but no less deadly. He asserted that

"The dollar is the same, whether it is made of gold or silver." This was the theory that the dollar is merely a label or an empty vessel that Congress fills up at its will. Sen. Allison made some remarks along the same line when he said that "The unit was the same, the dollar," in both 1792 and 1873, even though one was silver and the other, by statute, gold.

The article "Bank-Note Despotism" that William J. Bryan published in the *New York Journal,* also appearing in full in the *Congressional Record*, made a number of cogent points that were echoed by various Congressmen, including Senators Bate and Butler. Bryan observed that gold standard advocates had two purposes: to make gold the only legal tender and to make bank notes the only credit money.[104] Bryan aptly criticized the inequity and political danger of the national banks and the national banking system, in arguing that they stood to benefit from the Act of 1900 and that it advanced their larger agenda.

Vieira explains (p. 550) that once Congress left behind the sound and constitutional ideas of a monetary standard and regulating the value of coinage relative to the standard, a vacuum appeared. It was rapidly filled by false ideas embodied in unconstitutional statutes that served interest groups such as bankers:

> "Once Congress had lost track of the Constitution's true monetary standard – the (silver 'dollar[ ]' – it found political-*cum*-economic excuses to substitute gold for silver, then Treasury paper for both, then private bank paper for government paper – which became the terminus of this development, inasmuch as it best served the interests of *haute finance.* So, too, once Congress had lost track of the real meaning of the power to 'regulate * * * Value' – translating it as a power to 'regulate the purchasing power of the dollar', whatever the 'dollar' might be – it invented political-*cum*-economic rationalizations for delegating this fictional power to the nation's banks cartelized in the Federal Reserve System, inasmuch as that also best served the interests of *haute finance.*"

[104]They more than succeeded. They got the U.S. to stand behind their bank notes while making them the only credit money, and, eventually, that credit money became the only money, period. Gold was relegated to a "barbarous relic" by Keynes and in practice. Silver disappeared from U.S. coins.

## Closing Remarks

During the late 1800s, Congress maintained bimetallism, but it lost track of and set aside (i) the nation's silver standard, (ii) how to regulate the value of non-silver coins by that standard, and (iii) a free market in money via free coinage. It amplified what it had no authority to amplify, which was government paper money. Congressional rhetoric promised to maintain parity, but, having set aside these three constitutional essentials, Congress veered into the unconstitutional terrain of schemes to influence gold and silver prices by government purchases and sales of gold and silver.

The power to regulate coin values to a standard needs only look to the market's valuations and then regulate in that direction, either periodically or continuously by an appropriate law. This maintains parity and keeps gold and silver coin both in circulation. If this power is taken constitutionally to allow the buying and selling of gold and silver by the government, so as to maintain a predetermined government price ratio, then there is price-fixing and price controls. The three strikes against this are first, that it is unnecessary, second, that it won't work, and third, which is the most serious, that it opens the door to a wide range of other unconstitutional actions. If the government has the legal power to fix specie prices, what may it not do in support of that objective? One can imagine a wide range of unpalatable measures.

One of the most important other developments between 1862 and 1900, that we have not stressed, was the introduction of a paper currency operating simultaneously with specie. This began with the Greenbacks in 1862, covered in the next part of this series. Even after they were redeemed, the Act of May 31, 1878 allowed them to be retained by the Treasury and reissued again. This sort of reissuance notion appeared in the Act of 1878, the Act of 1890, and the Act of 1900. In 1878, the law says that the certificates may be reissued after they are paid into the Treasury for customs, taxes, and all public dues. The Act of 1890 says that Treasury Notes that are redeemed for coin may be reissued. The Act of 1900 says that the gold certificates received by the Treasury for customs, taxes, and all public dues may be reissued.

What this did was to create a paper money circulation parallel to and interwoven with the specie circulation. National bank notes were a part of this. The next few parts of the story of the U.S. Constitution and money will deal with the development of the paper money system. The main topics will be the legal tender cases, silver and gold certificates, and the national banking

system.

## CHAPTER VI

## The Legal-Tender Cases

### Introduction

On February 25, 1862, Congress passed an Act that authorized the issuance of United States Notes with full legal-tender quality. In 1869, the Supreme Court ruled that the Act was constitutional. These government actions were unconstitutional. The government seriously breached the Constitution's provisions on metallic money. The Supreme Court gave its assent to government emissions of (paper) bills of credit and its assent to emission of bills of credit with a legal-tender provision. This opened the door to further issues of various kinds of government paper money, backed or unbacked by metal. It opened the door to irredeemable government money and to central bank money.

There should be no question and no disagreement among unbiased students of the Constitution and money that these government actions re-introduced into government policy a variety of currency finance or inflationary finance as a means of financing government activities. The pre-Civil War political economy relied on metallic money and bank money, both privately-generated. The government, starting in 1862, moved the political economy of America away from these constitutional kinds of money, toward and into unconstitutional state-money.[105]

This chapter continues to provide its readers with a summary of Edwin Vieira Jr.'s *Pieces of Eight: The Monetary Powers and Disabilities of the U.S. Constitution*. This chapter covers pp. 561-670. All page references in parentheses are to the second edition of Vieira's work. It is at times necessary to introduce material and analyses of my own. I take full responsibility for any errors and omissions in the resulting hybrid. The goal is to render accessible

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[105]The creation of the National Banking system, to be reviewed in a later article, is a further instance of this transition. Georg Friedrich Knapp, in his 1905 book *The State Theory of Money,* associated this "state money" or "chartal money" with the state's going to war, but any reason for state spending suffices. Ludwig von Mises, in *The Theory of Money and Credit*, criticizes the state theory of money for its inability to explain prices. This controversy in economics rages on to this day in new forms, such as the debates concerning the fiscal theory of the price level.

to a wide audience an accurate and clear rendition of the main matter under consideration, which is the U.S. Constitution and money.

**Legal Tender and the Constitution**

If person P borrows from person Q, and Q agrees to be repaid in copper, then copper is the lawful tender for their contract. In *private* transactions, a proper (or lawful) statute or law recognizes as lawful tender that which the parties themselves have agreed to.[106] The legal tender (p. 129) in these exchanges "means no more than the thing the [government] law will require a creditor to accept from his debtor in satisfaction of a monetary debt – typically, the money in which the parties themselves denominated the debt." The properly-functioning government and courts, in such private cases, do no more than enforce the privately-constructed contracts. In private transactions, law adheres to what people privately use as money or an exchange medium.

If person P owes taxes to the government, the payment is not a private transaction. In these government-involved transactions, the legal tender is what the government requires be paid to it by law. In the U.S., the Constitution is the supreme law, and the legal tender required by the Constitution in these cases is gold and silver Coin based on the dollar as the money-unit of account.[107]

When private transactors choose to denominate payments in dollars, the legal tender becomes dollars. Does this mean literally the *silver* dollar that is the U.S. standard, or does it encompass *other* silver and gold coins, whose metal content is the equivalent to that in the number of dollars owed? Since courts have to decide on damages in cases where payments are contested, they inherently have a power to declare what the legal tender is in court cases. Since the Constitution requires just compensation under due process, the courts are instructed to choose payments that comprise fair market value, i.e, a payment that is a full economic recovery of what is owed. They can decide fairly and

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[106]A statute that prohibits mutually agreeable clauses calling for payments in gold or other media of exchange is legal, by definition as a statute. Nonetheless it is improper and unlawful. The U.S. had such statutory law between 1933 and 1977. A statute that changes the monetary terms of the contract, after the fact, from gold to United States Notes, for example, is unlawful.

[107]See chapter I of this book and below for proofs of this statement. The existing U.S. legal-tender law, provided at the end of this article, is very different.

choose *all gold and silver coins* if they are properly regulated in value, which the Constitution instructs Congress to do. Hence, silver and gold coins in general, including foreign coins, with values properly regulated, are or should be legal tender.

Article I, Section 10 says that if States make anything a legal tender in payment of debts, it has to be gold and silver Coin: "No State shall...make any Thing but gold and silver Coin a Tender in Payment of Debts..."[108] At the same time, the federal government has the duty and power to coin gold and silver and to regulate the values of all such coins, including foreign coins. This implies that *all* gold and silver coins can justly serve for payments in court cases and in private contracts that call for dollar payments.

The common law understanding in 1789, implicit in the coinage power of the government, as in England, was that these coins were legal tender at their value by weight. When the Constitution instructs the States to make nothing but gold and silver a Tender in Payment of Debts, it proscribes their making bills of credit (paper money) a legal tender while also showing that the Constitution tolerates gold and silver being a legal tender. But, since the Constitution is the supreme law of the land, the federal government cannot make something a legal tender that conflicts with the prerogative of the States to make gold and silver a legal tender; so if the federal government has any legal-tender power, it can be to make *only* gold and silver a legal tender. Now, since the Constitution gives to the federal government the power to coin Money and regulate coin values, and that power implicitly carries with it the common law notion that such coins are a legal tender, the federal government *does have* a legal tender power, and that power is restricted to gold and silver coin.

This explains why, although the Constitution gives no explicit power to the federal government to say what is or is not legal tender, still the Coinage Act of 1792, Sec. 16 reads

> "That all the gold and silver coins which shall have been struck at, and issued from the said Mint, shall be a lawful tender in all payments whatsoever, those of full weight according to their respective values [weights] herein before declared, and those of less than full weight at

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[108]This retains for the States a portion of their pre-constitutional legal-tender power. It proscribes making bills of credit a legal tender.

values proportional to their respective weights."

The understanding built into the Coinage Act of 1792 is that if a private contract has not expressed a different tender, which it may, or if it uses dollars as a tender, then the Mint's gold and silver coins are a legal tender. It accepts the common and common law understanding of the time, embodied in the Constitution, that gold and silver are money and are an acceptable tender and means of exchange. The Constitution makes it clear that bills of credit are neither acceptable money for the governments, federal and state, to emit, nor can they be made acceptable legal tender. Only gold and silver can serve those purposes. The legal-tender cases after the Civil War overturned this understanding.

## Borrowing Money Distinguished from Issuing Money as Bills of Credit

Article I, Section 10, Clause 1 of the Constitution says that "No State shall...emit Bills of Credit." Neither does the Constitution grant power to the U.S. government to issue Bills of Credit. The Constitution disables any American government from issuing bills of credit.

What are government-issued bills of credit? They are a paper medium of exchange, or what people call paper money, that the government emits (or issues) that are intended to and/or actually do circulate as money. In short, American governments are prohibited from issuing paper money.

Bills of credit have no *single* defining feature. They have several features, each of which may or may not be present. Hence, if we try to define them by a single feature, it could be absent and yet the bills could still be circulating as money. Their potential features include denomination (usually low), rate of interest (usually absent), transferability (usually easily transferred), redemption date (usually no redemption date or redeemable on demand), and legal-tender quality (may or may not be present, partially or wholly).

The Constitution empowers Congress "To borrow Money on the credit of the United States." The Money it may borrow is silver and gold coin, also known as specie. Government borrowing entails an inflow of Money now followed by a promised outflow of Money at a later time. That is the nature of any Money loan. Capitalizing the word Money emphasizes that the Money is specie.

Borrowing Money involves issuing a credit in exchange for Money. The security issued in borrowing is sometimes called a bill (and sometimes a note or bond or loan or some other term.) This overlap of terms does not make borrowing Money the same as a bill of credit. Borrowing differs from an emission of a bill of credit in two main ways. First, borrowing Money means the borrower gets some existing Money from the lender, which the borrower intends to spend. Second, the security or loan certificate is not intended to and/or does not circulate as a medium of exchange. It can be sold to get Money, but it itself is not Money and doesn't circulate in its place.

By contrast, the government that issues a bill of credit *avoids* immediately transacting in Money. It exchanges the bill of credit in return for some goods or services. It *uses* the bill *as paper money* instead of Money. There is no initial receipt of Money as there is in borrowing Money. For example, the government pays soldiers with its bills of credit. The government does not intend that the bills of credit be immediately redeemed for specie that it will pay out. If it wanted that, it would pay out specie and not go through the roundabout emission of a bill of credit. It wants the bill to circulate hand-to-hand as currency. It wants to *defer* redemption and payment in Money. It wants the paper money to become a Money substitute in everyday exchanges.

Borrowing Money in a Money loan is an exchange of Money received now for the promise of Money paid out later, without the security circulating in Money's place in everyday exchanges. Issuing a bill of credit is obtaining a good or service now for the promise of Money paid out later, with the bill of credit intending to and/or actually circulating as a Money-substitute in everyday exchanges.

Rep. Vallandigham, speaking on Feb. 3, 1862 on the proposed emission of legal-tender notes, makes this very distinction:

> "Therefore the Government must fall back upon Treasury notes for its present support. But a single question is presented: what shall be their form, and how shall they be floated? But inasmuch as the Government has no money, no gold and silver coin – these notes, incapable, therefore, of being the representatives of money, must take its place as a substitute. They must become currency, and pass or 'run' from hand to hand. But Treasury notes bearing interest and payable at a future day, are not fitted to run or pass as money. They are as mere ordinary promissory notes; and though often issued in this form – and indeed

never before in any other, except once, within the last fifty years[109] – they never at any time passed into general circulation or even circulation at all. They are a particular form of loan or indebtedness or security, and fit subjects for speculation on the stock exchange, but are neither money, nor the representatives of, nor a substitute for money...Therefore, intending that Treasury notes should circulate and become a sort of currency, this bill proposes, as did the act of July, 1861, that they shall bear no interest and be payable in gold and silver..."

**Demand Notes, Legal-tender Notes, Greenbacks**

During the Civil War, the government issued very large amounts of two kinds of bills of credit: demand notes and legal-tender notes, also known as United States Notes.[110] They were nicknamed "greenbacks". Being bills of credit, whether or not they were made legal tender, they were unconstitutional. When they were made legal tender, that meant that by law they *had* to be accepted as payments for debts[111] The Act of February 25, 1862 read in part:

"...and such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall

[109]The reference is to Treasury notes issued in 1815 that were arguably bills of credit, and only saved from being so by their rapid conversion into 7 percent bonds. Before 1861, the Congress legally authorized borrowing Money via Treasury notes, but the government did not issue bills of credit. It stayed within the constitutional bound that forbids the emission of bills of credit.

[110]Short, readable, and recommended expositions of the demand and legal-tender notes are here and here. They look very accurate, although I can't vouch for every statement. One may also usefully consult Wesley Clair Mitchell, *A History of the Greenbacks*, (1903); William Graham Sumner, *A History of American Currency,* (1878); Albert Sidney Bolles, *The Financial History of the United States, from 1861 to 1885*, (1894); Alonzo Barton Hepburn, *History of Coinage and Currency in the United States and the Perennial Contest for Sound Money*, (1903).

[111]Some sources on legal tender include Sophonisba Preston Breckinridge, *Legal Tender A Study in English and American Monetary History* (1903); Sidney Webster, *Misuse of Legal Tender* (1893); and Jörg Guido Hülsmann, *The Ethics of Money Production* (2008).

> also be lawful money and a legal tender in payment of all debts public and private, within the United States, except duties on imports and interest as aforesaid..."[112]

The first part says that the U.S. will accept the notes as payments owing to it except for import duties. They comprised a very large share of U.S. revenues, and the U.S. wanted to be paid in specie for those amounts owed it, as it was basically out of Money. To accept one's own notes as payment for what is owed one is a standard set-off procedure among private parties, but the government is prohibited from issuing notes that circulate as money and making them a legal tender even for debts owed to it. This is because it is forbidden from issuing bills of credit.

The next part says that the U.S. will pay interest in coin on its debts. This was to keep up their value and not heap paper upon paper. Past debts called for coin. Not to have paid coin on future debts would have undermined the credibility of such issuance.

The last part covers the first part and expands upon it greatly to private transactions, where it says *a legal tender in payment of all debts public and private*. This is a very strong provision and a radical departure from both the Constitution and the country's monetary history between 1789 and 1862. It means that, not only will the government accept the notes (apart from import duties), but also that people can pay private debts that they owe with the notes and creditors must accept the notes in payment. Furthermore, by making the notes "lawful money," which means here official money of the U.S. and to be regarded as such in other statutes involving money, the greenbacks can enter the banking system and be used as reserves and as base money upon which banks can issue their own derivative money in the form of bank notes.

We now focus on the debate in Congress that preceded the Congressional authorization and government issuance of the greenbacks. Then we examine the Supreme Court's assessments of their constitutionality. Some of the debate arguments appear in the Supreme Court opinions.

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[112]The term "lawful money" is often ambiguous. See here.

### Congressional Debate on Legal-tender Paper Currency

Vieira's summary of the debate is on pp. 564-591.[113] Additional summaries are available.[114] At the outset and elsewhere, Vieira emphasizes that he is not analyzing the debates in order to understand either the statutes or the Constitution. He views that as inappropriate and cites Supreme Court language to the same effect. The goal is to see how the speakers treated the constitutional powers. His objective is more to find out what kinds of ideas got us to where we are today, which is that we are looking back at a rather long history of legal-tender paper money that was disabled by the Constitution but still occurred. That understanding is a means to the end of finding ways back to sound constitutional money.[115]

I begin with a brief recounting of what some of the speakers said, so as to

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[113]All the speeches can be accessed online in the *Congressional Globe*. Some specific links to some important speeches: Mr. Spaulding, here (p. 523); Mr. Hooper, here (p. 615); Secretary of the Treasury, Mr. Chase here (p. 618); Mr. Morrill here (p. 629); Mr. Conkling, here (p. 634) and also here, (p. 691); Mr. Bingham, here (p. 636); Mr. Pike here (p. 656); Mr. Alley, here (p. 658); Mr. Wright here (p. 663); Mr. Horton here (p. 663); Mr. Kellogg here (p. 680); Mr. Edwards here (p. 682); Mr. Shellabarger here (p. 690); Mr. Lovejoy here (p. 691); Mr. Walton, here (p. 692); Mr. Fessenden here (p. 764); Mr. Collamer here (p. 767) and also at p. 770; Mr. Sherman, here (p. 789); Mr. Cowan here (p. 791); Mr. Bayard here (p. 795); and Mr. Sumner here (p. 797).

[114]Rep. Elbridge Gerry Spaulding, who chaired the House Sub-Committee on Ways and Means at the time the legal-tender act was passed, assembled many useful materials and debate speeches in *A Resource of War – The Credit of the Government Made Immediately Available History of the Legal Tender Paper Money Issued During the Great Rebellion* (1869). There is further literature on the debates. One such article is Ajit V. Pai, "Congress and the Constitution: The Legal Tender Act of 1862," *Oregon Law Review* 77 (1998), 535-600. A brief assessment by historian James Ford Rhodes appears here. W.C. Mitchell's review of the debates is on pp. 51-68 of his history of the greenbacks, op. cit. in note 2. Francis A. Walker and Henry Adams have an excellent essay that criticizes "The Legal-Tender Act" (1870).

[115]One of Vieira's ongoing projects is to have States introduce specie as an alternative currency. See here. A broader objective held by others is to find ways to monetary freedom that involve private money alternatives, this being a condition that is both desirable in itself and also as a means to enhancing liberty all the way around. See here for some articles in this vein and here. There is also a literature on free banking, with such proponents as Kevin Dowd, George Selgin, and Pascal Selin. More radical work on money and banking includes William B. Greene and Gian Piero de Bellis.

provide a flavor for the main debate elements. This will be followed by a look at Vieira's debate summary.

Sen. Fessenden, who was against the legal-tender stipulation, didn't go into the constitutional issue. He began by stating what the pro-legal-tender advocates argued, which was "absolute, overwhelming necessity." He then argued against the necessity. He alluded to taxing the people. This would also be a more honest measure. He then suggested that public credit (debt issuance) sufficed without the need of being made legal tender, and that the legal-tender clause actually undermined public credit. Credit, he noted, rested on capacity and willingness to pay. The capacity was present, he asserted, because the debt of the country was not great and the debt capacity of the country very large due to its productive capacity and potential, even with one part of the country being separated from the other. The willingness to pay had always been present, as the country had never defaulted on its debts and had paid them down measurably, that being the policy of a republic. The country could surely pay the interest on the debt, which would keep creditors happy. He assessed the war effort as not having gone well at the outset, but that, he said, was not unusual. The army and navy were now well organized.

Fessenden then raised objections against the legal-tender aspect. It surely cannot improve the country's credit standing. It is a confession of bankruptcy, signaling that the country cannot borrow without forcing its credit instruments on the nation. It is in its essence a wrong. A man who owes money will pay his debts to another man in the greenbacks, which are bound to be selling at a discount to gold and silver. The creditor will lose and will have no way to recover what he has lost. It must change the value of property: "What is the result? Inflation, subsequent depression, all the evils which follow from an inflated currency." This, he said, already had happened in the confederacy. The inflation would hit the poorer people the most.

Sen. Collamer was against both the emission of bills of credit and the legal-tender quality being attached to them. His position was that he had taken an oath to support the Constitution. Since soldiers were willing to risk their lives to save it and since the rebels were trying to overthrow it, he thought that necessity was no excuse to break it. A legal-tender clause enables men to break their private contracts. If Congress does that, why won't potential creditors infer that Congress also will break its contracts, and won't that undermine public credit? Congress was impairing the obligation of contracts, forbidden to the States by Article I, Section 10. Collamer went on to cite Justice Story's

history of bills of credit.[116] The Constitution never intended Congress to have a power by which it could impair debt contracts. It would be a useless power tending only to injustice. Since the prohibition to the States of making anything but gold and silver a tender occurred in the context of ruinous inflation caused by State emissions *and* emissions by the Continental Congress, it made no sense that the Convention would have forbidden such emission to the States and allowed the federal government the power to debauch the currency, Collamer added. He recounted the text of the Convention proceedings, ending up with the vote of 9-2 to strike the words "and emit bills" in the section on Congressional powers. Can it then be considered an incidental power under the necessary and proper clause? Collamer derided the notion that it was a power under the commerce clause, for it actually acted upon debtor-creditor relations within the states. He argued that the legal-tender power could not be incidental to borrowing, for that required borrowing *on the credit* of the United States. For that there have to be lenders who act *voluntarily.* What happens, however, is that some creditor ends up holding the note, whose nominal value has been tendered to him to extinguish a loan, but whose market value is lower than the nominal value. He becomes a forced lender to the government and lacks assurance of redemption in Money, which his debt contract had called for.[117]

Rep. Conkling observed that if such a power to make debts into legal tender had existed in the Constitution, it would have been discovered before now and resorted to, for there had been many occasions to do so. Apparently, "the uniform and universal judgment of statesmen, jurists, and lawyers has denied the constitutional right of Congress to make paper a legal tender for debts to any extent whatever." The measure is "retroactive in scope. It reaches back and strikes at every existing pecuniary obligation." This *ex post facto* aspect makes it "of very doubtful constitutionality." Conkling cited a letter from the Attorney General, in which the latter asserted that the Constitution contains no prohibition of such a thing. In rebuttal, Conkling instructed everyone (yet again) that the Constitution "is an instrument of delegated and enumerated powers, and Congress has no powers except those which the Constitution confers." He suggested that speculators will buy up depreciated greenbacks for

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[116]See §1351 to §1366 here and §486 here.

[117]Collamer's analysis is correct. The legal-tender provision attached to the bill of credit is a put option. The holder can put the bill to a creditor at the face value of the bill, even if the market price of the bill is less than the face value.

the purpose of paying off debts, and that borrowers who contract debts and expect to pay them off in greenbacks may one day find that Congress shifts position and requires specie as payment.

Rep. Spaulding, who fathered the bill, had, among others, argued that what the government *called* or *stamped* money *was* money:

> "Gold and silver by long practice...has become the legal money of the world in all commercial transactions. Its real intrinsic value is not as great as that fixed upon it by Governments...Any other metal or thing that should be stamped, and its value regulated by all the Governments of the world, would pass equally well in all commercial transactions as gold and silver, although not intrinsically as valuable..."

Conkling asked him, if this were so,

> "why was it that the brass guineas of James II would not pass for guineas?...Why should we not make our dollars out of fifty pennies' worth of metal, and cause them to pass? Why was it that the Continental money, with an edict of Congress that whoever refused to take it at par should be held an enemy to his country; why, with such value affixed, did Continental money become so worthless?"[118]

Rep. Hooper, who favored the bill, began with a patriotic appeal to support the "necessary measures." He made no bones about the issue being money: "The United States notes...are not to bear interest, but are to be issued and received as money...and these notes are to be a legal tender." After outlining the taxation and national banking measures also before the House, he argued that the Government should not rely on ordinary bond issues because the interest rates would be too high. The Government would be dependent on the market, i.e., lenders. "To render the Government financially more independent, it is necessary to make the United States notes a legal tender."[119]

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[118]Evidently, something stamped as Money does *not* "pass equally well" as gold and silver anymore than a brochure that describes a one-bedroom house as a mansion can make the one-bedroom house sell at a mansion price.

[119]This, of course, tells us that making them a legal tender was *not* necessary. It was a choice made to avoid market required returns and a market discipline that was constitutionally mandated.

Rep. Morrill was against the bill, beginning by saying it was "a measure not blessed by one sound precedent, and damned by all." He noted that the legal-tender provision would undermine confidence among creditors. He then forecasted an inflation-depression cycle would ensue after such a large currency issue. He recollected that the monetary expansion of 50% between 1830 and 1835 led to the "terrible collapse" in 1837 "from which the country failed to recover in less than ten years." He observed that the power was not given in the Constitution. At best it was "an inferential or doubtful power." He implied that the advocates were merely searching here and there for a place to lodge it. He said that Congress had ample means to raise funds through a legitimate power, which was taxation.[120] He observed that the paper money would drive gold out of circulation. He criticized Mr. Alley's contention that debasement brought prosperity. He corrected the record by observing that England, with its suspension, had not made notes of the Bank of England a legal tender. Austria's paper fell by 40 percent when it made it a legal tender. The resumption of specie payments in England in 1824, he charged, created "an era of commercial ruin and individual distress." He predicted that further issues of paper would be forthcoming, and that this would be the easier road to take than taxation. Morrill made the argument that the law would be an *ex post facto* impairment of contracts.

Rep. Alley said that his assent to the measure was due to "uncontrollable necessity." The added volume of payments generated by the war required more currency. Reliance on banks meant using "their irredeemable bills at ruinous rates." During the War of 1812,

> "The Government was in great distress...Its securities sold for eighty cents on the dollar, payable in irredeemable bank paper, which had depreciated about twenty per cent. Capitalists who purchased the securities of the Government at such ruinously low prices realized immense fortunes out of its necessities, and millions upon millions were thus wrung from the hard earnings of a patriotic people; and we

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[120] A number of sources suggest that the Treasury Secretary, Salmon P. Chase, "repeatedly blundered," (p. 562) in Vieira's words. It seems that he did not market government debt properly. He did not deal with the banks properly, and he ruled out potential tax increases. Subsequently, we look at his role in fathering the national banking system. He was not financially adept. This suggests that what may have seemed necessary to him when he recommended the legal-tender provision to Congress was not necessary at all. Lincoln chose Chase for political reasons.

> shall have a similar state of things again if the short-sighted policy of the opposition prevails."

This passage implicitly argued *against* necessity even though it championed necessity. A high demand for loans, carrying enhanced risk and to be obtained in a very short period of time, was raising the government's borrowing rate of interest. Like Chase and some others, Alley didn't want to issue credit at the high or higher interest rates required to bring forth specie. They didn't want to pay the costs of war in this way, i.e., through the market. To circumvent the market-required yields that they thought too high, they proposed to add the legal-tender aspect to a paper money issue in order to render it more attractive as money and defer having to redeem it in the specie that they lacked.[121]

Alley argued that the Constitution should not be construed strictly because Congress had not done so under the Articles when it started the Bank of North America, because Hamilton thought that it was allowable "whenever of paramount necessity for the preservation, or prosperity even, of the Government," and because Jefferson and Madison had "never hesitated, when the necessities of the Government were overwhelming, to depart, from their favorite views, and adopt, practically, those of the Hamilton school..." And, he added, constitutional provisions have "always in this country, whenever occasion required," been easily broken like threads on Samson's arms "before the resistless will of the people."[122] His next argument was that the nation should not use the volatile banking system for currency, citing the ups and downs of the 1812-1837 era, but should go back to currency finance, in which the government controls and issues its own currency and simultaneously raises taxes to provide support to the issues and limits them. Just as banks issue demand notes on long-term illiquid assets, he suggested that the government issue its notes on its long-term taxing power rooted in a productive people.[123]

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[121]Unlike today, the government had no central bank to monetize its debt issues, issue the currency indirectly, and hold down the interest rate. It had directly to inflate by issuing U.S. notes, and this was and is unconstitutional.

[122]Under these arguments, the Constitution doesn't count for much of a restraint on government powers. The government need only break it and declare that it is doing the will of the people. The constitutional republic becomes a variety of unbounded democracy.

[123]This monetary system, besides being unconstitutional, fails to constrain money issues of government. Alley himself noted that the Massachusetts issues in 1690 swelled from 50,000 pounds to 2 million in 12-14 years.

Let's turn to Vieira's observations and summary. In the debates, he says, some speakers viewed the legal-tender notes as constitutionally barred. Another group had greater doubt and supported them as a necessity or as an emergency issue or as a temporary expedient. A third group supported them with broad-reaching theories of the sovereign power of Congress.

Spaulding, Hooper, Walton, and Sherman all appealed to necessity. Sherman said the banks would not lend more except with the legal-tender provision. Major banks wanted the greenbacks to be legal tender to take the place of their suspended specie payments.

Spaulding and Sherman ruled out selling ordinary bonds at a discount (higher yields), while Walton and Edwards thought taxes impracticable. This left, they argued, only legal-tender notes. Their opponents, Wright, Collamer, Lovejoy, Bayard, Fessenden, and Conkling argued the lack of necessity. Wright said that advocates hadn't proven their case, that the country was wealthy, and that the government was simply unwilling to tax. Taxing enough, Bayard argued, would strengthen the security of bonds and allow them more easily to be issued. Conkling said that a set-off provision was enough to support the bills.

Thomas, Cowan, Collamer, and Conkling pointed out that the legal-tender provision is a profession of weakness or even bankruptcy.

Legal-tender advocates like Kellogg, Pike, Alley, and Shellabarger were on weak grounds in forecasting that the issues would be limited and not cause inflation and then a boom-bust cycle. Fessenden, Collamer, Thomas, Morrill, Horton, and Vallandigham pointed out the various perils of paper money, including more and more issues, inflation harming small savers, a greater reluctance to tax, a growing debt, and teaching corruption and dishonesty.

Horton and Lovejoy countered the notion that the government could succeed in making Money out of paper promises that were stamped money or made into legal tender by law. This idea was put forward by McDougall, Hickman, Bingham, and Spaulding. Sen. Howard thought that the power to borrow necessarily depended on the power of the government to declare that its paper was of equal value to silver and gold.

Sen. Sumner insisted, all logic and evidence to the contrary, that the Congress was empowered to emit bills of credit because it was not prohibited.

Spaulding argued that the legal-tender part of the note issue was necessary and proper in order to provide for the support of the Armies and Navy that the Constitution empowered Congress to do. Vieira points out that any necessary and proper power must, as Marshall wrote in *McCulloch v. Maryland*, be appropriate, not prohibited, and consistent with the letter and spirit of the Constitution. It would not be appropriate, for example, to raise an Army by empowering recruits to plunder towns in order to feed themselves. Hence, Spaulding still had to show that the legal-tender provision was appropriate, not prohibited, and consistent with the Constitution.

Walker and Adams, in their essay on legal tender written in 1870, point out that each proponent of the necessity of legal tender contradicted himself and posited a choice. They just didn't like the alternative, which was to borrow at the market rate of interest. For example, Mr. Spaulding, after saying the measure was one of necessity, not of choice, deeper into his remarks let slip:

> "We have this alternative, either to go into the market and sell our bonds for what they will command or to pass this bill...If you offer to the people, and put on the market, $300,000,000 more to the highest bidder...they would not be taken except at ruinous rates of discount."

In sum, the proponents of the legal-tender paper currency (p. 591) "could muster no sound constitutional argument or precedent in favor of the Greenbacks." To justify the measure constitutionally, they attempted without argumentative success to find a home for the legal-tender provision as a necessary and proper power. They fell back on pleas of necessity, which meant mainly that they refused to impose the required taxes and refused to borrow at the required market yields. They urged a degree of government independence through inflationary finance that the Constitution precluded. They could not acquire this independence of the government without breaching the Constitution.

The legal-tender Act was a movement away from free-market money and into State-money. Its advocates naturally stressed its fitness, its practicality, and its advantages. All the while, many legislators knew that it was unconstitutional, which is why they stressed necessity. Many revealing remarks show that they also knew that necessity was not the issue either, rather it was a reluctance to have to finance in the market at high rates of interest.[124] State control over the

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[124]See Walker and Adams, *The Legal-Tender Act*.

currency was a *power*, not *required* by necessity, but *desired* so that the State could become more independent of the constraints of financing through markets by borrowing and through financing through taxation. Freedom of government action was its goal.

The Senate, on Feb. 13, 1862, passed the legal-tender notes bill by a vote of 30 to 7. The House passed it a week earlier by a vote of 93 to 59. After some differences were reconciled, Lincoln signed the first bill authorizing bills of credit issued by the federal government and the first such bills carrying a legal-tender status.

### Intermediate Court Cases

Prior to the legal-tender cases, the Supreme Court heard a few other cases with monetary relevance. In *Bank of New York v. Board of Supervisors* (1868), the Court found that the greenbacks were U.S. notes that were "obligations of the United States." "They are, therefore, strictly securities."

> "The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollars had before been recognized by the legislation of the national government as lawful money."

Here the Court correctly maintained the distinction between a coined dollar and a promise to pay a dollar, even though the latter had been made a legal tender on a par with a coined dollar.

In *Lane County v. Oregon* (1868), it held that the States could collect taxes in gold and silver coin, and that the payment of "debts" with legal-tender notes didn't include taxes. The Constitution did not abridge the taxing power of the States in this respect. This implies, Vieira notes, that Congress cannot make a State pay its creditors in United States Notes, because if the State's taxing power can't be interfered with by Congress, neither can its constitutional power to make gold and silver coin a legal tender.

*Bronson v. Rodes* (1868) concerned a contract calling for "dollars payable in gold and silver coin, lawful money of the United States." At issue was whether the debtor could pay it in legal-tender United States notes instead of coin. State courts had split on this question, with the majority ruling that the debtor could

pay in notes. The Supreme Court ruled that the debtor had to pay in coin, and that the U.S. notes did not suffice because of the express terms in the contract. The Court also noted that the coinage laws still held in full, so that there were two kinds of legal tender that were not economic equivalents, in which case there was no reason for saying that a contract in terms of one could be satisfied by the other. Justice Miller, in his dissent, argued that the U.S. notes were legal tender for all debts then due to be paid under existing contracts, without regard for the intent of the parties at that point. This didn't rule out making future contracts with silver and gold clauses.

*Butler v. Horwitz* (1868) elaborated further, spelling out that a contract to pay in gold and silver is well-understood to be "in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count." It does not call for delivery of an abstract item called money or dollars or some other thing like a note or a promise that becomes money by virtue of an impress being made on it by the government.

### Justice Strong's Opinion in *Knox v. Lee*

The first case on the legal-tender Acts, which was *Hepburn v. Griswold* (1869), found the legal-tender provision unconstitutional. Salmon P. Chase had become Chief Justice. He reversed his position as Secretary of the Treasury when he had, somewhat reluctantly, accepted legal-tender notes. The opinion was on narrow grounds and, in any event, shortly reversed when the Court's composition changed. The reversal came in *Knox v. Lee* (1870), which also ruled on *Parker v. Davis.* Vieira says "*Knox* was an historical, economic, legal, and philosophical travesty and disaster of the first magnitude."[125]

Justice Strong, who wrote an opinion for himself and three other Justices, led off with

> "If it be held by this Court that Congress has no constitutional power, under any circumstances, or in any emergency, to make Treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become

[125] An earlier article of mine examines the alarming doctrine of inherent powers that is proposed by Justice Strong in this case. See also Philip Newcomer.

> indispensable, even if they were not when the acts of Congress now called in question were enacted."

He is saying that there are necessary instances when Congress has to dispense with the Constitution (or some constitutional restrictions) in order that the government preserve itself. This is virtually a doctrine that is self-contradictory, because "the government" does not exist outside of the Constitution and cannot exist in a constitutional form by dispensing with that which shapes it. Subsequent Justices have repeatedly rejected this doctrine. There is nothing in the Constitution that allows the government to dispense with the Constitution under any circumstances or emergency. Martial law, for example, is ruled out and a constitutional impossibility. That is not preservation of "the government" but usurpation by a different kind of government that is unconstitutional. The American people did not create a government with a mandate to preserve itself with anti-constitutional actions at their expense. Such a creation, were it in place, would be very dangerous to their rights, undercut the Constitution, and lead to a powerful government over them.

Regarding Treasury notes, his parenthetical claim that all other independent sovereignties have the legal-tender power for their paper is simply false. It is also irrelevant. What matters is what the *U.S. Constitution* allows, not what other countries do.

The Constitution doesn't provide for contingent unconstitutional means that become indispensable to preserve the government. It provides for orderly and lawful ways to deal with all sorts of situations, and where experience suggests that other ways are beneficial, it provides for amendment procedures to alter the Constitution. In other words, preservation of government via changing the government is in the hands of the people acting lawfully, not unlawfully.

All must *not* admit that legal-tender paper currency is an indispensable means of government preservation. It is *a* means of finance and one with large known negatives that were pointed out again and again during the debates and afterwards. Financiers like James Gallatin told Spaulding that the government could sell bonds at market value. If anything, the bill's critics under-estimated the negative long-term constitutional, political, and economic effects of this measure that have occurred.

Strong next introduced a straw man, which was that

> "if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice."

This was false. If the Court had ruled that the legal-tender Acts were unconstitutional, it could have declared that contracts made under the Acts could be satisfied using amounts of gold and silver that exchanged for the contracted amounts of greenbacks at the time the contracts were made, since these past exchange rates were known. Strong then used this false premise to bolster his case for going easy on what Congress had done:

> "The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal-tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears."

In other words, given constitutional doubt on the question facing the Court, he chose to err on the side of making legal-tender notes constitutional because of the (entirely) fancied negative economic effects that he posited as being consequences of acting lawfully.

Next, he cited two statements issued in other cases to the effect that a court should defer to a legislature when constitutional questions are in doubt. In one of these, John Marshall had written that "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void." This is quite reasonable, but was the case against legal-tender notes one of vague conjecture? The dissents in this case use language that suggests the opposite.

Justice Strong put the question in this case as to whether Congress has the authority to "give to treasury notes the character and qualities of money." How slight is the constitutional implication for saying that it cannot, when its only explicit authority is to *coin* Money? Why isn't the shoe on the other foot? Why, in a case in which the government proposes to reverse 74 years of a constitutional money system, don't the advocates of a radical change that is, on the face of the matter, unconstitutional, have to show that *their* case is not one of such vague conjecture as inferring a power from far-flung clauses in the Constitution like the commerce clause? Why, in such a case, doesn't the Constitution take precedence over what a legislature is attempting to enact that

may well be unlawful?

Strong then proposed his theory of the Constitution and the government created through it:

> "Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy."

The allusion here is to the Preamble, which reads

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

His theory contains elements of truth and elements of untruth that undermine it. The Constitution does indeed establish a government with delegated sovereign powers ("in its sphere"). The *immediate* objective of the People indeed is to improve the government as compared with the government under the Articles of Confederation. But is that the *paramount* objective of the powers delegated by the People to the government and the disabilities and restrictions that are also written into the document? The improvement of government via establishing a new government under a new Constitution is a *means* to other ends, which are listed in the Preamble, such as greater ("improved") General Welfare, Justice, Tranquility, a common defence, and secure Liberty. Why else have a government?

Is *self-preservation* of that government likewise a dominant objective? Does the government have a right (a power granted to it by the People) to preserve itself at all costs, even that of ignoring the Constitution's provisions? Nothing in the Constitution says so or allows this. The situation is the opposite. The People have limited the government in many ways so as to assure that the government does not abrogate their rights, even at a higher risk of government not preserving itself, or in recognition that such self-preservation carries risks to liberty that the People do not wish to accept.

If the People could change their Constitution and government once, they can do it again. They can effectively dissolve it if they wish. There is no overriding objective of preserving government itself. Logically prior to that is that the People preserve their ability to decide upon the form and content of their government for their own ends. This is part of their set of rights.

It is true that the powers granted to the government, such as taxation and coining money and raising armed forces, keep the government alive and well ("capability of self-preservation"), but their ultimate object is *the good of the People ("general welfare')*, **not** *government per se.* The government's self-preservation is *bounded*. It does not allow a person to become President who is less than 35 years old. What if a remarkable 30-year old seemed to be the only person who could save the government? This is disallowed. It does not allow money to be appropriated for longer than two years to raise and support Armies. What if a longer period seemed to be required in order to preserve the government? This is disallowed. The Constitution affirms free speech. What if the government could only preserve itself by suppressing free speech? This is disallowed. What if the government thought that its preservation depended on issuing legal-tender paper money? This is disallowed.

The Constitution is a document that creates tradeoffs when it makes some rights absolute and disables some government actions and limits government powers. It trades off self-preservation of the government for other more important ends and considerations.

Strong's theory of government self-preservation as a paramount objective that overrides the limitations written into the Constitution falls apart upon scrutiny. It implies no constitutional limits to government power. His doctrine can only end up destroying the constitutional basis for the government.

Having posited that all the powers delegated to the government exist for the sake of the government itself, or at least for the sake of its own establishment and preservation, all those powers being what he termed "means for a common end" and "but part of a system, a constituent of one whole," Strong went on to a new and expansive interpretation of the laws necessary and proper to implement those powers. These implicit powers, he proposed

> "reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail..."

Do they? Is that what the Constitution says? Not at all. They are only such as to be necessary and proper for "carrying into Execution" the delegated (foregoing and other vested) powers:

> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Strong, writing for the majority, opined that

> "It certainly was intended to confer upon the government the power of self-preservation."

But not, as we have argued, in an unbounded way, not by enacting *any* laws that might help attain that end, and not by acting unconstitutionally and abrogating constitutional restrictions, not by destroying maintained rights, not by taking on powers reserved to the People and the States, and not by obliterating the proper boundaries of governments or their branches. In support of his statement, Strong cited Justice Marshall in *Cohens v. Virginia*:

> "A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always he tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, so far as its nature will permit, with the means of self preservation from the perils it may be destined to encounter."

Marshall was referring to the judicial power, but even taken out of context, there is a phrase here that Strong completely ignored that undermines his expansive interpretation: *"so far as its nature will permit."* The farsighted framers provided the means of self preservation of that Constitution so far as the nature of the Constitution itself allowed. If it disallows certain powers, that is its fundamental nature. They are not available as means of self preservation. Taxing and borrowing are allowed. Issuing bills of credit is not, with or without the legal-tender quality.

Strong's premise that the government's own self-preservation is the aim of the Constitution leads him to *read into* or *amend* the necessary and proper clause by adding the words "*necessary for its preservation*":

> "That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it the right to employ freely every means, not prohibited, necessary for its preservation and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article."

The clause actually allows only those means that are proper *and* necessary to effect the enumerated powers; not *every* means not prohibited (proper) – they have also to be necessary; and *not every means in the service of government self-preservation*. The latter goal is not present in the clause at all.[126]

Strong went on to propound *another* doctrine that can expand government power:

> "And here, it is to be observed, it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred."

The claim here is that undiscovered government powers lurk in the Constitution, not in specific words, and not associated directly with enumerated powers, but deducible from several or all the delegated powers.[127]

Having laid the groundwork for endorsing as constitutional any means that are necessary to preserve the government, Strong had only to argue that the

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[126]In order to justify what cannot be justified in the Constitution, which is to issue legal-tender U.S. Notes, the Court has either to read things into the Constitution, misinterpret it, insert foreign elements into it, or build up a case based on extending prior such endeavors.

[127]Strong cites *United States v. Marigold.* I omit a summary of Vieira's explanation (pp. 613-622) that *"Marigold* "proves no such thing." In this case, the Court claimed to discover a power to punish counterfeiting within the legislative power to coin money, even though Congress has a specific power "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States."

government's existence was at stake and that legal-tender notes afforded a means, not prohibited, to preserve that existence.[128] He began by arguing that in 1862 "The necessity [for money] was immediate and pressing," saying that neither taxation nor borrowing were available. This was not true, as explained earlier, and even in the Congressional debate, these alternatives were not ruled out. They just seemed unpalatable to advocates of legal-tender money.

Strong at first did not come right out and say that the notes were the *only* means available to finance the war. He said, let us suppose other means were available:

> "Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress..."

Here he had assumed away the key issue. He had already assumed or concluded that the notes were an appropriate means for government preservation. This left only a trivial objection that he could easily dismiss, which was that they may not have been the best means.

He then declared, without proof, that no other measures "could have met the exigencies of the case."[129]

Referring to *Veazie Bank v. Fenno* (1869), Strong made note of the Court's ruling that the federal government *could issue bills of credit.*[130] This left merely the legal-tender concern. On that issue, Strong began by an erroneous reading of the coinage power and by injecting the concept of *currency* as something apart from or encompassing more than the coinage:

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[128]The question of the constitutionality of such a means after the crisis is past and existence is no longer threatened is a loose end in his theory. The *Juilliard v. Greenman* decision in 1884 tidied up by finding that the legal-tender notes are constitutional even in times of peace.

[129]It seems incongruous to suppose that the government had power to issue legal-tender notes but lacked power to tax or borrow.

[130]In this case, the Supreme Court made the incredible and false statement that "And it is settled by the uniform practice of the government and by repeated decisions that Congress may constitutionally authorize the emission of bills of credit." This case overthrew 80 years of American monetary history that had been supported by the hard money provisions of the Constitution.

> “They claim that the clause which conferred upon Congress power ‘to coin money, regulate the value thereof, and of foreign coin,’ contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed.”

His errors here are as follows. First, he is saying that to coin money means that Congress declares by law what is money and/or has a power to say what thing has the uses of money. This is certainly a fiction. The money that Congress has the power to coin pre-exists the Constitution. It is gold and silver coin. The power of Congress is not either to declare what is used as money or what money’s uses are, but to coin it and regulate its value. Congress also can define the metal content of a standard dollar. Second, he is saying that the coinage power is “certain powers over the currency...expressly given to Congress...” He is alluding to unnamed powers such as making something legal tender. This too is a fiction. Currency is not mentioned in the Constitution, and the only allusion to it concerns counterfeiting “current coin of the United States,” which identifies currency, if at all, with coin.

Given the fiction that the coinage clause referred to government declaration of what is money and/or currency, Strong piled up further fictions to justify a legal-tender power:

> “So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own...”

Strong didn’t reference any sources here. Under that “general power”, he meant to include the legal-tender power. Even if this attribute were “an acknowledged attribute”, which it had not always been at that time or earlier, was American constitutional law to depend on what other nations, civilized or not, had done, or was it to depend on the U.S. Constitution and its recorded intent?

To clarify the actual situation, here are *all* direct references to legal tender

contained in Max Farrand's *The Records of the Federal Convention of 1787.*

Volume 1, page 137:

> "General Pinkney wished to have a good national Govt. & at the same time to leave a considerable share of power in the States. An election of either branch by the people scattered as they are in many States, particularly in S. Carolina was totally impracticable. He differed from gentlemen who thought that a choice by the people wd. be a better guard agst. bad measures, than by the Legislatures. A majority of the people in S. Carolina were notoriously for paper money as a legal tender; the Legislature had refused to make it a legal tender. The reason was that the latter had some sense of character and were restrained by that consideration."

Volume 2, p. 309:

> "Mr. Madison*,* will it not be sufficient to prohibit the making them [bills of credit] a *tender?* This will remove the temptation to emit them with unjust views."

Volume 2, p. 310:

> "Mr. Butler. remarked that paper was a legal tender in no Country in Europe. He was urgent for disarming the Government of such a power."

Volume 3, p. 350:

> "In Pennsylvania, their paper money was not a tender in discharge of private contracts. In South Carolina, their bills became eventually a tender; and in Rhode Island, New York, New Jersey, and North Carolina, the paper money was made a legal tender in all cases whatsoever."

Volume 3, p. 495, in a letter of James Madison, dated February 2, 1831:

> "The evil which produced the prohibitory cause in the Constitution of the United States was the practice of the States in making bills of credit, and in some instances appraised property, 'a legal tender.' If the notes of the State Banks, therefore, whether chartered or unchartered, be

> made a legal tender, they are prohibited; if not made a legal tender, they do not fall within the prohibitory clause. The No. of the 'Federalist' referred to (44) was written with that view of the subject; and this, with probably other contemporary expositions, and the uninterrupted practice of the States in creating and permitting banks without making their notes a legal tender, would seem to be a bar to the question, if it were not inexpedient now to agitate it."

Volume 3, p. 548, preface written by James Madison:

> "In the internal administrations of the States a violations [sic] of Contracts had become familiar in the form of depreciated paper made a legal tender..."

Justice Strong further elaborates his view of the relation between the State and money in this remark:

> "The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated."[131]

It is alarming to Strong if the State does not have this power:

> "...it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible, its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people... it might be argued, we say, that the gift of power to coin money and regulate the value thereof was understood as conveying general power over the currency, the power which had belonged to the states, and which they surrendered."

Strong holds to the modern or prevalent "State-money" notion which *wants* the State to have power over the currency and assumes it must have such a power even to be a State and survive as a State. The powers of taxation and

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[131]Strong misspeaks when he says "Whatever power there is over the currency is vested in Congress," for the States may make gold and silver a legal tender.

borrowing are not sufficient, in this view. In order to bring this about, despite the Constitution, it became necessary for Strong to read this power into the coinage power and transform it into a "general power over the currency."[132] True to the State-money view, he even *imagines* the that the power to "declare what shall be money" *had belonged to the states.* But as Vieira notes (p. 625),

> "The most the Colonies or States ever did in this regard...was to emit 'Bills of Credit' ostensibly redeemable in money – silver and gold coin – and to declare these 'Bills' (or those the Continental Congress emitted) to have certain values in money that neither the Colonies , nor the States, nor Congress coined."

Strong proceeded throughout his opinion on the basis that if a government action was appropriate to achieving a legitimate government power (and he thought the legal-tender power was), then if it were not prohibited, it was constitutional. On this basis, he dismissed a variety of objections to the legal-tender power, such as that they impaired contracts and were a taking under the Fifth Amendment.

Strong did concede that

> "The legal tender acts do not attempt to make paper a standard of value...It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value."

Vieira (p. 628) comments that this has "real constitutional significance" because it disqualifies *Knox v. Lee* as a legal precedent for irredeemable currency.[133] He adds (p. 630):

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[132]Congress in 1862 implemented this theory without expressing it in its full force. Strong's opinion articulates the theory much more openly and in much greater detail while attempting to argue for its constitutionality.

[133]Market quotations for goods, assets, gold, and silver quickly became in terms of the greenbacks, and, as they depreciated, gold rose in terms of the greenback dollar. Despite that market fact, it is true that the legal-tender Act did not fix a standard of value and did not regulate money values. Also, the greenbacks did not lack a backing that gave them value beyond legal-tender acceptability, because they had a tax foundation and there was an expectation of eventual specie resumption.

> "In sum, Justice Strong's opinion was a pastiche of economic, historical, and legal errors linked to an *anti*-constitutional theory of Congressional omnipotence."

### Justice Bradley's Opinion in *Knox v. Lee*

Justice Bradley concurred with Strong and added his own reasons. His conclusion that legal-tender notes are constitutional hinges on several faulty arguments. He began by reciting the nature of the national government and mentioning its array of powers. Then, as if it followed from his recitation, he made this leap:

> "Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such and as being essential to the exercise of its functions."

Here he threw away the notion that the Constitution enumerates powers delegated to it by the People, even though he had just got done saying that the government "was constituted by the people." He replaced it with the idea that the People ratified a "general government" that was representative of "every government as such," whatever such an ideal type of government means. And this "general government" is supposed to have "inherent and implied powers," although where they come from and how they are to be identified, if not by the Constitution, are not "self-evident" as he seems to think. After all, there have been hundreds of governments making all kinds of claims to power, many of which the Founding Fathers purposely eliminated from the U.S. government.

Bradley followed this faulty proposition with another:

> "They establish the *historical fact* that when the Constitution was adopted, the employment of bills of credit was deemed a legitimate means of meeting the exigencies of a regularly constituted government, and that the affixing to them of the quality of a legal tender was regarded as entirely discretionary with the legislature."

The Articles of Confederation authorized the United States in Congress to "emit bills on the credit of the United States," but the U.S. Constitution did not. They are not legitimate for *a* or *any* regularly constituted government.

Bills of credit and the boom-bust cycle they caused came under severe criticism at that time and afterwards, which is why the Constitution did not permit them as a matter of course for the new government. Legal tender was not an "entirely discretionary" choice "with the legislature." Congress, for example, in 1777 did not consider it had that power, for it recommended to state legislatures that they make its bills of credit legal tender (p. 83). In 1780 and 1781, Congress asked the States not to make the bills a tender except at current values in gold and silver, and then to repeal the legal-tender laws altogether.

Bradley's next error in legal logic was to argue that the lack of a prohibition in the Constitution implied that a power was present. The Constitution gave the government "all the powers before rehearsed" including "the sole control of the money of the country" and "expressly prohibiting the *states* from issuing bills of credit and from making anything but gold and silver a legal tender"; and the Constitution imposed no such restriction on the general government; therefore, "they intended to leave to it that power [of emitting bills of credit] unimpaired..."

Vieira argues (pp. 141-154) that the debate at the Convention shows that no such intent prevailed.[134] His conclusion (p. 151) is

> "of the eleven delegates whose remarks Madison recorded, *every one* enunciated the view that striking the phrase 'and emit bills' from Article I, Section 8, Clause 2 would deny Congress any power, under any circumstances, to create a *legal-tender* paper currency. As these speakers included both 'friend[s] to paper money' and its most uncompromising foes, their unanimous agreement on the operative effect of deleting the phrase 'and emit bills' from the Constitution is especially striking."

In addition to this, careful inspection of the Constitution shows *the opposite* of Bradley's contention that the omission implied leaving the power unimpaired. In five separate instances, powers are *explicitly denied the States* and then *explicitly granted to the U.S. government*. The power of making Treaties is explicitly denied the States and explicitly granted to the U.S. government; the same for Letters of Marque and Reprisal; the same for coining Money; the same for Imposts and Duties (without permission of Congress); the

[134]The debate appears at pp. 308-310 of volume 2 of Farrand, op. cit.

same with the army and navy (Troops and Ships). In the case in which the States are denied to emit Bills of Credit, this is *not explicitly* granted to the Congress. The logical inference is that the Convention, knowing that it was delegating powers to the U.S., decided, unlike the other five cases, *not to* empower the Congress to emit bills of credit. From this lack of empowerment to emit bills, it follows that it did not need an express provision that denied a legal-tender power attached to bills of credit. It being understood that gold and silver, as explained above, are a legal tender by the coinage of money, there was likewise no need to *grant* a legal-tender power to the U.S.[135]

Why then include the restriction on the States of making anything but gold and silver a legal tender? This accomplishes several things. It endorses and reinforces gold and silver as a lawful and legal tender. It makes certain that there will be a uniform money everywhere, which will be gold and silver. It closes the door to any loopholes by which the States might make something else a tender, which would amount to issuing their own currencies. It recognizes that the States have a sovereign role in dealing with debtor-creditor relations, and it limits the payments to gold and silver in implementing debtor-creditor relations.

Having decided to his satisfaction that the government could issue legal-tender bills of credit, most of Bradley's opinion went on with a variety of supporting appeals. He described some of the long history of bills of credit. That aspect of the case he construed as showing that such issuance somehow was a standard for governments and therefore a standard under the Constitution. His review was biased, however. While citing the praise of Benjamin Franklin, he omitted the many observations of the economic havoc wrought by the bills. Those would have shown that the delegates intended to prevent such future catastrophes by denying the power. He drew support for his position from the fact that the country had set up two national banks, despite the lack of an

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[135]The Constitution also forbids four actions to the Congress that it also forbids in Article I, Section 10, Clause 1 to the States: Bills of Attainder, ex post facto laws, laws impairing the obligation of contracts, and titles of nobility. Why did the Convention not forbid bills of credit? The five powers that it shifted from the States to the U.S. government are central concerns in the three main areas of governing: international relations, the sword, and the purse. Emitting bills comes under the power of the purse. Failure to shift the power to emit bills meant denial of that particular power of the purse, whereas borrowing and taxation are granted. The remaining four actions that are forbidden to both governments involve a different category of activities to which the emission of bills does not belong: due process of law and natural justice.

explicit provision concerning incorporation. He did not examine the constitutionality of those banks. He strongly repeated his conclusion several times, with such statements as "No one doubts at the present day nor has ever seriously doubted that the power of the government to emit bills exists...giving such bills the quality of legal tender follows almost as a matter of course." It does not seem to have entered his mind seriously to consider what the *Constitution* allows, or that the Constitution may have altered or eliminated the power under the Articles. Based on his notion that what was not expressly prohibited was allowed, he easily construed the emission of bills as constitutional. He was not concerned that such a doctrine leads to the constitutionality of a vast array of government powers.

Bradley did not think that the power to emit bills fell under the coinage clause. Like Strong, he didn't see it as an attempt to coin money out of a valueless material or to change the standard of value. He saw it as implicit in the power to borrow. In fact, a legal-tender bill of credit is a kind of receipt, usually but not always promised eventually to be paid in money, for goods and services. It has the unusual feature that creditors not involved in the initial transaction are forced to accept it as payment in lieu of gold and silver coin. This is not borrowing on credit, which calls for a voluntary receipt of funds on the basis that the lender believes in and relies upon the borrower's willingness and ability to repay (i.e., his *credit*). Bradley recognized that third parties would lose wealth. He viewed this as coming under the right of eminent domain. However, this theory doesn't fly. Just compensation in money for property taken by eminent domain is one thing, but an uncertain promise to pay in some other kind of certificate or bill of doubtful value that is spread through unnamed persons in society, is quite another. How can there be just compensation with legal-tender notes? Who is to keep track of the losses and compensate the people who lose value over time as the bill passes from hand to hand?

Bradley then inflated his argument, and the realm of government power, even further. He proclaimed, without showing where this power fell in the Constitution, that it was the job ("the duty") of the government, not just to coin bullion brought to the Mint, but to provide

> "A proper currency for the country, and especially of providing for the failure or disappearance of the ordinary currency in times of financial pressure and threatened collapse of commercial credit."

Like Strong, whose opinion looks forward to modern theories of State-money, Bradley looked forward to modern ideas of an elastic currency provided by the State or by a central bank.

He launched into a totalitarian theory of government:

> "It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services – the bodies and lives – of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country."

The Constitution allows no such "absolute control" by "government" and no such unrestricted right to military and financial power, under any circumstances, emergency or not. American government, first of all, is not a single and undivided unit. It has five parts. The national government has three parts. The States have powers. And the People form the fifth part. Of all of these, only the People are sovereign. Second, the Constitution is an instrument that legally connects to the Declaration of Independence, which clearly enunciates rights and limits abuses of government powers. Third, "independent national existence" pre-exists government. It does not necessarily require a high degree of government control over the sword and the purse. Fourth, the first ten amendments to the Constitution enunciate a subset (non-exhaustive list) of rights that limit government actions. Fifth, any exercise of government power inconsistent with the Constitution is legally void.

Both Strong and Bradley seem to have drunk from the same well of a strong nationalism and government. In providing extravagant claims of government power in their opinions, both went well beyond what they might have, even if they wished to justify the power of the government to emit bills of credit. They both seemed intent on solidifying a powerful government that could not be shaken or uprooted. It is possible that the Civil War helped to nurture these sentiments.

### Chief Justice Salmon P. Chase's Dissent in *Knox v. Lee*

Chase did not disapprove of bills of credit, as he had ruled them constitutional

in *Veazie Bank v. Fenno*. He disapproved of the legal-tender quality. This meant that he did not think it necessary and proper. Like Strong and Bradley, Chase did not think that the power to coin money carried any inference that the debts of the U.S. government could be made to pass as legal tender. The power, if it existed at all, arose from the power to borrow and the commerce clause. Chase maintained the same opinion (previously the majority but now the minority opinion) as in *Hepburn v. Griswold*, which was that the legal-tender provision impaired the obligation of contracts and "deprived many persons of their property without compensation and without due process of law."[136] The latter two objections he argued strongly.

Chase argued that the legal-tender quality was *not necessary* to achieve the circulation of the bills. He suggested that "the circulation of the notes was amply provided for by making them receivable for all national taxes, all dues to the government and all loans." This is the (correct) argument that such notes will circulate if they have a "tax foundation." If a note is good for paying a dollar in taxes, it will have *some* worth due to the demand for it as a means of paying taxes. If the notes are over-issued relative to tax collections, then that worth may sink. Chase well understood the necessity of limiting supply:

> "The real support of note circulation not convertible on demand into coin, is receivability for debts due the government, including specie loans, and limitation of amount. If the amount is smaller than is needed for the transactions of the country...the demand...will prevent its depreciation."

He observed that in this case, as in others, "history shows no instance of paper issues so restricted." In the case of over-issue, legal tender was still not needed. One had only, he correctly noted, to make the notes convertible into bonds that paid interest in specie at the prevailing market rate in order to sustain their market value.

Chase then argued that the legal-tender quality added no value to the notes, but depreciated them. His strongest support for that contention is that the issue signals that the government has exhausted other means of finance. The notes will exchange at less than par, because they are not immediately redeemable into specie. Debtors will seek out the notes so that they can extinguish their

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[136]Both Strong and Bradley admitted these effects, but they either downplayed them, re-interpreted them as just, or argued that the government's powers overrode them.

debts at less than the values owed in specie. But this apparent support to their value is offset by the losses to creditors. This leads Chase to conclude "The legal tender quality is only valuable for the purposes of dishonesty."

As for the doctrine of implied and inherent powers, Chase rejected them:

> "It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this court, by the present majority, that the legislature has any 'powers under the Constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it.' If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited."

Chase went on to reject the notion that legal-tender notes were a standard of value:

> "...the idea that it was ever designed to make such notes a standard of value by the framers of the Constitution is wholly new. It seems to us impossible that it could have been entertained. Its assertion seems to us to ascribe folly to the framers of our fundamental law, and to contradict the most conspicuous facts in our public history."

He reached this conclusion by reviewing the constitutional monetary system.

> "...it is the duty of every government to establish a standard of value. The necessity of such a standard is, indeed, universally acknowledged. Without it the transactions of society would become impossible."

The standards in wide use among nations he said were gold and silver. This was due to their properties of high value relative to weight, durability, divisibility, impressibility, and slowness in changing value, and the fact that they were adopted by "universal consent."

> "But the terms of the only express grant in the Constitution of power to establish such a standard leave little room for presumptions. The power conferred is the power to coin money, and these words must be understood as they were used at the time the Constitution was adopted. And we have been referred to no authority which at that time defined

> coining otherwise than as minting or stamping metals for money..."

And so, Chase endorsed original meaning and the understanding that to coin money meant exactly that and not to deliver a currency to the country or thereby control the standard of value.

### Justice Clifford's Dissent in *Knox v. Lee*

Justice Nathan Clifford's opinion extensively reviews the monetary history of the United States. It is quite valuable for those seeking an understanding of the Constitution and money. A direct link to it is here.

As far as Clifford was concerned, most of what Strong and Bradley had to say was irrelevant. ("...it is doubtful whether either of the cases before the court present any such questions as those which have been discussed in the opinion of the majority of the court...") This was an open and shut case. At issue was whether or not a person who had contracted to receive money (gold and silver) could constitutionally be made to receive government legal-tender paper, as the majority had ruled. Clifford's review shows, as have earlier articles in this series, that the Constitution sets Congress the task and duty of setting a value standard in coin and coining money according to that value. Since the standard of value is metallic and the money of the U.S. is gold and silver, when the mint certifies the weight of coins, it certifies that they are legal tender. And since nothing else is a standard and nothing else, particularly a paper promise, is or can be certified as to weight and thus value, gold and silver coins are the only possible legal tender.[137]

> "...it necessarily follows that Congress cannot, under any circumstances, make paper promises of any kind a legal tender in payment of debts."

It is not even evident that an act of Congress

> "...is absolutely necessary to constitute the gold and silver coins of the United States, fabricated and stamped as such by the proper executive officers of the mint, a legal tender in payment of debts. Constituted as such coins are by the Constitution, the standard of value, the better

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[137]For another full explanation of this position, see Justice Field's dissent in *Juilliard v. Greenman*.

> opinion would seem to be that they become legal tender for that purpose...as soon as they are coined and put in circulation by lawful authority..."

Strong and Bradley attempted to derive the legal-tender power of paper promises from the power of borrowing. This can't be done, Clifford says. Clifford's double-barreled argument is that to make something into a legal or lawful tender under the Constitution simply cannot be done (a) for anything other than gold and silver, and (b) without the government *certifying* that something's value as a tender, which can't be done for paper promises of fluctuating worth:

> "Credit currency, whether issued by the states or the United States, or by private corporations or individuals, is not recognized by the Constitution as a standard of value, nor can it be made such by any law which Congress or the states can pass, as the laws of trade are stronger than any legislative enactment."

In considering the necessary and proper clause, Clifford pointed out that it is inconceivable that one can derive an implied power under one major enumerated power (such as borrowing) that nullifies another major enumerated power such as the power to coin money and regulate value. He noted that prior borrowing gave no reason to believe that a legal-tender power was implied by that power. There had been twenty issues of Treasury notes prior to 1862

> "...and every one of such prior acts, being twenty in all, contains, either in express words or by necessary implication, an equally decisive negation to the new constitutional theory that Congress can make paper emissions either a standard of value or a legal tender. Superadded to the conceded fact that the Constitution contains no express words to support such a theory, this long and unbroken usage, that Treasury notes shall not be constituted a standard of value nor be made a tender in payment of debts, is entitled to great weight, and when taken in connection with the persuasive and convincing evidence, derived from the published proceedings of the Convention, that the framers of the Constitution never intended to grant any such power, and from the recorded sentiments of the great men whose arguments in favor of the reported draft procured its ratification, and supported as that view is by the repeated decisions of this Court and by the infallible rule of interpretation that the language of one express power shall not be so

> expanded as to nullify the force and effect of another express power in the same instrument, it seems to me that it ought to be deemed final and conclusive that Congress cannot constitute such notes or any other paper emissions a constitutional standard of value or make them a legal tender in payment of debts -- especially as it covers the period of two foreign wars, the creation of the second national bank, and the greatest financial revulsions through which our country has ever passed."

Clifford then argued that the war powers also did not justify the legal-tender provision:

> "All remarks, therefore, in the nature of entreaty or appeal, in favor of an implied power to fulfill the great purpose of national defense or to raise money to prosecute a war are a mere waste of words, as the most powerful and comprehensive means to accomplish the purpose for which the appeal is made are found in the express powers vested in Congress to lay and collect taxes, duties, imposts, and excises without limitation as to amount, to borrow money also without limitation, and to coin money, dispose of the public lands, and to appropriate all moneys in the public Treasury to that purpose."

### Justice Field's Dissent in *Knox v. Lee*

Justice Stephen Field began by endorsing the constitutionality of government-issued bills of credit, even to writing that

> "...they may be issued in any other form, and in such form and amounts as will fit them for general circulation, and to that end may be made payable to bearer and transferable by delivery."

*Craig v. Missouri* (1830) may just as well have never been decided. Striking the clause "emit bills of credit" from Article I, Section 8, Clause 2 , may just as well have never been done. By 1869, the government could exercise the power to emit paper money, with the Supreme Court's blessing.

Field regarded the arguments attempting to relate the power to make notes a legal tender to other powers like borrowing, or to aggregate powers, as "general and loose." He felt that they, and also the arguments concerning the consequences of not allowing such a power, "rest upon no solid foundation."

He pointed out that the nature of government borrowing is no different from that of individual and corporate borrowing. The contract is between lenders and borrowers. The rights or interests of third parties are not affected. The government can affect those interests through the legal-tender quality only if it has a "right to interfere with any other property of third parties." The necessary and proper clause confers no such right, because that clause, in Field's view, "neither augments nor diminishes the expressly designated powers."

The legal-tender provision, he argued, is not an appropriate means to advance borrowing because it does not affect the credit of the loan. It "does not touch the terms of the contract of borrowing, nor does it stand for a security for the loan." Being basically unrelated to the act of borrowing, the legal-tender power finds no home under the wing of the power to borrow. That the addition of legal tender makes it easier to borrow does not mean that it is an accouterment or property of borrowing and thus allowable under the power to borrow. Many features could be added to the debt issue that would invade the property of third parties. It might contain vouchers good for a "percentage out of the revenues of private corporations."

Field digressed briefly to consider the utility of the measure, explaining that the legal-tender provision was not necessary:

> "Without the legal tender provision, the notes would have circulated equally well and answered all the purposes of government -- the only direct benefit resulting from that provision arising, as already stated, from the ability it conferred upon unscrupulous debtors to discharge with them previous obligations. The notes of state banks circulated without possessing that quality and supplied a currency for the people just so long as confidence in the ability of the banks to redeem the notes continued. The notes issued by the national bank associations during the war, under the authority of Congress, amounting to $300,000,000, which were never made a legal tender, circulated equally well with the notes of the United States. Neither their utility nor their circulation was diminished in any degree by the absence of a legal tender quality. They rose and fell in the market under the same influences and precisely to the same extent as the notes of the United States, which possessed this quality."

As for justifying the legal-tender power by war needs and the power to raise

armies,

> "...it is evident that the notes have no relation to these powers or to any other powers of Congress except as they furnish a convenient means for raising money for their execution. The existence of the war only increased the urgency of the government for funds. It did not add to its powers to raise such funds, or change in any respect the nature of those powers or the transactions which they authorized...The wants of the government can never be the measure of its powers."

The legal-tender "provision operates directly to impair the obligation of such contracts."

> "The money specified in a contract is not a name or a sound...contracts for money are not made without a specification of the coins or denominations of money, and the number of them intended..."

> "It is obvious that the act of 1862 changes the terms of contracts for the payment of money made previous to its passage in every essential particular. All such contracts had reference to metallic coins, struck or regulated by Congress, and composed principally of gold and silver, which constituted the legal money of the country."

Field was incensed by the idea of the legal-tender power being constitutional; as it was evident that debtors could settle debts using abundant paper money that was discounted in worth compared to the money owed in their contracts. The power had no limits. "If the contract can at one time be changed by congressional legislation for the benefit of the debtor it may at another time be changed for the benefit of the creditor." His language grew strong:

> "For acts of flagrant injustice such as those mentioned there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality without which society would be impossible and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice upon the existence of which all constitutional government is founded and without which government would be an intolerable and hateful tyranny."

Chase had seen legal-tender notes as "only valuable for the purposes of

dishonesty." He could see, by the aggregate powers doctrine, the government "become practically absolute and unlimited." Field saw "acts of flagrant injustice" and the possibility of "an intolerable and hateful tyranny."

In the next several paragraphs from *Knox,* Justice Field foresaw a later government crime, the seizure (p. 650) of "WE THE PEOPLE'S gold – an enormity the Supreme Court never bothered to review."

> "It follows, then, logically from the doctrine advanced by the majority of the Court as to the power of Congress over the subject of legal tender that Congress may borrow gold coin upon a pledge of the public faith to repay gold at the maturity of its obligations, and yet, in direct disregard of its pledge, in open violation of faith, may compel the lender to take in place of the gold stipulated its own promises, and that legislation of this character would not be in violation of the Constitution, but in harmony with its letter and spirit.
>
> "The government is at the present time seeking, in the markets of the world, a loan of several hundred millions of dollars in gold upon securities containing the promises of the United States to repay the money, principal and interest, in gold; yet this Court, the highest tribunal of the country, this day declares by its solemn decision that should such loan be obtained, it is entirely competent for Congress to pay it off not in gold, but in notes of the United States themselves, payable at such time and in such manner as Congress may itself determine, and that legislation sanctioning such gross breach of faith would not be repugnant to the fundamental law of the land.
>
> "What is this but declaring that repudiation by the government of the United States of its solemn obligations would be constitutional? Whenever the fulfillment of the obligation in the manner stipulated is refused, and the acceptance of something different from that stipulated is enforced against the will of the creditor, a breach of faith is committed; and to the extent of the difference of value between the thing stipulated and the thing which the creditor is compelled to receive, there is repudiation of the original obligation. I am not willing to admit that the Constitution, the boast and glory of our country, would sanction or permit any such legislation. 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."

Vieira tells us (p. 647) that the totalitarian doctrine expressed in *Knox* had never appeared before "and it was never to find expression, as an explicit general principle, in the Court thereafter." It doesn't have to find *explicit* expression as a principle to be a fact.

### *Juilliard v. Greenman (1884)*

*Juilliard v. Greenman* (1884) is the last of the legal-tender cases after the Civil War. By the Act of May 31, 1878, Congress stopped retiring greenbacks and kept them in circulation, although the supposed wartime necessity of doing so had been over for almost 20 years:

> "From and after the passage of this act, it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law, from any source whatever, and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation, *provided* that nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed."

The Court ruled that the Act was constitutional. The Justices were unanimous in agreeing that the principle involved was the same as in previous legal-tender cases. All but Justice Field then agreed that those cases had been rightly decided. This case affirmed the earlier decisions. The importance of this case rests on its (p. 651)

> "misapplication in recent years by various national and State courts, many of which have asserted in *dicta* that Congress has power, perforce of *Juilliard*, to declare irredeemable paper currency a legal tender in payment of all debts, and even to delegate that supposed authority to the largely private Federal Reserve System."

The U.S. first changed from a hard money (gold and silver) and free market monetary system into a system involving both hard money and legal-tender

paper money, of government issue, that is redeemable into hard money, and from thence into a system of irredeemable legal-tender paper money issued by the Federal Reserve. The existing system is no longer either a hard money or a free market monetary system.

As a legal matter, *Juilliard* cannot rightly be cited as a precedent for irredeemable notes because the notes at that time were redeemable. According to the Supreme Court in *Gomillion v. Lightfoot* (1960):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

*Juilliard* (p. 653) "implicitly recognized two important limitations on this alleged power" of the government to emit legal-tender paper currency. They are "the necessity for redeemability of the currency in specie; and the immunity of the States from any Congressional imposition of such currency, redeemable or not, as a medium of exchange in the exercise of their governmental functions."[138] The opinion noted that the notes had been "redeemed and paid in gold coin of the Treasury," and confirmed the States' powers as in *Lane County v. Oregon*.

Justice Field's dissent made cogent observations on the misjudgments being made by the Court. The entire opinion is well worth reading for its clear explanations of the Constitution and money. Among other statements:

> "...whenever it is declared that this government, ordained to establish justice, has the power to alter the condition of contracts between private parties and authorize their payment or discharge in something different from that which the parties stipulated, thus disturbing the relations of commerce and the business of the community generally, the doctrine will not and ought not to be readily accepted. There will be many who will adhere to the teachings and abide by the faith of their fathers. So the question has come again, and will continue to come until it is settled so as to uphold, and not impair, the contracts of parties, to promote and

[138]This and, of course, the Constitution support Vieira's work in introducing legislation at the State level to use gold and silver in the State's monetary dealings. See, for example, here.

not defeat justice.

“If there be anything in the history of the Constitution which can be established with moral certainty, it is that the framers of that instrument intended to prohibit the issue of legal tender notes both by the general government and by the states, and thus prevent interference with the contracts of private parties.

“It would be difficult to believe even in the absence of the historical evidence we have on the subject that the framers of the Constitution, profoundly impressed by the evils resulting from this kind of legislation, ever intended that the new government, ordained to establish justice, should possess the power of making its bills a legal tender, which they were unwilling should remain with the states, and in which the past had proved so dangerous to the peace of the community, so disturbing to the business of the people and so destructive of their morality.

“For nearly three-quarters of a century after the adoption of the Constitution and until the legislation during the recent civil war, no jurist and no statesman of any position in the country ever pretended that a power to impart the quality of legal tender to its notes was vested in the general government. There is no recorded word of even one in favor of its possessing the power. All conceded, as an axiom of constitutional law, that the power did not exist.

“So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience.

“As to the terms ‘to borrow money,’ where, I would ask, does the Court find any authority for giving to them a different interpretation in the Constitution from what they receive when used in other instruments, as in the charters of municipal bodies or of private corporations, or in the contracts of individuals? They are not ambiguous; they have a well settled meaning in other instruments. If the Court may change that in the Constitution, so it may the meaning of all other clauses, and the powers which the government may exercise will be found declared not by plain words in the organic law, but by words of a new significance resting in the minds of the judges.

“The power vested in Congress to coin money does not, in my judgment, fortify the position of the Court, as its opinion affirms. So far from deducing from that power any authority to impress the notes of the government with the quality of legal tender, its existence seems to me inconsistent with a power to make anything but coin a legal tender.

“The clause to coin money must be read in connection with the prohibition upon the states to make anything but gold and silver coin a tender in payment of debts. The two taken together clearly show that the coins to be fabricated under the authority of the general government, and as such to be a legal tender for debts, are to be composed principally, if not entirely, of the metals of gold and silver. Coins of such metals are necessarily a legal tender to the amount of their respective values, without any legislative enactment, and the statute of the United States providing that they shall be such tender is only declaratory of their effect when offered in payment.

“They [the United States Notes] are promises of money, but they are not money in the sense of the Constitution. The term ‘money’ is used in that instrument in several clauses -- in the one authorizing Congress ‘to borrow money;’ in the one authorizing Congress ‘to coin money;’ in the one declaring that ‘no money’ shall be drawn from the Treasury, but in consequence of appropriations made by law, and in the one declaring that no state shall ‘coin money.’ And it is a settled rule of interpretation that the same term occurring in different parts of the same instrument shall be taken in the same sense unless there is something in the context indicating that a different meaning was intended. Now to coin money is, as I have said, to make coins out of metallic substances, and the only money the value of which Congress can regulate is coined money, either of our mints or of foreign countries. It should seem, therefore, that to borrow money is to obtain a loan of coin money -- that is, money composed of the precious metals, representing value in the purchase of property and payment of debts. Between the promises of the government, designated as its securities, and this money the Constitution draws a distinction which disappears in the opinion of the Court.

“No such debasement [of money] has ever been attempted in this country, and none ever will be so long as any sentiment of honor influences the governing power of the nation. The changes from time

to time in the quantity of alloy in the different coins has been made to preserve the proper relative value between gold and silver, or to prevent exportation, and not with a view of debasing them. Whatever power may be vested in the government of the United States, it has none to perpetrate such monstrous iniquity. One of the great purposes of its creation, as expressed in the preamble of the Constitution, was the establishment of justice, and not a line nor a word is found in that instrument which sanctions any intentional wrong to the citizen, either in war or in peace.

"Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense, as an attribute of an independent political community. The power to commit violence, perpetrate injustice, take private property by force without compensation to the owner, and compel the receipt of promises to pay in place of money, may be exercised, as it often has been, by irresponsible authority, but it cannot be considered as belonging to a government founded upon law. But be that as it may, there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere but powerless outside of it. In this country, sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld. It seems, however, to be supposed that as the power was taken from the states, it could not have been intended that it should disappear entirely, and therefore it must in some way adhere to the general government notwithstanding the Tenth Amendment and the nature of the Constitution. The doctrine that a power not expressly forbidden may be exercised would, as I have observed, change the character of our government.

"From the decision of the Court I see only evil likely to follow...If Congress has the power to make the notes a legal tender and to pass as money or its equivalent, why should not a sufficient amount be issued to pay the bonds of the United States as they mature? Why pay interest on the millions of dollars of bonds now due when Congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement if the printing press can

> furnish the money that is needed for them?"

### ***Thompson v. Butler* (1878)**

The *Thompson v. Butler* case (p. 666) is "little-known today."

> "In essence, Thompson asserted that the legal-tender law had effectively *demonetized* gold coin, to the extent of making the United States Note the exclusive monetary standard of value, even where a judgment was stated in gold coin."

The Court ruled against Thompson. It did not rule that legal-tender notes were the money standard. Congress (p. 670) has "never purported to declare any paper currency the sole statutory standard of value to the exclusion of specie." This is a plus for the return of constitutional gold and silver money.

However, instead of saying that the unitary standard was the silver dollar and that a dollar note is not a dollar, the Court proclaimed a dual standard. In the market, they have different values, the Court said, "but as money, that is to say, as a medium of exchange, the law knows no difference between them."

The economic result of this is that people will pay obligations in the form of the money worth the least. The legal result is that there is "no intelligible standard of value." Different kinds of things are all called a dollar: Federal Reserve Notes, base-metal coins, and silver and gold coins. Different kinds of things are all legal tender. The existing code is as follows:

> "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts."

Most of this law is unconstitutional, besides making no sense. The only part that is valid is that relating to gold and silver coins.

### **Summary and Conclusion**

If we examine the arguments in favor of the constitutionality of legal-tender notes, we find that such a power was justified by its advocates either because of a purported necessity, or as implied by the sovereignty and existence of

government itself, or because the power was thought to be a power implied as necessary to an enumerated power.

The necessity was never present. Those in Congress who urged it had the other powers to tax and borrow, but they didn't use them or want to use them. After the war, the court realized that necessity didn't augment or change the Constitution. If Congress could legally authorize legal-tender notes in war, it could authorize them in peace. The Constitution didn't distinguish these situations. Necessity was not an argument on the legality of the measure. Once the Court had found the notes constitutional in a time of war, it went on to find them constitutional at any time.

Justices Strong and Bradley proposed that the U.S. government possessed inherent and implied powers and/or that it possessed the power to preserve itself by exercise of powers beyond what was allowed or spelled out in the Constitution. This totalitarian doctrine has no legal or constitutional support. It is far from comforting to find such theories spelled out in a Supreme Court decision. It is equally disconcerting to find that subsequent courts have adopted elements of these theories without spelling them out.

This leaves the necessary and proper clause as a crutch for the legal-tender power. Proponents sought to relate it to various other powers, such as the power to coin money, the power to borrow, the power to regulate commerce, and the power to raise armies. But since legal-tender notes clash with and, at least partially, negate legal-tender coins, it is not possible to make this case. It is not possible to derive a power as an adjunct to an enumerated power that is so strong that it nullifies another enumerated power.

Those who reached for the legal-tender power as necessary and proper to other enumerated powers faced a withering array of counter-arguments. Most of these supposed attachments were implausible and far-fetched. The most plausible came under the heading of the power to borrow. Justice Field disposed of that. In any event, it cannot be supposed that issuing notes as money is the same as borrowing money.

Many major arguments were throughly aired during and after the Civil War on legal-tender notes. It cannot be said that the right and just decision was reached. Justice Field accurately predicted that, because of the injustice of making notes into legal tender, "the question has come again, and will

continue to come." In our time, it has and it will.[139]

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[139]See, for example, the efforts by Ron Paul to end legal-tender laws here, here, and here. Paul wrote the foreword to the first edition of Vieira's book. The latter was submitted to the United States Gold Commission, of which Paul was a member, in 1982.

# CHAPTER VII

## The National Currency and Banking System

This chapter covers pp. 671-746 of the second edition of Edwin Vieira Jr.'s *Pieces of Eight The Monetary Powers and Disabilities of the United States Constitution.* While I follow Vieira's work quite closely and attempt to represent its main findings faithfully, my own thought, emphases, and occasional original research also appear throughout this book, so that it represents something of a hybrid or supplement to his own work. I hope that even readers of Vieira's original will find the results useful. The chapters do not seek to reproduce the style, tone, precise content, or emphases of Vieira's work. All errors, misinterpretations, and omissions herein are solely my responsibility. Dr. Vieira has not seen this work or commented on it.

This chapter discusses two topics: the paper money issues of the U.S. government that began in 1861, and the National Currency Acts of 1863 and 1864 that set up a National Banking system.

### Monetary Revolution

Between 1861 and 1864, Congress broke sharply with the past when it *created* a brand new monetary and banking system. This creative and controlling rôle of the government continues right down to the present. It is this act of creation and the subsequent deep and intimate involvement of the government in its national creation and *vice versa* that mark a fundamental monetary revolution.

Before 1861, the federal government *administered* a *constitutionally-mandated* system that comprised the coinage of metallic money and regulation of its value. Although the latter applied nationally, the constitutional system in important respects was not nationally-centralized. The money supply, both specie and paper, was, for the most part, privately-generated. The States incorporated banks. Their constitutionality depended on the extent to which they were agents of the States in emitting bills of credit, since the Constitution forbids the latter. We have argued that the public state banks were clearly not constitutional, even though the Supreme Court ruled otherwise. States oversaw the state banks. The state banks issued paper money (or bank-money) without federal participation and control. The Banks of the United States did have proto-central bank properties, as we have seen, but, overall, the pre-1861 system was, more or less, consistent with the constitutional monetary powers

and disabilities. The government did *not create* the main features of this system by *statute*. The government surely played its part, and in creative ways, but what it did was more or less guided by or in accord with the Constitution.

Between 1861 and 1864, a major change occurred. The *government legislatively* created a money and banking system. Thereafter, it controlled and continually altered the details and workings of the monetary system, right down to the present and mostly regardless of the Constitution. The Supreme Court found constitutional the actions of Congress that changed the monetary system, even drastically, even when they were obviously unconstitutional.

While our focus is on the monetary system and its constitutionality, this monetary revolution accompanied other important changes that should be mentioned briefly.

In legal terms, the break with the past in 1861-1864 was a clearly-recognizable shift from a constitutionally-organized monetary system to a legislatively or governmentally-organized system that lacked constitutional grounding and justification. There is a huge difference between a government that rules according to constitutional law and a government that rules by legislative statute. In the former, the Constitution lays down the controlling and fixed law. Government and government power are constrained. In the latter, legislators control a body of statutory laws that they continually change and that may markedly depart from the Constitution's powers and disabilities. Government and government power grow.

In broad political-economic terms, the new system shifted from one understood within society and by society's leaders to be in accord with classical liberal and laissez-faire principles, even if never a perfect exemplar thereof, to a system much more directed to and embracing corporatism.[140] Laissez-faire means a minimum of government involvement in business and industry. It means a government limited to such rôles as contract enforcement and matters of the regulation of interstate commerce. It means an ideal of free

[140]Vieira calls (p. 693) the new system of political banking a *corporative state.* See Higgs' (2006) discussion of "Quasi-Corporatism: America's Homegrown Fascism," here. Some call it crony capitalism or state capitalism.

markets.[141] It has no place for government enterprises and intimate government participation in business and commerce. Corporatism goes in the opposite direction. It means an absorption or combination or merging of industry and government into one body or corpus. Its direction and thrust is unlimited enlargement. Big government permeates industry and commerce and, in turn, is heavily influenced by industry and commerce. The two organizations become something of two branches within a common organization. The republic becomes an empire that assures its finance by incorporation.

In terms of natural justice, the corporatist system favors select segments of society at the expense of the remainder. Cronyism, favoritism, control, and wealth redistribution are a few of its hallmarks. Justice as an ideal is weakened in this system. Other values take her place.

In financial-economic terms, the new monetary system had three new elements: the form of currency, the banking system, and a greatly enhanced government bond market. All three became corporatively-organized. The currency became national and more uniform. Large numbers of local banks were tied together by various national connections created by statute. From the government's perspective, the new currency and banking system served its main end, which was an *augmented capacity to borrow* large sums almost at will. The higher borrowing capacity supported and sustained bigger government.

The corporatist system is exemplified by the very close association of Treasury Secretary Salmon P. Chase with financiers Henry and Jay Cooke. Henry Cooke explained the proposed new banking system to his brother, Jay Cooke, in these terms:

"By the system proposed two important objects will be attained: 1st,

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[141]A free market is a social condition of exchange in which non-violent exchanges of goods and services are made by persons without imposing their wills on others with undue force, that is, without behaving in a criminal or tortious manner. There is no force or fraud in free market transactions. In order to maintain free market exchanges, people expect one another to live up their contracts and bargains, and if they do not, then various agreed-upon settlement and judgment procedures come into play to make good any harms that are inflicted. A free market is brought into being by bringing an ethic of non-violent exchange into being. The free market is an ideal, approached to various extents but not realized fully in practice. Naturally, one can find many exceptions to it in America in the pre-1861 era.

> Uniformity in the currency throughout the country and, 2nd, a large and permanent market for government securities."[142]

This was an accurate assessment, as far as it went. He neglected to mention the underwriting and distribution profits to the Cooke brothers. The national debt became a permanent fixture in government finance, as did the investment bankers who distributed the bonds to financial institutions and the public. The new money and banking system accompanied larger government and a large and permanent national debt. In 1791, the U.S. debt was $75.5 million, which was high compared to the nation's wealth. In 1861 it was $90.6 million, which was a negligible fraction of the higher wealth of the country. By 1866, the debt was $2.8 billion, due to war financing. This was reduced to a low point of $1.5 billion by 1893. Thereafter, the government debt growth shifted into higher gear and so did the growth of the national banking system and its notes.

## New Paper Monies

As noted earlier, the State banks prior to 1861 already produced non-specie bank-money, including paper notes. The monetary revolution was that Congress created a new *national* paper money and banking system that operated parallel to and with the gold and silver system. The first step was the legal-tender greenbacks directly issued by the government starting in 1861. The next step was an entirely new national currency in the form of National Bank Notes in 1863. These were not full legal-tender notes, but they were "like explicit Treasury currency, not only because they were obligations of the federal government at one remove, but also because the maximum amount outstanding was determined, also at one remove, largely by federal action, either administrative or legislative."[143] The third step was government-emitted silver and gold certificates. All of these steps were inconsistent with the ideal of free markets in that they involved a high degree of government instigation and control. All moved away from laissez-faire.

The legal-tender notes (greenbacks) were, at best, an unconstitutional

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[142] See Ellis Paxson Oberholtzer's *Jay Cooke Financier of the Civil War* (1907). Chapter VII on "The National Banks" is instructive.

[143] Milton Friedman and Anna J. Schwartz, *A Monetary History of the United States, 1867-1960* (1971), p. 23. The government controlled the volume of notes both by a maximum statutory amount and by specifying the government bonds that could be used to obtain the notes.

emergency measure; and they should have been so declared, but were not, in the legal tender cases. The fact that Congress added other forms of paper money and controlled their terms and amounts shows that the greenbacks were not an isolated phenomenon. The government was enacting a broader paper money agenda. The National Bank Notes (also called National Currency) were not expected to make much of a contribution to war financing, even by most of their promoters. They were meant to be a permanent, not a temporary, feature of the monetary system. The gold and silver certificates became important many years after the war had ended. The overall goal was clearly, as the title of the Act of 1863 read, a National Currency in paper form, whose amount was controlled or coordinated by government.[144]

All the new paper money was *liability-money* (debt-obligation money), not an asset-money like gold and silver. The silver and gold certificates involved the emission of bills of credit by the government. The National Bank Notes were bank obligations, but they were also obligations of the government via the new corporative arrangement. As Friedman and Schwartz note:

> "Though national bank notes were nominally liabilities of the banks that issued them, in effect they were indirect liabilities of the federal government thanks to both the required government bond security and the conditions for their redemption."[145]

Although all the paper money emissions of the federal government were unconstitutional, the Supreme Court supported their constitutionality. Once the constitutionality of legal-tender notes was promulgated in the legal tender cases, the die was cast for other forms of paper money.

The fourth step in the paper-money parade was the Federal Reserve System in 1913. Today's Federal Reserve Notes are paper-money descendants of the earlier paper monies, accompanied by important institutional changes in the banking system and the virtual elimination of gold and silver from the

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[144]The appropriate way to have attained it was through constitutional amendment, but the votes of 75 percent of the State legislatures were not there. The States feared the displacement of State banks. Some senators wanted to maintain the specie system. The bill passed the Senate by only a 23-21 vote.

[145]Friedman and Schwartz, op. cit., p. 21.

monetary system. The corporative system remained.[146]

The National Bank Notes were nominally bank money. Bank money is a liability-money. It typically consists of bank notes and demand deposits. The demand deposits are created by an ordinary bank as a credit to someone's account, thus being a debt obligation to the bank (a liability). The offsetting debit on the bank's books is an asset such as cash made as a deposit, or else a loan extended to a borrower. When the bank makes a loan and creates a deposit simultaneously, it is exchanging its own better-known, liquid, and transferrable credits (bank demand deposits) for the credits of less well-known and/or illiquid credits, such as a mortgage security of a homeowner. The bank note is typically created by withdrawal of credits in certificate form from a demand deposit, it too being a bank debt obligation. Bank money is therefore created as a liability on the basis of or backed by the bank's assets. By contrast, physical gold and silver coins and bullion are assets. They are no one's liabilities. They are an asset money. Not being asset money in itself like gold or silver, but instead a debt claim based upon various assets, the worth (in terms of specie) of bank money depends on market expectations of the nature and timing of its future cash (specie) flows and/or on other factors such as its acceptance by others in exchange or laws that maintain its circulation. Such expectations depend in part on the worth of the bank's assets. This makes bank-money a contingent claim or derivative security.[147]

An unquestionably important financial fact is that all liability-monies, unlike gold and silver, are subject to defaults of various kinds, and this results in widespread depression and hardship at times. When a country's money is a form of debt, typically the liabilities of banks or government, the money can experience serious drops in value. It also links to booms associated with excessive money creation, and then to panics wherein people, knowing or suspecting value declines, rationally attempt to convert these debts into asset-monies like gold and silver. Excessive issues of this debt-money have the problems of inflation and hyperinflations, in which people attempt to flee from depreciating debt-money into real assets. Any paper money scheme in which

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[146]Actually, it enlarged and went worldwide. Vieira does not cover those developments.

[147]Government-issued paper money is similar. It too is a liability-money backed by various assets such as the government's taxing power or gold and silver inventories. The National Bank Notes, as an indirect government liability, were also a liability-money in that sense.

money is debt is bound to be subject to some degree to these problems.

An important political-economic fact is that the powers that run the corporative system have, so far, shown a long-run political capacity to maintain corporatism of the monetary system despite the recurrent crises. This has often involved altering the appearance and workings of the system, while always maintaining its basic feature: government control and financial industry influence within a corporative system that involves financial institutions.[148] For example, Congress created the Federal Reserve System in 1913 out of the National Banking System that it created in 1864. New regulations and institutional changes occur all the time. Being corporative in nature, when the system goes seriously awry, the controlling powers attempt to preserve it and change it in new corporative ways. The controlling powers mainly include people within the institutions of the monetary system, government bureaucrats and elected officials, the courts, and academics, with participation at times by people from other industries and the media.[149] The controlled include taxpayers and WE THE PEOPLE.

One of the reasons that the corporative system survives its crises is that the currency reaches so deeply into all areas of the political economy. Any basic change is bound to affect everyone and many interest groups. Hence, the powers-that-be always have a ready-made constituency that fears *basic* change and supports preserving the existing system by changing it superficially. Congressmen themselves fear the repercussions of seriously changing the

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[148]The lines of influence and control are blurry within the corporatist system. The same people move back and forth between government and financial institution positions. The government has control but also is beholden to the financial system and influenced to bail it out of crises. Not blurry is the control of the government-financial combine over taxpayers and WE THE PEOPLE, who foot the bills and bear the debt loads.

[149]The longevity and endurance of monetary and government corporatism are remarkable. Who would have predicted that the government in 1933 could seize all the privately-held gold without encountering rebellion? Who would have predicted that the U.S. would abandon gold altogether in international payments in 1971? The sheer size of the bailouts of the system from 2007 onwards suggests that its proponents will attempt yet another shakeup in the corporatist order so as to prolong its life. Nevertheless, that order is much closer to its demise or transformation into some other order than ever before. After the complete break with gold in 1971, the U.S. debt has increased from $424 billion to $13,000 billion, and this excludes other obligations that raise it to five times that amount. This 9-13 percent growth rate is unsustainable compared to real economic growth. Hence, it will come to an end.

system that they have created. They defer to bankers. Things change superficially but the system remains. For a really new money and banking system to emerge, such as digital gold currency, it will probably have to emerge as a parallel system in much the same way that the paper money system began life parallel to the specie system.

### Silver and Gold Certificates

From 1789 to 1861, the money of the U.S. was of two types: silver and gold coin, and bank notes (and deposits) derived from using silver and gold coin as a foundation or backing asset. Both types of money were privately-generated. The volume of coins was set by people bringing bullion to the Mint to be minted, or, conversely, melting coin for other uses. The bank money was usually privately-emitted, with the private banks being incorporated, regulated, and influenced by the States, except for the two Banks of the United States that were incorporated at the federal level.[150]

Starting in 1861, the U.S. government added a third type of money when it issued demand notes and then legal-tender United States Notes or greenbacks (with varying redemption features.) These were, like bank money, a liability-money or derivative security.

Chapter V went into some detail on several Acts of Congress (in 1878, 1890, and 1900) that, among other things, introduced a fourth kind of money, which was fully redeemable money certificates issued by the government. "Fully redeemable" means that the Treasury, by law, kept a corresponding amount of metal (silver and gold) on hand and redeemed the certificates on demand. The Treasury acted as a metal depository institution that issued a type of warehouse receipt against the deposits. These could be exchanged for the metal on presentation of the certificates by their holders. These certificates were a liability-money. They were an obligation of the U.S. government. They appeared to be relatively safe, due to the law making them fully convertible into specie held in a fund. Nevertheless, they were subject to political risks.

The certificates were of two kinds: silver and gold. The silver certificates began in 1878 and ended in 1968. Gold certificates began in 1863. They ended

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[150]This does not mean that either that all banks were private or that there were free markets in banking. There were state banks run by the States. There was State regulation of banks and State involvement in the privately-owned and operated banks they incorporated.

for all Americans, except the Federal Reserve System, in 1933-1934. At that point, one of the political risks became a reality when the government seized private gold and ended redemption of the gold certificates in specie.

In 1869 and again in 1884, the Supreme Court ruled that United States Notes (greenbacks) were constitutional. This made it apparent that constitutional challenges to the silver and gold certificates might also prove fruitless, and Vieira mentions no such court cases. Once the greenbacks were found to be constitutional (and even before that), further kinds of government paper money, all of which were liability-monies, became possible and probable.

After 1900, the next Congressional action on silver certificates was in the Act of January 30, 1934. This allowed the President to issue silver certificates "in such denominations as he may prescribe" against any silver in the Treasury not held against outstanding silver certificates. Later that year, by the Act of June 19, 1934, the Secretary of the Treasury was empowered to issue legal-tender silver certificates redeemable "in standard silver dollars." By these actions, as earlier in history, the Congress in 1934 showed that it wanted silver certificates to be currency.

In 1963, by the Act of June 4, Congress changed the redemption to allow the Treasury to redeem in silver bullion at its option. This move toward restriction reduced the currency characteristic of these certificates somewhat. Then by the Act of June 24, 1967, Congress permitted redemption for only one more year and only into silver bullion. That ended the role of silver certificates as currency. It ended the circulation of silver coins as a medium of exchange.

About the constitutionality of the silver certificates, Vieira says (p. 475)

> "...the Treasury's new license [in 1878] to issue 'certificates'...lacked any obvious constitutional warrant...nowhere appears any power for the government to act as a deposit banker for privately owned coins, even on the basis of 100% reserves; or to 'emit bills', even redeemable in silver."

About the gold certificates issued in 1863, Vieira remarks that their constitutionality is "open to serious doubt."

Congress renewed the issuance of fully-redeemable gold certificates in the Act of July 12, 1882. It extended their use as "receivable for customs, taxes, and

all public dues." It allowed them to be reissued, and it allowed them (and silver certificates) to be counted as part of the lawful reserves of national banks. This makes it apparent that Congress wanted these certificates to circulate as a medium of exchange. In 1919, Congress made the gold certificates into legal tender for the first time. At that time, neither National Bank Notes nor Federal Reserve Notes were legal tender.

In 1934, Congress still allowed the issuance of gold certificates by the Treasury against gold it held, but at the same time it ended the power of the Treasury to coin gold, pay out gold coin, and redeem any currency of the United States in gold. That ended the use of gold certificates as currency. Redemption became only possible to Federal reserve banks.

By Money, the Constitution means one thing: gold and silver coin. What do we say when the government *offers the option* to recipients of its payments that they take it in certificates convertible into gold and silver on demand? Such an offer does not simply *designate* an *existing* medium as the one chosen by the government. The government has to *create* and *issue* a *new* medium in the form of this certificate. Since this medium is a kind of money and the government is supposed only to coin Money, not create and emit paper forms of it as its liabilities, there is no constitutional basis for such a new issue. Such certificates are, in fact, bills of credit. They are meant to circulate as Money without being Money. This is disallowed by the Constitution. These certificates are a credit instrument and not Money, because the offer to be paid in these certificates creates a contract upon which the government may default. The obvious dangers or risks of holding a certificate convertible into specie include partial payments, substitute payments, delayed payments, failures to allow conversion, law changes such as allowing fractional coverage of the certificates, specie debasement, and seizures of the coins on deposit.[151]

[151]If a certificate system is allowable, then the government can extend the certificate system to paying with a book account (credit) of the payment or an electronic credit. It can extend it to clearing payments made by those holding such credits. This makes the government into a banker, providing deposit banking services. This raises a host of other risks and dangers. The default risks of government-issued certificates make the issuance improper, even without the constitutional bills of credit disability, because the government is also the body that enforces contracts. To whom are the citizens supposed to turn if the government reneges on its commitment to redeem? For all these reasons that require careful consideration, the introduction of gold and silver certificates should have been done, if at all, by constitutional amendment.

In 1933, the United States government seized the gold of Americans under its jurisdiction. After Congressional authorization, the gold was seized:

> "Now, therefore, I, Henry Morgenthau, Jr., Acting Secretary of the Treasury, do hereby require every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion, and gold certificates situated in the United States, owned by such person..."

### Gold Certificates as Warehouse Receipts

In the Supreme Court case *Nortz v. United States* (1935), Chief Justice Charles Evans Hughes didn't want to overturn the government's seizure of gold, for which it had exchanged liability-money in the form of paper dollars (and which it then devalued in terms of gold.) He didn't want the government to have to give the gold back, and so he argued that the gold certificates were not warehouse receipts for gold but currency. His reasoning reads as follows:

> "Gold certificates under this legislation were required to be issued in denominations of dollars, and called for the payment of dollars. These gold certificates were currency. They were not less so because the specified number of dollars were payable in gold coin of the coinage of the United States. Being currency, and constituting legal tender, it is entirely inadmissible to regard the gold certificates as warehouse receipts. They were not contracts for a certain quantity of gold as a commodity. They called for dollars, not bullion."

He contended that, for purposes of payments, a gold certificate's being *currency* overrode its being, and even *entirely negated* its being, at the same time a warehouse receipt requiring payment in gold. He said that even though the certificates called for payment in gold coin, which he admitted, they were not an obligation of the United States (not contracts, not warehouse receipts) to pay gold when presented for such payment. What were they, then? They were "currency," he said. They called for "dollars," and "dollars", even though the certificate said that dollars are payable in gold coin of the United States, are currency, and "currency dollars" are legal-tender units (pieces of paper) created by the United States that are not and need not be the same as the specie promised in the gold certificate.

This Through-the-Looking-Glass reasoning was specious in all sorts of ways.

First, the Acts of Congress said the opposite. For example, the Act of July 12, 1882 authorized the Secretary of the Treasury

> "to receive deposits of gold coin...in sums not less than twenty dollars, and to issue certificates therefor in denominations not less than twenty dollars each...The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand."

Could anything be more clear? The coin is paid in *for* the certificate, and it's to be kept *for the payment of the same coin back on demand.* This is virtually the definition of a warehouse receipt for a type of commingled gold account in which individual gold coins are not identified by owner. The dollars paid in are not some abstract unit of currency, which is nowhere mentioned in this law. They are gold coin worth at least twenty dollars, which means having a value in terms of the standard silver dollar or unit, or the equivalent in gold which was 23.22 grains of gold. On demand, no currency or abstract dollar or piece of paper labeled a dollar was to be returned, but a coin of known value (weight) of gold.

Second, the certificate at issue in the *Nortz* case, which was typical, read

> "This certifies that there have been deposited in the Treasury of the UNITED STATES OF AMERICA ONE THOUSAND DOLLARS in gold coin payable to the bearer on demand."[152]

Third, Hughes' logic presumed that something that is currency cannot simultaneously be a warehouse receipt. Financial and monetary logic suggests the opposite. A warehouse receipt payable to bearer on demand makes excellent, albeit risky, currency. No legal authority was cited by Hughes to prove his case either.

Fourth, even if a gold certificate were not payable in gold for some reason, the creditor (the government) could pay it in an equivalent amount of silver.

Fifth, the statutes from 1934 relating to silver certificates tell a different story than Hughes told. They required the Treasury to hold silver in value equal to the face amount of all outstanding silver certificates. Why would they have

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[152]See here and here.

done this if the government could pay them off with paper, since they are supposed by Hughes to be currency, not warehouse receipts?

Sixth, the Act of 1900 actually spoke of setting up segregated "trust funds" for redemption of gold and silver certificates "and shall be used for no other purpose.". (See Section 4 here.) This was consistent with a properly run warehouse procedure. If any of these bullion funds were stored at a Federal reserve bank, it was required to segregate them. Currency had no such requirement.

Seventh, the Treasury's annual reports likewise spoke of trust funds and securing the certificates by bullion. There was a smoking gun or two, as well. The 1924 and 1926 reports spoke of warehouse receipts. The 1926 report: "[g]old and silver certificates are in fact mere 'warehouse receipts' issued by the Government in exchange for gold coin or bullion deposited..."

Eighth, even during the gold seizures, the government's language lumped together gold coin, gold bullion, and gold certificates and distinguished them from Federal Reserve Notes and United States Notes, which were other currencies.

The facts of the matter cannot rightly be construed in the way that Hughes interpreted them in *Nortz*. Hughes was a highly intelligent man. He was precocious, graduated near the top of his college class, and graduated law school with the highest honors. We have to conclude that he knew these facts and knew what they meant. We have to conclude that he intentionally used his position to create a smokescreen of fallacious words in order to provide a legal-sounding cover for the government's gold seizure.[153]

### The National Currency Acts of 1863 and 1864

The National Currency Act of 1864 (here and here) amended the 1863 Act. The resulting National Currency Act as amended, which ran 29 pages, was an act "to provide a National Currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." It accomplished this objective. Those who supported, drafted, and passed this Act had a larger goal. A national currency was a means to another end: *an*

[153]In later articles, further evidence of the duplicity of Hughes will be found when we examine the Court's other decisions.

*institutional system to support government borrowing.* Banks had to deposit government bonds as collateral for the new National Bank Notes; this created a demand for the bonds. Supporters of the bill wanted a "uniform currency" that facilitated borrowing and financing war.[154] They got it. A number of persons wanted to put an end to state banks. They achieved some success in suppressing the great variety of state bank notes. They did not succeed in ending state banks, even with a later act that heavily taxed the notes of the state banks. After a rather short period of time, state bank growth grew sharply. This occurred because demand deposits were becoming a larger factor in bank money than bank notes. The state banks grew rapidly by creating demand deposits and these were not taxed.

One might well wonder what had become of the already existing uniform currency, namely, gold and silver. The major banks suspended redemption of their notes in specie at the end of 1861.[155] Subsequently, the greenback issues tended to diminish circulation of specie relative to paper money because bank-money was created by State banks using greenbacks as reserves. In the 19th century period being considered, gold and greenbacks exchanged at market prices. Greenbacks floated against gold, so that Gresham's law did not drive specie entirely out of use.[156]

The bill succeeded at its objectives. By the end of 1865, almost 1,600 national banks had been incorporated, of which about half were conversions of state banks.[157]

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[154]The bank notes issued by state banks traded at different prices. They had various degrees of acceptability in different places. In the same way, it is not usually possible to get checks on one's local bank accepted outside one's region. Even locally, merchants require verification. Although different prices were and still are a normal feature of free markets, certain interests wanted a uniformly-priced currency.

[155]See Wesley Clair Mitchell's *A History of the Greenbacks* (1903) for an account of how this came about. For an account of Jay Cooke's activities in financing government debt issues, see Oberholtzer, op.cit.

[156]Gold and silver remained as part of the money supply well into the twentieth century. Gold's use as money domestically ended in 1933 and silver's use ended in 1967-68.

[157]Murray Rothbard's *The Mystery of Banking* (1983) contains a brief but very useful summary of the national banking system, including the rôle of Jay Cooke in establishing it and its inverted pyramidal system of reserves. Bruce A. Champ's work, here and here, contains helpful

The legislation used a method that had previously been used at the state level.[158] It allowed those forming banks to deposit certain U.S. bonds with a new Treasury official, the Comptroller of the Currency. He then issued uniform-looking National Bank Notes to the banks and held the securities for as long as the notes were outstanding.[159] The interest paid on the bonds continued to go to the bank's owners. The bankers could then use the notes to service demands for cash as they began to make loans.

To give the notes currency, several features were attached. The notes promised to pay "dollars" on demand.[160] All the banks in the system were required to accept each other's notes. The government accepted the notes at par in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports. The government also, by law, said that for salaries and debts that the government owed, except for interest on its debt and for redeeming this national currency, it could use these notes at par. These provisions gave the notes something of a legal tender quality with respect to inter-bank and government operations.

The rules for insolvency also supported the currency. If a bank could not redeem its notes in lawful money, the government would liquidate the bonds held for collateral in order to pay off on the notes. If that fell short, the government had a first and paramount lien on all the bank's assets. These provisions insured the notes against default.

These provisions melded the banks and the U.S. government into a mutually supporting corporatist relation. To start a bank required U.S. bonds, the demand for which supported the U.S. bond market and helped the government to float more bonds. The bank that joined found itself working within a cartel-like structure in which there was competition for loans combined with system-

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summaries of the legislation and some empirical facts on the system.

[158]Rep. Spaulding observed that the bill was modeled closely after the 1838 banking law of the State of New York.

[159]They carried the distinctive name of the issuing bank and had places for the signatures of the bank's cashier and president or vice-president who, by law, had to sign. Examples are here and here.

[160]At a time when the government lacked gold and silver coin, this meant greenbacks.

wide regulatory features.[161] A cartel is an organization of firms with the objective of making a monopoly of sorts. Free market cartels usually fall apart because individual firms undersell others, and the cartel cannot enforce its pricing or quantity restrictions. A government-run cartel can be maintained, however, due to the government's ability to make and enforce rules. The words "uniform currency" were code for creating a money cartel or monopoly and driving out the competition from notes issued by the State banks.[162]

Such a government-corporative banking system has many changing facets. There are different participants involved who have different interests that play out through politics in such systems. The government has interests, and within government, different parts of it have different interests. Banks have different interests according to size, type, location, etc. Laws have effects on banking, which then have effects on the economy, which then have political effects. Causation works in multiple directions that are not always easy to understand.

Complexities included the following. There were taxes on the notes issued. There was a redemption fund required after 1874, which was a method of insuring the notes. Banks could present each other's notes for redemption in lawful money (greenbacks and specie). There were complex reserve requirements. The government chose to use some banks as depositories for public money and as financial agents of the government. There were geographical and size constraints within the legislation. Loan and demand deposit creation could grow to become more important than note creation. The banks could not expand the supply of notes without buying more government bonds. This inelasticity of supply may, at times, have introduced seasonal fluctuations in interest rates that strained the system. Note issue was costly, and some major banks did not issue them for extended periods. All of these factors impinged on the behavior of banks and National Bank Notes within the national system.

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[161]Competition was lessened by controlling entry by geography and population size.

[162]Suppose that instead of there being a number of competing auto manufacturers, who make a variety of different models at different prices, they all are forced together under government control to manufacture a "uniform model." Each car's body is stamped with a different name, like a bank's name, but all are manufactured in Washington and shipped to the various dealers for further manufacturing and distribution. This kind of cartel is something like what the National Currency Act accomplished.

Furthermore, the government raised the allowed denominations of notes in 1882 when it also made silver certificates into lawful money that could be included in bank reserves. National Bank Notes could not be used as reserves. Silver certificates in small denominations were increasingly issued. These changes discouraged bank note issuance and encouraged use of silver certificates. But after 1900, due to rule changes that lowered the amount of bonds required and the tax on notes, note issue expanded sharply.

The structure of the National Banking System made it susceptible to financial shocks. Panics occurred in 1873, 1893, and 1907 with 1884 and 1890 borderline cases. See, for example, Wicker's summary.

Congress always reserved to itself the power to amend, alter, or repeal the act. This is a powerful clause that allows the government to change or revoke the chartering of the banks. By this reserved-power clause, the banks, their stockholders, and their customers, including holders of National Bank Notes, according to one Supreme Court decision, "took their interests with knowledge of the existence of th[e reserved] power [in the Act], and of the possibility of its exercise at any time in the discretion of [Congress]."

**Constitutionality of the National Currency and Banking System**

Chapter IV of this book contains a critique of *McCulloch v. Maryland*, which is the decision that ruled that the federal government had the power to incorporate the Banks of the United States. With that building block in place, Congress was free to incorporate hundreds of national banks. That aspect of the National Currency Act raised no further constitutional challenges. But, from our perspective, since we have argued that federal incorporation is unconstitutional, this makes the National Currency Act unconstitutional on that ground alone.

Justice Marshall ruled that the power to incorporate was incidental, or implied, or necessary and proper to the power to borrow. Neither he nor any other Court thereafter derived this power from a supposed power of the government to emit bills of credit (p. 746). They also didn't say that the power to incorporate implies that the government has the power to emit bills of credit. The constitutionality of emission of bills of credit is a separate matter.

Once the legal tender cases, covered in Chapter VI, made the greenbacks constitutional, the government-created national banks could distribute the

government-printed and government-supported National Bank Notes without any concern over a constitutional challenge. But we can question this emission of money on constitutional grounds.

Chapter I, Chapter II, and Chapter III of this book all treat bills of credit. Chapter I argues that the federal government has no constitutional power to emit bills of credit. Chapter II reviews monetary history prior to 1861 and shows that the government did not issue any bills of credit and didn't act as if it had that power. The Constitution explicitly prohibits the States from issuing bills of credit. Chapter III shows that the Supreme Court, from 1837 onwards, produced erroneous constitutional arguments as it bent over backwards to allow State-owned banks to emit bills of credit.

Salmon P. Chase, as Secretary of the Treasury (1861-1864), was the creator and instigator of the National Bank plan. He very much wanted what he thought to be an honest, secure, and uniform currency. He wanted to clamp down on the state banks. He brought the plan to Congress and pushed for its passage. By the time we get to 1869 and *Veazie Bank v. Fenno*, Chase had become Chief Justice Chase. It then is no surprise to find him writing

> "It cannot be doubted that under the Constitution, the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions that Congress may constitutionally authorize the emission of bills of credit...it is enough to say that there can be no question of the power of the government to emit them, to make them receivable in payment of debts to itself, to fit them for use by those who see fit to use them in all the transactions of commerce, to provide for their redemption, to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers until recently were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country...

This statement is, in all important respects, a series of misleading statements and outright falsehoods. First, Congress didn't "provide a circulation of coins." It minted bullion brought to it into coins. It was passive with respect to the circulation except insofar as it had a duty to regulate value of coins so that the coins that persons wanted to maintain in circulation could so remain. Second, the matter of emission of bills was not settled by any uniform practice or

repeated decisions of Congress. Those decisions had only begun in 1861 and then taken reluctantly under pressure of war, as Chase well knew. Many in Congress hoped they would be temporary. Third, no matter what decisions had been taken, they do not determine what the *Constitution* allows. That is the proper criterion, not practice. And so, fourth, there remained in 1869, when Chase wrote these words, a very serious question that government had the constitutional power to emit such bills. The rest of his statement does not justify the power as constitutional. It only acts as if the power is proper because the resulting currency is a good thing, by being uniform, useful, and convenient, and because somehow Chase conceived that Congress was doing the right thing by supplying the country with a paper currency.

> "It [the currency] now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government, both are issued on the credit of the government, and the government is responsible for the redemption of both, primarily as to the first description, and immediately upon default of the bank as to the second. When these bills shall be made convertible into coin at the will of the holder, this currency will perhaps satisfy the wants of the community in respect to a circulating medium as perfectly as any mixed currency that can be devised.
>
> "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...Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."

Since the Court itself here admitted in plain English that the National Bank Notes were bills of credit, which are unconstitutional, we conclude that the National Currency Acts were unconstitutional for that reason too.

There is a large contradiction in the Supreme Court's logic in *Veazie Bank* and the cases like *Briscoe* and *Darrington* covered in Chapter III. In the earlier cases, although the relation between state government and state banks is, if anything, even closer than that of federal government to national banks, the Court denied that the banks were issuing bills of credit on behalf of the States. That was because the Constitution clearly denies that power to the States and

the Court wanted to allow the States to be able to have their paper-money-issuing banks, regardless of the Constitution. In *Veazie*, the Court boldly said, in *dicta* that were not essential to the case being judged, that federal bills of credit were constitutional. This was in order to build up a record that could be used in later cases that allowed these bills of credit. The “constant” in all of this is the Court’s desire to maintain paper-emitting banks and corporatist structures, at the state and federal levels.

Let’s turn to the speech of Rep. Noble (here) in the debates preceding the passage of the 1863 Act. Noble opposed the measure. He began by saying that he didn’t expect “to change a single vote.” He said that the “great and untiring efforts that are being made by the Secretary of the Treasury” make its passage a “foregone conclusion.” This, he said, was “not because it, or any other thing like it, is demanded by the people, but simply because it is a pet measure of the present head of that Department.” He continued by expressing his belief “that, like all great paper money schemes, it is fraught with many evils that must sooner or later fall upon the country...”[163]

Noble then turned to the constitutional issues. Secretary Chase, he said

> “has found it difficult to decide just where the power is to be found. He says he forbears any extended argument on its constitutionality; that it is proposed as an auxiliary to the power to borrow money, as an agency of the power to collect and disburse taxes, and as an exercise of the power to regulate commerce, and of the power to regulate the value of coin.”

He then quoted Chase’s explanation:

> “Of the first two sources of power nothing need be said. The argument relating to them has long been exhausted and is well known. Of the other two there is not room, nor does it seem needful to say much. If Congress can prescribe the structure, equipment, and management of

[163]This prediction and other similar predictions made by critics of the national currency system take *time* to come true, often *many decades.* The effects of basic changes often take a number of generations to work themselves out. The effects are contingent on a host of future events, new laws, and regulations. Effects may be slow in coming but they are inexorable. They add up. Over the course of a single lifetime, an observer will usually be able to detect substantial effects occurring as a result of basic causes.

> vessels to navigate rivers, flowing between or through different States, as a regulation of commerce, Congress may assuredly determine what currency shall be employed in the interchange of their commodities, which is the very essence of commerce."

Noble countered on each power. Money could be borrowed from citizens, and the questions there were only interest and security. Creating a currency affected neither. People already have money to loan. It is not the government's business to create that money. There is no connection to the disbursement of funds, which people are always ready to receive. The proposed banking system does not "render...the debtor more able and willing to pay."

Let's elaborate Noble's reply. As collateral, a bank under the National Currency Act delivers bonds as collateral to the government. These are bonds that the government has already sold for specie. The bank in return receives printed paper notes to be used in its lending operations. As notes flow back to the government through taxes, the government then spends these notes, which are accepted because they have to be accepted in salaries and because they have a tax foundation. The scheme is a way for the government to issue a paper money like greenbacks through the instrument of the national banks. The more that the government borrows, the more debt it creates. The more bonds it creates, the more the banks can buy and use for collateral to obtain the notes. The only difference between this scheme and issuing greenbacks directly is that this scheme interposes government borrowing and banks into the process.

Banking and government become a corporative body made up of two parts, each dependent on the other, each influencing the other, each seeking to control the other, and each having some power over the other – with the government having the ultimate legal power. This arrangement encourages a flow of key persons back and forth between important posts in government and the banks. It also encourages lobbyists, influence over legislation, vote manipulation, and joint committees to study issues and problems and make recommendations.

As for the commerce power, Noble argued that the connection was "a little too far fetched to be worthy of any serious consideration." To regulate "does not mean to destroy or create."

The Constitution already prescribed the regulation of coin value in order to render "exchanges easy and convenient." The regulation *of* commerce *by*

government presumes that the government stands apart from commerce as a separate entity and kind of organization. It exists on its own and so does commerce, with its institutions. For government to join *in* commerce *with* commercial enterprises, even to *starting* them, cannot be regulation *of* commerce. It is a merging of government and commerce.

The notion of a new paper currency with legal tender qualities could not be found in the Constitution, Noble argued. It was inconsistent with the logic of the Constitution:

> "It would be strange indeed, if it was the intention of the framers of the Constitution, that the Federal Government should have the power to issue or authorize to be issued and put into circulation any other currency [than gold and silver] which might be made a legal tender in payments of debt by it, and yet that it should restrict the States from allowing the same money which it might thus provide or authorize to be received as a legal tender. No one can be convinced for a moment that it was the intention that the Federal Government should have a power to create a currency which the States should not have the right to give as much credit to as might be given to it by the Federal Government. The proposition is preposterous, and will not bear the test of reason. If this had been the intention of the framers of the Constitution, instead of providing that nothing but gold and silver should be made a legal tender in payment of debts, they would have provided that nothing but gold and silver and such other currency as might be authorized by law of Congress should be received in payment of debts."

This is a devastating argument against the constitutionality not only of the proposed national currency but also of the greenbacks.

### Congressional Debates on the Currency Acts

A review of some of the Congressional debates is useful in understanding what members of Congress were thinking, or at least articulating, as they engineered an entirely new and unconstitutional monetary system for America. We can do little more than suggest some of the history, interests, attitudes, and ideologies that influenced the vote. Even without the war as an influence, federal-state relations in banking and money issues were unsettled. The relative powers of the federal and state governments were a component of these problems.

Struggles over the Banks of the United States, over state banks, paper money, the sub-Treasury, and specie suspensions had gone on for a long time.[164]

The state banking system, in the Free Banking era, resulted in a multiplicity of bank notes issued by different banks. A substantial literature has developed on the subject. Free banking has its critics and its supporters. Vieira is highly critical of the abuses of fractional-reserve banking, the suspensions of redemption in specie, and the failures of either States or the federal government to clarify and control these problems.

At the time when the National Currency Acts were passed, opinion was likewise divided. Some legislators were anxious to suppress the state banks, and others supported their existence and utility to their communities. Jay Cooke, the premier investment banker who distributed bond issues for the government, used state banks to buy the bonds. At first, he was reluctant for this reason to endorse a national system, noting

> "Mr. Chase frequently mentioned the matter [the national banking system] and his anxiety on the subject at times when I met him in Washington, but I was indisposed to aid him because I felt that the banks with which I was in close connection were doing much to facilitate my government loan operations, and that under the present conditions it would be hazardous to make war upon the state banking system."

Cooke wanted, however, to change over to a uniform national banking system at an opportune time to correct "the evils of the old system" and at the same time "create and make a market for a large amount of our government bonds." He changed his mind and embarked on a nationwide newspaper campaign to promote the bill, which at that time was moribund in Congress. He also engaged in lobbying through "personal appeals to the senators and representatives." After six weeks of promotion, the bill passed.[165] Cooke saw that the banks not only would be buying bonds so as to obtain bank notes, but also could distribute (sell) government bonds to their customers. He and his investment banking operation would profit by distributing the greater volume

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[164]The sub-Treasury, first created in 1840, was a system of handling the government's monetary operations in specie that was separate from the banking system.

[165]Oberholtzer, op. cit., credits Cooke entirely for the bill's passage.

of bonds to the banks, as he had in the past.

Rep. Spaulding introduced (here) the 1863 Act. He "had no doubt of the constitutionality of the national bank bill proposed by the Secretary of the Treasury..." inasmuch as "the Supreme Court of the United States had, by repeated decisions, held that they were constitutional and legitimate State institutions." He regarded it, not as something that would relieve the Treasury in the following 2-3 years and not something that "will in any manner lessen the issue of paper money," but "as the commencement of a permanent system for providing for a national currency."

Spaulding extolled the corporative (and non-free market) character of the measure. He observed the law had "the purpose of combining private capital with the credit of the Government in the issue of bank bills similar in all respects to legal tender notes." The bankers would earn interest on the bonds deposited as collateral and on the notes as part of the arrangement: "The Government gives this bonus and the privileges of banking to capitalists, to induce them to combine their credit with the credit of the Government in issuing this national currency." As another inducement, "The banking associations are to be exempt from all State and United States taxation..." The plan "proposes to combine the interest of the nation with the rich individuals belonging to it."

Many questions can be raised about this scheme. The nation had diverse interests. The interests of bankers, the nation, and the government might diverge. How would such divergences be reconciled? Why did the country need a uniform paper currency? The country had a uniform specie currency. Why was it not being fully mobilized? Why create a national paper currency through the banking system? Why make it permanent? Why create a liability-money? Why privilege bankers in a symbiotic relation with the government? Why should the People have to pay bankers for money? Why create a structure susceptible to booms, busts, panics, and depressions? Can this scheme possibly be what the framers envisioned and embodied in the Constitution's monetary powers and disabilities? Wouldn't this Act radically transform the balance between federal and State powers?

Spaulding took the Bank of England as his model: "The Bank of England is a striking example of the combined power of public authority and private influence in sustaining the credit of Government. We may safely profit by this example." Spaulding revealed here the major purpose of this bill from the

government's point of view, which was to sustain its credit, that is, support the government bond market. National currency was a means to that end. This raises further questions. How safe was it for liberty to generate such "combined power"? How safe was it for liberty to meld government power with private influence? Mightn't the government credit become *too* strong and with it, the government become too powerful? What kind of concept of government was this in which the government no longer stood neutral among society's many divisions, but allied itself with one industry? Mightn't this lead to Leviathan? Wasn't this, in fact, Leviathan, a building-block of empire?

Spaulding noted that "This bank has been the chief agent in sustaining the British Government in the long and exhausting wars in which she has been engaged." Where was the concern that a similar banking system in the U.S. would encourage the U.S. government to engage in long, costly, and unnecessary wars that it otherwise might not have engaged in, by providing it with a ready means of finance beyond taxation? Where was the concern that the republic was being supplanted by a structure attuned to empire? Spaulding's preference was exactly *in* the direction of empire. He extolled national government and a national bank. It was not enough that the government do its business in gold and silver coin or maintain its accounts in the subtreasury. He aimed instead for "permanent control over the national currency," independence from any "State institutions for the execution of its great powers." He invoked Hamilton: "It is now most apparent that the policy advocated by Alexander Hamilton, of a strong central Government, was the true policy." This, he thought, would "have been able to avert this rebellion."

Spaulding's speech is an example of how the war was strengthening the sway of nationalism and the federal government. The logic of the situation demanded this outcome, because the war was being fought to maintain a Union against breakaway States. A national currency system that supplanted state diversity in money and banking fitted in with this general movement toward a much stronger federal government.

In this vein and forgetting that the American dollar was a silver dollar, the Philadelphia *Press* wrote

> "We accept this measure of the Senate as the beginning of a new reform in our currency. It is a step in the path of progress. The right of state banking and state currency perishes with other pernicious states' rights that this war is terminating. Hereafter the American dollar will be the

> same wherever the authority of America is respected."

The Chicago *Tribune* denounced state bank-money while thoroughly mangling the Constitution:

> "The bank issues...are the spawn of special privilege and have in violation of the plain letter of the Constitution usurped one of the attributes of national sovereignty; viz., to coin money and emit bills of credit."[166]

Bank-money issues of private state banks are constitutional. Being paper, there is no coinage of money involved. The federal government may *not* emit bills of credit.

Rep. Harrison, who was against the bill, (here) preferred an emergency greenback issue to a permanent paper currency *cum* national banking system because the greenbacks, as an expedient, would end when the war ended. He preferred the sub-Treasury system as a check on money supply expansion and undue bank-led speculation that had, in the past, led to booms and then depression. A government-sponsored banking system would maintain the boom-bust cycle:

> "The circulation [of money] of the country will increase and continue beyond all proper proportions...When that inevitable day shall come, the bubble will be pricked. The circulation of the banks will be returned home more rapidly than it can be redeemed; the stocks will come upon the market and the price will fall, to the inevitable loss of the community. This state of affairs has happened, and I do not see why it will not occur again under the same or very similar circumstances."

Rep. Fenton supported the bill (here), noting the feature of government *control*:

> "In giving my support to this bill, which is substantially the scheme of the able Secretary of the Treasury – to give the Government the control mainly over the issue and circulation of currency – I shall run counter to my previous convictions upon this subject."

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[166]See Oberholtzer, op. cit., chapter VII on "The National Banks".

Fenton felt that "delay cannot be admitted; action is absolutely demanded of us..." He alluded to the *government imposition* of this bill upon the existing institutions, saying

> "...I might, indeed, hesitate and oppose any congressional action which would make innovation upon the systems of banking established by the people of the different States...But now...the conviction of the necessity of a change, so as to give the Government the control of the currency of the country, cannot be avoided."

After listing all the extreme measures that the government had adopted, so as to suggest that an extreme money measure would be of the same sort, it is interesting that Fenton acknowledged how *well* the decentralized banking system had worked in the past:

> "But considering the monetary system the banks bring to us – theoretically based on the precious metals, and a paper currency which financial regulations have allowed to represent them, issued by banking institutions scattered over the Republic, more than one thousand in number, created by differing local legislation, in some States with a limited circulation and in others unrestrained, in some States based on solid securities, in others with no pledge for public safety other than the integrity of their management – the wonder is that such a system should have subserved the wants of a great commercial country so well, even previous to our present disorders."

Amid his many suggestions, Rep. Baker (here), who was against the bill, noticed the intersection between the banking system and the national debt:

> "I will also add that this whole system is based on the idea of a permanent public debt, an idea which is totally opposed to the traditional policy of the country."

In order to produce a uniform currency, Baker sketched the outline of a central bank, which he called a "national association, with a branch in each principal city of the Union..." It would serve as a bank for other banks, taking in their currency and issuing uniform notes obtained from the Treasury. Baker feared that the bill would decimate state banks. He complained that "it is calculated to interfere with satisfactory banking regulations in most of the States." He ended by accusing the Treasury of fiscal mismanagement:

> "I still think that the management of our finances, by resorting only to temporary expedients, has been grossly and radically wrong. I believe from the very outbreak of the rebellion that our permanent [long-term] securities could have been sold to a large amount, and that the necessity of such an enormous and profligate issue of Treasury [legal tender] notes could have been obviated. I favored the issue of interest-bearing notes to keep them out of circulation..."

Rep. Alley (here) favored the bill as a way to curtail excessive issues of legal tender notes. He

> "saw no other way but for the Government to take into its own hands the regulation of the currency...and to act in cooperation either with existing monetary institutions or aid in the creation of new ones that shall be in sympathy with the Government, and whose interests and fortunes will be identified with its own."
>
> "...I am in favor of identifying them [the banks] with the Government in the supply of currency to the nation, making it for their mutual interest to sustain each other; and it seems to me this bill does it..."

Alley was describing a corporative *national* state. Currency in the form of gold and silver was no longer to be a market-determined good that was produced by those responding to the price incentives of a free market in specie. It was to be bank-money produced according to a set of political incentives by which government might expand its debt, and a set of political and economic incentives by which a favored industry might choose to expand its liabilities. It was to be influenced by all the many complex interests and incentives within a corporative state arrangement. Corporative arrangements had previously occurred at the state level, wherein banking, real estate, and construction interests ally with the State. Now they were to be taken to the national level.

Sen. Sherman (here) strongly favored the bill. He had supported the legal-tender notes as a "necessity," on the notion that the legal-tender provision would maintain their value against gold; but even at that time, he had favored a national currency. He ruled out a repeal of the sub-Treasury. He ruled out borrowing because "putting our bonds into market and selling them for what

they will bring, it would be at a great sacrifice."[167] That left, according to him, a choice between legal-tender notes and the national currency system. Legal-tender notes, he thought, presented the temptation of more and more issues, accompanied by more and more depreciation and inflation. The National Currency Notes would instead be backed by the collateral of U.S. government bonds.

Sen. Powell (here) said that

> "The object is to destroy the State banks...That is clearly set forth in the report of the Secretary of the Treasury...The sole object of the bill is a grand consolidated scheme for the issue of paper money. The Secretary of the Treasury and the friends of this bill...desire that they shall be the only makers of paper money; that it shall penetrate into the channels of commerce in every section of the country, to the exclusion, ultimately, of all the local bank circulation."

He offered an amendment that required the banks to pay their issues in coin one year after the war ended. Mr. Sherman thought it best to wait. Powell made an incisive retort that revealed one of the political effects of the bill:

> "I do not wish to wait for future Congresses to make it the law. I well know the influence that this bank system will have if it shall extend throughout this country. I know they will have a vast influence. They will have their lobbyists from every State and district perhaps in this Congress to prevent any healthy improvement of this bill. It will be vastly to their interest to redeem their issues in a depreciated currency to the damage and injury of the people and the whole commerce of the country. I do not, for one, desire to be forced to contend against that influence hereafter."

Sen. Collamer (here) began by pointing out that "It is not a war measure." A uniform currency, he noted, meant the destruction of the local currencies. This was to be done by taxing the State bank notes. He questioned the constitutionality of such a tax. A tax should be to raise revenue, not to destroy

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[167]Actually, the Treasury could sell callable bonds or sinking fund bonds. Several Congressmen mention this favorably, *including Sen. Sherman*: "The power of paying off a national debt, by the means of a sinking fund, exists at any time."

state institutions. He questioned the constitutionality of federally incorporating thousands of state banks in the States and territories without their oversight of corporate affairs (visitation.) He questioned the constitutionality of removing the bank property from state taxation.

Collamer wondered how the government could redeem the notes if the bonds fell in value, or what would happen if the bonds held as security for the notes fell in value. He wondered about the power of the Comptroller of the Currency in holding funds in pet banks and distributing banks across the country.

Sen. Howard (here), an opponent of the bill, observed that "The scheme does not contemplate the use of one dollar of gold or silver coin as the basis for the support of this immense circulation." It rests on the credits of the bonds of the United States and "It is sufficient for me to know the credit of that kind of paper is far below gold and silver..." He regarded any such liability-money that was not "convertible into specie or its equivalent...[as] a vicious and fatal principle of banking." His State (Michigan) had a constitutional provision prohibiting any suspension of specie payments by any person, association, or corporation. The national banks would operate inconsistently with that provision.

Sen. Davis (here), who was opposed, favored gold and silver as money, or perhaps paper and specie, with the paper convertible into specie; but he did not favor paper money backed by more paper. He did not favor undermining the state banks. He observed that if the federal government should not survive, the people still had intact their state governments. The many state governments provided a kind of insurance policy. If the country had only a federally-generated currency, then

> "...when it has done its work of blotting out the State banks, and itself falls, as it must, what then will be the condition of the country and people? Sir, madness rules the hour."

There would be no monetary system to fall back on. He termed the national system a "monster". He thought that "the union of purse and sword" was "folly, madness, and degeneracy of the day.

The last comment of Davis is insightful. The Constitution granted the U.S. government a significant sovereignty in the sword and also the purse, through the taxing and borrowing powers. It withheld control over money. The

monetary revolution brought about during the Civil War added control over money to the powers of the purse as did the income tax in 1913.

In 1864, upon amending the 1863 Act, Congressmen made further comments.[168]

Sen. Davis provided general remarks (here) on gold and silver vs. irredeemable paper currency.

> "There never was a highly commercial country on the earth that had for any considerable length of time an irredeemable paper currency. There is a higher and more imperative law in relation to currency than can be imposed by the legislation of the Congress of the United States, or even by our Constitution, and that is the general law of the world. By the universal practice, by the inexorable judgment of the whole commercial world from ancient times to the present, money, the great representative of value, has been gold and silver coin...It will remain so in the future as it has been in the past...Whatever measure we may pass and whatever arrangements may be adopted by our Government for the purpose of establishing a permanent irredeemable paper currency will prove futile and we will have to return to the metallic standard. The process of transition from a metallic currency to irredeemable paper is always attended with a vast degree of inconvenience, of loss, and of ruin; and so is the transition back to a gold and silver or mixed currency."

Davis continued by distinguishing temporary expedients from permanent measures:

> "There may be certain exigencies, certain great necessities in the condition of a country, that require a temporary resort to an irredeemable paper currency, but whenever they occur, as in our revolutionary war, they are of temporary duration; they are transitory and fugitive in their nature; the exigency that demands them must soon pass away; and then it is a law of commercial trade, required by the universal usage of the world, that the country having made this temporary resort shall return to the uniform and universal money of

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[168] I do not discuss several lengthy speeches that focused on the nature of banking itself and the position and operations of the state banks as compared with the prospective National Banks. Those speeches may be found here and here.

> gold and silver, according to the practice of all commercial nations. The nation that persistently stood out against this general law of currency would be subjected to a commercial outlawry."

Later in his speech, Davis observed that specie was indispensable for settling balances of trade among nations, and that the substitution for it of a "spurious paper currency...would cause an amount of confusion, loss, and ruin too wide-spread and great to be estimated."

Davis recalled that he had voted for legal-tender notes as an emergency measure

> "not that demand notes were, or could be made by a law of Congress, money in the sense of the Constitution of the United States, for I entertained no such opinion as that. The idea of coining money out of paper, in the sense in which the Constitution and those who made it understood the coinage of money, to my mind was an absurdity..."

Davis here underscored the original meaning of the Constitution.

He went on to recount his reassessment of his past vote:

> "I was induced, against the powerful argument of the honorable Senator from Vermont [Mr. COLLAMER,] to vote for the demand notes, and to give them the characteristic of a legal tender. The argument of the honorable Senator [see Chapter VI or here] staggered my mind in relation to the legality and the constitutionality of making that kind of paper a legal tender, even to answer any need of the Government, however extreme. I have investigated the question more maturely since, and my subsequent inquiries and reflections have satisfied me beyond all doubt that there was no authority in the Constitution for attempting by legislation to give any such character to our demand notes. I see from a paper which has reached me this morning from Kentucky that one of our judges has decided that the 'greenbacks,' as they are termed, are not a legal tender, because they are not money according to the sense in which the Constitution of the United States uses that term, and therefore that Congress, under its power to coin money has no authority whatever to establish such a laboratory for irredeemable paper money as now exists at the Treasury Department."

Davis went on to consider another important constitutional question. Had Congress the power to authorize a United States bank to issue paper money? Davis had his doubts. He began by saying that he thought

> "...that for the purposes of a fiscal agency Congress had a right to charter a United States bank; but I have doubted the power of Congress to authorize the bank to issue a currency. That it would have the power to give the other functions of a bank to its fiscal agent for the convenience of the collection, custody, disbursement, and transfer of its funds from one point to another, I entertain no doubt; but I seriously distrust the correctness of the position that Congress, under the power 'to coin money and regulate the value thereof,' can resort to any such indirect and irregular power as to authorize its fiscal agent to issue paper to circulate as money, even though it is redeemable in gold and silver; but that Congress have no power to substitute a declared irredeemable paper money as the medium of values, as the representative of the commercial transactions of the country, under its power 'to coin money and regulate the value thereof,' in my own mind I entertain no doubt whatever."

Davis doubted that the government had the power to make or allow *any paper* obligation circulate as money, whether its own or that of a bank acting as its agent, even if the paper notes were redeemable in specie. This is a description of bills of credit being emitted. Hence, he doubted the constitutionality of National Bank Notes, since the banks were agents of the Treasury and the Treasury was intimately involved with the scheme. He had no doubt that Congress had no power to make any irredeemable paper money into a "medium of values." He observed that the National Bank Notes were not redeemable into gold and silver. The phrase "medium of values" includes legal-tender, partial or full; so that this was another constitutional obstacle.

Notice that Congress in 1919 and 1934 made gold and silver certificates, respectively, a full legal tender. Federal Reserve Notes became legal tender in 1933. National Bank Notes had the partial legal-tender qualities noted earlier. Davis apparently would have been opposed to all on constitutional grounds. His position includes the States and banks they might create as agents, since they can make nothing but gold and silver a legal tender.

There ensued some arguments over exactly who caused the suspension of specie payments, the government or the banks, and who had brought about the

excessive money issues, the government or the banks. Davis defended the banks vigorously. He entered data showing that the circulation of New York and Kentucky banks had not increased in years, which led him to assert

> "The great and ruinous circulation of irredeemable paper which so disorganized all the commercial transactions and business of the country, threw everything into confusion, and produced such fluctuations in prices, was produced mainly by the Government of the United States."

Mitchell's *History of the Greenbacks* details *several* causes of the suspension, one of which was the Treasury's handling of a large loan from the banks. Davis criticized the government on that score:

> "The Government gathered together all of the gold and silver of the banks, and instead of drawing drafts upon the banks that had made subscriptions to the Government loans and allowing those drafts to be met at the counters of the banks, if I recollect aright the Government distributed that specie widely over the country, and therefore made it in a great degree unavailable for the convenient business of the banks and for the interests of the country."

Sen. Sumner (here) reminded the Senate that

> "The primary object of this bill is not, therefore, to establish national banks, but to secure the national currency. For the sake of the currency a system of national banks is to be established; they are the means to an end. But the end sought is an improved currency."

This made it clear that the banks were agents of the government in the issuance of its bills of credit. Sumner ignored the lack of constitutional power for such an emission. He assured the Senate that "Gold will assume its normal place..." He pooh-poohed that some Senators "set up claims for their States and insist upon certain rights of taxation." These "local pretensions" should be set aside "when the national life is staked upon the issue." In his zeal to defend the national banks and remove any obstacle in their path, he rebuked the state banks for being in the way and for producing too much circulation of their

bills.[169]

Vieira, it should be noted, consistently criticizes the paper money emissions of fractional-reserve banks, unless under certain conditions. He favors a separation of banks into 100% reserve *deposit* banks and fractional-reserve *loan* banks (p. 712):

> "And under 'free banking', honest deposit banks issue notes on 100% reserves of specie; and honest loan banks emit notes on fractional reserves, but with full disclosure – so that no notes not perfectly redeemable in specie are held by anyone unknowingly or unwillingly."

**Summary and Conclusions**

From 1861 onwards, the U.S. government introduced paper monies that were its liabilities, direct or indirect. These included legal-tender United States Notes, National Currency (or National Bank) Notes, Silver Certificates, and Gold Certificates. These traded alongside gold and silver coins.

All of these notes were unconstitutional bills of credit. The Supreme Court, starting in 1837 in the *Briscoe* case, looked favorably upon bills of credit issued by the states; even though the Constitution explicitly forbids the states to emit bills of credit. The Court continued its illicit love affair by approving these unconstitutional federal bills of credit and even affirming the legal-tender quality of greenbacks in such cases as *Knox v. Lee, Juilliard v. Greenman,* and *Veazie Bank v. Fenno*.

The government emitted the legal-tender notes and the specie certificates directly and the National Currency indirectly, through a system of national banks that it created nationwide. This was a monetary revolution. The U.S. government had, for the first time, constructed a corporative state in the monetary sector. It left the Constitution, laissez-faire, and free markets in money and banking behind, in favor of legislative law, a corporative state, and

[169]This criticism may not have been justified. The large issues of legal-tender greenbacks could be used by the state banks as reserves. The demands of war production placed upon the economy also caused an increase in demand for credit. Even Sumner conceded "If it be said that in certain parts of the country, as in New England and New York, the State banks have performed good service, I reply that, even admitting all that is claimed, this service is local and incomplete. It does not embrace the West."

controlled and regulated markets.

The tendencies of the corporative state would take time to unfold. In due course, liberty and justice for all would increasingly take a back seat to political maneuvers, deals, interest groups, lobbying, favoritism, cronyism, and the exercise of raw power. Matters would get to the point in 1933 when the U.S. government would expropriate the people's gold and give them paper for the gold promised in the gold certificates. The Supreme Court would stare reality in the face and ignore it, claiming that warehouse receipts for gold could be satisfied by the government's proffering "currency" in the form of printed rag paper in the place of gold. And in 2008, the threatened collapse of the entire financial system due to the failures of huge dominant financial institutions would lead to trillions of dollars being infused by taxpayers, without making the banks solvent.

A good many Congressmen spoke up and voted against these measures on constitutional grounds. The debates, however, often focused on how the new system would or would not work, on the perceived successes and failings of state banks, and on what would happen to the state banks. The exigencies of Civil War finance were raised again and again. Nationalist and anti-States' rights sentiments were raised. In the end, majority ruled. A new system was inaugurated. The republic did not fall. Neither did the banking sector or the economy. Not right away, at any rate. Rome didn't decline and fall with Augustus in 27 BC.

Let Vieira (p. 705) have the last word:

> "A not overly cynical observer might conclude, however, that the bill was no blessing at all for WE THE PEOPLE, inasmuch as a reading only slightly different from {Senator] Sherman's would have the National Banking System greasing the skids for a slide into massive public indebtedness, facilitating citizens' expropriation through taxation, assisting in the erection of a powerful central government – and, perhaps most immediately, delivering the people into the grasping hands of political bankers, by making Americans 'dependent on the United States [and the banks] for...a medium of exchange' (so unlike constitutional 'free coinage', through which the market determines the amount of silver and gold converted from commercial commodities into media of exchange)."

## CHAPTER VIII

### The Federal Reserve System

We continue our journey through lawyer Edwin Vieira Jr.'s *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution.* This article finishes Volume 1 (pp. 746-846) with a first look at the law and policy pertinent to the Federal Reserve System. In future chapters, we examine the removal of gold and silver from the system followed by a discussion of the unconstitutionality of the Federal Reserve money and banking system.

Here we focus on (i) the key elements of the statutory scheme, or what the Federal Reserve legally is and can do, (ii) the Congressional debates that led to its creation, and (iii) some court cases that challenged various aspects of the Federal Reserve's structure. Because there is available a large literature on the origins of the Federal Reserve or Fed, Vieira does not provide a history of its origins.[170] As in earlier parts of this series, this chapter goes beyond, often well beyond, being a strict summary of Vieira's work. I am fully responsible for all errors, omissions, and misrepresentations of Vieira's work and thought, although none are intended.

### Introduction

We have seen (see Chapter VII) that the government in 1863, in the National

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[170]Some books with Fed history include Clarence Walker Barron, *The Federal Reserve Act* (1914); J. Lawrence Broz, *The International Origins of the Federal Reserve System* (1997); Jane W. D'Arista, *The Evolution of U.S. Finance: Federal Reserve Monetary Policy, 1915-1935* (1994); Milton Friedman and Anna Jacobson Schwartz, *A Monetary History of the United States, 1867-1960* (1963); G. Edward Griffin, *The Creature from Jekyll Island: A Second Look at the Federal Reserve* (1994); Elgin Groseclose, *Fifty Years of Managed Money* (1966); James Livingston, *Origins of the Federal Reserve System Money, Class, and Corporate Capitalism, 1890-1913*; Allan H. Meltzer, *A History of the Federal Reserve, Volume 1, 1913-1951*, (2003); Wright Patman, *A Primer on Money* (1964); Murray Rothbard, *The Mystery of Banking* (1983); Murray Rothbard, *A History of Money and Banking in the United States: The Colonial Era to World War II* (2002); Walker Todd, *From Constitutional Republic to Corporate State: The Federal Reserve Board, 1931-1934* (1995); Paul M. Warburg, *The Federal Reserve System, Its Origins and Growth* (1930); Robert Craig West, *Banking Reform and the Federal Reserve 1863-1923* (1977); Elmus Wicker, *The Great Debate on Banking Reform Nelson Aldrich and the Origins of the Fed* (2005); Henry Parker Willis, *The Federal Reserve A Study of the Banking System of the United States* (1915).

Currency Act, introduced a new currency and a new organization of money and banks. We have seen that nowhere in the Constitution is the government given the power to issue paper money, such as the National Currency Notes, and to set up national banks to distribute these notes, as it did in 1863. Organizationally and politically, this unconstitutional arrangement was a corporative state monetary system that fused banking and government. Economically, the national banks were made into a cartel with an advantaged or near-monopoly power over note issue. Taxes on the notes of state banks drove such notes out of circulation, but state banks survived due to the growth of demand deposits. Judicially, the faulty Supreme Court decisions to allow this power and money structure came to be accepted as the norm. Questioning them and the continued Congressional actions declined to a negligible level.

The government kept this system in place until 1913, at which time it deepened the government-banking involvement in money and banking by replacing the older system with the Federal Reserve System. This too is a corporative state arrangement that finds no justification in the U.S. Constitution. This legislation strengthened the system's monopoly on note issue and extended to the newly-created Federal Reserve Board and Federal Reserve banks even greater powers to expand and contract money and credit.

Within the Federal Reserve System, there were contests for control between the Board and the Reserve banks between 1913 and 1935. These led to a consolidation of power within the Federal Reserve Board. The Banking Act of 1935 formally resolved this power struggle by changing the control structure of the Fed in favor of the Board. This contest merely clarified the power over money creation and destruction that had been delegated to the Fed. It is secondary to the fact that the corporative state framework of money and banking remained in place. This structure still exists.

The seriousness and implications of the corporative state arrangement should not be underestimated. The fusion of the money power, banking, and government creates an absolutist power over property. Greenbacks are a government debt that is declared to be money by force of law. They carry a promise of redemption in coin. After greenbacks came a national currency tied to government debt. After this national currency came Federal Reserve Notes tied to debt creation and gold. After the government seized private gold came

irredeemable paper money tied only to debt creation and not to gold.[171] There is a trend toward money inflation and debasement that is unmistakable. This trend is part and parcel of growth in the size of government and government debt. It accompanies a government that uses the paper money and seemingly inexhaustible credit to fund its social programs and its wars. It is part of the process by which a limited republican form of government turns into an unlimited government.

### A Note on Money

The legal, not the financial aspects of money and banking, are our focus; but since the debates often comment on financial matters, we delve briefly into considerations of money and banking.

The existing system entangles paper money and credit, because the money is a liability-money and thus a form of credit. However, to understand such a system, asset-money such as specie, that is, constitutional Money, should not be confused with credit. Although people can use credit in place of money, and sometimes do, money is money because the people choosing to place it in wide use view it as best fitted and therefore most desired for the purposes it serves. One basic role of money is as a medium of account. When a dollar is a silver coin of 371.25 grains of silver, it becomes possible to measure or account for all other prices of goods and services in terms of this dollar and silver weight as the accounting measure or unit. Stability, wide recognition, and acknowledgment of the worth of the medium of account are some of the reasons why people choose a particular good, such as silver or gold, as a medium of account from which to define a unit of account.

A credit is a promise to pay. Pay what? Usually pay money. Money in this sense is the most common means or medium of settling up. It is the item that people usually use to finalize and complete everyday exchanges. Settling and finalizing exchanges is a second aspect of money, distinct from its being a medium of account. That good is money which people select to use in the final settling up when credits are extinguished. It will tend to be something widely accepted through space and time because of its known and stable value. It will tend to be transportable, recognizable, divisible, durable, and of low cost to use

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[171]The demise of this progression is nearing if such signs as the Fed's swollen balance sheet, the debt loads carried by Americans on private account, and the mountain of debt incurred by the United States government mean anything.

and store. In understanding why gold and silver became a common money, Mises summed this all up in the incisive insight that "those goods that were originally the most marketable became common media of exchange."

Some credits (debts) have enough of the characteristics of money to substitute for money as a medium of exchange and settlement. They are easy to transport. They are durable and divisible. But they have serious problems, which make them not as well-suited to money as gold and silver. They are not low cost to use because their values are not well-known, widely-known, and stable. There is a vast variety of non-uniform credits with varying values.

Governments have overcome these problems and made their debts into a medium of exchange by such devices as making them payable for taxes and making them legal tender. This creates a forced money or a fiat money. Government-created debt money is not a free-market medium of account. This kind of money has another serious problem, which is inflation. Debts can be expanded almost at will by governments. This makes their value deteriorate and causes a boom-bust cycle.

It is not possible for a government debt or any IOU – the paper itself, not in terms of a money unit such as the silver dollar – to serve as a unit of account, absent compulsion, because its worth in terms of other goods is not recognizable, widely-known, and accepted. Forced debt-monies typically continue to rely on prices quoted in terms of some other unit of account that people understand and use almost subconsciously, like silver and gold. In the U.S., the price system based on specie that was prevalent in the U.S. probably could not have made, in 1971, a transition to a price system that seems to be unconnected to specie without specie still remaining a price anchor and medium of account.

Personal IOUs may possibly function as money. They have the drawback as a means of exchange that their collectability is difficult to assess. They also lack uniformity. If they are denominated in labor hours, then the labor hours may perhaps become a medium of account; but this has drawbacks, such as the inconvenience of settling up, the hazards of collecting, and the vast variety of different kinds of labor services.

Bank money, such as transferable demand deposits (checking accounts) and individualized bank notes, constitute a debt-money redeemable into specie under a

free-market specie money system.[172] This has historically provided serious competition to specie as a medium of exchange while relying on specie as a medium of account and a medium of redemption.

Private banks issuing their own bank notes have been forced out of existence by central banks and national systems. The currencies of individual countries have displaced privately-issued bank notes of this kind. Most countries now have their own single currencies. Since these currencies are issued through central banks that coordinate all or most of the private banks within a country, each country that has its own currency is analogous to what a private bank issuing its own notes used to be in the early to mid-1800s in America. If there are 150 countries with 150 different currencies in the world, it is somewhat analogous to having 2,000 different banks issuing notes in the U.S. in 1850. One difference is that the private bank money in days of old promised redemption in specie, whereas the modern currencies are not redeemable in specie.[173] Another difference is that the modern currencies are government-created. How do these 150 different currencies settle up when trade balances are not zero? There's the rub. Between 1945 and 1971, they used the dollar as a unit of account, with the dollar being tied to gold. This system broke down in 1971 when the U.S. abandoned gold altogether in international settlements. Since then, the dollar has still been used, but due to its inflation, many countries have sought alternatives. They are still thrashing around looking for alternatives, and they are gingerly finding their way back to gold.

There are several ways to categorize money. First, there is free-market money and government-forced money. Second, there are two basic kinds of money that compete in wide use: hard money such as silver and gold coin; and paper money, such as bank notes, bank demand deposits, and government-issued currency. Third, there is asset-money and liability-money. Coin is an asset-money; it is no one's liability. Paper money is a credit-money or a liability-money (also called fiduciary money), that is, it is a debt of the issuer of the paper. It is a promise to pay (hard) money (coin) in the future. Credit-money is a partial money-substitute. It is not the medium of account. It can be a means of settlement for everyday exchanges of goods and services, but it can't

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[172] In modern systems without gold and silver, bank money is irredeemable. It is derivative of and dependent upon government force as well as the loan assets of the banks.

[173] Their values seem to be determined by the demand for them to pay debts and taxes, by fiat elements, by the demand for a convenient medium, and by their supply. These currencies trade against each other, but the exchange rates probably still refer back to a basic medium of account like gold, or perhaps traders use proxies for gold such as certain goods that trade internationally.

be used to settle a debt in a final sense. Paying off a debt with another debt is not final settlement. That requires an asset, like gold.[174]

It is hard and costly to expand the supply of coin, but not impossible. If allowed to work freely, the market and price system works to bring forth the supply that people wish to use in exchange. This system has worked tolerably well for a long time, even with the money debasements of government that have at times produced disastrous results. Credit, on the other hand, being a promise to pay, can be readily expanded. With government behind it, credit expansion can proceed almost indefinitely.

Another harmful interference in hard money has often occurred when the government has set a fixed exchange rate between gold and silver. This has usually caused Gresham's law to operate, driving one or the other of gold and silver out of circulation. If the government is to be involved in coinage, as it is constitutionally empowered to do in the U.S., the solution to this is known. It is to use one metal as a standard and let the other float in price. The standard dollar in the U.S. is a silver coin with 371.25 grains of pure silver.

The fear that there is not enough specie to provide for the large volume of exchanges in the world is unfounded. New supplies are brought into use. Adjustments in prices can occur. Furthermore, money is not needed for every exchange. Huge quantities of money are not required in economies. Systems of offset and settling up through banks economize on the use of coin to settle transactions. If all the merchants in a city deposit rather small amounts of money in a bank or clearing house, they then can buy and sell among each other extensively using checks or tokens. The final settling up of balances that do not cancel need not involve anywhere near as much money as was involved in all the exchanges.

### A Note on Banking

Banks are useful for such purposes as clearing, checks, safekeeping, and loans. Private bank money has proven to be very useful. But fractional-reserve banks that make loans

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[174]The values of all paper currencies, assets, liabilities, and goods and services cannot be comprehended without reference to a unit of account like gold or silver. Paper currencies or designations of paper inscribed with the terms "dollar," "euro," and "yen," have no known value other than in relation to some other items of known value. Individuals can trade in gold and silver on private account, even if not on an everyday basis in exchange of goods and services. This gives them the property of a use in final settlement even if, at present, hard money is not in any obvious wide use for final settlement.

have also presented a recurring problem for hundreds of years. The problem arises when banks create excessive bank money in the process of creating credits. Mixing the various banking functions is what allows this fusion of money-substitutes and credit to occur.

Basic bank organization is an underlying problem that needs to be addressed. This is easier said than done. The problem has either to be resolved by free market competition and innovation, or by a kind of government action that has heretofore been absent. The free market solution has formidable obstacles. It means ending the cartels of banks, ending deposit insurance, ending central banks, and ending government fiat monies. Government action no less faces large obstacles. None of the modern attempts to address banking fiascoes through capital requirements based on asset risk, deposit insurance, and other regulations have worked. Banks and bankers heavily influence the political system. They find ways around most regulations.

Let us at least see what the problem of bank organization is, even if no obvious political solution presents itself.

A typical mixed-services bank is like a mutual fund. It holds assets in the form of loans, while it issues credit-money liabilities in the form of demand deposits and bank notes. In seeking profits, banks mismatch their assets and liabilities. They do this in two ways: liquidity and maturity (technically duration.) The bank's loan assets (like mortgage loans) are relatively illiquid and of longer maturity than its credit-money liabilities. The bank may lend someone money for a year and not have a ready market to resell the loan note. Yet the bank offers to redeem a demand deposit at any moment.[175] The bank's assets are riskier than its deposit liabilities, but the bank presents its deposit liabilities as being riskless.

This discrepancy causes no problem as long as a variety of precautions are taken by the bank to assure that it can obtain the cash to meet deposit withdrawals. But banks do not always observe these precautions. Furthermore, the government often induces the whole system of banks to endanger the safety of deposits by lowering loan quality and by extending improvident amounts of long-term, illiquid, and risky loans.[176] The Fed

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[175]Securitization of bank loans is a feasible way for a bank to manage its business, but its liabilities still cannot be demand deposits in such a business. In addition, securitization in the presence of government-sponsored enterprises like Fannie Mae has proven disastrous.

[176]An example in 1927 is the McFadden Act. This bill allowed national banks to do more real estate lending. It extended the maximum loan maturity from one to five years. It increased

or any central bank acts as in intermediary in many instances by adjusting its credit policies in support of what the government wants done.[177] These episodes usually end in disaster when loan values suddenly decline and the value of the bank's assets fall below the value of its promises to redeem the demand deposits.[178]

The typical bank presents itself as what appears to be an open-end, money-market mutual fund, that is, it offers to redeem its liabilities on demand for a fixed price, dollar of coin for dollar of deposit.[179] It *cannot do this for all depositors all at once*, because the money is tied up in illiquid and longer-term loans. This may not be a fraudulent endeavor, for the depositors may be aware of the risk they face and the bank may have no intent to defraud; but it is a way of operating open to serious risks (dangers). It is made more dangerous when government encourages the banks to extend their lending in various directions.

This mismatch of assets and liabilities would not create major problems if all banks operated conservatively or, alternatively, if they found ways to obtain coin quickly upon the value of their loan portfolios or collateral they hold; but they don't all behave this way and they have a hard time finding coin to borrow at low cost when everyone else is also seeking it at the same time. Although long-run survival demands conservative banking methods, some banks always have a short-term orientation. Indeed, it is relatively easy for banks to expand credit and thus expand credit-money. If, for whatever reasons, a bank does this to excess by making questionable or poor loans, it is almost certain that over a long enough period of time, the asset values will experience a decline in value. If depositors *en masse* attempt to withdraw their deposits at such a time (in a bank run), the bank will be unable to liquidate its assets quickly

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the maximum possible amount from one-third of time deposits to one-half of time deposits. An example in 1977 is the Community Reinvestment Act.

[177]The Fed lowered reserve requirements against deposits upon its inception. They were lowered further by the Act of June 21, 1917. Lax oversight by the Fed resulted in member banks reclassifying demand deposits as time deposits, which had lower reserve requirements.

[178]This is what happened to the banking system in 2007 and continues. Every week, banks in the U.S. fail. When they are taken over by the Federal Deposit Insurance Corporation (FDIC), the worth of the bank assets is revealed to be typically far less than its stated values, by such amounts as 30-50 percent. The Financial Accounting Standards Board (FASB) has allowed banks to carry assets on their books without marking them to market values.

[179]I am analyzing a bank prior to the advent of irredeemable paper money and deposit insurance, when it offered to redeem its paper money in coin upon demand.

and, even if it could, will be unable to sell them for enough coin to satisfy all depositors. The bank has to default in some fashion. The typical bank action, short of outright dissolution of the bank, is to suspend coin payments temporarily. Another possibility is that the bank fails altogether and closes its doors.

The typical action of many banks, especially the larger leading banks, is to band together, to influence the government via support of candidates who will do their bidding, and to create an unshakeable source of credit and money that will be or must legally be accepted by depositors who are withdrawing specie. The banks find a solution to their problem in a central bank.[180] At the same time, such a solution has usually found enough political support in the U.S. to be institutionalized. When Congress created the Banks of the United States, it created a national credit system combined with a specie-based money system. The Jacksonian Democrats dismantled this combination for a time, but the Republicans created a new such system under the National Currency Acts of 1863 and 1864. The Federal Reserve carries the national credit system much, much further. The Federal Reserve can extend credit in any amount to almost any enterprise, domestic or foreign. In 2008, its credit extensions went into the trillions. At the same time, by creating paper money (or reserve deposits) through credit to banks, it influences their lending behavior, overall credit, and various money aggregates. In effect, there exists a highly centralized national credit system as well as a national non-specie or paper money system. Alexander Hamilton and Salmon P. Chase wanted a system of banking that would provide support to government borrowing. The Federal Reserve is such a system. It can issue unlimited credit to the government and create unlimited inflation. The result is to create a growing national debt that supports a growing government. This growth process cannot proceed very far or go on forever, however, without affecting the value of the credits (government securities), prices, economic activity, interest rates, and many other such economic and political variables. Bubbles can be blown up but they eventually burst; and even before they burst they affect the investment and consumption choices of everyone who is subject to these money and credit manipulations.

The broader picture I am painting concerning the U.S. credit system is that the corporative structure is a deep, secular, long-term, structural, political-economic, and unconstitutional dysfunction. I am saying that there are two levels of reform that are needed. The larger level is to decouple the government from money and banking. This involves privatizing the central bank, which will radically alter its power. The second level is to reform the structure of fractional-reserve banks.

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[180] See Rozeff, "Why do central banks exist" for a more complete explanation of central banks.

The shorter-term social-economic issue is that economy-wide boom-bust cycles are frequently associated with excessive and widespread bank credit creation during boom periods followed by panics in security markets that usher in periods of recession.[181] Bad loans surface because the banks helped fund bad investments, called mal-investments. Recession is the period of liquidation of this capital and unemployment of factors of production while better uses for them are sought out and started up. A bank run means that people's demand for holding coin goes up as a safety precaution. The banks are unable to extend credit. They are forced to contract credit. The financial system's flows of money and credit contract during the recessionary period. People endure hardship for awhile until they rearrange production and get money and credit flows back up into operation. Computers crash and so do markets and economies. The basic problem is to prevent these crashes from occurring in the first place, or at least mitigate their size, without needlessly slowing down or interfering with the markets and economies.

Credit and paper-money that are created and destroyed by banks and sometimes governments are a central feature of the boom-bust cycle. An inflation of credit and credit-money almost always accompanies the boom. A deflation of credit and credit-money almost always accompanies the bust.[182] The organizational setup of the bank is central to alleviating this problem. If the bank setup can be gotten right, then the boom-bust cycle can be alleviated. However, the bank setup can't be fully rectified without also solving the structural problem, which is the existence of the corporative banking and credit system that fuses government and banking. Central banking and fiat money have to be ended in order to do this.

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[181]Panic is a common term, but for scientific understanding it requires explication. Attempts to convert bank notes to specie are rational when the bank's assets are thought to be deteriorating in value. Rapid and large changes in prices of assets are rational when markets discover that values have changed. The process of inflation-deflation, boom and bust, cannot be understood as a process of emotional speculative frenzy followed by panic unless there is an explanation of why these emotions take hold when they do and to the extent they do. Robert Prechter attempts this. He is the foremost exponent of the theory that social mood governs events financial, economic, and political events. Most economists look elsewhere for explanations. Some of them hold to the notion that speculation and panic are manifestations of "animal spirits," but this is a non-theory. Some of my own explanation is here.

[182]After the advent of central banking in the U.S., the power of the central bank over credit and credit-money becomes a problem over and above the problem of bank organization. Forming a central bank as a means of mitigating the boom-bust cycle doesn't resolve the problem of how banks are organized, and it adds a new problem, which is the central bank's organization and powers. The Great Depression came on the central bank's watch.

How can the bank setup be fixed? Banks can be divided into multiple types. For example, there might be a place in the market for deposit banks and loan banks. Deposit banks might offer a variety of services that include safekeeping of money, redemption of deposits on demand, and clearing of exchanges. They might not make loans. Hence, these banks could be viewed as a kind of money-market fund.

Loan banks might hold a portfolio of loans. Think of this as a mutual fund that offers debts and equity shares and makes loans with the proceeds. It is a loan company. The loan bank could present itself either as an open-end or closed-end fund with a variable market price, with that price depending on the value of its assets and its redemption policies. *Its credits will no longer pass and exchange as money, especially official money, but they might come close*. It will not offer continuously to redeem its credits at a fixed price. But if its cash flows are sufficient, there is nothing to prevent it from having buybacks of its debt and equity securities so as to raise their prices and stabilize them. This is done today. Some closed-end funds repurchase their shares so that they do not go to unreasonable discounts from net asset value.

Entrepreneurs might devise banks that are hybrids or present other innovations. The existing kind of bank that offers a fixed redemption price against assets whose value fluctuates remains a possibility, but the nature of redemption of its shares or deposit accounts in the event of a decline in asset values needs legal clarification. If suspension of coin payments is allowed, then the conditions under which this is allowed should be known at the outset.

Vieira's proposals to rectify the problems come at the end of Volume 2.

This discussion brings us to the inception of the Federal Reserve System. By 1913, America had been using a mixture of asset money (gold and silver) and bank-created credit-money. It had experienced a series of bank panics, in 1819, 1837, 1857, 1873, 1893 and 1907. Contra the Constitution, the government had gotten deeply involved in issuing paper money and working closely with banks as issuers. The government had not sorted out a reliable, safe, and fair legal and financial framework for the varied activities of banks (and still hasn't.) Rather than identifying the sources of the problems as basic bank organization, government interference in the monetary system, and excessive credit-money, the legislators decided to introduce a new source of "elastic currency" into the system, i.e., a new engine of inflation of money and credit. They sought to resolve the problem of credit-money issued by fractional-reserve banks by creating a lender of last resort in the Federal Reserve banks. Almost a century later, we can safely conclude that this solution has totally failed to fix the banking system. Instead, it threatens to bring the entire economy and government down around our ears.

### Organization of the Federal Reserve System

Let us begin with a look at the organization of the system. For full details, of which there are many that cannot be covered here, the interested reader may read the laws.

The Federal Reserve Act of December 23, 1913 has been amended, with the latest available statute formulation being here. Most of the quotations of law below are from the statutes.

The Act created several new organizations. It began by setting up "The Reserve Bank Organization Committee," consisting of the Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency. They were empowered to create between 8 and 12 Federal reserve districts, each to contain one Federal reserve city. After the Federal Reserve Board was organized, it had the power to review these districts. In each such city, the Committee then supervised the organization of a Federal reserve bank, each of which has a name like "Federal Reserve Bank of Chicago." The Federal reserve banks can establish branches within their districts.

The national banks (created under the National Currency Act) and other eligible state banks were given 60 days to accept or not accept in writing the terms in the Act. The national banks, if they decided to become member banks, were required within 30 days to subscribe to stock in the Federal reserve banks in their districts. The amount was 6 percent of the equity capital of each national bank, to be paid in gold certificates. This capitalized the Federal reserve banks and made the member banks their owners. The Federal reserve banks are limited liability corporations with the usual corporate powers and those provided for in the Act. The stock cannot be sold, loaned, or transferred. There are provisions for further increases in the stock as member banks increase their own equity or as new members join.[183]

Taking a narrow view of it, the Federal reserve banks are, in certain respects, mutual banks that serve their owners, who are its member banks. But, more broadly, since they are formally linked by law to each other via the powers of the Board of Governors of the Federal Reserve System and the Federal Open Market Committee, they and their member banks form a government-created cartel.

Nonaccepting banks could not act as "reserve agents." If after one year the national bank had not become a member bank, it lost all its rights, privileges, and franchises

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[183]State banks could convert to national banks or they remain as state banks and become members with most of the provisions applicable to the national banks also applicable to them.

under the national-bank Act. In this way, the new system basically absorbed the national banks in the old system while allowing state banks also to become members. It also retained the status of reserve cities and central reserve cities under the older system.

The minimum capital of a Federal reserve bank was $4 million. The Committee had the power to sell nonvoting stock in the Federal reserve banks to the public if, in its judgment, this was warranted to achieve this minimum. No person could own more than $25,000 of such stock. If that didn't provide enough capital, then the United States could subscribe.

The Board of Directors of each Federal reserve bank has nine members divided into three classes. The stockholder member banks choose three (class A). Three more are actively engaged in commerce, industry, or agriculture in their district (class B), and the last three are chosen by the Board of Governors (class C). The Board chooses one of these as Chairman of the Board, and this person must be of "tested bank experience." The Chairman is the official liaison between the Board of Governors and the Federal reserve bank. Congressmen are ineligible for these posts and for the Board. Bankers are ineligible for the class B and C positions. The class A and B directors are selected by an electoral process that involves election by member banks of electors who vote for nominees proposed by the member banks.

After all expenses have been paid, the Federal reserve banks are required to pay a 6 percent cumulative dividend on paid-in capital provided by shareholders. The remainder of earnings is retained, but most of it is transferred to the Treasury. The Federal reserve banks are profitable due mostly to the fact that they are able to obtain earning assets at low costs. They can buy securities and make loans by issuing notes or crediting member bank reserve accounts.[184] They are also tax-exempt except for real estate taxes.

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[184]Here, for example, are the audited financial statements of the Federal Reserve Bank of Chicago for 2007 and 2008. The bank made $2.8 billion on equity of $1.4 billion, which is a 200 percent return on equity. It paid $66 million in dividends. It paid $2.8 billion to the Treasury "as interest on Federal Reserve notes." The bank is highly levered with debt being 99 percent of its capitalization. Its return on average assets was 2.8 percent. Its operating expenses were $352 million to manage average assets of $100 billion. This rate of 0.35 percent is lower than many Pimco funds and somewhat higher than some of the Vanguard bond funds.

**Preamble to the Original Federal Reserve Act**

The original preamble reads

> "CHAP. 6. – An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

Let's consider what each clause means.

The original Act authorized between at least 8 and no more than 12 Federal Reserve banks. Twelve of these are now established in 12 cities within 12 districts that have to be larger than any single State. They go by their city's names, such as Federal Reserve Bank of St. Louis.

The Act authorized means by which these banks can obtain Federal Reserve Notes (FRNs). The notes are the currency with which we are all familiar (dollar bills, five dollar bills, etc.) A bank makes an application through its accredited "Federal Reserve agent" (who is its chairman of the board of directors) accompanied by collateral:

> "Any Federal Reserve bank may make application to the local Federal Reserve agent for such amount of the Federal Reserve notes herein before provided for as it may require. Such application shall be accompanied with a tender to the local Federal Reserve agent of collateral in amount equal to the sum of the Federal Reserve notes thus applied for and issued pursuant to such application."

Notice that the bank initiates the process of obtaining the Federal Reserve Notes (FRNs). The collateral includes notes, drafts, bills of exchange, acceptances, and bankers' acceptances, gold certificates, Special Drawing Rights, etc. Member banks can rediscount commercial paper at their Federal Reserve banks and get FRNs as cash upon such collateral.

The agent submits the application to the Board of Governors of the Federal Reserve System.[185] The Board issues notes at its discretion to the Federal Reserve banks upon their application:

> "Federal reserve notes, to be issued at the discretion of the Board of Governors

[185]Ben S. Bernanke is the current Chairman of the Board of Governors.

> of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are authorized."
>
> "The Board of Governors of the Federal Reserve System shall have the right, acting through the Federal Reserve agent, to grant in whole or in part, or to reject entirely the application of any Federal Reserve bank for Federal Reserve notes..."

Where do the FRNs come from physically? The Treasury prints and delivers them:

> "In order to furnish suitable notes for circulation as Federal reserve notes, the Secretary of the Treasury shall cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of $1, $2, $5, $10, $20, $50, $100, $500, $1,000, $5,000, $10,000 as may be required to supply the Federal Reserve banks."
>
> "When such notes have been prepared, the notes shall be delivered to the Board of Governors of the Federal Reserve System subject to the order of the Secretary of the Treasury for the delivery of such notes in accordance with this chapter."

Elastic currency refers to the ability of the Reserve banks to add to or decrease their FRNs through the procedure just outlined or its reversal and through other procedures that include open market operations and changes in reserve requirements of member banks.

The supervisory powers of the Fed refer primarily to bank examinations. Supervision of banks in the United States is divided among various authorities such as the Comptroller of the Currency, the States, the Fed, and the FDIC.

The last phrase in the preamble refers to "other purposes." This catchall phrase today includes monetary policy in the light of various Congressional directives concerning the economy of the United States. Clarence Walker Barron in 1914 commented

> "The purpose of the act most largely in its inception was 'for other purposes' and these 'purposes' can never be wisely or effectively carried out; if persisted in they spell disaster to the country.

> "The hidden purpose or 'motif' which inaugurated this legislation, however in effect it may work out under wise administration, is to cheapen money.
>
> "The whole primary discussion of this bank act was to make money easier, to cheapen it to farmer and producer and manufacturer and merchant. Senators and representatives both proclaimed., within and without Washington, that what they were seeking was a financial system that would give us an average rate approaching that of the Bank of France where interest over a series of years averaged between 3% and 4%. They frankly said they hoped for something under a 4% rate."

### Board of Governors of the Federal Reserve System

The Board of Governors has seven members, whom the President of the United States appoints, by and with the advice and consent of the Senate, and following certain criteria in the Act. The Board has no banking powers, but it has numerous powers over the system of reserve banks.

The original name of this board was Federal Reserve Board. At the outset, the Secretary of the Treasury and the Comptroller of the Currency were ex officio members, but they were taken off the Board in 1936 when the name changed. The Secretary of the Treasury was originally the chairman of the Federal Reserve Board. The original Board had a governor and vice-governor; those titles were changed at that time to chairman and vice-chairman. The governor was the "active executive officer." The offices of the Board were initially in the Department of the Treasury.

It is reasonably clear from these provisions that the Board was set up as an official government agency. There are two minor ambiguities. First, the Board assesses the reserve banks in order to pay its salaries and expenses. Second, there is a reserved-powers clause in the Act similar to one that was in the National Currency Act. This clause states that "The right to amend, alter, or repeal this Act is hereby expressly reserved." This clause protects the government from an irrevocable granting of power to private parties, such as the Federal Reserve banks.

Apart from these two matters, everything else indicates that the Board is a government operation, even if the Reserve banks are private. Rep. Glass, in introducing the legislation, said of the Board: "It is an altruistic institution, a part of the Government itself, representing the American people, with powers such as no man would dare to misuse." He pointed out that

> "Nearly every power conferred by this bill on the Federal reserve board, composed of seven members, has been for half a century vested by the national-bank act in the Secretary of the Treasury and the Comptroller of the Currency..."

Vieira notes (p. 799) that "Very early, however, the Attorney General of the United States described the Board as 'an independent board or Government establishment', 'a distinctly administrative board with extensive powers'". Furthermore, the Act contains language specifying that wherever there appears to be a conflict in the Board's powers and the Secretary of the Treasury's powers, "such powers shall be exercised subject to the supervision and control of the Secretary." By this language, the Act demarcates the powers of two government components.

The courts (p. 800) "generally treat the Board of Governors as an official agency of the United States," and "This...contrasts starkly with the manner in which courts treat...the private Federal Reserve regional banks."

All seven Governors on the Board of Governors also serve on the Federal Open Market Committee (FOMC), which has another five members chosen by the boards of directors of the Federal Reserve banks. Open-market operations refer to buying and selling of securities in the markets by the Federal reserve banks. The Federal Open Market Committee (FOMC) *fully controls* these operations, which implement the most important power of creating and destroying bank reserves. Actual open market operations are executed by the Manager of the System Open Market Account at the Federal Reserve Bank of New York.[186]

The Federal Reserve Banks advise and make recommendations on discount rates and open-market operations to the Board of Governors via the Federal Advisory Council. This consists of one member from each district, chosen by the board of each reserve

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[186]Vieira examines the FOMC in Volume 2. The FOMC didn't exist in the original Act of 1913; Sec. 14, which spelled out the powers to do open-market operations, left them in the hands of each Federal reserve bank while "under rules and regulations prescribed by the Federal Reserve Board." These included dealings in "cable transfers and bankers' acceptances and bills of exchange..." They also included bonds and notes of the United States and all manner of State and municipal securities. The language left a gray area concerning who would control open-market operations, the Federal reserve banks or the Federal Reserve Board. A multi-front contest for control emerged among the Board, the smaller and larger reserve banks, the Federal Reserve Bank of New York, and several committees that preceded the FOMC. In 1935, the Board, through the FOMC, won this control contest.

bank.

### Federal Reserve Notes

Section 16 of the Act originally read

> "Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or in gold or lawful money at any Federal reserve bank."[187]

They are no longer redeemable in gold. The government has defaulted on this obligation. Bill users were legally forewarned of this possibility occurring through the clause in the Act allowing the Congress to amend, alter, or repeal any portion of the Act. The last sentence now reads: "They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank."

When the Reserve banks obtain the FRNs issued by the Board of Governors, they have to put up collateral to secure the notes. The FRNs are notes that evidence a debt. Noteholders also have a first and paramount lien of all the assets of the bank. When a member bank obtains notes and transmits them to the public, whoever holds the notes is the creditor. The debtor is the issuing Reserve bank. Since 1933, the FRNs have been declared legal tender.

When gold was still used for redemption, between 1913 and 1934, the phrase "redeemed in gold on demand" probably meant dollar-for-dollar, that is, a $20 bill could be exchanged for $20 in gold, according to the standard of the Coinage Act of 1900; but that phrase was not actually ever defined by statute. After 1934, when the redemption is in "lawful money," the phrase "redeemed in lawful money" has no known meaning, i.e., no meaning established by statute.

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[187]The Federal Reserve agents are the chairmen of the boards of directors of the 12 Federal Reserve banks.

The Federal Reserve Act used the phrase "lawful money" without clarifying what it meant. But since the FRNs could be redeemed in gold or [other forms of] lawful money, the FRNs from the beginning could not have been lawful money.

The FRNs are legal tender, but not for the obligation that they be redeemed in lawful money. That would be circular. They can't be redeemed for copies of themselves, i.e., other FRNs. In other words, FRNs are legal tender but they haven't been made "lawful money." Congress has made various kinds of money "lawful money" without making them legal tender. The National Bank Notes are a prime example. Silver and gold certificates were, in 1882, made a lawful part of bank reserves. They didn't become legal tender until 1933 and 1919, respectively. At times, Congress had made into lawful money the following: demand Treasury notes (Act of March 17, 1862); clearing-house certificates (under the National Bank Act of 1863-64); gold and silver coin, by the Act of July 12, 1870.

The bottom line is that Congress has never defined what "lawful money" means. Vieira argues that, at present, lawful money means the base-metal coins used for pocket change. Congress can declare what lawful money is, as it has in the past, and it can declare the rate of exchange of FRNs for whatever it places into the lawful money category. Congress in creating the Fed allowed for amending and altering the Act, as it has when it stopped redemption in gold, so it certainly can alter the redemption into lawful money as it pleases. In other words, once Congress has exercised an unconstitutional power to create and issue a paper money like FRNs, its scope of unconstitutional action over that currency knows few bounds. Once the constitutional limitation to coining money has been erased and/or expanded to mean issuing currency, Pandora's Box is opened.

As pointed out above, the Reserve banks initiate the process of obtaining FRNs upon submission of debt collateral. The resulting notes are obligations of the United States. Hence, a private process of monetization of privately-owned debt instruments causes obligations of the United States to be generated at its open-ended discretion. Under what constitutional power? It can't be the power to borrow, since the notes are an advance or loan to the Reserve banks. It can't be the power to coin Money. It is not a regulation of Commerce. It is not to lay and collect Taxes.

FRNs are drawn from the Treasury, but without the constitutional appropriation process that is required. Congress does not control these note emissions.

### Official Goals of the Fed

Congress has charged the Board and the FOMC with certain goals:

> "The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."

Congress engages in national economic planning, management, and control.[188] It delegates the money and credit side of that planning and control to the Board of Governors and the FOMC. In point of fact, employment has been less stable and more susceptible to large and lasting bouts of high unemployment after the creation of the Fed than before. Prices have been less stable after the Fed began. The value of the dollar has deteriorated more than 95 percent since the advent of the Fed. It is in vain to think that the Fed can control long-term interest rates in any permanent fashion when they are set in worldwide markets by the operation of factors such as time preference, risk, and investment opportunities that lie beyond the Fed's control. The Fed doesn't know which of many monetary or credit aggregates to focus on. It doesn't know what alternative and contradictory targets to focus on. It usually cannot control its targets, or if it does, it leads to other problems. It cannot relate whatever targets it selects to something as vague as "long run potential to increase production." Congress has charged it with three different and equally vague objectives: maximum employment, stable prices, and long-term interest rates.

Since the legal-economic language provided by the Congress is so vague, it does not really guide the Fed. It can't. It instead provides a patina of legality by which the Congress divests itself of its constitutional responsibility over monetary policy and shifts it to the Fed. The Fed, in its turn, exercises enormous discretion within such broad boundaries of latitude that it rarely can be held responsible for its actions.

Where is the warrant for national economic planning and control by Congress in the Constitution? Where is the warrant in the Constitution for manipulating fiduciary

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[188]There are numerous critiques of such planning and control. A recent one by me is here. Gross failures of entire economies like those of East Germany, Eastern European countries, the Soviet Union, and the People's Republic of China have failed to dent the allure of the same policies when practiced by western democracies or by socialist varieties like those of Castro and Chavez.

money or liability-money issues so as to control production, employment, prices, and interest rates? Where is the warrant for Congress abdicating the coinage of money? Where is the warrant for creating an agency with broad latitude to issue money as it pleases? Where is the warrant for issues of legal-tender irredeemable fiduciary money that promise to pay in something that is not identifiable and appears to be worthless?

The further that Congress has gotten from its constitutional charge of coining Money and regulating the value thereof, and the longer the time that has elapsed since overcoming the constitutional bounds, the greater the accumulation of debt-money and debt as compared with the productive capacity of Americans to discharge these obligations. And the more lopsided this relation, the closer the system gets to collapse.

The longer that the unconstitutional system has remained in place, the less do Congressmen mention and debate the constitutionality of what their latest money and banking bills contain. They take their powers as a *fait accompli*. The debates on the Federal Reserve Act circle around many issues related to currency and banking.

### Congressional Debates on Federal Reserve Act

The debates were about the bill's proposals, not about how to fix the money and banking system in any fundamental sense. They got into the fine-tuning of provisions within the bill. They reviewed history. They proposed pet schemes. They often addressed the political making of the bill. They criticized their favorite purported malefactors, be they speculators, stock-jobbers, the money trust, or bankers. Little did they address constitutional matters. Vieira (p. 750) says

> "To a degree greater even than other instances of Congressional ventilation of monetary and banking issues, the debates on the Federal Reserve Act must depress, rather than illuminate, the reader."

He extracts, however, nuggets that do illuminate, and so shall we.

Rep. Glass introduced the Owen-Glass bill (Federal Reserve Act) to the House on September 10, 1913. He began with public opinion and pressure:

> "I think it is pretty generally agreed that there is a pressing necessity for currency legislation in this country. The country itself thinks so if any significance may be attached to the thousands of letters received by the Banking and Currency Committee of the House within the last six months or to the resolutions passed by hundreds of commercial bodies throughout the United

> States calling for immediate consideration and action by Congress."

He went on to the reason for this pressure:

> "For more than a quarter of a century there have been strong symptoms of an intense dissatisfaction with the prevailing national banking and currency system; and this spirit of discontent has been accentuated as, from time to time, the utter inadequacy of the system has been made manifest in periods of financial peril. While the existing system has operated satisfactorily under ordinary business conditions...its very best friend is bound to admit that in time of stress and storm it has broken down utterly...the failure of the system in acute exigencies has caused widespread demoralization and almost universal distress. Five times within the last 30 years financial catastrophe has overtaken the country under this system; and it would be difficult to compute the enormous losses sustained by all classes of society...The currency based upon the Nation's debt is absolutely unresponsive to the Nation's business needs..."

Here we have a denunciation in the strongest terms of the national banking and currency system. He declares that the government's first attempt at designing a system of money and credit has, from the point of view of the public, been utterly inadequate. What theory or theories does he hold that lead him to think that a second attempt will succeed in improving the general welfare? His defense of the bill reveals his thinking. He believes that the new system will be able to stem banking panics and bank runs because of its ability to create Federal Reserve Notes and mobilize bank reserves. He basically believes that inflation of money is a solution. He doesn't realize that inflation prolongs a recession, creates distortions in the economy, depreciates the currency, redistributes wealth, and lays the foundation of further banking and economic problems.

In addition, what Glass is about to offer is a blueprint for the greater success of a *bank cartel* organized by the U.S. This in itself is doubtless unconstitutional, being not a regulation *of* commerce but a wholesale interference *in* commerce, and a design that advances the interests of, among others, bankers, not the general welfare.[189]

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[189]There is no question that the Federal Reserve System is a cartel. The micro-regulation of every aspect of the Fed by the legislature is a cartel-organizing device. The organized division of the country into territories or districts divides the loan markets. This too is a typical cartel procedure. The coordinated purchase of securities by the Federal reserve banks, which led to system-wide control by the Federal Open Market Committee, is a cartel device whose aim is to control competition in the purchase of securities and not raise their prices. The legal power of the

After Glass defended the provision that Reserve banks provide relief reserves to other Reserve banks in times of stringency, he made a forecast:

> "We believe that the power will not be invoked once in half a century, for the reason that if this bill should be enacted into law it will so withdraw the reserve funds of the country from stock speculative uses and apply them to commercial, industrial, and agricultural transactions that we shall rarely ever again have bank panics in the United States."

This was part of his theory of why the new system was superior to the old and to gold and silver as money. He asserts that the system contains a "process of mobilizing reserves," that is, shifting them from banks making speculative loans to banks making commercial loans. This vision of controlling the flow of money to specific uses and geographic places breaks down due to the integration of seemingly separate markets and the fungibility of money. Once money is loaned, it can flow anywhere and into any use that a bank desires. Unless the Reserve banks are prepared to micromanage loans, they cannot direct lending to specific uses although they may at times compose directives and attempt "moral suasion."[190] Even raising margin requirements on stock lending can be negated. People can borrow on a home mortgage and speculate with the proceeds. Reserves can be more than adequate against FRNs and still not be sufficient to stem bank runs because only fractional reserves are held against demand deposits, which compose most of the bank-money. Furthermore, ample reserves against FRNs do not prevent banks from making loans that turn out to be bad loans.

There are five ideas that we do *not* find raised in the speech of Glass, even as

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system to buy earning assets with its own newly-created and government-sanctioned money obviously imparts a source of non-competitive profits to the Federal reserve banks. The legal power of the system to lower the risk of bank failure by printing money for the benefit of member banks is another obvious source of profit to the system's member banks. To the extent that the Fed controls any important monetary variable, be it high-powered money, other money measures, credit, and interest rates, it is thwarting market forces and acting as a cartel does, while using powers that are not the government's to use or to delegate. The government aids the cartelized banking industry in other ways. It ended the redeemability of the Federal Reserve Notes into gold. It enhanced the FRNs by making them legal tender, and it has always supported them by making them obligations of the United States. The government regulates entry of banks into the industry.

[190]The government can direct uses of funds, however, through legislation. An example is the Community Reinvestment Act of 1977. Another is the creation of government-sponsored enterprises like Fannie Mae and Freddie Mac.

*possibilities*. (1) An asset-money like silver and gold might be (or is) preferable to bank-issued liability-money. (2) A free market in money and credit might work (or does work) a lot better than any government-designed and instituted system. (3) Fractional-reserve banking itself might need (or does need) fundamental reform. (4) A new central banking setup might raise (or will raise) a set of new and worse problems. (5) The entire area of instituting paper money and a bank cartel might be (or is) beyond the constitutional scope of the federal government.

Instead, Glass proposes to continue and intensify the politicization of banking, money, and credit. He proposes to solve the problems of banking and credit-money issues, already exacerbated by politics, with another series of banks, which are the Federal Reserve banks, each of which is to be given central-banking powers. He proposes to enhance the monetary corporative state, adding to the cartel's strength and ability to generate cartel profits, while also increasing its power to affect the entire economy and mismanage money on an even greater scale than before. Little does he know that the system's new design combined with the ineptitude of those running it will, within 8 years, produce a large inflation followed by a sharp deflation; and within 20 years, contribute to and accompany a Great Depression that will see thousands of bank failures and persistent unemployment lasting for years.

Rep. Hayes found several "glaring defects in our [current] system" that included

> "First. The lack of elasticity in our currency and the rigidity of our laws in regard to reserves.

Those who called for an elastic currency wanted a paper money made available to banks so that they could pay off on their promises made in coin at those times when they could not meet their obligations to pay coin. They wanted to take the risk out of banking and transfer it elsewhere. They wanted the illiquid and long-term assets of the bank, which probably had declined in value, to be the basis of loans of a new money (FRNs) that the banks could then use to meet payments being demanded of them. The Federal Reserve banks would accomplish this feat by rediscounting the bank's illiquid paper, i.e., making a loan to the member bank at interest on collateral of dubious liquidity and worth. An elastic currency at such times meant inflation.[191]

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[191]It also meant deflation at times, or at least decreases in the rate of growth of the supply of FRNs, although this prospect seemed not to have entered many people's minds. That could arise if the reserve banks tried to slow price inflation, or restrain booms, or improve the value of the dollar in foreign exchange, or if they thought that they were supplying sufficient liquidity and reserves. The possibility of up-and-down, stop-go, banking behavior also was not emphasized.

Elgin Groseclose incisively disposes of this idea.[192] What does an elastic currency mean?

> "...it means that regardless of the condition of business, the individual, or the economy, the individual [or bank] should always be able to convert his property into money...The logical meaning of this is that the *quantity of money should always be potentially or actually co-extensive* with property...so any notion of a stable value of money – or any value whatsoever – must be abandoned. For the unique quality of money – that which gives it meaning above other forms of wealth – is this, that it is the most liquid of all forms of wealth, being generally infinitely divisible, readily transmitted, and universally acceptable. Now, if this liquidity be nullified by equating it to all other forms of property...then its uniqueness as money ceases and its worth diminishes. In short, any idea of stability in the value of money must be surrendered.
>
> "At the same time, the theory upon which the notion of bank liquidity rests requires the negation of the theory of profits and rent. For the essence of profit is compensation for risk; but the commonest risk of enterprise is its illiquidity – that is, the inability to convert goods of trade into money...Now if goods in trade [or bonds, loans, and mortgages] can be converted into cash at any time – through the mechanism of note issue...– then enterprise is relatively without risk, and the incentive of and reason for profit disappears."

The bank cartel of member banks has what amounts to an internal "subsidiary" or a captive finance company, which consists of the Federal Reserve banks that they own. The Reserve banks can basically create (or get) money at will, money that is made acceptable by government support such as by being a legal obligation of the United States or legal tender. They can make that money available to the member banks through an internal process of loans on illiquid collateral. They can also create bank reserves at will by buying securities in the open market, and they can create reserves by lowering reserve requirements. One result is that the risk of the member bank in making illiquid and long-term loans to customers is reduced, as the banks always have a backup procedure, which is to liquify by obtaining money from the Federal reserve banks. The risk reduction allows the banks to expand their loan volume and to extend their volume of loans into more risky areas. In this way, they can make greater profits. This is one way in which the cartel works. In addition, by keeping short-term interest rates low, the banks are enabled to borrow at a low short-term rate and invest in higher-yielding long-term bonds. This is another source of profit.

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[192]Groseclose, op. cit., pp. 65-66.

An elastic currency supported by federal power and administered by Reserve banks has no moral, economic, or constitutional justification. It creates a moral hazard and supports the banking cartel's profits. It is open to abuse, inflation, error, mismanagement, and misuse. It creates shocks to the economy and distorts economic activity while redistributing wealth. Hayes suggested that gold and silver were worse because they are quite inelastic in supply. They are elastic enough, but even if they are not as elastic as paper money, that is a virtue, not a defect. The framers, conscious of the ill effects of inflation in paper money, made gold and silver the only allowable constitutional money available to government. They wanted the government to refrain from manipulating the currency as governments had usually done in the past with such negative effects.

Hayes mentioned another defect in the national banking system:

> "Second. Our system of independent banks with no control or reserve power anywhere and no union among the banks generally to enable them and each of them to get support and to replenish their cash and reserves in times of financial stress."

Here Hayes spells out a necessary mechanism in creating any cartel, which is the "union" of otherwise "independent banks" and placing them under some sort of "control," the purpose of which, he states, is to gain access to "cash and reserves."

Hayes believed that evolution in banking systems brought them "from more imperfect beginnings to their present state of perfection and usefulness." He praised the European central banks: "The great central banks of Europe as they exist today are likewise an evolution." He defended the Reichsbank:

> "I am aware that the German system has been violently criticized in many quarters as unsound and something to be avoided. One high authority has charged it with carrying financial dynamite, feared by all Europe...Since the adoption of her present currency system Germany has passed through one of the greatest periods of financial and industrial developments known to history..."

In less than 10 years, the Weimar hyperinflation was in progress. Hayes' comments are a warning against both empiricism and casual empiricism. Unless one has a correct understanding of how economic factors work causatively, one is likely to be misled by simple correlations.

Hayes was by no means ignorant of economics. He pinned down, for example, the

moral hazard problem with deposit insurance and why deposit insurance must fail:

> "The biggest bank in the State which guaranteed deposits has gone to the wall. The reason is that deposits when there is adequate guaranty of payment outside the bank itself will go to the bank that pays the highest rate of interest without reference to the banking methods it employs. It stimulates wildcat banking, and of course the result must be disastrous."

Hayes also understood the popular resistance to a central bank and the dangers of such a bank:

> "I am satisfied that our people have set their faces like steel against a central bank or any similar institution. They fear the danger of its falling into the hands of selfish and unscrupulous men who will use the power thus acquired to their own enrichment and the oppression and impoverishment of the people. For the present, at least, we may therefore as well dismiss the thought of a central bank, by whatever name it may be designated, as a means for improving and strengthening our system."

Hayes talked as if a central bank that was set up by Congress would, nevertheless, be unaccountable to Congress and uncontrolled by Congress. He seems to have had in mind the Bank of England. Perhaps he understood that the bill provided no real control over the Board by the Congress inasmuch as there were no specific goals or measures or means of control within the bill, other than periodic appointments by the President.

But the main point here is that he didn't view the 12 reserve banks as a central bank but as 12 separate banks that would perform the functions of a central bank in a decentralized way. He did not foresee the organizational struggle over the control over open market operations because he didn't understand the great importance of open market operations. He viewed the central bank functions more as holding the country's supply of specie, rediscounting member bank paper, issuing notes, and acting as fiscal agent of the government. He and many others, including at first the central bankers themselves, did not fully grasp that by open market operations they had the power to control bank reserves.

In passing, Hayes made some valuable remarks concerning the separation of banks into different types so as to match their deposits and liabilities. Governments have not made his insightful suggestions a reality, and yet they show the way to overcome the worst features of fractional-reserve banking:

> "...we can never have a thoroughly satisfactory, strong, and safe banking and currency system in this country until the State laws recognize the fundamental difference between commercial banking and investment banking [applause] or until the bankers controlling the State banks recognize this difference and conduct their business in such a way that their demand or commercial deposits will not be loaned out on long time or invested in on liquid loans or securities."

By investment banking, he didn't mean what we mean today. He meant long-term loans such as real estate mortgages, stocks, and bonds. By commercial deposits he had in mind short-term loans. He suggested that

> "No commercial bank with deposits payable on demand, whether such bank be national or State, should be allowed to loan any large percentage of its money on real estate mortgages or on local industrial or other stocks and bonds not easily salable, and so convertible into cash. Any commercial bank having its deposits payable on demand, which has any large amount of its deposits invested in such loans is a candidate for trouble..."

He is correct. Such a "bank" that finances itself with demand deposits and makes long-term loans and buys long-term securities is, in reality, a kind of mutual fund. It cannot possibly pay all deposits on demand at a fixed dollar price because quite common fluctuations in security prices can drive the value of its assets below the value of its promises (the demand deposits.) It cannot offer to redeem demand deposits at a fixed dollar price. If continuous redemption is allowed (as an open-end fund), this kind of financial institution has to be designed so as to have a fluctuating value of its liabilities. The illiquid loans require independent appraisals on a regular basis. The other alternative is not to have demand deposits and not to have continuous redemption, but to have a secondary market for the company's liabilities and equity (a closed-end fund.)

Another possibility that Hayes suggested was to separate the various kinds of accounts and investments within a bank, in the same way that a mutual fund family separates its mutual funds one from another.

Rep Callaway called the bill "dangerous" and "laden with dangers to the party, to the people, and to representative government..." The party platform said

> "We oppose the establishment of a central bank...True, we did not say 'We oppose the establishment of a central board,' but I submit in all candor that there is no real difference, so far as the concentration of power is concerned,

> between a central bank which controls the entire banking interests of the country and a central board which controls the entire banking interests of the country."

He objected to "the power concentrated in it," and compared it to "the Czar of Russia..." The party platform had pledged that any banking legislation should provide "'absolute security to the public and...complete protection from the misuse of the power that wealth gives to those who possess it.'" He cited Jefferson's objections to the Bank of the United States

> "that the bank had a monopoly that it should not have, a favoritism from the Government that it should not have, and a concentration of power that should not exist...when a little bank abused its power the effect was inconsequential, whereas when a giant central bank abused its power the effect was destructive and the disaster widespread."

He went on. The bill would give to the reserve board "the monopoly of the note issue." The national banking act likewise gave national banks "the exclusive right to issue notes on United States bonds. This was done for the purpose of forcing a market for Government bonds at an exaggerated price." But bad as the system is, it is better to endure it "than to usher in this Trojan Horse, loaded with we know not what, and have to go through years of struggle and suffering before we understand its evils."

Callaway penetrated to incentive defects. The President, already powerful, controlled the Board appointments. Moreover,

> "He has to have their cooperation before this Bill can become effective, and the banks must have his cooperation after they enter the scheme before their business can be profitable. Necessity makes them act together. Where will the people come in?"
>
> "The big banking interests have never at any time opposed this bill in its entirety...the general policy of the bill has suited them...You have 12 banks under one control each of the 12 regional reserve agents directly appointed by this board and subject to its autocratic discretion...Forgan says that is practically a central bank, and it is a central bank so interlocked with the politics of the country that not only the banking business and the finances of the country will be controlled by it, but the politics of the country will be controlled by it."

Rep. Burke argued that Congress shouldn't intrude upon the banking business. He

sensed the difference between money and credit. He sensed that if the government provided a sound money as a unit of account and for final settlement, it has done its job. Extending credit was the job of bankers:

> "Ninety-five per cent of business is done on credit and eight dollars of a actual business is done for every dollar of cash that exists.
>
> "Therefore, the banker's business is far beyond the realm of coining money, fixing the value thereof, and punishing counterfeiters, which properly are governmental functions under the Constitution.
>
> "That the Government has the legal or the moral right to invade the banking world to the extent of assuming complete and absolute control over every department of its activities is a doctrine to which no trained lawyer or sensible legislator will subscribe."

Rep. Lindbergh criticized the banking monopoly that the government was sustaining:

> "No monopoly should be given to bankers to distribute credit or money...They are now bound unto each other by a community of interest, and are organized into voluntary associations [under the Aldrich-Vreeland Act]...Under the Glass bill their voluntary associations would become legalized into one great monopoly, the only private monopoly which the Government has supported by statutory acts."

Lindbergh didn't understand the Constitution on coining money, however, for his preferred alternative was for the government "to issue a new United States currency, which should be in the form of public-service certificates..." He viewed a direct issue along the lines of greenbacks as far more sensible than placing government-sanctioned money into circulation via banks that lend funds into circulation at interest.

> "It is the acme of absurdity for Congress to place between the people and the Government itself an agency in the absolute control of the distribution of money and the use of credit that would be valueless without the guaranty of the Government, and yet that is the identical thing that has been done by Congress, and the Glass bill emphasizes the absurdity."

He believed that, despite its defects, the new "plan...would probably remove some of the danger elements that in the past have driven the country into frequent money stringencies and occasional panics..."

Lindbergh pointed out a constitutional difficulty:

> "It may be questionable whether it is constitutional to deposit Government funds in the banks except in consequence of appropriations made by law...Subdivision 7 of section 9, article 1, reads: 'No money shall be drawn from the Treasury but in consequence of appropriations made by law...'"

Concerning the Constitution, Rep. Gorman expressed what the living Constitution means:

> "The Constitution is a grand old document...The Constitution is being read and interpreted today in the light of modern progress, and it adjusts itself readily to our marvelous growth and development. It keeps pace with our progress. The Constitution possesses the quality of being at once elastic, expansive, and sound."

Legislators and jurists adjust the interpretation of the Constitution to suit their aims. The Constitution doesn't self-adjust.

Rep. Collier began by heaping scorn upon the existing system:

> "...it would be indeed difficult for the ingenuity of man to devise a more cumbersome, antiquated, and useless system of currency than the one now in operation throughout the United States – a currency system which in time of stress always failed to give relief, and under which we have frequently been threatened with financial disaster."

Collier didn't emphasize that the system was instituted by the government, or else he might have realized that such a process was bound to fail to foresee the many problems any such law would generate. How many of those who voted for the Federal Reserve Act would have said in 1913 "It would be difficult to devise a system more biased toward inflation, disaster, big government, and a debt-laden economy than the Federal Reserve System we are heartily approving?" Rather than reverting to the specie system or suggesting that government should not be devising currency systems, Collier excused the National Currency Act as having been born at a time when legislators were not thinking straight due to the pressures of war.

Like Glass, Collier thought that "an elastic currency...will be a tremendous source of strength at all time and, I believe, will prevent the recurrence of a panic." He didn't foresee that the elastic currency meant inflation, that inflation meant an unsustainable

boom, and that the boom had to lead to a bust due to its inherent distortions and malinvestments. He didn't understand that he was voting for an institution that would make matters worse in a few short years. His theory was this: "This panic [of 1907] was due to an overspeculation on the stock market." He thought that any such panic could be quelled by bankers having enough reserves. These ideas are faulty. Overspeculation on stocks is a symptom of a boom. It is an effect of inflation and excessive credit creation. It doesn't cause a panic. The panic occurs when failures of some malinvestments come to the attention of the markets and they realize that the boom is over and cannot be sustained. They then revalue the production structure downwards, as they realize that certain capital investments are going to prove unprofitable. More inflation and supply of reserves doesn't resolve the problems. It starts up a new set of distortions in the economy.

A number of speakers lauded the Owen-Glass bill as a Democrat measure that places control in the hands of the government, as opposed to the rejected Republican-favored bill that more openly placed control in the hands of the Federal Reserve banks.[193] Rep. Collier was one of them:

> "I am as much opposed to centralization of the banking business as any Member of this House, and I would not countenance any plan which had the merest suggestion of centralization, if the control of these plans were to be in private hands.
>
> "One of the most serious objections to the Aldrich plan of currency reform was that it contemplated placing this control in the hands of the bankers themselves. I would never agree to such a proposition...This power should properly be placed under the control of the Government itself..."

In reality, the Congressmen with these attitudes were being fooled or fooling themselves. The Aldrich plan was not much different from the Owen-Glass plan.[194] They both set up a central bank. They both attempted to divest purported legislative powers over money to this central bank. They both continued a structure in which the supply of money no longer was set by free coinage but mainly by bankers. When

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[193]President Wilson's embrace and support of the legislation played an important part in its passage.

[194]Several Congressmen pointed this out. Rep. Towner said "If the Aldrich bill could have been patented, this bill would be an infringement. If it could have been copyrighted, this would have been an invasion."

bankers spoke for the Aldrich plan or against the Owen-Glass plan, it induced the opposite reaction of support for the Owen-Glass plan, but this played into the hands of bankers. The notion that somehow the government would be controlling money and not the bankers comforted some of those who voted for the bill, but it has evidently not worked out that way. Once the Fed was organized and set up, it could concentrate its efforts at securing complete control over money and credit while Congress was busy on other matters. Congress never set up a stringent system of control over its creation. Where were the control criteria? Other than reporting, there were none. What should they be? No one really knew, other than a vague idea that interest rates should be lower and panics prevented.

Rep. Hardwick said that he would go easier on the bill than had Sen. Benton in his speech of Feb. 2, 1831 against the Second Bank of the United States. His speech shows some loyalty and understanding of the Constitution mixed with some misconception:

> "I have always thought that there was a vital and fundamental distinction, in the first place, between money and bank credits. I have always belonged to that school of political thought that believed that the Constitution of the United States meant what it said on the money question, and that the sole power to issue money – real money that should discharge private debts and public dues – rested solely with the Government of the United States...If we are to issue real money – and that is the sole as well as the exclusive function of the Government – then it should have the functions and attributes of real money and should be made legal tender for all debts, public and private, and should, in my judgment, be redeemable in gold."

He is correct to distinguish money from bank credits. He is correct to attach the notion of a "sole power" to the government. If he had said this sole power was to *coin* money rather than *issue* money, he would have put the matter much more accurately and correctly. But he had in mind some kind of paper certificates that could be redeemed in gold, rather than gold itself. He was one step removed from being a hard money man. Given this position of his, we can understand his view, also endorsed by the Constitution

> "that all of the real money of the country ought to be...full legal tender for the payment of private debts and public dues, and that nothing else except this money issued by the Government ought to be...made legal tender..."

It is from this perspective that he criticized the Federal Reserve money. Bank credits should not be made legal tender in any respect, whereas the bill makes them into

obligations of the U.S. and also makes them acceptable for payments to the U.S.[195]

> "The money or currency – I do not know which to call it – that it provides for is neither fish, nor fowl, nor good red herring. It partakes of both; it does not pay private debts, although it is accepted for public dues. It is neither bank currency nor full government money..."

Hardwick sensed the long-term risks in the Fed system:

> "Credit is already cheap, far too cheap. And yet when the splendid facilities afforded by this bill for turning promissory notes and commercial paper into Government currency are fully utilized, what prophet among us can tell how cheap it will finally become before the day of reckoning finally arrives? It may be pleasant enough and easy enough for a time, but what is the end to be?...If this bill becomes a law...you will have prosperity, expansion, more loans, more credits, boom times – for a while...But I tell you, gentlemen, it is equally true in the case of a nation and of an individual, that pay day comes after a while. We will go on perhaps five years more getting our notes discounted and rediscounted, and double discounted, and triple discounted, flooding the country with too much credit and engaging in overtrading of all sorts, but after a while the day of reckoning will come."

One risk was that of business cycles. His prediction was not bad. A boom lasted until 1919 or 1920, at which time a sharp drop occurred. Another boom commenced in 1922 and lasted to 1929, at which time the Great Depression occurred. A second risk was political:

> "We are giving as a substitute for the alleged private monopoly of Wall Street a gigantic monopoly that binds together all the banks in the country...we rush headlong and pell-mell into the arms of a great public monopoly – a system that we create today, but may not be able to destroy tomorrow; that we control now, but that may control us before the end is reached."

The rush to bail out the banking system in 2008, at any cost, for fear of a catastrophic series of bankruptcies and financial failures that would paralyze the money and credit system of the U.S. and much of the world, is the kind of outcome that Hardwick sensed. The money system would become so entrenched and so important that it would

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[195]Furthermore, which he did not note, the redemption into gold was highly diluted or on a fractional-reserve basis.

control the Congress, or Congress would act as if it had no choice.

Vieira's conclusion:

> "Whether he knew it or not, Hardwick was describing, not a truly '*public* monopoly' (because the system was not exclusively public), but a *corporative-state* arrangement, both *quasi*-public and *quasi*-private, with the lines of control, influence, and ultimate profit sufficiently blurred so that few not on the inside could know whether the government was the banks' master, partner, shill, or dupe."

Like Hardwick's problem with the new currency having legal tender attributes bestowed on them by government, other Congressmen sensed something wrong with the government's new role. Rep. Murdock spoke of the bill as "a device by which the citizen borrows currency of his Government, with the banker as a profit-taking intermediary..." Rep. Willis wondered

> "Why should this vast amount of notes be issued to the Federal reserve banks, to be used by them for their profit, and still be made obligations of the United States? Why place this burden on the Government of the United States for the benefit of the Federal Reserve banks? Since the people can get these notes from the Federal reserve banks only by paying interest for them, why should not the notes be the obligations of the banks instead of the obligations of the United States?"

Let us penetrate to the heart of these concerns and locate the real problem they allude to. Banks always create demand deposits at will for debtors by granting them credit in exchange for the debtor's promise to repay. That is their business, and it is unobjectionable if people realize that the demand deposits are not as liquid or continuously redeemable as the name suggests. The Federal Reserve pyramid system is a fancy way of piling up and creating more of these credits. Therefore, the heart of these objections cannot be either credit creation or that interest is being paid for loans. The heart of it is that the people's credit, i.e., the government's credit, is being placed on bank money that is created by a *private* system of banks. The government's *imprimatur or stamp of approval* is being placed on a privately-generated currency. The government is creating a private currency *monopoly* with a *privileged* currency. It is doing this in several ways. The currency is a legal obligation of the United States. It is made receivable for public dues and taxes. It is through a system entirely created by the government. It is the sole such system and carries a Federal name in its title. The President is appointing the Federal Reserve Board, but the Federal Reserve banks are

private as are the member banks. The currency is printed by the Treasury, carries the Treasury's seal, and signatures of Treasury officials. In effect, the government is engaged in a joint venture with the Federal Reserve System. It is a venture with unclear control and oversight by the Congress and substantial control held by the System. This joint venture is a corporative state arrangement.

With the Federal Reserve, the government, having departed from the Constitution to the point where issues of money are thought to be allowable, enters more deeply into never-never land, escaping from constitutional constraints, by delegating the power to issue and contract paper money to a private organization of banks with titular federal control. It appears that Congress intentionally opts for a means of control, the Federal Reserve Board, that is more apparent than real. Its purpose seems to be to shirk its responsibility to the people as it divests itself, unconstitutionally, of one of the legislative powers vested in that body by the Constitution. What Congress demands of the System, in return for its privileges, is that it make money easy and support the government's bond issues. The Fed has fulfilled its side of the bargain.

Congressmen explored the nature of the government's commitment to the currency. Private banks could trade commercial paper and other paper for Federal Reserve Notes (FRNs) that were as good as gold.

Rep. Gray pointed out that the FRNs did not depend for their value on the paper held by the Federal Reserve banks as collateral:

> "They bind the whole country, all the property of all the people...You can burn all the securities rediscounted; you can cast them into the sea; every one of the indorsing banks can become insolvent, and yet this money issued by the Government will be redeemed in gold at the Public Treasury, without regard to the assets or the solvency of the indorsing banks of the securities rediscounted."

The FRNs were backed by the ability of the government to tax the people and obtain gold to redeem them, as Rep. Hulings observed.

Sen. Root raised a basic constitutional issue, which was that the power of the banks to issue currency had no limits:

> "There is in this description of the notes and bills – the paper which may constitute the security to be offered for the loans of the Government notes – no limitation whatever by a reference either to the capital of the bank discounting or to the deposits of the bank discounting or to any other fixed standard. There

> is no limit that I can find in the bill to the quantity of paper of the kind described that any bank may take..."

Vieira cites *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* (1931) which said in part "Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard." But neither Root nor anyone else followed up on this issue.

Sen. Reed pinpointed the basic problem that banks have when they mismatch their assets and liabilities. They do not keep reserves high enough to meet the demands of depositors. "It is because he wants to make money rapidly that the system has grown up of loaning the depositors' money down to the danger line." But then there was another problem. Enforcing the legal liabilities of the banks courted disaster:

> "...no longer ago than in 1907 substantially all of the national banks of this country repudiated for the time being their obligations. If the law had been enforced in all of its rigidity, most of them would have been placed in the hands of receivers and the entire financial structure would have been wrecked; but the law was not enforced. Manifestly, there was no moral obligation resting on anybody to enforce the law, because to have enforced it would have been to have wrought ruin and disaster. We would have destroyed the bankers, who, after all, were not greatly to blame, but we would also have almost destroyed the country."

Congress keeps kicking the can. It keeps patching the system up. It's possible that, being risk averse, Congress has not wanted to risk bringing on "ruin and disaster." It's possible that Congress has been satisfied with the position of depositors. It's possible that Congress has not recognized the real source of the banking problem. It certainly has never acted as if it had. Now that it has enacted deposit insurance and the deposits are irredeemable, it has even less incentive to alter the system. However, while Congress may be comfortable with its handiwork, the costs of failing to fix banking have fallen on society in the form of recessions, depressions, and slower economic growth.

### Challenges in Court

Reading court judgments can make you shake your head in disbelief. *Horne v. Federal Reserve Bank of Minneapolis* (1965) is such a case. The complainants made a weak case, but it is doubtful they would have gotten very far even if they had made a stronger case. What the court wrote is astonishing. The basic complaint was that the

Fed was harming them and all taxpayers by using bookkeeping entries to buy U.S. securities, taxpayers then being forced to pay the principal and interest on these securities. The court ruled that the complainants had no standing to raise its claim. Why not?

> "By plain mandate of the Supreme Court, federal taxpayers have no interest in the expenditure of tax funds as will give rise to a legal right to supervise expenditures therefrom through court action. *Commonwealth of Massachusetts v. Mellon, supra*. Any damage claimed to be suffered thereby is suffered in common with all other taxpayers, and simply will not suffice to establish requisite standing to sue."

It's not at all clear that the case cited is applicable here, which involves the private actions of the Fed, not a statute that produces taxes. That aside, the court claimed that if many people suffer a wrong, then no single one of them can sue to rectify it. The court ruled that "an injury to be justiciable must be peculiar to the particular plaintiff, and not one suffered by all similarly situated persons in common."

This case included two plaintiffs who refused to accept FRNs in exchange for Canadian currency because they are not legal tender. The court dismissed this claim summarily: "The fact that those appellants choose not to recognize Federal Reserve notes as legal tender is not a 'plausible ground' for the maintenance of this lawsuit." Vieira (p. 842) notes that "the court cited no authority whatsoever for the proposition that Congress could constitutionally make FRNs legal tender."

In *Bryan v. Federal Open Market Committee* (1964), the court again ruled that the plaintiff had no standing to sue.

Henry S. Reuss was a Congressman who brought a case in *Reuss v. Balles* (1978). He alleged that the manner in which the five Reserve Bank members of the FOMC was chosen was unconstitutional, and that, with the authority they have, they should be presidential appointments confirmed by the Senate. He said that as a legislator, his power to impeach was being infringed. He alleged that his power to coin money and other powers (like the commerce clause) were being usurped due to the improper delegation of powers to the FOMC. He also maintained that as an owner of bonds, certain FOMC actions might deprive him of his property without due process of law.

As in the other cases, Reuss failed to make the strongest case. The problem is worse than an unconstitutional delegation of the power to coin money. The Congress has first assumed an unconstitutional power to emit bills, and *then* it has unconstitutionally

delegated that unconstitutionally-assumed power. He should not have brought in the commerce clause. Congress has no power under the commerce clause to guarantee the obligations of a private banking cartel in the first place, and so it cannot delegate that power.

To determine if his case had standing, the court assumed that his claim was correct that the five members should be appointed by the President. They then asked whether the illegality of the appointments injured Reuss. They decided he was not injured in his capacity as Congressman:

> "The defect in his theory, however, is that even if we were to declare, in effect, that all members of the FOMC had to be presidential appointees, the same responsibilities currently delegated to the FOMC would remain so delegated. The fact that appellant's role vis-a-vis monetary policy would in no way be enhanced by such a declaration indicates that his legislative powers, including relevant votes either in committee or on the floor, are not currently adversely affected in any respect; there is, therefore, no injury in fact that would be redressed by a favorable decision."

This is scarcely believable logic. The actions of a past Congress and the failure of the present Congress to act have deprived Reuss of his power to exercise certain powers over monetary policy. They have been delegated to private parties within the FOMC. If this is unconstitutional, as the court was assuming, they would not automatically be replaced by presidential appointees so as to leave the position of Reuss unchanged. The powers would revert to Congress. Congress would be in a position to draw up a new statute and a new arrangement. Reuss would have his power restored. He would be able to vote on any new arrangements. The court's supposition that the private appointees would be replaced by presidential appointees simply circumvents a remedy for Reuss' complaint and acts as if his exercise of his power will never enter the picture.

The court then ruled on his loss of the impeachment power:

> "Even if we were to declare, in effect, that the Reserve Bank representatives had to be presidentially appointed, the appellant's interest relative to the impeachment process—primarily the power to initiate impeachment proceedings—would not be changed in the slightest from its present position, since there is nothing to suggest that he cannot now introduce a bill of impeachment."

This ruling is nothing short of amazing. How can Reuss successfully introduce a bill of impeachment against members of the FOMC who are private persons placed on the committee by the private Reserve banks? They are not officers of the United States.

The court denied that Reuss had standing to sue:

> "There is no reason to believe that a declaration ultimately resulting in presidential appointment of the entire FOMC would benefit the appellant in any manner whatever, even assuming that a concrete injury caused by the appellees could be established. The same type of decisions would be made by the FOMC, contributing to both increases and decreases in interest rates, the rate of inflation, and other financial indicators...Finally, even if appellant could overcome these obstacles, he would be faced with the fact that his is a very generalized grievance, one held in common, to some degree, by virtually all members of the public."

If the FOMC had public members who replaced the private members, their incentives would differ. The appointment and monitoring processes would make them more responsive to public concerns and less responsive to the interests of the Reserve banks. The substance of their decisions would change, even if they were making the same type of decisions. Why should a grievance that is shared by others disqualify one from obtaining a remedy?

The court denied that Reuss would be able to show the injury to his bond portfolio caused by the FOMC, because other forces also determine the outcomes, even though, contradictorily, they acknowledged that FOMC decisions are "an important part" of those factors. The main support for the standing of Reuss is in a similar case, *Buckley v. Valeo* (1976). The Supreme Court had noted that persons "with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency [the Federal Election Commission] designated to adjudicate their rights." The Court of Appeals hearing the Reuss case felt that his interests were insufficiently identifiable. Judge Wright dissented. He argued that even if Reuss could not show that his portfolio would perform better with a different FOMC or that his choices as a Congressman would be enhanced, that

> "an individual's rights are being determined by an allegedly unconstitutionally composed body is, in itself, sufficient to meet the injury requirement and to permit the court to decide the merits of his constitutional challenge...[Reuss] should at least be afforded an opportunity to introduce evidence to a factual point which the majority views as critical before this court rules against him

> because of the absence of such proof."

Vieira notes that "a complainant *must* be allowed to attempt to prove the facts on which his legal claims rest," citing two Supreme Court cases.

Reuss was an articulate, blunt, outspoken gadfly. Holder of a bronze star, he opposed the war in Vietnam. He was a New Deal liberal who shed some of his allegiance to Keynesianism. Reuss attacked the Federal Reserve. The court knew it. They knew he was in the minority. The court blew with the majority wind. When it comes to the Fed, that is the usual behavior of courts.

The next case is *Riegle v. Federal Open Market Committee* (1981) brought by Senator Don Riegle on appeal from a District Court ruling that denied him standing to obtain relief. Riegle argued that the public members of the FOMC are officers of the United States and, as such, he had a right to advise and consent to their appointments, which was being abridged.

Riegle's claim is straightforward, and the court decided that Riegle had standing, on traditional principles, to sue: "...the causation requirement has been satisfied despite the naming of inappropriate defendants." (The court said that he should have sued the directors of the Reserve banks who made the appointments, not the appointees.)

The court still declined to hear the case for another reason, which was that it did not want to intrude on the domain of the Congress because of separation of powers. It termed this a doctrine of *equitable discretion*. Citing several precedents, the court argued that the Senator's

> "dispute appears to be primarily with his fellow legislators. In these circumstances, separation-of-powers concerns are most acute. Judges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking."

Once again, the court finds an excuse not to challenge the FOMC, because it doesn't want to find itself in the midst of a hot political controversy. This is shown when the court says that "Riegle's attempt to prohibit voting by the five Reserve Bank members of the FOMC is yet another skirmish in the war over public versus private control of the Committee which has been waged in the legislative arena since 1933." But is this battle in the legislative arena? This is not a simple matter of a constitutional decision that can go one way or another. It is a matter of constitutionality vs.

unconstitutionality.

The result is that the court concocts an argument that does not hold water. For, if a child were abused by its parents and sought court relief, would the court send the child back to the parents to settle the dispute with its parents? By telling Riegle that his beef is with Congress, the court disallows the possibility that "Congress's will" has been exercised unconstitutionally, which is the heart of the complaint. Besides, is Congress the problem, or is the problem the bank directors who are usurping his right to advise and consent? How can something called "democratic decisionmaking" take precedence over considering Riegle's complaint when his complaint alleges that the process used resulted in an unconstitutional statute? He is not arguing against democracy or the process but against the outcome of the process.

The court counseled that if a private party brought the claim, then the separation of powers concern would be alleviated and "the court would be obliged to reach the merits of the claim." This occurred in the next case, *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System* (1985):

> "The present action was filed in the District Court in June 1983 by the Committee for Monetary Reform, a non-profit corporation, and over 800 other corporations, businesses and individuals who alleged that they were 'directly affected by the money supply policies of the Federal Reserve System and in particular have been damaged financially by the devastatingly high interest rates caused by its policies and by the recession which those policies produced.'
>
> "The complaint charged that, in managing the nation's money supply, the Federal Reserve System had been operating unlawfully in three respects. First, as in Reuss and Riegle, the plaintiffs claimed that the FOMC exercised significant governmental authority and that all of its members were therefore 'Officers of the United States' required to be appointed in the manner prescribed by the Appointments Clause. Second, the complaint charged that the inclusion on the FOMC of members whose selection was ultimately controlled by commercial banks violated due process by delegating authority to individuals directly interested in the operations of the regulatory body. Third, the plaintiffs maintained that four statutes that authorize the Federal Reserve System to control the money supply, 12 U.S.C. Secs. 225a, 263, 357 and 462b, 'represent an unconstitutional delegation of the Article I, Section 8 power of Congress 'To coin money [and] regulate the value thereof ...' in that neither they nor any other statutes provide any meaningful criteria to guide the administrative exercise of the power so delegated.'"

It appears that the cases are getting stronger, at least the complaints are.

The court conceded that the allegations of injury were sufficient to meet the requirement of injury in fact. This case was brought after a period of extraordinarily high interest rates and severe recessions of which few were unaware.

But, once again, the court ruled that the plaintiffs didn't show that "their injuries are fairly traceable to the asserted constitutional violations." The court's conclusion had merit because the case made by the complainants had weaknesses. Vieira terms their arguments (p. 858) "utterly jejune."

It is going to be challenging to attribute and prove harm to one's business or wealth due to actions of the Federal Reserve System. If a theoretical approach is used, there will always be competing theories. If empirical econometric models are used, there will be ambiguities; and the models are unlikely to speak to an individual's circumstances. On the other hand, if discovery procedures were to obtain the models used by the Fed itself and combine their findings with evidence from the minutes of Fed meetings and with appropriate theories, these challenges might be overcome.

This court decision also denied standing on the grounds that the plaintiffs, although private, were not "directly subject to the governmental authority." Senator Melcher brought a complaint in *Melcher v. Federal Open Market Committee* (1988). He argued that the five members of the FOMC are officers of the United States and must be appointed by the President with the advice and consent of the Senate. The court found "an insurmountable barrier" in "the doctrine of equitable discretion" as in the Riegle case.

Melcher argued that since private parties had no standing and were knocked out of contention in the *Committee* case, the situation had now changed; and the only way left open judicially to challenge the FOMC composition was through a senator once again bringing the case and being heard. The District Court had *accepted* this argument (it ruled against Melcher on the merits of the case.) The Court of Appeals disagreed with the District Court's acceptance and once again reinstated dismissal at its discretion on separation of powers grounds:

> "the District Court discerned the following principle of law: '[L]egislators will be denied access to the courts only when private plaintiffs are available to bring the type of suit brought by the legislator.' *Id.* at 515 (footnote omitted). Since 'it is beyond question that private plaintiffs lack standing to challenge the FOMC and its Reserve Bank members,' *id.* at 516, the District Court held that

> the doctrine of equitable discretion may not appropriately be invoked to dismiss Senator Melcher's complaint. *Id.* at 517. For the following reasons, we respectfully disagree."

It argued that statements made in Riegle about private parties were not essential to the case. They were *dicta.* It went on to bolt the door shut. It strengthened its determination not to hear such a senatorial objection by saying that it didn't matter whether or not private parties were available or able to challenge the statute:

> "Specifically, the separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit."

It was not up to the courts to provide routes by which constitutional claims could be vindicated: "... if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action."

But this begs the question: What if one cannot obtain such relief because one's fellow legislators are content to do nothing in the face of an unconstitutional statute?

## Congressional Inaction

Congress has not yet seen fit to control or even monitor in detail its creation. Wright Patman's *A Primer on Money* (1964) notes that

> "...the system eludes even the audit control exercised by the General Accounting Office, whose function it is to make sure that other Federal agencies not only handle their financial affairs properly but also pursue policies and practices that are in accord with the law. The system provides for its own auditing; clutching the mantle of independence, it has stoutly resisted repeated congressional suggestions that the General Accounting Office perform an annual audit."

The Federal Reserve explains that the "Reserve Banks, like the Board, are subject to audit by the GAO, but certain functions, such as transactions with foreign central banks and open market operations, are excluded from audit."

The Fed's accounting for its security holdings is not mark-to-market. It is not on the basis of generally accepted accounting principles (GAAP). It is on the basis of

amortized cost. See here. "The primary difference between the accounting principles and practices in the Financial Accounting Manual and GAAP is the presentation of all System Open Market Account (SOMA) securities holdings at amortized cost rather than the fair value presentation required by GAAP..."

Congress cannot get an accurate picture of system activities without a fair value presentation. Congress has not yet demanded such an accounting.

Corporations that report publicly provide statements of cash flows so that interested parties can more easily assess operations. Not the Federal Reserve Banks:

> "In addition, the Reserve Banks have elected not to present a Statement of Cash Flows because the liquidity and cash positions of the Reserve Banks are not a primary concern given the Reserve Banks' unique powers and responsibilities."

If Congress were interested in monitoring the Fed so as to exercise financial control, it would insist on up-to-date statements of cash flows. The unique powers and responsibilities of these Banks make this all the more important.[196]

**Summary and Conclusion**

This will be in Vieira's words (pp. 865-866):

> "In sum, the member banks of the FRS are private, independent associations pursuing their own economic self-interest. Through the Federal Reserve regional banks, the Federal Open Market Committee, and the Federal Advisory Council, they, together with the Board of Governors, function as a *quasi*-public agency to which Congress has purported to assign the task of enacting or implementing economic laws to control the supply of money and credit in the United States. As a whole, the FRS is a *quasi*-public, but largely private banking cartel that asserts independence from, and is generally recognized as outside the control of, the courts, Congress, the President, and (derivatively) WE THE PEOPLE...
>
> "...the FRS is a rather typical example of the *corporative-state form* of economic-*cum*-political organization. Basically, under that system the government recognizes or establishes as a specific entity a group in a particular

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[196]See Gary North for a recent assessment of the progress of Congressman Ron Paul's bill to audit the Federal Reserve.

industry, trade, or profession; endows that group with peculiar legal rights, privileges, powers, and immunities; and delegates to it the function (in coöperation with some supervisory public agency) of enacting 'economic laws' for that industry, trade, or profession – and, indirectly, for all citizens who deal with members of the group. This legally privileged entity – as the Italian theorists of corporativism labelled it, the *corporazione* – operates both as an independent private group seeking its own and its members' economic self-interest, and as a *quasi*-public, political agency exercising delegated legislative authority supposedly in the interest of the community as a whole...

"Had the Board substituted 'corporativist' or 'fascist' for 'federal' in [its] description [of itself], it would have hit the nail squarely on the head – because, for all practical purposes, the FRS is nothing less than an American banking *corporazione*."

CHAPTER IX

## The Gold Seizure: Presidential and Legislative Action

This chapter begins discussion of Volume 2 of Edwin Vieira Jr.'s *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (second revised edition, 2002). This chapter discusses the presidential and legislative actions that brought about the seizure of all privately-held gold by the United States government in 1933.[197] The corresponding pages in Vieira are pp. 867-1026 and pp. 1046-1127. The next chapter in this series discusses the associated gold seizure court cases, which include the Campbell cases (pp. 1027-1046) and the gold clause cases (pp 1127-1240).

### Introduction

By its Constitution, the American government's money is supposed to be gold and silver, and the government has no role in the system of credit. Yet America now has an unconstitutional fiat paper money that doesn't even pretend to have an official connection to gold and silver and it has a national credit system. The government through the Federal Reserve (the Fed) issues legal-tender Federal Reserve Notes (FRNs) that must be accepted in payments, and these notes do not even *promise* to redeem in gold or silver. Furthermore the government has created a centralized credit-granting in the Fed. Extraordinary.

Prior to 1933, America used several kinds of money including paper money that was redeemable in gold. That itself was unconstitutional, but that proved to be a stepping stone to paper money irredeemable in gold. In 1933 and 1934, the government removed gold from the monetary system. More than that, it removed gold coinage, gold bullion, and gold certificates from private ownership altogether. In the 1960s, the government finished de-metallicizing the monetary system by removing silver.[198]

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[197]Henry Mark Holzer reviews each step in the process by which the government seized all the privately-held gold (and gold certificates) in the country, including the gold held by the Federal Reserve banks. See his article "How Americans Lost Their Right to Own Gold and Became Criminals in the Process" that is online here. Prof. Holzer's article originally appeared in the *Brooklyn Law Review* 39 (1973) 517-559.

[198]Private gold ownership became legal again in 1975. One can therefore "self-redeem" FRNs by buying and selling gold and silver in the open market, but only at a serious disadvantage. Gold and silver are taxed as collectibles at ordinary tax rates. If one buys gold at $500 and later sells it at $600, in order to make a payment in FRNs or FRN-dollars, which are

Vieira leads us through the maze of New Deal actions to show us all the many ways in which the gold seizure was unconstitutional. No court decision has ever ruled on the constitutionality of the seizure.

In 1933 and 1934, the government

- Seized all privately held gold
- Defaulted on government obligations payable in gold, later found unconstitutional
- Outlawed gold clauses in private contracts
- Withdrew gold coins from circulation
- Devalued the statutory gold dollar, and
- Made gold ownership a criminal activity with jail terms and fines.

No power granted to Congress justified these acts. None ever can. If seizing people's money is allowable, then the government can seize anything else it wants, the result being that "No man's life, liberty, or property are safe while the legislature is in session." That is certainly not the intended aim of the Declaration or the Constitution.

Every component of the gold seizure was abhorrent, defying any notion of liberty and rights to property. It was a governmental exercise in brute force and theft, covered over with a patina of legalities passing for laws. The money system bereft of gold remains in place today. None of the steps taken were constitutional, as will be overwhelmingly demonstrated. The fact that the gold seizure happened shows that, in the blink of an eye, elected officials of constitutional government can subvert the Constitution and the government they are sworn to uphold. It shows what can happen under an elected government possessing a monopoly on legal force. It shows what can happen when a people no longer guards its liberties. It shows that those who want to preserve their liberty must constantly be suspicious of government in any form, must constantly monitor it, must have means of controlling it, and must take every precaution against it.

The gold seizure served the interests of the government and the central bank fractional-reserve banking system. The government consolidated its control over the monetary system. It removed the last vestiges of a free market in money. It made a big profit, extracted from holders of gold. The Treasury began to play a larger role in monetary policy. The gold seizure and associated measures saved the banking cartel from its own

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central to the currently predominant payments system, one must pay a tax on the phantom gain of $100.

evident failure, while divorcing its money from gold and making it into legal tender.[199]

Forcing everyone to turn in gold to the government in exchange for paper money was also, in a legal sense, bizarre and absurd. Vieira makes every sincere attempt to locate a constitutional basis for the various acts. That is the accepted way in examining statutes, as we have seen. But the further one goes into the sequence of events, the more that faulty explanations pile one on another, and the more remote they seem to get from any sense of right or constitutionality. It seems that once a departure is made from original constitutional meaning, the way is open to incredible eventual distortions and contradictions. After awhile, Congress and the Supreme Court are talking and operating with concepts so far disconnected from constitutional reality that they lose themselves in a maze.

The government's excuse for seizing WE THE PEOPLE's gold was that the country was experiencing an emergency. An emergency, as argued earlier and as again we shall see, is not a basis for setting aside the Constitution. In addition, in practical terms, there was no good reason for the unconstitutional seizure of gold. It didn't solve the problems it was supposed to solve, and, what is more, there existed a set of effective constitutional actions that would have resolved the banking emergency and prevented a future recurrence: The banking system could have been placed on a sound footing and gold and silver reintroduced as Money, especially in view of the adulation accorded Roosevelt. What Roosevelt and the Congress did was not only unconstitutional but unnecessary. Even within the scope of the system then in place, the gold seizure was unnecessary, for if the Fed had supplied paper notes, as it did after the banking holiday, that would have sufficed to reopen banks. Opening the mint to free and unlimited coinage of silver would have been another helpful step. The gold seizure didn't solve the basic economic problem of a central bank-fractional-reserve-banking cartel; and it didn't solve the problem of a corporative state monetary system in which government caters to the banking cartel and vice versa. If these problems had been solved by removing gold from the possession of Americans, we wouldn't be looking at an insolvent banking system in 2010, a government engaging in massive bailouts, a government deeply in deficit and with rapidly mounting debts, and a society facing the threat of monetary collapse.

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[199]We are living with the fiat money system today, and, once again, we are living through another sequence of bailouts of the central banking, big government, debt bubble, fractional-reserve banking system. The debt buildup of this system is so large that collapse of the monetary system and government is in view.

The reason for the emergency was that the fractional-reserve system had, yet again, experienced one of its periodic disasters. These always take the same form. Excessive loans turn into bad loans. Banks become insolvent. Depositors, who have a perfect right to withdraw Federal Reserve Notes (FRNs) and gold, and who have a perfect right to act with prudence against the prospect of further losses in bank asset values, withdraw cash from the banks. Due to their bad loans, banks find that they cannot generate the cash flows demanded by depositors.

Before 1933, bank closures had risen sharply. Even in the 1920s, there was a steady drip of bank closures as a consequence of the WW I boom-bust sequence. The Fed dithered. It could not resolve an insolvent system, but it could stop a chain reaction of bank closures by open-market operations and/or discount operations. This *it did not do*, despite its mandate to provide an elastic currency.[200] President Hoover considered a government guarantee of bank deposits, but didn't act on it.[201]

Why did the government seize the people's gold? One reason was to inflate the supply of money and raise the overall price level in the United States on the (false) theory that this would end the Great Depression.[202] Another reason was to stop the bank closures and preserve the fractional-reserve monetary system. A third reason was to place the monetary system on a fiat money basis. A fourth reason was to profit from the devaluation.

Seizing the gold stopped further withdrawals of cash from the banking system. This

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[200]The Fed wasn't the sole cause of the Great Depression. In addition, mismanaged government macroeconomic policies, such as the Tariff Act of June 17, 1930 (Smoot-Hawley), contribute to booms and busts. Inflation can't and shouldn't be used to cure such a situation. The cure, short of ending nonconsensual territorial government altogether, lies in four steps. Sound money (gold and silver) supplied by a free market (opening the mint to free and unlimited coinage), reform of fractional-reserve banks, an end to the government-constructed central banking-managed bank cartel and to the legal-tender status of FRNs, and an end to the economy-wide misdirection of resources by government into its favored "investments," which usually are unprofitable and increase uncertainty. All of these reforms are associated with a small and limited government.

[201]These are inappropriate permanent measures. Within the fiat money fractional-reserve system, these steps were available. They could have bought time to take correct and permanent steps, had anyone wanted to.

[202]The policy didn't succeed. See Robert Higgs, *Regime Uncertainty Why the Great Depression Lasted So Long and Why Prosperity Resumed After the War* (1997).

stemmed bank failures as well as decreases in the monetary base and the money supply. The latter could have been accomplished if the Fed had bought securities in the open market. Having seized the gold, the government devalued the dollar and had paper profits of about $3 billion. This allowed a corresponding inflationary increase in the monetary base. Congress in 1934 authorized the government to buy gold, which it did. It more than doubled the gold stock between 1934 and 1941. By this means, the Treasury inflated high-powered money. The Treasury took over the role of the Fed in this period.

Vieira reminds us again and again that when acts of government are unconstitutional, as in the gold seizure, they are not laws. He cites *Norton v. Shelby County* (1886). In this case, the Supreme Court affirmed a ruling by the highest court of Tennessee that the Board of Commissioners of Shelby County

> "had no lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justices of peace of the county; that their action in holding a county court was void, and that their acts in subscribing to the stock of the Mississippi River Railroad Company and issuing bonds in payment therefore were void.
>
> "While acts of a *de facto* incumbent of an office lawfully created by law and existing are often held to be binding from reasons of public policy, the acts of a person assuming to fill and perform the duties of an office which does not exist *de jure* can have no validity whatever in law.
>
> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

The last paragraph is especially worthy of note. "An unconstitutional act is not a law..." The distinction between *de facto* and *de jure* must constantly be borne in mind when we discover unconstitutional acts that have persisted for decades on end. Their *de facto* status does not lend them a *de jure* status. They are not laws. In legal contemplation, or from a legal perspective, such a law is "as inoperative as though it had never been passed." People may be obeying the act or may have been made to obey the act, through force or threat of force, but the act is still not a law.[203]

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[203]It does not even have to be repealed. It can simply be eliminated from the code by decision of the authorities; and an executive may simply stop enforcing the act's provisions. But it is useful for all concerned if such an act is in fact repealed.

## Roosevelt's Gold Seizure – The Initial Step

Roosevelt's gold seizure began with Presidential Proclamation No. 2039 on March 6, 1933. This, in turn, referred to the Act of October 6, 1917, as amended, otherwise known as the Trading With the Enemy Act.[204] The original Act is online here.

The Act of September 24, 1918 amended section 5(b) of the original. After Roosevelt's proclamation, Congress on March 9, 1933 hastily passed the Emergency Banking Act of 1933, which altered section 5(b) again. Further changes occurred in the Act of December 18, 1941 and in the Act of September 14, 1976.

In *Stoehr v. Wallace* (1921), the Supreme Court ruled that

> "The Trading With the Enemy Act, originally and as amended, is strictly a war measure, and finds its sanction in the provision empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.'"

Since the country was not at war on March 6, 1933, Roosevelt's proclamation had no legal basis. This is why he immediately asked Congress to pass the Emergency Banking Act.

If the Trading with the Enemy Act was constitutional, it also had limits, according to the Court. In *Becker Steel Company of America v. Cummings* (1935), the Court ruled

> "Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous...But, in thus authorizing the seizure of property as a war measure, Congress did not attempt the confiscation of the property of citizens or alien friends."

Any seizures were to be of enemy-owned property, not of citizens or alien friends. The

[204] At the time of the Constitution, the Trading with the Enemy Act might have been viewed as an unconstitutional infringement on rights because warfare was not unlimited at that time. See Murray N. Rothbard *Trading with the Enemy: An American Tradition.* See also his discussion in Chapter 3 of his *Anatomy of a State.* The latter quotes a passage from John U. Nef's *War and Human Progress* in which Nef indicates how little the wars of the State affected relations between civilians in the two warring States at that time.

Act defined the word "enemy" clearly as including persons who were "natives, citizens, or subjects of any nation with which the United States is at war," and excluding citizens of the United States.

*Proper v. Clark* (1949) confirmed this:

> "Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country."

The Trading with the Enemy Act allowed the President to interdict or embargo transactions in foreign exchange, gold and silver coin, bullion, and currency, and credit and debts, between any person in the United States and enemies of the United States or their allies. It excluded purely domestic transactions.

With reference to gold, the original language was "export of earmarkings of gold or silver coin or bullion or currency." The 1918 amendment changed that to "and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency." In the context of a war, hoarding and melting referred to processing and sequestering bullion for purposes of shipping to a foreign country. This did not make a large change, as long as hoarding meant placing in inventory for future shipment, since it was still directed at trading with an enemy. But if hoarding were taken to mean any holding of gold domestically by Americans, then it would be a very large change.

The amendment in 1918 also gave the President a sweeping power over domestic transactions in bonds of the United States. He could "regulate...any transactions in such bonds or certificates by or between any person or persons" except those transactions done in cash.[205] Rep. Hayes objected that such a power was tantamount to confiscation, which is ruled out by the Constitution.

In *Markham v. Cabell* (1945), the Court made clear that the Act as a whole did not expire in 1921 when World War I ended, even if certain of its provisions no longer could be used. It stood ready to be used again in another war.

On the eve of Roosevelt's proclamation, the Trading with the Enemy Act could not be invoked since the country wasn't at war. It certainly couldn't reach to purely domestic

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[205]Most U.S. bond market transactions are not cash transactions. They are made on borrowed funds.

transactions in specie among U.S. citizens.

Hoover was communicating with the Federal Reserve Board (FRB) about what emergency action they would recommend. The Board sent Hoover a detailed message. It got to Roosevelt by his March 4 inauguration, and he incorporated large portions of it into his March 6 message.

The FRB's recommendation contained some remarkable statements, such as

> "by the end of banking hours tomorrow, the gold reserves of the Federal Reserve Bank of Chicago will be dangerously depleted. Representative bankers are assembled there tonight and have requested that a national holiday be proclaimed as the only method they know of for dealing with the immediate exigency with which they are confronted."

There is no credibility in the claim that a national holiday was the only method of dealing with the cash demands. The banks could have suspended payments in specie. The Fed, prior to this point, could have provided bank reserves that the banks could have withdrawn in FRNs.[206] Clearinghouses, if need be, could have resurrected clearinghouse certificates. The Fed could have discounted more collateral more freely, or, if it had to, sought an expansion of allowable collateral.

Roosevelt's March 6 proclamation led off with this statement:

> "WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding..."

Roosevelt blamed Americans for the banking problems. Large numbers of Americans were doing what was their right, which was to demand their deposits in cash. The banks were obligated to respond. Whose fault was it that they could not? Whose fault was it that they had overextended themselves? Large numbers of Americans were behaving rationally in view of the likelihood that when they needed cash, the banks would not be able to meet their end of the bargain. It was prudent to take the

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[206]See Allan H. Meltzer *A History of the Federal Reserve, Vol. 1, 1913-1951* (2003), pp. 272-414 for explanations of why the Fed failed to supply bank reserves. He rejects that the reasons were either operation of the gold standard or lack of knowledge of the economic situation. His explanation is that the Fed thought its policies were already sufficiently easy, because they, being guided by a real bills approach, were looking at the wrong indicators of tightness and ease.

precaution of withdrawing cash. By saying that the withdrawals were unwarranted and hoarding, Roosevelt blamed the American public for a crisis not of their making. Roosevelt paired hoarding, which simply means accumulating or storing up, with "unwarranted", so as to connote that the hoarding was somehow a bad thing. He was blaming the victims of fractional-reserve banking for the insolvency of the banks.

Next, he mentioned "severe drains on the Nation's stocks of gold." Individual persons had claims on this gold. It didn't belong to "the Nation."

He said that "those conditions have created a national emergency." Then he invoked Section 5(b) of the Act of October 6, 1917. He was careful to avoid calling it the Trading with the Enemy Act. He invoked a power to regulate transactions in gold and silver coin, including the hoarding thereof.

The Act was inapplicable to the situation at hand, since there was no war and since only perfectly legal transactions of American citizens were involved.

District Judge Mathes provided us with a highly readable no-nonsense opinion in *United States v. Briddle* (1962) that confirms these conclusions.[207] For example,

> "In an obviously strained effort to find legal support for such drastic and unprecedented control of the banking business of the nation, the President made reference to the 'national emergency' and to authority claimed under the above-quoted provisions of the Trading with the Enemy Act of 1917. [40 Stat. § 411.] Although this action was cheerfully accepted, and even welcomed, at the time, it was clearly unauthorized, since nowhere in the Constitution is the President given authority to act in an 'emergency' as such, and the requisite war conditions which might have called into play his granted power as Commander-in-Chief or his delegated power under the Trading with the Enemy Act of 1917 did not obtain.
>
> "This patent lack of authority prompted the President immediately to submit to a compliant Congress the bill which became the Act of March 9, 1933. [48 Stat. 1, 12 U.S.C. § 95a.]"

Note that Judge Mathes says that a President has no constitutional authority to act in an emergency as such. The President and Congress have no authority to set aside the Constitution in an emergency, no authority to assume emergency powers unless they

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[207]So does *Anthony v. Bank of Wiggins, 183 Miss. 885* (1938).

are necessary and proper to execute other enumerated powers, and no domestic police powers. Any purported laws to support acting under color of an emergency as such are not laws and, in legal contemplation, inoperative, even if they are in *de facto* operation.

The Supreme Court spoke on emergency in *Home Building & Loan Association v. Blaisdell* (1934):

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency."

The Constitution gives no power to the government even to declare an emergency. As far as legal power goes, such a declaration is (p. 892) "constitutionally irrelevant." The Supreme Court spoke again on emergency in *A.L.A. Schechter Poultry Corp. v. United States* (1935):

> "We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

The President declared the banks closed for four days, March 6 to March 9, during which time no banking transactions were to be done except those permitted by the Secretary of the Treasury. By the evening of March 9, 1933, Congress passed the Emergency Banking Act of 1933.

### The Emergency Banking Act of 1933

This law passed in one day.[208] Congress didn't define the nature of the emergency, investigate its causes, or consider alternatives. Debate was extremely limited. Congressmen who may have wished to ponder the meaning or implications of what they were voting on had no time to do so. Congress went immediately to the supposed solutions.[209]

The first section of the Act "approved and confirmed" the actions taken by the President "heretofore and hereafter." The Supreme Court has ruled in *United States v. Heinszen & Company* (1907) that Congress can, after the fact, ratify an action of the President if Congress had the constitutional power to authorize that act. Congress cannot ratify an illegal action of the President.

We need to inquire into the constitutionality of the Act's contents. Before doing that note that Congress can't in the present approve and confirm actions taken in the future by the President, because such approval requires knowledge of the (p. 895) "material facts and circumstances surrounding that action," which Congress lacks. The Supreme Court has articulated that condition in *Bloomfield v. Charter Oak Bank* (1887) and elsewhere: "Any ratification of an act previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts." This means that the "hereafter" language in the Act shouldn't be there.

Section 2 leads off by saying that it amends Section 5(b) of the Act of October 6, 1917. Actually, it completely transforms the Act in three vital and unconstitutional ways. It adds the words "During time of war or during any other period of national emergency declared by the President..." Since the amendment doesn't define national emergency and since the President can declare a national emergency under a vast array of circumstances, this practically authorizes the President to exercise the Act's powers at his discretion. This is an unconstitutional delegation of power because it's too broad and vague. The Act contains no standard (or intelligible principle) by which Congress tells the President when there is a national emergency.

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[208]Meltzer, op. cit., informs us (p. 389) that "Walter Wyatt, the [Federal Reserve] Board's legal counsel, prepared the act. According to Joseph Dreibilbis, one of the Federal Reserve attorneys, there was only one copy of the act when it passed."

[209]Congress is perfectly capable of hasty, ill-considered, and unconstitutional actions that are injurious to the American people. Congress is also perfectly capable of slow, well-considered, and unconstitutional actions that injure the American people.

Second, vagueness also comes in where the President is given power to prohibit "hoarding" of gold. Hoarding is undefined. The President has no intelligible principle by which to judge whether hoarding is or is not occurring. The Supreme Court disallows vagueness of legislative instruction. See such cases as *Connally v. General Construction Co.* (1926), *Champlin Refining Co. v. Corporation Commission of Oklahoma* (1932), and *Cline v. Frink Dairy Co.* (1927). Since hoarding is any accumulation or set-aside, the President could place anyone under threat of a $10,000 fine and ten years in prison merely for saving money in the form of gold.

Third, the rewritten 5(b) got rid of the language referring to transfers between the United States and any foreign country that was an enemy or ally of an enemy. This left behind the power to control the "export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency by any person within the United States..." The power to embargo or interdict domestic to foreign transfers was transformed into a generalized power to prohibit *any domestic* transfers or even holdings of gold and silver. This cannot be justified under any war power, since there is no war and no enemy involved in domestic gold transactions. What power in the Constitution justifies it? It cannot be the power to coin Money and regulate the value thereof. That has the opposite objective of making a specific viable money available, namely, gold and silver. It cannot be the power to regulate Commerce among the several States. If the regulation of Money is included under the commerce clause, then what's the use of the separate powers over Money? Clearly, the Constitution separates Money regulation from Commerce regulation.

One must conclude that Congress has no power in the Constitution that justifies its prohibiting the holding and transfer of gold and silver coin or bullion or currency domestically. It cannot delegate this nonexistent power to the President. Furthermore, seizing gold coin contradicts the Congressional duty to coin Money.

The next section of the Act went much further. It amended the Federal Reserve Act by adding a new section. This was Section 3 of the Emergency Banking Act. This authorized the Secretary of the Treasury to **seize all the gold in the country**. The gold would be exchanged for "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States."

> "...the Secretary of the Treasury, in his discretion, may require any or all individuals, partnerships, associations and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations and corporations. Upon receipt of such gold coin, gold bullion or gold certificates,

> the Secretary of the Treasury shall pay therefor an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States."

The penalty for noncompliance was twice the value of the gold that a person failed to deliver.

The act allowed the government to give FRNs in exchange for the gold. The FRNs would then not be redeemable in gold because no one would be allowed to hold gold. The act allowed the government to give silver in exchange for the gold. Had that been done at the statutory rate of 16 to 1, it would not be an equivalent amount because the market exchange rate was 59 to 1. If the Secretary of Treasury had decided to make payments in silver at the market rate, that would have been unconstitutional anyway because he had no authority to regulate the value of the coinage.

If we bend over backwards in an effort to find some justification for the seizure of the gold, we might view it as an act of eminent domain. This, however, is not enough. Eminent domain still needs to be justified by some enumerated power, because eminent domain is not a separate power of Congress. The Supreme Court has ruled that eminent domain is a necessary and proper power, that is, a means to an end.[210] Hunting for the enumerated power that guides the seizure, we see that the source of the seizure power claimed in the Act is a monetary power, since the section amends the Federal Reserve Act. The constitutional money powers include coining Money, punishing counterfeiting, and borrowing money. Seizure of Money obviously is not justified by any of these powers. How about the illicit power that Congress claimed for decades, which is to emit bills of credit? Seizing gold does not come under that power either. Since we can find no power to justify the seizure, we conclude that it was unconstitutional.[211]

One aim of the seizure was to demonetize gold money as private money, i.e., to remove it from free circulation in the hands of individuals. The government would have it all to use as it saw fit for its monetary purposes, which would be, for example, for

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[210] See *United States v. Gettysburg Electric Railway Co.* (1896), *Cherokee Nation v. Southern Kansas Railway Co.* (1890), and *Berman v. Parker* (1954).

[211] Vieira (p. 916) writes that "the Supreme Court never heard a case which challenged Congress's authority to seize WE THE PEOPLE's gold at all, or the amount of payment for any confiscated gold as a denial of 'just compensation'". In the cases that were litigated on gold, the plaintiffs assumed that the seizure was constitutional.

international balance of payments settlements or manipulating exchange rates. The public would not. This further undermined a free market in money, or a money supply created by the actions of many individual persons. It further nationalized money. It further solidified the corporative state in monetary affairs.

At the same time, the gold seizure provided the banks with a mass suspension or default of gold redemption. This was exactly what the Federal Reserve wanted. It let insolvent banks off the hook of having to redeem in gold. Seizure of private gold was not necessary to accomplish this gift. The government could have amended the Federal Reserve Act so that FRNs would be redeemable in "lawful money" but not gold. (The government could have had no intent to use the gold to redeem FRNs domestically because it forbade private holding of gold.).[212]

If one somehow stretched one of the enumerated powers in order to justify seizing gold, the government would then have to use its eminent domain power so as to compensate gold holders fully. We will now see that this is actually not feasible via this Act and could not have even been contemplated. The Act called for payment in an "equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." Silver would serve the purpose admirably, if it were distributed at a properly regulated value, as the Constitution requires.

The silver dollar was still the standard 371.25 grains of fine silver. The statutory gold dollar was 23.22 grains of fine gold. With 480 grains of gold per ounce, this meant that gold was 480/23.22 = $20.67 per ounce of gold. Silver was 480/371.25 = $1.29 per ounce of silver. Gold's price was officially 371.25/23.22 = 15.99 times the price of silver.

In the market, however, gold had appreciated considerably relative to silver. In 1933, one ounce of gold bought 59.06 ounces of silver. In 1934, one ounce of gold bought 72.09 ounces of silver, on average. The 1933 ratio of 59.06 is 59.06/15.99 = 3.69 times the official rate. A gold dollar of 23.22 grains was exchanging for 3.69 silver dollars of 371.25 grains each. A $20 gold piece was exchanging for 73.9 silver dollars.

The Treasury could not constitutionally regulate the value of the gold dollar with respect to silver, that being the job of Congress. For all practical purposes, the Act meant that gold had to be exchanged for FRNs that would be irredeemable in gold.

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[212]The idea that centralizing gold reserves was a useful tool of Federal Reserve policy may have played some part in the seizure. In addition, by paying $20.67 in FRNs per ounce of gold, the government later profited when it devalued the dollar to $35.00 an ounce.

The Supreme Court rulings on compensation for eminent domain takings are abundant and clear: the criterion for just compensation is the market value of the item taken, paid in money. The only way that the Treasury could provide an equivalent compensation in silver would have been to regulate the gold value to this 3.69 ratio. But this is constitutionally impossible, because only Congress can regulate the value of coined money. There is another obstacle, which is that it is a well-established legal fact that only the courts determine just compensation for takings, not Congress and not the Executive. Hence, the Emergency Banking Act of 1933 doesn't even have a constitutional basis with respect to the equivalent compensation it was supposed to provide in exchange for taking the gold.

The next two constitutional problems with Section 3 of the Act are that it delegates a power supposedly vested in Congress to the Secretary of the Treasury and it does so vaguely:

> "Whenever in the judgment of the Secretary of the Treasury such action is necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, may require any or all individuals..."

If there is a power to seize gold, it most likely comes under the power to coin Money. This was an executive power in pre-constitutional English law. The Constitution explicitly made it a legislative power. For Congress to delegate this power back to the Treasury goes directly against the Constitution's structure.

If such a delegation were allowable, it would have to be in well-defined terms, which this delegation is not. The pertinent cases are *A.L.A. Schechter Poultry Corp. V. United States* (1935) and *Panama Refining Company v. Ryan* (1935). The Schechter case says

> "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

In the Panama case, Justice Charles Evans Hughes laid down a significant number of provisos for a constitutional delegation, such as a policy, standards, a rule, a requirement, and a definition of circumstances and conditions. He wrote that the President should be finding facts and conditions that relate to the required conditions. None of this is present in Section 3.

The actual gold seizure order of December 28, 1933 met none of these conditions. Even from this narrower perspective, the seizure was unconstitutional:

> "Whereas in my judgment, such action is necessary to protect the currency system of the United States:
>
> "Now, therefore, I, Henry Morgenthau, Jr., Acting Secretary of the Treasury, do hereby require every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion, and gold certificates situated in the United States, owned by such person..."

From the point of view of people using gold as currency, it is lunacy to suggest that the currency system is being protected by totally removing that gold from circulation, as Morgenthau claims.

Section 4 of the Act says that "no member bank of the Federal Reserve System shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury, with the approval of the President." This is a broad power to control banking. It could include who gets what loans and how much they get. Where in the Constitution does Congress get such a power? If it does have such a power, can it delegate it to the Executive in this totally unrestricted way? Once again, we find this Act smashing constitutional fences and bounding into unconstitutional territory.

Sections 301-304 of the Act allowed banks to issue preferred stock that could be bought by the Reconstruction Finance Corporation in order to infuse capital into banks. Section 401 allowed Federal Reserve banks to obtain blank notes from the Treasury that could be issued as Federal Reserve notes by depositing with the Treasury all sorts of securities as collateral. In effect, the Treasury became the lender of last resort, although the issued notes would be obligations of the Federal Reserve banks. Section 402 allowed the Federal Reserve banks to issue credit to member banks on a member's banks time or demand notes "secured to the satisfaction of the such Federal reserve bank." These provisions loosened considerably the requirements for making advances to banks. Gold backing requirements were removed. Section 403 gave the Fed power to make short-term loans directly to individuals, partnerships, and corporation on their promissory notes secured by U.S. securities. The Fed used this power in 2008-2009 to lend on the commercial paper of corporations.

The debate in the House on this Act lasted all of 40 minutes. It covers 3 pages in the *Congressional Record.* Mr. McFadden was able to make a few negative comments on the bill. He saw the influence of the Fed behind it:

> “Mr. Speaker, I regret that the membership of the House has had no opportunity to consider or even read this bill. The first opportunity I had to know what this legislation is was when it was read from the Clerk’s desk. It is an important banking bill. It is a dictatorship over finance in the United States. It is complete control over the banking system in the United States...I have been calling attention for some years past to the manner in which the Federal Reserve System has been conducted, and have predicted that it would lead to this kind of a situation. We have, step by step, been proceeding along the lines of centralization...This gives supreme authority to those people who have wanted to control the finances of this Government, through a centralized system, to have such a system...I can see much in this bill that can be abused and that may have been dictated by the same banking influences that are responsible for our present predicament...The other [section] gives supreme authority to the Secretary of the Treasury of the United States to impound all the gold in the United States in the hands of individuals, corporations, or companies...”

Most of the other brief comments were cheerleading.

Mr. Snell: “The house is burning down, and the President of the United States says this is the way to put out the fire. [Applause.] And to me at this time there is only one answer to this question, and that is to give the President what he demands and says is necessary to meet the situation.”

Mr. Steagall: “The people have summoned to their service a leader whose face is lifted toward the skies. [Applause.] We follow that leadership today, and we shall follow that leadership until we stand in the glorious sunlight of prosperity and happiness in this Republic. [Applause.]

Mr. Goldsborough: “Mr. Speaker, in time of storm there can be only one pilot. In my judgment, the House of Representatives realize that the pilot in this case must be the President of the United States, and they will steer their course by him. [Applause.]

### The First Fireside Chat

On March 9, 1933, Roosevelt issued Proclamation No. 2040 to continue the national emergency. This froze the gold in the banks. He followed this the next day with Executive Order No. 6073 to freeze any gold in anyone’s possession so as to prevent it from leaving the United States.

Roosevelt’s first fireside chat (March 12, 1933) began well enough by explaining the

nature of fractional-reserve banking:

> "First of all let me state the simple fact that when you deposit money in a bank the bank does not put the money into a safe deposit vault. It invests your money in many different forms of credit-bonds, commercial paper, mortgages and many other kinds of loans. In other words, the bank puts your money to work to keep the wheels of industry and of agriculture turning around. A comparatively small part of the money you put into the bank is kept in currency -- an amount which in normal times is wholly sufficient to cover the cash needs of the average citizen. In other words the total amount of all the currency in the country is only a small fraction of the total deposits in all of the banks."

He quickly veered off into a misleading analysis:

> "What, then, happened during the last few days of February and the first few days of March? Because of undermined confidence on the part of the public, there was a general rush by a large portion of our population to turn bank deposits into currency or gold."

Roosevelt failed to mention that bank failures had been going on for years. He failed even to hint that the Federal Reserve had done little to stop them. He failed to raise any question about the viability or wisdom of the fractional-reserve system that had led to such a pass. He didn't explain why confidence had been undermined. The rush to gold was so great, he said,

> "that the soundest banks could not get enough currency to meet the demand. The reason for this was that on the spur of the moment it was, of course, impossible to sell perfectly sound assets of a bank and convert them into cash except at panic prices far below their real value."

This passage suggested that the rush to get gold was a blameworthy event, because the banks were sound, had perfectly sound assets of real value, and could only liquidate them at distress prices. This was all misleading. Depositors had a right to demand gold. Banks were supposed to manage their affairs so as to meet depositor demands. If the soundest banks could not meet the demand for cash, didn't it suggest that the general run of banks were following unsound lending practices? The Fed was supposed to be providing an elastic currency for just such a contingency.

After three years of depression, the value of the loans of most banks no doubt was considerably lower than the book values at which they were carried. Had they been

sound loans, they would have found a ready market. Banks had made too many long-term illiquid loans while financing them with short-term liquid deposits. Their financing structure was untenable. The flaw lay in improper fractional-reserve banking methods, mainly borrowing short and lending long, creating a maturity mismatch; and including extending questionable, speculative, and illiquid loans.

Roosevelt went on accurately to explain the steps taken to manufacture more notes that could be issued to the public. He then said

> "This currency is not fiat currency. It is issued only on adequate security -- and every good bank has an abundance of such security."

This was misleading. The currency being issued had some security behind it for sure, but most fiat currencies do. Could this currency have lasted a day in a free market, as gold and silver can? It was forced into being or supported in its existence by a welter of government laws and regulations, and this made it a fiat currency.

Roosevelt reassured his listeners:

> "I hope you can see from this elemental recital of what your government is doing that there is nothing complex, or radical in the process."

Not radical? Gaining the power to seize all the gold in the country? He had neglected to mention that. Other than the rush into gold, his only other mention of gold was that there were more important things than currency or gold.

Roosevelt issued Executive Order No. 6102 on April 5, 1933. He said that the national emergency still existed and that he was prohibiting the hoarding of gold by all Americans in the continental United States. Section 1 defined hoarding as "withdrawal and withholding of gold coin, gold bullion or gold certificates from the recognized and customary channels of trade." This seeming restriction to hoarded gold was meaningless. Roosevelt didn't leave *any* gold in private hands, even within the customary channels of trade, because Section 2 of his order required everyone to deliver "all gold...now owned by them" by May 1 to any member bank or Federal Reserve bank. The member banks were to deliver the gold they owned to the Federal Reserve banks. Violations were subject to $10,000 fines and up to ten years in prison. The banks receiving the gold were to pay "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." This was inconsistent with the Emergency Banking Act, which instructed the Secretary of the Treasury to make these payments.

A month earlier, Roosevelt had left the impression that hoarding was inconveniencing banks. His authority was to seize hoards. He left the impression that restocking the banks with notes would alleviate the problem. Subsequently, he prohibited gold from being exported and banks could not pay out gold. Now it became clear, despite the continued linking of hoarding to channels of trade, that he had no intent to let *any* gold be traded. Mere possession was a crime.

On April 20, 1933, Roosevelt ordered that no gold could be earmarked for a foreign account or exported. On April 28, the Acting Secretary of the Treasury declared that no licenses would be granted to obtain gold in order to pay off on contracts calling for delivery in gold. The government forced debtors to default on gold clauses in contracts. It abrogated the gold clauses.

### The Emergency Farm Mortgage Act of 1933

This was Title III of the Agricultural Adjustment Act of May 12, 1933. It contained Sections 42-46 of that Act. The Act is headed by a reference to its supposed enabling power in the Constitution:

> "FINANCING – AND EXERCISING POWER CONFERRED BY SECTION 8 OF ARTICLE I OF THE CONSTITUTION: TO COIN MONEY AND TO REGULATE THE VALUE THEREOF".

By this Act, Congress authorized the Executive to execute certain actions at his discretion. One such action was that the Secretary of the Treasury could arrange with the Fed to conduct open market operations. Another was to buy $3 billion of Treasury securities, while suspending certain Federal Reserve bank requirements. The Act's Section 43 made clear that the open market operations were so that the government could engage in currency intervention:

> "SEC. 43. Whenever the President finds, upon investigation, that (1) the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any other government or governments in relation to the present standard of gold, or (2) action under this section is necessary in order to regulate and maintain the parity of currency issues of the United States..."

The purchase of $3 billion of Treasury bills, notes, and bonds was, according to the same section, so that the government could both expand credit and fix currency prices:

> "...or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments, the President is authorized, in his discretion..."

If the Secretary of the Treasury could not secure the Fed's agreement, then the President could have him issue United States Notes as provided in the Legal Tender Act of Feb. 25, 1862. This part of the Act authorized that

> "Such notes and all other coins and currencies heretofore or hereafter coined or issued by or under the authority of the United States shall be legal tender for all debts public and private."

Vieira (p. 972) points out that "Here, for the first time in American history, Congress claimed the power to make a full legal tender something other than silver or gold coin...This...went beyond even what the English King had claimed under *pre*-constitutional common law..."

The words "or hereafter" show clearly that the theory behind this legal enactment is that *anything* that the Congress says is legal tender becomes legal tender, no matter what its qualities are, for Congress could not in 1933 foresee what such items might be. In this view, legal tender is detached from constitutional legal tender. The clause in the Constitution allowing the states to make nothing except gold or silver a legal tender becomes meaningless. Justices Strong and Bradley, who made all sorts of unconstitutional claims in *Knox v. Lee*, didn't go so far as to say that Congress had the power to make anything into money. Strong wrote

> "The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money."

Bradley wrote

> "This power is entirely distinct from that of coining money and regulating the value thereof...It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells...No one supposes that these government certificates are never to be paid – that the day of specie payments is never to return."

One unconstitutional thing leads to another worse unconstitutional thing. The Court allowed legal-tender paper in *Knox v. Lee* under some sort of theory that it was temporary, or would be redeemed, or could be justified under the power to borrow. They said it was constitutional because it *didn't* make money out of something valueless; the notes contained a promise to pay that was a reliable credit. By 1933, Congress was saying that even something valueless *could be* legal tender. The Court has never taken up a case challenging that view or made any attempt to reconcile the contradictions in these government actions with the Constitution. It could not do so honestly without bringing down the entire monetary scheme that grows out of it.

The President was then given certain discretionary power to devalue the dollar in terms of gold. The Act read that if the preceding measures

> "prove to be inadequate to meet the purposes of this section, or if for any reason additional measures are required in the judgment of the President to meet such purposes, then the President is authorized –..."

The President could, for any reason, take certain steps regarding gold and silver that he judged necessary in order to obtain the currency prices he thought desirable, such that foreign commerce would not be adversely affected, domestic prices would be stabilized, or in order to adjust the parity of foreign currencies with that of the U.S. These allowable steps were

> "By proclamation to fix the weight of the gold dollar...and also the weight of the silver dollar...at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon, and such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 percentum."

The act contemplated a dollar devaluation. Otherwise the restriction to a 50 percent limit would not have been included.

Part of the background of this act is that Roosevelt and his advisors were acting on fallacious economic theories.[213] They wanted to raise the domestic prices of goods, and they believed that if the price of gold were raised, this would cause domestic prices to increase.[214]

This act is filled with unconstitutional actions. To begin with, the coinage clause of the Constitution tells Congress to regulate the value of foreign coins, by which is meant,

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[213]Politicians and central bankers engage in ceaseless, fruitless, and counterproductive attempts to understand, interpret, and manipulate markets and economies. They and most economists always rationalize these actions by incomplete and/or faulty economic reasoning. They always get lost in futile attempts to interpret prices, interest rates, market movements, and various facets of economic activity. If anyone can ever do this *consistently*, he will become very wealthy by market speculation alone. Such a complete understanding and manipulation of economies to a good end is beyond the limited capabilities and abilities of any human being fully to understand complex systems of human creation. This is due both to human limitations and to the dispersal of knowledge and information among countless persons, changing market dynamics based on changing knowledge and information, and due to the dynamics of changing values, human actions, and human interactions that are willed by individuals and can't be predicted.

[214]Meltzer informs us (op. cit.) that Professors Irving Fisher, George Warren, and John R. Commons all advised Roosevelt to devalue the dollar. Warren was an administration consultant. Both he and Fisher thought that the price level should be restored to the 1926 level. Morgenthau endorsed Warren's notion that raising the price of gold would raise the prices of agricultural commodities. Roosevelt was impressed with this theory. Dean Acheson and Oliver Sprague opposed devaluation. After a period of indecision, Roosevelt chose to devalue. Warren and Fisher met with Roosevelt on August 8, 1933 to advise on a price of gold. Both convinced Roosevelt that raising the price of gold would raise the domestic price level. In his October 22, 1933 fireside chat, Roosevelt said that "ever since last March, the definite policy of the Government has been to restore commodity price levels."

as explained in full in earlier chapters, to declare its appropriate worth according to its metal content relative to the standard silver dollar of the U.S. The government has no authority under the coinage clause to speculate in foreign currencies, to attempt to alter their values, or to attempt to create particular price relations with the dollar. There is no power anywhere in the Constitution to expand credit or to extend WE THE PEOPLE's credit to anyone for any reason, be it an emergency or an international currency price-fixing scheme. Government has the power to borrow, but not to lend.

If these acts were constitutional under the coinage clause, Congress could not delegate them to the President. Any such delegation, even if it were feasible, could not be made without more explicit standards than such vague language as foreign commerce being adversely affected, there being an economic emergency, or stabilizing prices at proper levels. What or how much is adverse, what defines an emergency, and what are proper price levels? The President was given discretion not to act as well as to act.

Section 43 on devaluing the dollar is littered with one constitutional problem after another. Congress could not constitutionally delegate its power to regulate the value of the gold dollar. The silver dollar could not constitutionally be fixed with respect to gold; it had to be the other way around, if at all. It couldn't be done constitutionally as the President "finds necessary"; the gold dollar coin content would have to be regulated at the free-market exchange rate between gold and silver. A presidential proclamation couldn't do it without abandoning the constitutional standard and economic rationality. Any such regulation couldn't depend on such nonconstitutional criteria as stabilizing domestic prices or protecting certain business interests from falling foreign currencies. No one, Congress or President, had authority to fix the weight of the gold dollar by an agreement with foreign governments. Once again, the illegality of a vague delegation crops up. Congress didn't determine the weight of gold in the dollar but left the whole matter to the President's discretion. The actual Congressional authority, which it had duly exercised up until 1900, was to fix the weight of gold in the gold dollar according to the standard silver dollar and to the free-market exchange rate between silver and gold. The authority in this Act to fix it or not fix it at the President's discretion according to an international agreement completely overrode the constitutional imperative. Section 43 ended up with the directive to maintain the silver dollar at parity with whatever gold dollar was to be established. If this were carried out at the required 50 percent or less rate, it would surely depreciate the constitutional silver dollar by some arbitrary amount.

Even the maximum 50 percent rate written into the law was unconstitutional. We saw earlier that "A gold dollar of 23.22 grains was exchanging for 3.69 silver dollars of 371.25 grains each" in the market. An appropriately regulated gold dollar should have

been 23.22/3.69 = 6.29 grains of fine gold. The percentage devaluation should have been (23.22 - 6.29)/23.22 = 0.729 or 72.9 percent. When gold was made $35 an ounce, that was 13.71 grains per dollar (480 /13.71 = 35). The actual devaluation was (23.22 -13.71)/23.22 = 41 percent.

The irony of this is that Roosevelt, under the mistaken theory that a devaluation would raise prices, resorted to all manner of unconstitutional means to achieve it, when all he had to do was do what the Constitution allowed. Had he done so, the devaluation would have been much larger. The Emergency Farm Mortgage Act of 1933 made the constitutional devaluation impossible by imposing a 50 percent limit.

**The Congressional Debates on the Emergency Farm Act of 1933**

The debates can be summarized at somewhat less length than in previous chapters. It will suffice to provide the various points of view at times without direct quotation.

Agitation for inflation as a solution to the economic problems is widespread, even though such a solution makes matters worse, Rep. Reed noted. Numerous Congressmen called for more currency, more credit, and more money in circulation. They thought it was essential to get wholesale commodity prices up, and that currency expansion would do it. The Thomas Amendment, much of which found its way into Section 43 of the Emergency Farm Mortgage Act, aimed to cheapen the dollar in order to raise prices.

Instead of thinking of a sound dollar as a fixed amount of precious metal, Congressmen spoke in favor of Irving Fisher's idea that a sound dollar meant a constant purchasing-power dollar.[215] Congressmen looked upon low prices of commodities as a cause rather than an effect. They wanted to manage the dollar, not realizing the inherent problems with the goal of a stable purchasing-power dollar. Such a dollar was nowhere to be found in the Constitution. Rewriting the Constitution, Sen. Connally said that "gold should be treated as a commodity and should not be coined...the number of grains which would be paid in redemption of a dollar would vary according to the commodity index of a thousand basic commodities..." He ignored the problem of how the prices of these commodities could be established without a unit of account in the first place.

Sen. Shipstead called for control of credit and management of currency without

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[215]See Murray Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* (2004), chapter 11, especially at 843-51, for a critique of stabilizing price levels.

realizing that the Federal Reserve already was doing this or asking how the Great Depression could have happened when the currency was managed. Congressmen continued to speak of national peril and emergencies, as if they had never occurred before and as if they meant that the Constitution could be forgotten. They spoke of emergency legislation as being temporary.

Senator Couzens openly acknowledged that they were setting up an "autocrat" to deal with the problems, but one "selected by the people themselves." He said the President would have a "tremendously broad" grant of authority, "virtually unrestricted...without precedent," but the country was in "a great war on depression," and had nowhere else to turn but their "Commander in Chief."

Senator Thomas saw the President as the only alternative because in 16 years in Congress, he had seen nothing but disagreement on the gold content of the dollar. If he had understood and turned to the Constitution, he would have found a perfectly satisfactory and constitutional answer that resolved all conflicts. The Founding Fathers had established a standard meant to be permanent and meant permanently to avoid all such money questions that invariably set debtors against creditors, bankers and government against the people, and people against one another.

A number of speakers recognized the deeper causes of the depression, pointing to "justifiable criticism of the Federal Reserve System", improperly managed credit, the inflation of 1924-1929, and fractional-reserve banking that "cannot stand runs."

There were (outvoted) voices who spoke against the delegation of monetary powers to one man. Reed explicitly noted "The Constitution gives to Congress the power to regulate the currency. It does not give us the power to delegate it." Senator Steiwer articulated perfectly the unconstitutional vagueness in the Act and the meaning of the separation of legislative from executive powers:

> "The failure to define the contingency upon which the President would act, the failure to prescribe a legislative policy, the failure to make a formula, the failure to outline a plan, the failure to fix the event upon which the President should act, and determine the time when he should act, the failure to make any requirement of him, giving to him...boundless discretion...takes this language...entirely beyond the power of Congress to enact."

Senators Reed and Borah similarly saw these problems. Senator Hastings saw the bill as "wholly unconstitutional...Congress ought to fold the Constitution and seal it and appoint a distinguished committee to take it to the White House and lay it in the lap of

the President."

Too many Senators were willing to pass the bill and let the Supreme Court decide on the questionable provisions, abandoning their duty, since the Court rules on only a fraction of all measures that are passed.

An abundance of ignorance was put on display by those who thought that the Coinage Act of 1792 set up the gold standard and the gold dollar, or that the Supreme Court "has held that printing money is the same as coining money under the Constitution."

Borah couldn't get his priorities straight. He thought it worse that the government was taking people's gold without providing them a safe place to deposit it with "assurance...that when they want it they can get it," than that the government was commandeering the gold in the first place. He naively thought the gold deposit was a bailment, when the only receipt anyone would get for it was an FRN. He at least recognized that "we are proceeding under a pure threat" and had the sense to confess "It is difficult for me to understand why that policy is being pursued."

Norris had the good sense to conclude that the government has no right "to require any citizen to deposit his money anywhere, whether it is gold or any other kind of money. It has no right, as a matter of law...to do that." He had the bad sense to vote for the bill that did just that.

Senator Wheeler was a lone voice calling for opening the mint to free and unlimited coinage of silver; but he didn't know what to do about gold. He thought that the government could fix the silver to gold ratio arbitrarily.

Rep. Steagall again trotted out his adoration of the American Führer: "We have chosen a leader who is responsive to the will and wishes and who embodies the hopes and aspirations of the people of the United States. In his hands he holds aloft the colors of civilization...Throughout the world the people have their eyes fixed on his leadership. They will follow him to new victories for peace and happiness. [Applause.]

### Outlawing of Gold Clauses

The Emergency Farm Mortgage Bill passed on May 12 made any coin or currency of the United States into legal tender. Congress then went further. It required that all contracts for money payments, past, present, and future had to be in any coin or currency that it had made legal tender. The House Joint Resolution No. 192 of June 5, 1933 declared that gold was *not* such a legal tender, that it was "against public policy."

It outlawed gold clauses. Congress stopped private parties from making gold, or any particular kind of coin or currency at all, or any amount of money of the United States measured in gold, into a private legal tender within private contracts. Person A could not contractually agree to tender gold or an amount of money measured by the price of gold to person B as payment of an obligation of any kind; nor could they contract in some other kind of coin or currency. Congress outlawed making such agreements in the future and it outlawed all such provisions in existing contracts. Instead,

> "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

There was one exception: FRNs. Federal Reserve Notes were an obligation that could be paid off in gold. Subsequently, the U.S. Treasury would redeem FRNs presented by foreign central banks for gold. Since American citizens were deprived of the right to hold gold, they couldn't redeem their FRNs for gold.

The resolution applied to obligations issued by the U.S. Treasury, including any bonds and notes that had promised payment in gold. This meant that the United States partially defaulted on its debt. The creditor's option to receive gold ended. Henceforth, he would receive whatever was legal tender, but not gold. This might have been silver, which would have lent at least some constitutional cover to the default, but, as argued earlier, unless Congress regulated the gold dollar properly, payment in silver would have taken wealth away from bondholders. This part of the resolution was later found to be unconstitutional.[216]

The Resolution began with what amounts to boilerplate, namely, that the "holding of or dealing in gold affect the public interest" and therefore was subject to "proper regulation and restriction." This broad language merely sets the stage. It obviously doesn't justify a major interference in private property rights like abrogating the gold clauses. The constitutional justification of a use of power requires a great deal more than declaring that something is affected with the public interest. Holding or dealing in *all* forms of property affects the public interest to some degree. If that is all it takes

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[216]In *Perry v. United States* (1935), the Supreme Court found that "The Joint Resolution of June 5, 1933, insofar as it undertakes to nullify such gold clauses in obligations of the United States and provides that such obligations shall be discharged by payment dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts, is unconstitutional."

to justify a Congressional power to regulate and restrict, then the Constitution has created a totalitarian government. This is hardly the original meaning of the Constitution or the Declaration that informs the Constitution.

The Resolution then argues that "the existing emergency has disclosed" that gold clauses "obstruct the power of Congress to regulate the value of money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States..." This is nonsense. The emergency disclosed nothing of the sort. The failure of the banking system had nothing to do with contractual gold clauses. They had been around for decades without causing any emergencies. They were in bond contracts of bonds issued by the federal government. It's astounding to read this in a piece of Congressional legislation.

As for the gold clauses obstructing Congressional power, this too is a ridiculous accusation. How could they possibly do that? The Congress had it within its power to regulate the values of gold and silver, regardless whether private parties agreed to contract in gold, silver, platinum, or unspecified dollars. The Congress had regulated gold and silver in the past without hindrance from gold clauses. Indeed, gold clauses do nothing more than specify payments in gold so as to protect those contracting from Congressional failures to regulate properly. Many people would not even bother with a gold clause except that Congress fails to adjust the gold dollar to changes in the market exchange rate with silver. Gold clauses do nothing to hold Congress back from proper regulation of the coinage.

When gold clauses started being used as a result of government issues of greenbacks, the Supreme Court had noted in *Bronson v. Rodes* (1869) that both notes and coin were okayed by Congress in contracts:

> "The coined dollar was, an we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it in fact convertible into a coined dollar...
>
> "If, then, no express provision to the contrary be found in the acts of Congress, it is a just if not a necessary inference, from the fact that both descriptions of money were issued by the same government, that contracts to pay in either were equally sanctioned by law."

If there was no obstruction of Congressional power in 1869 due to gold clauses, why did the Congress in 1933 think there was such an obstruction?

The gold clauses were perfectly consistent with the declared policy of the United States given in the Act of November 1, 1893, quoted in Chapter V, namely, to continue the use of both gold and silver as money and to regulate the coin values so that a dollar in each had "equal intrinsic and exchangeable value." If that is done, the gold clauses are superfluous. If it is not done, then the gold clauses achieve that purpose. Furthermore, Congress declared a statutory gold standard in 1873 and 1900. Gold clauses did nothing more than implement that standard in contracts.

In short, as Vieira (p, 1013) tells us: "In sum, the Congressional rationalization for the Joint Resolution of 1933 was monetarily moronic."

When Congress prohibited gold clauses, it contradicted its own Constitutional duty to regulate the value of Money. This can be seen in the *Guaranty Trust Company v. Henwood* (1939) case. Private railroad bonds had a gold clause that promised to pay "One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England £205 15s 20d, ..." as well as in three other currencies. Justice Hugo Black ruled that, since there was an option to pay dollars, the Resolution applied. Gold payment was forbidden. The 5-4 Court ruling meant that the options written into the contract were not options at all.

After ruling that the presence of the options were irrelevant, a ruling which itself made no sense, Black went on to say of the law:

> "The Resolution intended that debtors under obligation to pay dollars should not have their debts tied to any fixed value of particular money, but that their entire obligations should be measured by and tied to the actual number of dollars promised, dollar for dollar."

In other words, Congress intended that debts be paid in *nominal* numbers of dollars, not dollars of fixed value, even if the value of the dollars had changed, which was the eventuality guarded against by the gold clause. Congress is actually charged with keeping gold dollars regulated in value so that the amount of gold in gold dollars paid to discharge a dollar obligation is equivalent in value to the exchange value of gold against the silver contained in a standard silver dollar. By forcing payments in *nominal* numbers of dollars, Congress *prevents* market participants from achieving this result; and by removing gold as a means of payment, which it is charged to regulate in value,

Congress *obstructs* its constitutional duty. The dollars to be paid no longer are either standard constitutional dollars (371.25 grains of pure silver) or their equivalents in gold. In effect, the Resolution amended the Constitution by statute and claimed a monetary power that had never previously been claimed before or after the Constitution, which was to make a dollar be whatever Congress wanted it to be. In their aim to uphold the statute, Black and the Court failed to recognize any of this.

The Court went on to invoke the aggregate powers doctrine of Justice Strong that we have criticized as being totalitarian in Chapter VI. In so doing, the Court ignored the explicit rejection of that doctrine by the Chief Justice who dissented and the equally strong denunciation by Justice Field. Actually, the Court cited its own recent case of *Norman v. B. & O. R. Co.* (1935), which was a gold clause case. In that case, we can read the passage in which the Court attempts to create credibility for its misjudgments by citing language from earlier misjudgments and making believe that somehow these are reliable precedents upon which to base current (mis)judgments:

> "The Constitution grants to the Congress power 'To coin Money, regulate the Value thereof, and of foreign Coin.' Article I, § 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve 'the great objects for which the government was framed' -- 'a national government, with sovereign powers.' *17 U. S. 404-407;* Knox v. Lee, supra, *pp. 79 U. S. 532-536;* Juilliard v. Greenman, supra, *p. 110 U. S. 438. The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers.* Juilliard v. Greenman, supra,@ pp. 110 U. S. 439-440."

This passage shows how very important the legal tender cases were in overturning the U.S. Constitution's powers and disabilities in the monetary sphere. But worse than that, the grandiose notions of aggregate powers at the service of a national government with sovereign powers aiming itself at "great objects" easily infiltrate the Constitution in other spheres, thereby rendering the document something that serves the interests of government, not those of WE THE PEOPLE.

Section 2 of the Resolution amended a portion of the Emergency Farm Mortgage Act to read

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

FRNs were accorded legal tender status. Since these are obligations of the United States, there is at least a modicum of consistency in this, even though it is unconstitutional to have anything but gold and silver be legal tender. However, there is not even that shred of sense in making National Bank Notes legal tender. They are entirely obligations of the issuing banks.

**Congressional Debates on House Joint Resolution No. 192**

The leadership rushed this bill through Congress. There were complaints of

> "no witnesses before the committee...no explanation of the bill at first hand...working in the dark...[not knowing] the meaning of some clauses of this bill...We simply know there is a general purpose to repudiate the obligations of the United States."

Rep. Bankhead heaped praise on the bill as "the greatest step that has ever been taken by a government on an economic or a financial issue in all...history." Rep. Deen said he regarded "this bill which makes all currency of the United States worth as much as gold itself the most important bill that I will ever have the privilege to vote for." Vieira (p. 987) wonders if this were so, why outlaw gold, since creditors will accept currency as a substitute.

Rep. Luce saw "a permanent, constant, and complete abrogation of a solemn pledge" in the bill. Rep. Mates likewise said that the joint resolution "cannot be defended in law or morals."

Rep. Sabath identified the (p. 987) true culprits:

> "If Wall Street had not brought about the criminal inflation and later the

> deflation that ruined the Nation and bankrupted 90 percent of the American people, this legislation would not be necessary,”

although why it was necessary to remove gold he didn’t say. Rep. Beedy identified the bill’s beneficiaries:

> “It would permit foreign nations to meet their obligations to us, even though they carried the gold clause, in any form of legal money, in depreciated paper currency. This is, indeed, one of the principal objects of the pending legislation...The pending bill is certainly most welcome to the international bankers...[who] welcome this legislation as a means of making possible a nominal payment of the bonds...”

Rep. Steagall defended the joint resolution because Congress has declared its intention to maintain parity of all coins and currencies with one another and “So long as this parity and equal purchasing power can be maintained, there is no taking of property. The purpose of the resolution is to maintain the parity, not to destroy it.”

The Emergency Farm Mortgage Act, however, showed an intention to turn the whole matter of gold and silver prices over to Roosevelt. Anyway, if coin and currency were properly regulated, there was no need to abrogate gold clauses and prevent payment in gold. Maintaining the parity of gold could not logically be the purpose of removing gold as a means of payment in gold clauses.

Reps. Cross and Reilly defended the measure because the price level had dropped. They did not want debtors to have to pay off debts in a dollar with so much greater purchasing power. The Constitution, however, doesn’t give Congress the power either to alter the dollar or to abrogate contracts so as to maintain constant purchasing power. The dollar is a fixed amount of silver.

Rep. Luce noted that insofar as interest rates reflect an anticipated rate of price inflation, the rates on gold clause bonds are lower. To alter those contracts *ex post* would create an immense wealth transfer.

Sen. Borah defended the principle of the legal tender cases. Sen. Gore drew a distinction between Great Britain and America, by noting “The theory of the British constitution is that Parliament is omnipotent.” In his reply, Borah drew the logical conclusion from the legal tender cases:

> “The Parliament of England has no more control over the money question than

> the Congress of the United States under the grant given in the Constitution. There is no limitation upon the power of Congress. It is not circumscribed in any respect whatever. It is given full and plenary power to deal with that subject; and therefore it is the same as if there were no Constitution whatever..."

Vieira (p. 1001) notes

> "Here is a perfect illustration of how the doctrine of the 'living' Constitution leads straight to totalitarianism. And therefore here is a compelling argument against the doctrines of 'judicial supremacy' and 'judicial finality': If Congressmen assume that they must or ought to accept a decision of the Supreme Court, its merits notwithstanding, they will tend to do so out of the human weakness of shirking responsibility, if nothing else. And whatever blunders the Court makes will irreparably pollute the stream of both constitutional and statutory law thereafter. Whereas, if Congress treats a Court decision as merely the opinion [of] a majority of the Justices, rendered in one case, and binding only the actual parties to that case, then the merits of the issue will remain open, and Congress will retain its right – and, perhaps more importantly, its duty – to decide the constitutional question for itself when that question arises in the course of debate over a pending bill."

Borah completely failed to recognize what the dollar meant as a given amount of silver. Otherwise, he would never have said the following:

> "Every person contracts in the light of the power of Congress to change, modify, or wholly reestablish the kind of money which may be accepted as lawful money."

Those who contract do so in the light of *de facto* powers. But Borah is saying that control over what is lawful money is a constitutional or *de jure* power of Congress when it is not. Borah makes his position clear when he says that "I contend that Congress may declare that a dollar with 12.9 grains must be accepted in payment of a dollar of 25.8 grains. It may fix the value of the dollar, the value of money." Or where he says that Congress "may thereafter exercise its power to name what the dollar shall be and to say that the dollar shall be of a different weight and fineness, and the individual must accept that dollar."

The Constitution settled the legal question of what the dollar is and what legal tender is. Borah's confusion stems from (a) not knowing that the dollar is a fixed amount of

silver, and (b) not understanding that when Congress changes the gold content of a gold dollar, it is not an arbitrary change whatsoever. It is constrained to be an amount of gold whose market value is the same as the market value of the silver in a dollar. That is the regulation of value. Congress doesn't name what the dollar is and make people accept an arbitrary weight under the Constitution.[217]

Borah had company in Congressmen who misunderstood the Constitution. Sen. Fletcher said "there is nothing sacred about gold as a commodity. It is not money, except as we make it money." Sen. Barkley said that "Congress could tomorrow...pass a law destroying the value of gold as money at all by saying that hereafter gold shall not be money, silver shall not be money, but lead and tin and aluminum may be money."

Among some, the level of financial ignorance was so great that they worried that there was not enough gold to pay off on all debts. Sen. Reed had to remind them that gold circulated, that not all debts came due at once, and that the price system rationed the gold. A number of Senators were completely confused about parity of different dollars. Barkley thought that parity could only be maintained by not letting people have gold. After Sen. Fess correctly replied that "There is no such thing as parity unless we are willing to accept that which establishes parity when the equivalent is presented," Barkley confessed his ignorance: "Of course, the question of parity and the standard of values is one that is so intricate that...there is not a man in the world who understands it."

Roosevelt signed Executive Order No. 6260 on August 28, 1933. This revoked Order No. 6102 and the order of April 20, 1933, and replaced them. This order again called for delivery of all gold, gold bullion, and gold certificates. It significantly altered the terms of the exchange. Section 5 stated that "no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates..." The added phrase "or retain any interest, legal or equitable" meant that upon delivery, the gold holder had no claim whatsoever in the gold. He was not leaving

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[217]It appears that an understanding of what a dollar is and what this regulation procedure does was virtually lost by 1933. If Congress had created *only a silver dollar piece* (and subsidiary silver coins) and minted gold coins *without the dollar designation* but imprinted with their weight and fineness, history might have been very different. In addition, if the Constitution or statutes had allowed any gold certificates issued by anyone, including both banks and government, necessarily to be warehouse receipts for given amounts of gold held as bailments on deposit, this too would have eliminated confusion over other possible kinds of paper money, such as bank notes, that are not bailments.

the gold in the hands of the government and getting a receipt, as might have been the case under the April 5 order. He was giving up all interest in the gold. He could have no expectation of ever recovering it.

The gold seizure became more stringent between March 6 and August 28. At first, the official language spoke of hoarding and its regulation. Gold in banks didn't seem to be affected. Persons delivering gold may have expected to leave it in safekeeping. Within a short time, it became clear that Roosevelt was sequestering all gold from any source in the government and removing all titles and claims on it. By January 30, 1934, the Federal Reserve's gold went into the Treasury and the Fed got gold certificates in return but the Treasury can redeem these certificates at a nominal cost of $11 billion.

On December 28, 1933, the Secretary of the Treasury issued his own order calling for delivery of everyone's gold. The reason seems to be that the court, in one of the Campbell court cases, had refused to enforce Section 5 of the President's August 28 order. The Treasury paid out a silver dollar or paper currency redeemable in such a dollar in exchange for each gold dollar paid in. But since one gold dollar at that time contained enough gold to buy $4.53 silver on the open market, "the common people were cheated" (p. 1048.)

On January 15, 1934, the Secretary of the Treasury gave people 2 more days to tender their gold, after which time as little as nothing could be paid at his discretion, and any gold offered would be held and applied against penalties for failure to comply.

### The Gold Reserve Act of 1934

Section 2(a) of the Gold Reserve Act of 1934 appropriated all the gold in the Federal Reserve banks, in return for gold certificates that are today carried at $11 billion on the System's balance sheet or at a rate of $42.22 per ounce. The counterpart Treasury gold in 2010 has a value (at $1,200 an ounce) or about $313.8 billion. This can be construed as constitutional (with regard to the Fed-owned gold only) because Congress allowed the Fed to deal in gold in the first place, while maintaining the right always to alter, amend, or repeal the Federal Reserve Act.[218]

Section 5 created a national "gold reserve" or hoard of gold. It mandated the cessation

[218]The Federal Reserve does not own the national stock of gold. The United States government controls the gold stock. The U.S. Treasury has issued gold certificates to the Fed that are valued at $11 billion. The Treasury could cancel these certificates by paying the Fed $11 billion.

of any further gold coinage and paying out any gold. All coin was to be taken out of circulation and melted down into ingots.

Federal Reserve notes could no longer be redeemed in gold but instead lawful money. This was constitutional.

Having seized the people's gold, Congress laid down various rules for further management of the gold it had amassed.

Section 6 instructed the Secretary of the Treasury to redeem gold certificates from the Fed so as "to maintain the equal purchasing power of every kind of currency of the United States." This much could have been construed as constitutional by requiring him to implement a Congressional power. In practice, this was not done. The silver to gold ratio was officially 27.08 in 1934, whereas the market ratio averaged 72.49. The gold dollar was overvalued by a factor of 2.68.

A revision of another piece of code contradicted this constitutional interpretation by not requiring proper regulation of value and giving the Executive an unconstitutional free hand in buying gold:

> "With the approval of the President, the Secretary of the Treasury may purchase gold in any amounts, at home or abroad, with any direct obligations, coin, or currency of the United States, authorized by law, or with any funds in the Treasury not otherwise appropriated, at such rates and upon such terms and conditions as he may deem most advantageous to the public interest; any provision of law relating to the maintenance of parity, or limiting the purposes for which any of such obligations, coin, or currency, may be issued, or requiring any such obligations to be offered as a popular loan or on a competitive basis, or to be offered or issued at not less than par, to the contrary notwithstanding. All gold so purchased shall be included as an asset of the general fund of the Treasury."

The goal of buying gold was to inflate the money supply and raise the price level. The government hoard of gold increased to a peak of about 650 million ounces in the late 1940s. Thereafter, flows overseas reduced it to its present 261.5 million ounces.

Section 3 allowed the gold to be used to settle overseas claims, i.e., "for the purpose of settling international balances." The gold was not available for redemption of any currency within the United States by ordinary Americans, but it was available to be redeemed at the request of international bodies such as central banks and treasuries.

Section 12 amended Section 43(b)(2) of the Emergency Farm Mortgage Act. It underscored that it was delegating open-ended and standardless powers to the President to set the weight of gold in the gold dollar at his discretion. He could act or not act, and, if he did, he had to set gold at between 50 and 60 percent of its present weight. At that time, it would have taken a 78 percent devaluation to regulate the gold dollar to the silver to gold ratio of 72.49.

This section also authorized the President "to reduce the weight of the standard silver dollar in the same percentage that he reduces the weight of the gold dollar." This was entirely unconstitutional since the silver dollar is fixed at 371.25 grains of pure silver. It was also made no sense financially, as it was impossible to regulate gold against silver properly if both were changed by the same amounts. The following day Roosevelt devalued the gold dollar by 59.06 percent and left the silver dollar unchanged (Proclamation No. 2072.)

The government's unconstitutional actions in the Gold Reserve Act of 1934 included

- demonetizing gold, when the Constitution calls for both silver and gold to be a tender in payment of debts;
- delegating to the President the legislative power of regulating the value of the coinage;
- arbitrarily decreasing the weight of the gold dollar, rather than a proper decrease against the constitutional silver dollar;
- authorizing the President to debase the silver dollar by the same percentage;
- denying redemption of any paper currency in gold and confiscating private wealth without just compensation by failing to exchange silver or a currency redeemable in silver for gold at the proper ratio.

**Congressional Debates on The Gold Reserve Act of 1934**

Rep. Andrew spotted the essence of the bill:

> "Not only are we asked today to place the final seal of approval on the debasement of our gold coin but we are asked to abandon altogether the monetary system which has existed in this country since the beginning of its history, and to substitute for it permanently an irredeemable, inconvertible currency, depending for its amount and value only upon the fallible opinions of changing administrations.

He and others complained about the haste:

> "We are asked to take this tremendous step 4 days after the bill was first presented to Congress with only 3 days' hearings, which are not yet available to Members of the House, and after merely 3 hours of explanation and discussion..."

A number of members gave up trying to understand monetary matters and deferred to the President. Rep. Berlin:

> "This measure is one which goes to the very fundamentals of monetary theory...The technicalities involved make it impossible for those of us, who have not spent a lifetime in the study of money and its allied problems, to pass final judgment upon its provisions...It is difficult...to understand how any Member of this body can attempt, with any degree of certainty,...to flatly contradict the predictions and expectations set forth by the President and his advisors."

Rep. Perkins:

> "It is quite impossible to know all of the ramifications of this bill...I am willing to accept the conclusions of the President..."

Rep. Martin recognized the basic problem:

> "Ever since the passage of the National Bank Act in 1862 [sic] this banking system, wholly in private control, has been the dominant influence in the life of this Nation...Even the Federal Reserve System...has but tended to strengthen the hand of private ownership over the financial life of the Nation. Its calling in of loans and the reduction of its circulating medium in the space of a year brought on the terrible deflation of 1920 and 1921, and the use of its circulating medium and credit furnished much of the gas for the balloon which exploded in October 1929 and littered the Nation with the debris of its so-called 'prosperity."

The remarks of Rep. Terrell represented those members who abdicated their duty and deferred to judicial review:

> "I am not attempting to apply the Constitution to the bill under consideration – that will be done by the Supreme Court in the course of time, and Congress will have to conform to that decision...Congress need not worry about the constitutionality of laws."

Rep. Reilly correctly recognized the advisability of "cutting down the gold content of the dollar." He failed to realize that Congress could and should do that on its own without seizing one ounce of gold and without resorting to a panoply of unconstitutional directives.

Most members simply accepted the notion that gold should be suppressed. Vieira (p. 1059) tells us "The rationalizations the House put forward on behalf of the bill were truly pathetic. For example, Rep. May opined that 'there was never a reason why gold as a metal should have been used as a circulating medium.'" He neglected history and disregarded the constitutional instruction that only gold and silver be a tender in payment of debts.

House members had all sorts of theories. Both Reps. Martin and Greenwood endorsed monetary communism: "If there is any form of property which is, and of right ought to be, the property of all the people – and I mean that in the collective sense, in the sense of government – it is money." Others wanted gold nationalized so that it could be a base for issuing currency, a notion foreign to the Constitution. Some thought that by taking gold from the people, it now belonged to the people. Irving Fisher's theory of stabilizing the dollar's purchasing power surfaced again, as it might since he advised Roosevelt. House members yearned to control commodity prices.

Rep. Luce recognized that by first commandeering the gold and then devaluing the gold dollar, the government was "richer by thirty-four hundred to four thousand million dollars" and this was taken directly out of the wealth of "millions of depositors...Once again you are filching from the forgotten man."

Sen. Hastings saw through the entire scheme and spelled it out clearly for his colleagues:

> "The combination of the [pending] legislation together with May 12, 1933...which provided for the debasement of the coinage, in the discretion of the President, down to 50 percent, requires all persons to turn over gold in the form of coin or bullion or certificates..., title to this gold being vested by proposed legislation in the Federal Government in return for the payment 'in equivalent amounts in dollars.' This has been interpreted by the Secretary of the Treasury to mean payment of $20.67 [for each ounce of gold.] At the same time, the Government is paying for its newly mined gold in the domestic market approximately $34.45 for the same weight...The practical effect of this program of legislation and Executive orders is to confiscate all outstanding gold in the United States without the consent of the owners of such gold and at a figure

> which is fixed by statute – a figure which does not approximate the actual, as distinguished from the legal, value of the metal...a former owner of gold will now have in its stead money worth approximately one-third of the value of his gold.
>
> "...the whole course of the legislative enactments and of the regulations of the Secretary of the Treasury and of the President...show a plan to require the surrender of all gold and to pay therefor, in depreciated money, a value which is approximately one-third of the value of the gold itself. The present bill ratifies the previous regulations of the President and the Secretary of the Treasury, and...contemplates that the weight of the gold dollar shall be reduced. It is not only a connecting link in the plan of the Government but is one of the most vital links...It would be absurd to predicate the power of the Government to accomplish such an objective upon the mere basis that the taking of the gold is accomplished at one time and the reduction in the value of the dollars given for the gold accomplished at a later time, when this power would be lacking were both these steps to be taken at one and the same time."

There was nothing wrong with changing the gold dollar if the gold had remained in the hands of Americans. They would still have the same amount of gold. The key to the Roosevelt plan was to seize the gold, pay a below-market price for it, and *then devalue* the dollar so that the government secured the profits from seizing the gold at below-market prices.

The defenders of the expropriation referred to the *Ling Su Fan* case. We will cover that in the next chapter. It was no precedent for Roosevelt's scheme.

**Vieira's Summary Comments**

Congress acquiesced and fawned over a newfound Caesar. Legislators and the public showed (p. 1117) "profound ignorance of the constitutional principles...of money." The President and his supporters in Congress slyly relied on and misapplied inapplicable and wrongheaded cases like *Knox v. Lee* (1871) and *Ling Su Fan v. United States* (1910). The notion of judicial review provided them with a convenient but dangerous excuse to avoid understanding and obeying the Constitution themselves. "'Checks and balances' and other mechanical devices designed to limit and control the governmental apparatus turn out to be worse than useless if WE THE PEOPLE allow themselves to be stampeded by untoward events, and not to search out the real causes and culprit."

Ironically, the gold dollar could have been devalued deeply in a constitutional manner had anyone understood the meaning of the dollar and regulation of coin values. Americans would have accepted this. This "tends to evidence the politicians' ignorance, rather than their malice..." Further evidence that the "New Deal Democrats...were simply steeped in ignorance of their country's monetary law and history finds support in the congruent blunders of the Republican Party, which had an overwhelming self-interest in criticizing Roosevelt's monetary policies – yet could not see the forest for the trees."

An opportunity, given Roosevelt's personal political capital, to attack the real cause of the problem, fractional-reserve banking, came and passed.

Through all the unconstitutionality, the constitutional silver dollar remained. Silver coins and silver certificates still circulated. FRNs and other paper currencies redeemable in lawful money (p. 1119) "still promised, directly or indirectly, to pay their bearers silver 'dollars' on demand..." If Roosevelt and Congress "actually intended to usurp truly totalitarian monetary powers" by destroying the 'gold standard' through seizing gold, repudiating gold clauses, and debasing the gold dollar, they failed. The gold standard and gold dollar were "never more than politically driven statutory fictions." The constitutional silver dollar "was always the legal standard – and remained such, both in principle and in practice, notwithstanding all of Roosevelt's machinations."

**Monetary Confusions: 1896-1934**

Sheer ignorance played a part in the unconstitutional monetary actions of 1933-1934. Those who might have resisted the actions taken, inside and outside government, of both political parties, did not possess the intellectual tools to resist. When the right (and constitutional) ideas are ignored or set aside, a variety of worse ideas fills the vacuum. This can be seen by reviewing monetary ideas that preceded the New Deal.

In 1896, Republicans stood for "sound money" and the statutory "gold standard" of 1873. They stood for a dollar as good as gold and no currency debasement. They were opposed to

> "...the free coinage of silver except by international agreement with the leading commercial nations of the world,...and until such agreement can be obtained the existing gold standard must be preserved. All our silver and paper currency must be maintained at parity with gold, and we must favor all measures designed to maintain inviolable the obligations of all our money...at the present

standard...”

Th first confusion here is the inversion of gold and silver. In the U.S. constitutional bimetallic system, the way to maintain parity is to adjust the gold content of the gold dollar to parity with the silver content of the standard and constitutional silver dollar.

The Republican misunderstanding goes very much deeper than this. They don’t know the difference between what a *standard dollar* means and what the constitutional regulation or adjustment of coin values of non-standard metals to the standard means. They think that they can change the standard legislatively in the same way that Congress can adjust non-standard metals *to the standard.* These two are different. The mischief arising from their confusion is immense, so much so that, for the last time in this book, I will digress to explain what it is in the Constitution that tripped (trips) up those in government who were (are) sworn to uphold it but didn’t (don’t) understand it and didn’t (don’t) bother to read the history that would explain it to them.

A metal cannot be made a standard in the abstract. A coin of specific weight of that metal has to be made a standard. Even that basic idea seems to have been lost among the Congressional dunces.

If a gold dollar is declared by Congress to be the standard (itself an unconstitutional act and beyond the power of Congress), then its content in gold has to be declared and then presumably kept constant if it is to be a standard. That implies that Congress then would have to adjust the silver content of the dollar. It never did this.[219]

Let’s ignore for a moment the fact that the silver dollar-standard is established in the Constitution and cannot lawfully be changed by Congress but only by constitutional amendment. Suppose Congress were to set a new statutory standard – a gold standard. What would the gold content of the new standard dollar be? Would it be the 23.22 grains of fine metal set in the 1873 statute? It would be whatever Congress decides. It could be changed at the will of Congress whenever it wants to. But this gives an immense power to Congress. If Congress can legislate and define at will the *content* of a gold dollar *standard*, then it can change the value of all money to be paid in contracts whenever it wants to. If it can alter the *amount* of gold in a *standard statutory*

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[219]What economists mean by the gold standard and the gold-exchange standard are different things than this. They are referring to some sort of system or systems in which states went into the market to maintain certain gold prices in terms of paper currencies or certain exchange rates among currencies. Unlike the constitutional system, this is not a free market system.

*dollar*, then it can redistribute wealth between debtors and creditors at will. Any contract calling for payment in dollars calls for a given amount of gold in each dollar. If Congress can alter that gold content by statute, then it can make the debtor pay more or less gold to the creditor. This leads directly, in Vieira's phrase, to "monetary totalitarianism."

Such a power is not given in the Constitution. One can see that there is very good reason not to give such a power. The power given is to adjust the amount of gold in a gold dollar so that its value is the same as the value of silver in the standard silver dollar that contains 371.25 grains of fine silver. That not only can be done, it should be done. This is so that debtors pay creditors in dollars of the same worth, in terms of an amount of silver *or its current gold equivalent,* as when they contracted. Adjusting the gold content of a gold dollar *to a silver standard* is radically different from creating a new statutory gold standard.

Suppose that in 1825, a debtor agrees to pay a creditor $1 in 1875. This means a payment of 371.25 grains of fine silver. Suppose that the gold dollar in 1825 is 23.203 grains of fine gold, which is 1/16th of 371.25. This assumes that 1 ounce of gold in a coin called the gold dollar can buy $16 of silver in the market. Fast forward to 1875. Suppose the gold dollar can now buy $32 of silver in the market. If the debtor pays the $1 debt in silver, he pays 371.25 grains of silver. If he were to pay in a gold dollar coin, he'd be paying the equivalent of twice that amount in silver. Consequently, he'd pay the debt in silver, not gold. Gold dollars would disappear from use as payments. Congress, in order to keep gold coins in circulation, is supposed to regulate the content of the gold dollar *to the silver standard* so that it is defined in 1875 as one-half of 23.203 grains of gold or 11.60 grains. Then 1 gold dollar could pay the debt and still be equivalent to 371.25 grains of silver.

This idea is conceptually difficult to grasp. It takes study. Supreme Court Justices and Congressmen have stumbled over it, to the detriment of Americans. There is a simple way to avoid it. Keep the silver standard. Then mint a gold coin containing 23.203 grains of gold. *Do not call it a gold dollar.* It will trade in the market at a floating price relative to the silver standard. In 1825, it would sell at $16 (in silver.) In 1875, it would sell at $32 dollars (in silver.) If someone owed a debt of $1, he would be indifferent between paying one silver dollar and one-half of one of these gold coins. Congress would relieve itself of the burden of continually adjusting the gold dollar. Vast misunderstandings would be avoided. Futile attempts to start up gold standards would be short-circuited. Attempts to fix the prices of silver and gold would have no rationale.

Congress didn't adjust the silver dollar to the so-called gold standard or gold dollar. Instead, the government sought to maintain a fixed ratio or a desired ratio by entering the markets for gold and silver and buying and selling them. The government attempted to maintain exchange rates at certain levels. The term "gold standard" meant something very different from what a constitutional gold standard entailed, if the latter had been attempted. Gold standard stood for a government attempt to fix gold prices and exchange rates. This ends the digression.

The Republican platform rules out the free coinage of silver; it thinks of it as a debasement. This policy is absurd for anyone who understands the monetary system of the Constitution. Free coinage simply means that anyone can bring silver bullion to the mint and get it coined at no cost into a silver coin. Bullion that weighs 371.25 grains is worth about the same as a silver dollar with that same silver content. It is just more convenient to use as money because it is official money and a legal tender. This procedure allows people in a free market to control how much silver circulates as money and how much does not. There is not and cannot possibly be any debasement when the government mints 371.25 grains of bullion into a silver dollar.

As for waiting for an international agreement before coining silver, that too is absurd and unconstitutional. The duty of Congress is to coin silver at the known standard weights, not to paralyze coinage and hold it hostage to some international agreement or other.

The Democrats' platform was far better, although not without error. They recognized silver and gold "as the monetary metals of the United States." They recognized "that the Constitution made the silver dollar the money unit and admitted gold to free coinage at a ratio based upon the silver dollar unit." They correctly supported bimetallism.

They were correct to demand the "free and unlimited coinage of both gold and silver," and to do so "without waiting for the aid or consent of any other nation." They were wrong that this coinage be "at the present legal ratio of 16 to 1." This showed that they too didn't understand how to regulate the coinage. The market ratio at that time was 30.59 to 1. The amount of gold in the gold dollar needed to be reduced by almost one-half. The second place they went wrong was on paper money. While rightly denouncing National Bank Notes, they accepted United States Notes redeemable in coin.[220] The third place they went wrong was to attack the right to have gold clauses

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[220]This is basically a choice between monetary fascism and monetary socialism (or populism.)

in private contracts. They somehow viewed this as "demonetization...by legal contract." If the coinage had been properly regulated, there would have been no need for gold clauses. They are a means of fixing the amount of money (actual metal content) to be paid without using a "dollar" unit subject to Congressional misbehavior.

**Brief Summary of Gold Seizure Actions**

1. March 6, 1933. Roosevelt issued a Proclamation declaring a bank holiday from March 6 to March 9, during which time all payments by all banks, in silver, gold, or currency, were suspended. This was a suspension of specie payments on a nation-wide basis. No title transfers of gold were involved.

2. March 9, 1933. Congress authorized the Secretary of the Treasury at his discretion to require all gold coin, gold bullion, and gold certificates of all individuals, partnerships, associations, and corporations to be surrendered to the government in return for an equivalent amount of another United States coin or currency.

3. March 10, 1933. Roosevelt decreed that no gold may be exported or moved from any banking institution. This froze the movement of gold.

4. April 5, 1933. Roosevelt commanded the delivery of gold on or before May 1 to a Federal Reserve bank or a member bank, which would pay therefor an equivalent amount. Member banks were to deliver all gold delivered to them to a Federal Reserve bank. This violated the March 9 act that authorized the Secretary of the Treasury to require the gold and make the payments for it. This Order did not vest any title to the gold in the banks. They acted as agents for its transmittal.

5. May 12, 1933. Congress made FRNs and National Bank Notes into legal tender and authorized the President to devalue the gold dollar at his discretion.

6. June 5, 1933. Congress outlawed gold clauses in contracts.

7. August 28, 1933. Roosevelt forbade anyone other than a Federal Reserve Bank from acquiring gold. Banks were to act as agents for gold being surrendered. He again violated the Act of March 9, 1933 when he, not the Secretary of the Treasury, required that no person could, starting 30 days thereafter, hold, possess, or retain any interest, legal or equitable, in gold (beyond some low minimum.)

8. December 28, 1933. To correct the errors in the April 5 and August 28 orders, the Secretary of the Treasury promulgated his own order. This order made clear that the

Federal Reserve banks were acting only as custodians for the gold account of the United States.

9. January 30, 1934. Congress provided by statute that all right, title, interest, and claim of the Federal Reserve Board, Banks, and agents to any gold are vested in the United States, and that the Secretary of the Treasury would issue gold certificates in exchange.

Gold certificates now held by the Fed have three sources: Gold expropriated from the people; gold expropriated from the Fed; and gold newly-acquired by the Treasury.

In sum, WE THE PEOPLE were forced to surrender all gold in any form (except some minimum exceptions) to the Treasury (via the Federal Reserve), and were paid the nominal face value in some other coin and currency. This was substantially less than the market worth of gold at the time by approximately $3 billion. Hence a substantial expropriation of wealth occurred in addition to the seizure. The Federal Reserve banks were forced to surrender all their gold, and were paid the nominal value in gold certificates. Gold clauses in private contracts were nullified. FRNs became legal tender.

## Conclusion

Eighty years after the Great Depression, the inherent flaws in the banking system have yet to be corrected. Removing gold from the monetary system didn't solve the basic problems. It took the nation further away from the constitutional system, which is also a workable system if combined with banking reform.

The gold seizure activities exhibit a high degree of unconstitutional actions on the part of Congress and the Executive. Congress rushed through legislation without proper consideration. Congress rubberstamped what the President wanted. The degree of latitude afforded to the President was extraordinary. We are still living with the fruits of these actions.

Congress gets a failing grade for (i) its exceedingly low level of understanding of the monetary powers and disabilities of the U.S. Constitution that every member is sworn to uphold; (ii) its readiness to accede to judicial review while not bothering to think through the constitutionality of the laws that it is passing; (iii) its failure to analyze the causes of the Great Depression and come to grips with the problems of central banking and fractional-reserve banking.

Haste, superficiality, ignorance, shirking of responsibility, and excessive deference to

the judiciary and executive branches were and are a recipe for poor legislation.

CHAPTER X

## The Gold Seizure: Court Cases

This is Chapter X of a series that summarizes Edwin Vieira Jr.'s two-volume work *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (2002) in its second revised edition.[221] Here we examine court cases related to the gold seizure, of which there are amazingly few. The corresponding pages in Volume 2 are pp. 1027-1046, pp. 1127-1212, and pp. 1233-1240. All references to Vieira appear in parentheses.

### The Campbell Cases

Vieira leads off by informing us (p. 1027):

> "In light of all this unprecedented – and wildly unconstitutional – activity by the President and Congress, directly affecting tens or even hundreds of thousands of American across the country, the subsequent dearth of judicial decisions on the subject stands out starkly. Essentially, only a *single* case (under three styles) addressed in detail the unconstitutionality of the gold seizure, a case heard by a lone United States District Court Judge whose constitutional holdings neither a Court of Appeals nor the Supreme Court ever bothered to review: the *Campbell* cases."

There are three references: *Campbell v. Chase National Bank of the City of New York, Campbell v. Medalie,* and *United States v. Campbell.*

For background, see the contemporary article in *Time* magazine, dated October 9, 1933.[222] The facts of the case are straightforward. Frederick Barber Campbell was an

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[221]Dr. Vieira is a lawyer. He holds an A.B. degree from Harvard College, an A.M. and Ph.D. from the Harvard Graduate School of Arts and Sciences, and a J.D. from Harvard Law School. *Pieces of Eight* is an invaluable and truly monumental guide to the monetary history of the U.S. from a constitutional perspective. It is, unfortunately, out of print and not widely available. Dr. Vieira brings to bear his detailed knowledge of court cases, reviews and analyzes relevant laws, applies principles of constitutional interpretation, and extracts important debates from congressional records in order to illuminate monetary history.

[222]Campbell is also mentioned in Jim Powell's readable article "Roosevelt's Crusade Against Gold."

elderly Manhattan attorney who "had deposited gold bullion with the Chase National Bank for safekeeping under contracts of bailment" on October 11, 1932 and January 25, 1933. Bailment means that he retained all title and interest in the gold and that the bank merely stored it and kept it in safekeeping for him. The bank could not lend the gold. It had to be available at all times for withdrawal.

After Roosevelt's Executive Order of August 28, 1933, the Secretary of the Treasury on September 12, 1933 issued a requirement that anyone possessing gold file a return answering various questions about such possession. The Bank informed Campbell that he would have to file a return and that the Bank was going to surrender his gold to the government. Campbell then demanded to withdraw his gold. The Bank refused and informed him it would file a return with the Collector of Internal Revenue. On September 26, 1933, Campbell filed a case in equity against the Bank (pp. 1027-1028.)

> "seeking specific performance of its contracts of bailment, and an injunction against the Bank's delivery of the gold to anyone other than himself. On 28 September, Campbell was indicted for failing to make a return. Campbell demurred to the indictment on the ground that the Emergency Banking Act of 1933 'was unconstitutional in so far as it purported to affect gold bullion in private ownership, and that the executive action taken thereunder was, therefore, without authority and invalid.' On 5 October, the government obtained a superseding indictment, charging Campbell with failing to make a return and holding gold without a license. Campbell demurred again, on the same grounds. On 17 October, Campbell brought suit in equity against United States Attorney Medalie, seeking to enjoin him from prosecuting Campbell under the superseding (or any other) indictment.
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> "The court, *per* Judge John Munro Woolsey, dismissed Campbell's suit against the bank for lack of jurisdiction over the subject matter. It also dismissed his suit against prosecution on the ground that he had an adequate remedy by raising his constitutional defenses in the criminal proceeding."

The indictment had two counts. In the trial, Woolsey found Campbell guilty of failing to make a return. He found him innocent of holding gold without a license on a technicality. It was because Section 5 of the Act of March 9, 1933 gave authority to the Secretary of the Treasury to requisition the gold, but the August 28, 1933 requisition order came from an Executive Order of the President.[223] This explains why

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[223]The President's authority under the Act of March 9, 1933 was to investigate, regulate, or prohibit the hoarding of gold bullion, but not to yield up one's interest in it.

the Secretary of the Treasury issued his own requisition order on Dec. 28, 1933.

When the government was defeated on the second count of the superseding indictment, it had a right to appeal to the Supreme Court. The government appealed on Dec. 27, 1933, but then quickly caused the appeal to be dismissed. Campbell had a right to go to the Court to get the appeal reinstated. This he wanted to do in order to air his arguments. He obtained a certified copy of the appeal on Feb. 8, 1934 and saw to it that the Clerk of the Supreme Court received it on Friday, Feb. 9, 1934.[224] The government mailed to him its counter-motion to dismiss on Saturday the 10th at 2:30 p.m., which he received in New York on Tuesday the 13th. Monday the 12th was an official New York holiday (Lincoln's Birthday.) Meanwhile, the government made its motion to dismiss in open Court on Monday the 12th and the Supreme Court *instantly* dismissed it. In this way, the Supreme Court cooperated with the government to fend off having to hear the appeal. They prevented any further adjudication by Campbell on his loss of gold.

The Supreme Court knew that Campbell was not present to make his case. The record contained no evidence that he knew of the proceeding. Besides, there was no way for him to get to Washington from New York to appear on Monday even had he received the notice on Monday. Campbell learned from a press inquiry what had happened on Monday afternoon. Had the Court been at all interested in justice, it would not have participated in these tricks.

In his affidavit, Campbell explained that the President's Executive Order was invalid, not because of the technicality of being

> "made by the President rather than by the Secretary of the Treasury, but because...Section 5 of the Order and section 2 of the Act of March 9th were inherently invalid...as contrary to the Fifth Amendment, as well as by an invalid delegation of legislative power, and because of vagueness in section 2 of the Act (transactions in 'hoarding')."

These three arguments are solid. The gold seizure was a *taking* of *wealth* that

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[224]Vieira did some serious legal research on the sequence of events. There are no records of the appeal itself, but certain of the events that occurred are documented in Campbell's Affidavit and Notice of Motion to restore Case to Calendar and Memorandum in Support Thereof, United States v. Campbell, No. 779 (filed 15 February 1934).

discriminates among people who have gold and do not have gold.[225] Chapter IX argued the invalidity of the delegation of power and the lack of definition of hoarding.

Campbell pointedly queried the Court:

> "Should the Government having coerced [Campbell] through the medium of unconstitutional...enactments carrying ferociously terrorizing penalties, be allowed to withdraw this appeal upon the ground that such...illegal coercion having been successfully accomplished, further proceedings are unnecessary?"

In other words, Campbell asked whether the Court approved his being railroaded with no recourse to the justice system. He pointed out that his case was the leading test case in the nation and that dismissal would discourage others:

> "...other citizens will be deterred from...contesting enactments claimed to be unconstitutional, in view of a refusal of this Court to hear this case, and a new and sure way is opened for the Government to tyrannize over the individual citizen."

Since no other gold seizure case was ever heard, Judge Woolsey was alone in ruling on the issues.[226] His statements take the government's side in all major respects, except for the technicality. Woolsey's defenses or legal rationalizations for the seizure, which we examine next, don't stand up to questioning. But it is very useful to examine them closely in order to spell out explicitly the *misguided ideas* about the U.S. Constitution and about Money that have contributed to the unconstitutional monetary system in today's America, and to oppose them concretely with the corresponding *correct ideas* that accord with the Constitution.

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[225]Campbell asserted that to fill out the return involved self-incrimination, since he had no gold license, which was required under a previous government order. The Fifth Amendment also says that "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Campbell also argued that due process of law was absent and that he was not being justly compensated. He was aware that gold had risen in price from $20.67 to over $30 in market value, so that an exchange of dollars for gold at $20.67 was unjust compensation. Furthermore, he could have argued that the dollars being given were not Money, as defined in the Constitution, but paper promises of redemption, that is debts. Furthermore, they were promises not in Money, but an undefined object known as "lawful money."

[226]The Court of Appeals affirmed his rulings, but didn't consider any constitutional issues.

Woolsey didn't find it suspicious or even worthy of note that Congress had never before invoked the power to expropriate the citizens' Money, or that no one for hundreds of years had ever proposed such an action. Instead, he propounded a doctrine of latent emergency powers that lay fallow until Congress saw fit to admit them to its constitutional arsenal. For the government to seize everyone's money in order to save the banks and also to profit from paying a below-market price for the gold were hidden in the Constitution somewhere waiting to be called forth. His deference to Congressional power as opposed to individual rights was one-sided.

He wrote "that it was obvious that gold coin and gold bullion could not be allowed to be taken from the banks..." But he didn't explain where in the Constitution the Congress was given the power to privilege banks that had mismanaged their affairs and couldn't fulfill their promises. To Woolsey, it was "obvious" that banks must always be bailed out. This is not legal or any other kind of reasoning; it is dogmatic assertion. It assumes that somehow banks are a kind of vital public institution that rates the special coddling and sustenance of government. It assumes that government needs the banks. This may be true of *big and unlimited* government, at least until it thinks of something better to ensure its power, but it's not a constitutional vision, even if it was Alexander Hamilton's vision.

The Judge wrote that

> "...every dictate of wisdom pointed to the necessity of having all gold in the banks remain there, and that all gold, whether coin or bullion, already in the hands of private persons, should be brought back, whenever the authorities might deem necessary, into the hands of some fiscal agency of the government."

Generalized appeals to necessity are not constitutional arguments. If they were, the government could do anything it pleased. Woolsey's words suggest that depositors have even fewer rights of withdrawing Money than they thought. The banks, through the government, can make *them* deposit the wealth they have at home in the banks. But, what is worse, *safety deposits* that are bailments (specific property), held in the name of the depositor and legally distinct from other kinds of deposits, can also be raided.

Trying to justify his position using the Constitution, Woolsey invoked the "public interest":

> "Congress, which is given plenary power to coin money and regulate the value

> thereof, and to borrow on the credit of the United States, must, as an incident of these powers, also have the power to legislate regarding gold bullion held by persons within the United States and to treat gold bullion as affected with public interest."

Woolsey avoided seriously confronting the issue before him. The question is not the power to legislate regarding Money, but the nature and content of that power. Does coining Money imply seizing it? Does regulating its value mean seizing it? These are the questions to be answered. Woolsey didn't even begin to address them. If he had done so conscientiously, he would have ruled against the government.[227] Furthermore, the government didn't even intend to coin the bullion for use of the banks. It withdrew the gold entirely from circulation. The incantation of "public interest" is not an argument. Almost everything allowed in the Constitution is a matter of public interest, but not everything that is conceivably a matter of public interest is allowed to be a matter of legislation by the Constitution. If it were, the Constitution would be a document that sanctioned totalitarian, not limited, government.[228]

Woolsey went on to list the constitutional powers to coin money, regulate its value, and borrow money on credit, after which he commented:

> "These powers must necessarily be broad enough to achieve the objective of a currency which should be of universal circulation throughout the United States."

The powers are, in fact, broad enough to allow people to have a Money to circulate (gold and silver coin) via free coinage and regulation of coin values, including foreign coin; but they are also constrained narrowly to specific government functions. Woolsey clearly was unmindful of the latter. He used the term "currency", which is not in the

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[227]Earlier chapters have shown again and again what regulation of value actually means. Congress once understood that meaning. Examples of proper regulation of value by Congress occur in a number of nineteenth century coinage acts.

[228]Evidently, the Constitution and the constitutional system have serious weaknesses when it comes to protecting liberty. It is too easy for the personal interests and inclinations of those in the justice system to be shifted to the government's side. It is too easy for the people to abandon monitoring the government officials. It is too easy for special interests to capture government policy. It is too easy for clever lawyers to transmute the allocated powers into unlimited powers by such tricks as appealing to the public interest, or necessity, or emergency. It is too easy for people to lose knowledge of what a constitution means.

Constitution; the phrase “current coin” is the only phrase that appears. From what he recounted next, it is clear that by currency he mainly had in mind *paper money.* As examples of the powers of Congress, Woolsey recounted past Congressional actions, such as regulating the gold content of the gold dollar, declaring what is legal tender, issuing paper money, reissuing such paper, establishing national banks and national bank notes, making them lawful money, and taxing state bank notes. The monetary theory he harbored was that the government should control the gold “as a potential source of currency and credit,” that is, the government will use the gold against which to issue paper money. Another thread in this theory is that it takes the government to “achieve the objective of a currency which should be of universal circulation...” Both of these ideas are components of an entirely unconstitutional monetary theory.[229] That he held these ideas is shown in his next statements:

> “It seems to me perfectly clear from these decisions that gold need not be dealt with as an ordinary commodity, but that it is a commodity affected with a public interest as a potential source of currency and credit, and that Congress when it considers that the national exigency demands control of gold may control gold in such manner and to such extent as it deems advisable, provided always that it does not violate the personal constitutional privileges of citizens.”

Here he added in a third unconstitutional idea, which is that national emergency justifies the control of private gold by the government.

We really have a catalog of unconstitutional, nonconstitutional, and anti-constitutional ideas appearing in Woolsey’s court opinion. A non-exhaustive list includes

- the government has to see to it that a universal currency circulates,
- the currency is paper money,
- the paper money is backed by a pool of gold,
- the paper money is private bank notes invested with government privileges such as legal tender,
- the government is justified in bailing out and sustaining banks in various ways,
- something affected with the public interest is subject to Congressional control,

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[229]His reasoning shows how a slippery slope is created once the government unconstitutionally starts issuing any kind of paper money or invests any kind of private paper notes with governmental support as money as it did in 1862 and 1863.

- emergencies justify extensions of government powers, including gold seizure,
- Congress has broad powers to establish a monetary system and to control monetary policy, and
- the money powers in the Constitution justify all of the preceding.

The corresponding constitutional ideas that oppose these, point by point, are

- free coinage of silver and gold satisfies the demand for Money, or Money supply is market-determined,
- government-emitted or supported paper money is constitutionally prohibited, but private note emissions that may or may not serve as money-substitutes are allowed,
- paper notes of private issue that pass as money might be backed by gold or other assets,
- gold and silver are the only constitutional legal tender, and no private bank notes can be invested with that quality,
- banks that are mismanaged are subject to failure, and the Constitution accords them no special privilege of being saved or sustained,
- not all things affected with a public interest are reached by the powers of Congress, nor is that phrase a justification for any Congressional powers, all of which are enumerated in the Constitution,
- the Constitution's provisions address various contingencies, but emergencies are not *per se* events that justify any changes in constitutional procedures and powers,
- the monetary system is market-determined and Congress has no separate power to control monetary policy apart from its enumerated powers, and
- the money powers in the Constitution are specific and narrow, but they are broad enough to allow a well-functioning monetary system and government.

These two lists present two fundamentally different visions of money and the monetary system. They are a heavily government-controlled system with minimal constitutional restraints and a free-market system under constitutional law. The contrast is between a system of control by public officials by way of their agencies (bureaucracies) and a system of private property and contracts. Woolsey and others are importing a governmental monetary theory that is alien to the Constitution by reading into the Constitution and grafting on to it what they want the system to be, rather than what the Constitution says the lawful system is.

Judge Woolsey denied that Campbell would have incriminated himself by filing a return, but, in reality, under Sections 5 and 10 of the Executive Order, he would have had to disclose that he held gold without a license. Vieira lists six subsequent Supreme Court cases that supported Campbell's contention concerning self-incrimination in

similar instances.

We turn now to a Supreme Court case that Woolsey cited and that was cited in the *Gold Clause Cases*, namely, *Ling Su Fan v. United States* (1910.) The decision in this case contains several objectionable statements, which we will get to. Fan was convicted of the crime, under Philippine law, of exporting silver coin. The Philippine Commission operated generally under the Organic Act of Congress of 1902, and its authority on money was authorized by the Congressional Act of March 2, 1903. The Commission had forbade the export of Philippine silver coins and silver bullion.

How applicable is this case to the Campbell case or any other gold clause case? The answer is, not at all. The *Ling Su Fan* case arose in the Philippine Islands, which the United States controlled after the defeat of Spain in the Spanish-American War. They were not then or ever incorporated into the United States. It is well known that (p. 1033) "the Constitution does not extend of its own force to mere Territories, and that Congress may exercise in those domains powers the Constitution withholds within the boundaries of the States." For example, *Dorr v. United States* (1904) states

> "Congress has the right to make laws for the government of territories, without being subject to all the restrictions which are imposed upon it when passing laws for the United States considered as a political body of states in union, and until territory ceded by treaty has been incorporated into the United States, it is to be governed under Congress subject only to such constitutional restrictions upon its powers as are applicable to the situation.
>
> "It is evident, from Article IX of the treaty with Spain ceding the Philippine Islands that the intention of the framers of the treaty was to reserve to Congress, so far as it could constitutionally be done, a free hand in dealing with the territory ceded by the treaty."

Woolsey tried to support the gold seizure in the United States by the precedent of the law against silver export in the unincorporated territory of the Philippines. This required two leaps: from Philippine law to U.S. law, and from restriction on export of silver to seizure of gold:

> "...the Philippine Government not only had the power to prohibit the exportation or melting of silver coin which it had minted, but that it likewise had the power to make the violation of such a prohibition a crime."

He compared "silver which had been already coined" to "gold bullion which

potentially might be coined," leading him to conclude that

> "...it is not a long step to hold...that gold bullion must be looked at in its relation to the right to coin it into money or issue gold certificates against it, and thus to regulate the value of our currency and to maintain the credit of the United States."

This attempted rationalization of the gold seizure fails. Congress could impose or oversee any money laws it pleased in the Philippines. Even trial by jury is not an automatic right in "territory belonging to the United States that has not been incorporated into the Union." (See *Balzac v. Porto Rico* (1922).) Therefore, no matter what law was operative in the Philippine territory, it could not be a legal precedent for constitutional law in the United States.

Woolsey's operative idea, which we meet again in the Supreme Court, is basically that when it comes to money, the magical phrases "to coin money" and "regulate the value thereof" mean that government can do just about anything it pleases concerning money.

### *Ling Su Fan v. United States* (1910)

A brief excursion into the monetary aspects of this case sheds light on the Supreme Court's thinking in 1910. In all of this discussion, it must be borne in mind that the focus is whether or not such a law would be applicable and constitutional in the United States, since later Court cases cite it as if it were.

In 1902, Congress authorized a mint in the Philippines. In 1903, it started up a gold standard with the gold peso as the unit of value. It also authorized a silver peso. This bimetallic policy requires constant regulation of the silver peso with respect to the gold peso. Congress knew this, and so it added "the government of the Philippine Islands may adopt such measures as it may deem proper...to maintain the value of the silver Philippine peso at the rate of one gold peso."

Silver rose in price relative to gold in the world market. Silver began to leave the country, since it fetched a higher price outside the Philippines. Silver bullion was 9 percent higher in Hong Kong than in the Philippines. Instead of reducing the silver content of the silver peso, the government forbade its export. Fan was convicted of exporting silver coin. His appeal on grounds of deprivation of due process reached the

United States Supreme Court.[230] The Court affirmed his conviction. Subsequently, whenever the Court or others wanted to underscore Congressional power over gold and silver, they would just refer to this case, even though, as we have just seen, it is inapplicable to the United States.

The Philippine law was severe. No one could take more than 25 pesos out of the country. Any amount over that was subject to forfeiture (seizure) without return. One-third of the amount forfeited went to any informants. It was also a criminal offense subject to a maximum fine of 10,000 pesos and one year in jail.

The United States Supreme Court held that

> "...a substantial reason for such a law is indicated by the fact that the bullion value of such coin in Hong Kong was some nine percent greater than its face value. The law was therefore adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage."

This reason might be applicable in this situation of unincorporated territorial law, but it could not be the case in the United States. If we had a gold standard coin, Congress would have a constitutional duty and the means to regulate coin value by adjusting the silver content of the silver dollar, not prohibit the movement of silver coins. Fan's defense noted this in their brief:

> "...a remedy not impairing the right of property was at hand and has been applied to keep coin at home for ages; that of reducing the bullion value of the coin...an amount of silver bullion...improvidently incorporated in the silver peso as to make it valuable for exportation...is no sufficient reason for oppressing the individual holder of these coins..."

Here we have a direct confrontation of a private property right and government power exercised so as to oppress that right. Who owns the coin? Who controls it? The plaintiff's position is that Fan owns his wealth and controls its movement. His position is that a law prohibiting such movement is not a rightful procedure, not a due process of law. This is buttressed by the fact that an alternative non-invasive remedy is known and available that has a long history. It is also buttressed, as we shall see, by the fact

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[230]The Philippine law had the Fifth Amendment-style provision "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law."

that a government power to curtail coin export beyond territorial limits had not previously been exercised.

The Court conceded title of ownership but made much of the ownership limitations:

> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange...As an incident, government may punish defacement and mutilation, and constitute any such act, when fraudulently done, a misdemeanor."

Notice that there is a stipulation to the limitation not to mutilate a coin – "when fraudulently done". In other words, coin-clipping is punishable by law. What has this to do with transporting an honest coin?

The Court then concluded without further proof or justification:

> "...there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power, it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights."

This judgment is arbitrary and unsubstantiated. We see the "public interest" invoked while suppressing private rights of contract and property. If this seemed to the Court "plainly within the limits of the police power," it seems at a minimum just as plainly an undue "interference with private rights."

Meanwhile, the shoe is on the other foot. The stronger case is that the government's action is itself unlawful. The Court didn't answer the plaintiff's argument:

> "No necessity existed for the infringement of the rights of private property. The inducement to carry the coins out of the country wholly disappears by an adjustment of the bullion value to commercial conditions, which is one of the functions of government. Money is coined as a medium of exchange. That object is defeated by legislation curtailing its use."

The government's brief actually made a huge concession that the Court also ignored:

> "Congress has *never*, for the purpose of maintaining the parity between the two metals, or of retaining an adequate supply of them in this country, undertaken to prevent the exportation of them."

Vieira notes (p. 1037) that "the failure to use a supposed power for a long time is evidence that no one believes the power exists." The support for this is *FPC v. Panhandle Eastern Pipe Line Co.* (1949).[231]

In support of this absence of the power to prevent exports of coin, Blackstone's *Commentaries* on pre-constitutional law say nothing about prohibitions of coin exports, even though export of some other items was prohibited. To the contrary, in 1663 the Parliament recognized that due to trade balances, Money and Bullion "are carried in greatest Abundance (as to a Common Market) to such Places as give free Liberty for exporting the same," and "the better to keep in and increase the current Coins of this Kingdom," it is "lawful to and for any Person or Persons whatsoever, to export...all Sorts of Foreign Coin or Bullion of Gold or Silver...without paying any Duty, Custom, Poundage or Fee." This history contradicts the Supreme Court's statement that "there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin."

We conclude from this discussion that the prohibition of silver in the Ling Su Fan case cannot be cited as a precedent for the power to seize gold.

The Court's tendency to abridge rights of property and contract in favor of expanding government power over money is evident. As with Judge Woolsey, the presumptions of the Court come down to a conviction that the Constitution has given Congress near total control over gold and silver.

The report of the Committee on Finance of the U.S. Senate considered the exportation of coins in January, 1819. The report of the Treasury is appended to it. Both make for enlightening reading. What the Court believed in 1910 and what the Senate Committee on Finance expressed in 1819 strongly contrast:

> "Of the inefficiency, if not entire impotence of legislative provisions to prevent the escape of the precious metals beyond the territorial limits of the Government, the history of all countries in which the power of legislation has

[231]"The conclusion here reached is supported by the undisputed finding by the District Court that it has been the practice for natural gas companies to trade freely in gas leases and that the Commission has never before asserted the right to regulate the transfer of such leases."

> been thus exercised, bears testimony. And, if all the efforts of arbitrary power in despotive Governments, if regulations dictated by the most cautious and jealous policy, guarded by penalties and punishments the most cruel and sanguinary, and enforced with a rigor which knows no mitigation, have been in vain, what hope can be indulged that a Government like ours – the genius and spirit of which breathes mildness and moderation – a country in which cruel and unusual punishments are unknown – could find the means of obtaining, by this mild spirit of legislation, this desirable end? Indeed, no error seems more entirely renounced and exploded, if not by the practice of all nations, at least in the disquisitions of political economists, than that which supposed that an accumulation of the precious metals could be produced in the dominions of one sovereign by regulations prohibiting their exportation to those of any other. The evils resulting to the community from a scarcity, or too small a portion of the precious metals, seem to your committee to be too deeply seated to yield to any remedies within the competency of legislation to afford. It is a malady which admits of no cure but that of time, patient industry, and persevering economy. As long as the balance of trade is against us, so long will a constant efflux of the precious metals be required for the discharge of such balance."

A Congress that would not prohibit the export of coins would find it inconceivable to seize all the gold coins in the country for any purpose, including saving fractional-reserve banks. The letter from the Secretary of the Treasury ended with this sound advice:

> "...no legislative interference is conceived to be necessary, except for the enforcement of the obligation on the part of the banks to discharge their notes in specie, when demanded. This can be most certainly effected by considering and punishing, as an act of bankruptcy, any attempt on the part of a bank to circulate its notes whilst it refuses to discharge them in specie, or the notes of other banks in the same situation."

If Congress had heeded this advice, a Sword of Damocles would have hung over fractional-reserve banks. They would have had to modify the terms of their demand deposit accounts. Banks might have divided themselves into an assortment of institutions with varying accounts, not all with notes circulating as money-substitutes convertible into specie on demand. Congress would perhaps have been less inclined to create an unsound National Banking system in 1863.

### The Supreme Court's Refusal to Review Gold Seizure

The *Gold Clause Cases* are *Norman v. Baltimore & Ohio Railroad Co.* (1935), *United States v. Bankers Trust Company* (1935), *Nortz v. United States* (1935), and *Perry v. United States* (1935).

*Norman* and *Bankers Trust Company* were disposed of together. They upheld the validity of the Joint Resolution of June 5, 1933, as it applied to privately-issued bonds that promised payments in gold. *Nortz* upheld the government's power to redeem its gold certificates in currency not redeemable in gold. *Perry* found the Joint Resolution invalid for obligations of the government that promise gold payment, except for currency.

The main constitutional focal points of the train of events are (1) the validity of the gold seizure and (2) the improper regulation of the gold dollar with the concomitant Congressional misinterpretation of its meaning due to the failure even to understand what it meant. Only the Campbell cases litigated the gold seizure. Improper regulation of the gold dollar passed by in silence in *all* the cases. All sides in the *Gold Clause Cases* accepted the validity of the gold seizure. The parties that had a strong interest in challenging the validity of the seizure itself, as the step that made the cancellation of the gold clauses relevant and brought about their damaged interests, did *not challenge* the power of the government to seize the gold in the first place. Consequently, the Supreme Court never faced anything but softballs lobbed at them.

Chief Justice Charles Evans Hughes was therefore able to ruminate in *Norman* that if there had been no obligations with gold clauses, the gold seizure would have gone off without a hitch:

> "...we suppose that no one would question the power of the Congress, in its control of the monetary system, to endeavor to conserve the gold resources of the Treasury, to insure its command of gold in order to protect and increase its reserves, and to prohibit the exportation of gold coin or its use for any purpose inconsistent with the needs of the Treasury. *See Ling Su Fan v. United States, supra.*"

Only by being insulated from challenges such as Campbell's could Hughes have made such a statement. His statement could hardly be more irritating in its one-sided support of Congressional power and in its spin meant to cover up what Congress actually did.

The plaintiffs and *amici curiae* in *Norman* made a huge concession when they asked

for payment, not in gold coin, but in an equivalent paper currency. That conceded the seizure. They further failed to show how Congress was failing to regulate value, and they failed to demand the right compensation for their clients. In *Bankers*, they conceded even more, namely, that the government had the power to withdraw gold coins from circulation and that those who entered into gold clauses knew this. They gave away their case. The government argued in its brief that since gold coin had legally been withdrawn from circulation, they had to accept the dollar-for-dollar (paper for gold) exchange at the statutory rate. The Court used this argument in *Nortz* and *Perry*, but not in *Norman* and *Bankers*. Nortz concurred in the government's powers to appropriate gold and deliver it to the government. Hughes was enabled to boast that "These powers could not be successfully challenged," which outrageous statement he buttressed with cases that had nothing to do with seizure, namely, *Knox v. Lee, Juilliard v. Greenman, Ling Su Fan v. United States,* and *Norman v. Baltimore & Ohio Railroad Co.* Vieira (p. 1131) views the Court's statement as a "monumental bluff" which it got away with because no one "bothered to contest the seizure!"

The dissent in these cases is here. It mentioned the lack of challenge to the government on either the seizure or the regulation of value:

> "The authority exercised by the President and the Treasury in demanding all gold coin, bullion, and certificates is not now challenged; neither is the right of the former to prescribe weight for the standard dollar. These things we have not considered."

The plaintiffs not only did not contest the regulation of the gold dollar, they did not understand it. In *Norman*, they construed it as a nominal amount, not a true weight. They also suggested that "'to regulate the value of money' means that Congress can increase or lower the content of the unit according to a certain price level, or any other norm it chooses." This is completely wrong. Once again, it shows the prevalence of the Fisherian notion of stabilizing the purchasing power of the dollar. The Court was able to weave this false notion into its judgment:

> "That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment."

The Court construed the regulation of value as something that depends on the

judgment of Congress of economic conditions, which, being highly uncertain and subjectively assessed, gives Congress immense power and latitude of action; whereas the constitutional meaning is an objective adjustment of actual weight to create parity of value of a gold to a silver dollar, so that a dollar in payment conveys the same value whether paid in silver or gold. Hence, a narrow and limited power in the Constitution became what the Court says is "broad power to determine" monetary policy.

The counsel for the Railroad did no better. He argued that the power to regulate value meant that Congress could forbid arbitrage or conversion of a coin valued lower in one market to coin valued higher in another market. This was what Ling Su Fan was attempting, by transporting silver from the Philippines to Hong Kong. A proper exercise of power by Congress would make any such arbitrage unprofitable by properly adjusting the metal weight.

Since the Court never ruled on the two important issues of gold seizure and regulation of value, they remain open.

Vieira asks "*Why*, though, did this opportunity pass in 1934?" He argues the "strong likelihood" that the "*Gold Clause Cases* constituted a judicial setup." The fix was in, planned from the beginning, not to hear argued the constitutionality of the gold seizure. In building this hypothesis, Vieira calls our attention to a series of facts and events.

The *Gold Clause Cases* advanced to the Court on legal claims that the Court knew posed no basic challenges to the gold seizure or the compensation in dollars. The Court knew of Roosevelt's popularity and the one-sided majorities in Congress. Any six Justices can turn away a case from review on a writ of *certiorari*, but not even four Justices could be found to accept the Campbell cases. We have seen that the Court cooperated with the government to dismiss the *United States v. Campbell* case. The Court accepted the *Norman* case which was totally toothless. The plaintiff didn't demand gold despite the contractual terms. He was willing to accept a value in gold rather than a gold delivery. He lobbed a softball to the Court, asking them to clarify the question of payment in legal tender when payment in specie was impossible (due to the accepted seizure.)

Norman filed his petition on August 8, 1934, and the Court accepted the case on October 8, 1934. On August 17, 1934, Campbell filed his petition for a writ of *certiorari* in *Campbell v. Chase National Bank of the City of New York*. The Court denied him a hearing on October 8, 1934. The Norman case was a pushover for the government; the Campbell case was a real challenge.

Campbell's brief raised the issues squarely. It's also a good summary of some of the points discussed in Chapter IX. Campbell laid out the reasons why the Court should hear his case by explaining that the

> "...result reached by the District Court is
> (a) To deprive [Campbell] of his property without...due process of law...
> (b) To hold that the Constitution...can be set aside or suspended by the declaration of a so-called emergency.
> (c) To hold that Congress may requisition or take private property for public use without setting up the judicial machinery for the judicial determination of just compensation.
> (d) To sustain an invalid delegation to the President of legislative power.
> (e) The creation of the vague, uncertain, and indefinite crime represented by the word 'hoarding,' with the ferocious penalty of a maximum of ten years' imprisonment and $10,000 fine, or both.
> (f) To sustain enactments with ferocious penalties as an alternative to immediate surrender to the Government of private property.
> ...If these governmental enactments are constitutional, a way has been opened to circumvent the 'due process' and the 'eminent domain' provisions of the 5th Amendment. If the requirements contained in the Act and the executive orders in the instant case of gold bullion are constitutional, then in the future the same formula can be followed in the case of any kind of property, and the...protection of the 5th Amendment is gone.
> ...The enactments here involved are new and novel; have never been before this Court; and if allowed to remain upon the opinion of the District Court will create fundamentally unsound constitutional precedents."

These arguments alone should have awakened a hearing in the Supreme Court, but Campbell provided more. Section 2 of the Act of March 9, 1933 and the Executive Orders of April 5 and August 28 prohibited the owner of gold bullion from exporting his property, selling it, disposing of it, and continuing even to hold it. They required surrender of title "without even a proffer of alleged compensation...alleged regulation has gone to the extreme of confiscation."

> "Section 2 of the Act ...cannot be considered an exercise of the power of eminent domain." "Section 3...does not contain provisions for the judicial ascertainment of just compensation...unlike requisitions statutes enacted during the late World War in every case."

Campbell pointed out at length the ambiguity in the term "hoarding." He noted that the

President used it in two different and contradictory ways. In the April 5, 1933 order, he defined it as "withdrawal and withholding of gold coin, gold bullion or gold certificates from the recognized and customary channels of trade." This made mere possession be the crime of hoarding, despite the prohibition against its use in trade and the March 10, 1933 export prohibition. In the August 28, 1933 order, hoarding is no longer mere possession. It is any legal or equitable interest in the gold, even if not in one's possession. Campbell was not indicted under either of these meanings, "but...the District Court said...that [Campbell] had by his actions in bringing suit against the Chase Bank (to protect his property) construed himself to be a hoarder of gold bullion."

Further, Section 2 of the Act of March 9, 1933 contains no definition of hoarding. This section, "upon which the executive orders are based, does not, of itself, legislate against anything; it simply confers upon the President the power to 'investigate, regulate, or prohibit.'"

Regarding hoarding,

> "Congress passed the whole matter over to the President...The Act...makes the President the law-making power. The Act...states no policy, principle or rule which the President is to follow in his regulating or prohibiting..."

Campbell on August 17, 1933 also filed a petition for writ of *certiorari* in his case against Medalie. The Supreme Court likewise turned this down on October 8. It takes only four Justices to grant such a petition. Why didn't they do so when, within 5 weeks, the Court *accepted* the other three *Gold Clause Cases*?

After Campbell (p. 1151) "had been pounding on the courthouse door since 15 February 1934 trying desperately to question" the alleged powers of Congress and been refused entrance, Hughes had the nerve to opine that "we suppose that no one would question the power of the Congress" to seize the people's gold.

Vieira ponders various explanations, which are not mutually exclusive. Maybe the Justices swayed with the political winds. Maybe they feared the logistical nightmare of returning everyone's gold. Maybe they did not comprehend the constitutional monetary system. That system had been taken apart since 1862, and the dominant monetary ideas were very different. Older court cases were referred to almost ritualistically. Years later, Attorney Paul Bakewell, Jr., who participated in three of the cases, sent two books of his on the subject to Justice Owen J. Roberts, who had been on the Court. In his reply by letter, Roberts wrote in 1950:

> "Your new manuscript is a telling piece of writing, and gives a picture which I have not seen anywhere else. I am as much surprised as you have been that the material collected by you was never brought to the attention of the Supreme Court in the Gold Clause cases. Unless I am mistaken, all of the plaintiffs, and the Government, started with the assumption that Congress had the Constitutional power to do what it purported to do, except only the question whether the United States was bound to redeem gold currency with an equivalent amount of paper currency not redeemable in gold.
>
> "Of course, I ought not to be quoted concerning a decision of the Court when I was a member of it, but I am inclined to think that, had I known the history you describe, I would have been of a different opinion than that expressed."

In his brief, Bakewell recognized that the gold seizure followed later by the devaluation took money out of the pockets of gold holders. He wrote that if one conceded that the seizure by itself was constitutional, and if one conceded that the devaluation by itself was constitutional, "notwithstanding that such concession might be made, as to the validity of each of these acts (*standing by itself* and when it is *considered by itself*), nevertheless, if the *combined effect* of two or more such legislative acts produces a *result*, which is prohibited by the Constitution, that *result* is invalid and utterly void."

Rep. Martin understood this conjunction as well. Certainly banker Frank A. Vanderlip, one of the Jekyll Island godfathers of the Federal Reserve Act, understood it. If they understood this, didn't the Court understand it? Martin, on January 20, 1934, said this on the floor of the House:

> "Three days ago I sat in a committee room and heard one of the great financiers and bankers of America, Mr. Frank A. Vanderlip, advocate a government bank of money issue: the taking over of the money-making function of the Federal Reserve and national banks and the issue by the Government of all money. Forty years ago – yes, less – that man would have been denounced as a wild-eyed fanatic; for what he advocated was the first article of faith in the creed of Populism, the issue and control of all money by the National Government.
>
> "This banker went beyond that. He went to lengths never dreamed of by Populists or Greenbackers, because the conditions did not then exist – conditions which have brought the Nation to a parting of the ways as great as that which brought about the Civil War. He advocated the seizure by the Government of all gold, the devaluation of the gold dollar, the appropriation of

> the profits of the process by the Government, and that no more gold ever be coined; and that no more gold ever be paid out, except in settlement of international trade balances, which means not at all, since these balances are invariably in our favor, and should be always and ever in our favor."

Ten days later, Congress passed the Gold Reserve Act. The next day, Roosevelt devalued the gold dollar. The government appropriated the profits.[232] Vanderlip's description of his preferred roadmap to the removal of gold matched perfectly that of Congress and Roosevelt.

The opinion of Judge Woolsey perhaps reflects the general political thinking at the time, which was favorable to the powers of Congress. The Justices may have reflected this bias.

There is probably some truth in all of these explanations. At a more micro level, the fact is that the Court chose to hear the easy *Gold Clause Cases* and ignored the Campbell cases. The likelihood is that the Court's leader, Chief Justice Hughes, with the support of one or two other Justices of like persuasion, was able to influence the Court's decisions to refuse to review the gold seizure. It is likely that they knew that if they did hear the case, they would not have been able to find arguments to support the government's position; and that is the position they wanted to uphold.

***Norman v. Baltimore & Ohio Railroad Company***

We will go into this case in detail because the opinion written by Chief Justice Charles Evans Hughes is outrageous. Vieira (p. 1186) writes that "it was a disgraceful

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[232]The government's profits, extracted from holders of gold (including Federal Reserve banks) were approximately $3 billion (about $49 billion in 2010 dollars.) The Treasury used $2 billion to establish the Exchange Stabilization Fund and $650 million to retire national banknotes. According to Allan Meltzer, "The proposed fund was about the size of the Federal Reserve's open market portfolio. It operated secretly, under the control of the treasury secretary with the president's approval." The Treasury took control of credit conditions and could negate any policies of the Fed. "The Exchange Stabilization Fund gave the Treasury the means to conduct monetary operations without getting approval for spending from Congress...The Federal reserve paid for its inactivity by losing control of monetary policy. The fund gave the Treasury a strong hand in setting policy toward interest rates, money, and debt, and it used its power. The Treasury remained the dominant partner for the next fifteen years, until the March 1951 accord released the Federal Reserve from Treasury control." See Meltzer, *A History of the Federal Reserve Volume 1 1913-1951* (2003).

abdication of judicial responsibility with perhaps no equal yet in the dark chronicles of the Supreme Court's systematic deconstruction of WE THE PEOPLE's Constitution."

The facts in this case illustrate clearly how the seizure and subsequent devaluation looted wealth from bondholders. Norman was entitled to receive a bond coupon of $22.50 in gold. The gold clause in the bond indenture promised that the payment "will be made...in gold coin of the United States...of or equal to the standard of weight and fineness existing on February 1, 1930." There were 23.22 grains of fine metal in a gold dollar (25.8 grains of gold, 0.9 fine, so that 0.9 x 25.8 = 23.22). By February 1, 1934 and after the gold seizure, Congress devalued the gold dollar *it had seized* to 13.714286 grains of fine metal (15 and 5/21 grains of gold, 0.9 fine.) Norman demanded an amount of legal-tender paper currency equivalent to the *pre-seizure weight of gold*. To get his $22.50 *in gold* equivalent at the new gold rate set by Congress, he needed (23.22/13.714286) x $22.50 = $38.095 or a $38.10 paper money payment.[233] We see later that he should have demanded even more if he had taken into account a proper regulation of the gold dollar.

The trial court held against him and the Supreme Court affirmed that ruling by a 5-4 vote. He was to get only $22.50. This is obviously an injustice. We will examine the Court's faulty statements concerning money. But Norman also ruined his own case by not attacking the gold seizure itself as unconstitutional, or by not attacking the combination of seizure plus devaluation as an unconstitutional taking.

Hughes wrote for the majority:

> "1. A bond for the future payment of a stated number of dollars in gold coin of the United States 'of or equivalent to the standard of weight and fineness existing' on the date of the bond, or for payment in gold coin of the United States 'of the standard of weight and fineness prevailing' on the date of the bond, is not a contract for payment in gold coin as a commodity, or in bullion (cf. Bronson v. Rodes, 7 Wall. at p. 74 U. S. 250), but is a contract for payment in money. Pp. 94 U. S. 298-302.
>
> 2. Such 'gold clauses' are intended to afford a definite standard or measure of

[233]If he were paid $22.50 in paper with a value of 13.714286 grains per dollar in gold, he'd be getting the equivalent of 308.6 grains of gold, whereas he was owed 22.50 x 23.22 grains = 522.45 grains of gold. To get the equivalent of 522.45 grains of gold, he required 38.095 x 13.714286 = 522.45 grains.

> value, and thus to protect against depreciation of the currency and discharge of the obligations by payment of a lesser value than that prescribed. P. 294 U. S. 302.

Hughes wants us to believe that since the contract was for money, it wasn't for gold. His assertion assumes that a payment in gold cannot simultaneously be a payment in money. But a payment *can* have both properties if gold is money or money is gold. So Hughes is on shaky ground to begin with.

He could only hold his view if the dollars mentioned were not *gold* dollars or dollars to be measured in gold, which is *what the contract reads*, by invoking the idea that dollars are an *abstract* or *nominal* thing that is determined by Congress by law.

His next paragraph correctly states that the gold clauses are meant to provide a definite measure of value by weight of gold, but his position is that Congressional power to say what a dollar is overrides any such clauses. To Hughes, the dollar is a creature of law. It is what Congress says it is. This is fallacious. Earlier parts of this series have shown again and again that the dollar pre-existed the Constitution, that it is a specific weight of fine silver, that the Constitution used the term dollar with the framers already knowing what it meant, that the Founding Fathers said what the dollar was and embodied it in a number of coinage acts, and that accurate knowledge of what a constitutional dollar was persisted among legislators for decades. Hence, Hughes' theory that a constitutional dollar is what Congress says it is could not be more wrong.

Hughes cites *Bronson v. Rodes* (1868) at page 74 to support his contention. That reference says the *opposite* of what Hughes contends. We will delve into this case a bit. During the Civil War, Congress *did* make something else into legal tender, namely, United States Notes. This gave rise to two different dollars with two different values. This gave rise to the question of whether a contract payable in dollars was for gold or notes. Such a case came up in *Bronson v. Rodes*. Let's examine what was said there.

The 1868 Court in *Bronson* reviewed the various coinage acts. Gold and silver coins were a constitutional legal tender, so that the U.S. mint was careful in lowering the deviations from true weight. In 1849,

> "In single coins, the greatest deviation tolerated in the gold coins was half a grain...With these and other precautions against the emission of any piece inferior in weight or purity to the prescribed standard, it was thought safe to make the gold and silver coins of the United States legal tender in all payments according to their nominal or declared values."

Notice that the United States did not arbitrarily select anything it wanted as a legal tender. It did not "make" the coins a legal tender in the sense of *initiating* them as legal tender. That was already done in the Constitution. It was *assuring* that its gold and silver coins were an honest legal tender. It was *conforming* to a standard set years earlier.

The Court in *Bronson* then explained where coin value comes from, namely, weight and purity of metal, and that the government's role is *certification* of that value by certifying weight and purity:

> "The design of all this minuteness and strictness in the regulation of coinage is easily seen. It indicates the intention of the legislature to give a sure guaranty to the people that the coins made current in payments contain the precise weight of gold or silver of the precise degree of purity declared by the statute. It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them."

The Court went on to say what a *dollar* means and what its relation to legal tender was:

> "The propositions just stated are believed to be incontestable. If they are so in fact, the inquiry concerning the legal import of the phrase 'dollars payable in gold and silver coin, lawful money of the United States,' may be answered without much difficulty. Every such dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint of the United States, and therefore declared to be legal tender in payments. Any number of such dollars is the number of grains of standard gold or silver in one dollar multiplied by the given number."

This passage contradicts Hughes' idea that gold is not money, or that money is not gold, or that the dollar is not gold or silver, or that the dollar is an abstract unit declared by Congress. Ten dollars that are payable in silver coin mean a specific quantity of silver metal. How much? Ten times the amount of silver in a single standard dollar, which has 371.25 grains of pure silver. The word **"therefore**" is important in this passage. It is because a coin has been correctly certified as of a certain metal content, that therefore it can be declared a legal tender. The aim is honest

weight of the dollar. It is not to *make* or *create* something into legal tender.

Hughes misinterpreted *Bronson v. Rodes* for his own purposes in another way. He *had* to argue against this earlier decision because it went against the *Norman* decision. Hughes attempted to make it seem that the Court in *Bronson* supported or should have supported his notion that a contract was for money, not gold. Hughes wrote

> "With respect to the interpretation of the clauses then under consideration, the Court observed, in *Bronson v. Rodes, supra,* p. 74 U. S. 250, that 'a contract to pay a certain number of dollars in gold or silver coins is therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight.'

The above is an accurate quote that does not support Hughes, since it says that a contract to pay dollars is a contract to pay in gold or silver coin. He then added that the Court in *Bronson* didn't need to say what it did and relied instead upon the idea that a contract to pay coin is a contract to pay money and not gold:

> "The Court thought that it was not distinguishable, in principle, 'from a contract to deliver an equal weight of bullion of equal fineness.' That observation was not necessary to the final conclusion. The decision went upon the assumption
>
> "'that engagements to pay coined dollars may be regarded as ordinary contracts to pay money, rather than as contracts to deliver certain weights of standard gold.'"

The immediately preceding quote is from *Bronson*. It is what Hughes is attempting to use to suggest support for his case, but one must read all of what the Court in *Bronson* wrote to discover that Hughes took it out of context and mangled its meaning. The Court in *Bronson never regarded* contracts as contracts to pay money rather than contracts to pay gold. It entertained that assumption *for the sake of argument*:

> "Nor do we think it necessary now to examine the question whether the clauses of the currency acts, making the United States notes a legal tender, are warranted by the Constitution.
>
> "But we will proceed to inquire whether, upon the assumption that those clauses are so warranted, and upon the further assumption that engagements to pay coined dollars may be regarded as ordinary contracts to pay money rather

> than as contracts to deliver certain weights of standard gold, it can be maintained that a contract to pay coined money may be satisfied by a tender of United States notes.
>
> "Is this a performance of the contract within the true intent of the acts?"

Having entertained that assumption and explored where it led, the Court in *Bronson* ended up concluding the very *opposite* of what Hughes in *Norman* concluded, namely, that contracts to pay in coin can only be satisfied by payment in coin, and not by something else that Congress has called legal tender:

> "But we need not pursue the subject further. It seems to us clear beyond controversy that the act must receive the reasonable construction, not only warranted but required by the comparison of its provisions with the provisions of other acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars. They are not *'debts'* which may be satisfied by the tender of United States notes."

Another case in 1870 also concluded that contracts to pay in specie had to be paid in specie. That case was *Trebilcock v. Wilson*. Hughes also had to argue against this earlier precedent. He again managed to find a sentence that he could use out of context. Hughes wrote

> "The case of *Trebilcock v. Wilson, supra,* was decided shortly after the Legal Tender Acts had been held valid. The Court again concluded (pp. 79 U. S. 695-696) that those acts applied only to debts which were payable in money generally, and that there were, 'according to that decision, two kinds of money, essentially different in their nature but equally lawful.' In that view, said the Court, 'contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement.'

Hughes wants us to believe that a contract payable in gold can be paid in any legal tender money. This is not at all what Justice Fields in *Trebilcock* was saying. It is the *opposite* of what Fields ruled. The quotation means only that a contract payable in gold is just as enforceable as a contract payable in legal tender notes, or if the contract stipulates either one, then it is payable in either one. After saying this, Fields went on to mention that different contracts had different stipulations:

> "The act of 1862 itself distinguishes between the two kinds of dollars in

> providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. It is obvious that the requirement of coin for duties could not be complied with by the importer, nor could his necessities for the purchase of goods in a foreign market be answered, if his contracts for coin could not be specifically enforced, but could be satisfied by an offer to pay its nominal equivalent in note dollars."

Fields provided example after example of contractual distinctions between coin dollars and note dollars. For example,

> "The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognized in its fiscal affairs the distinction in value between paper currency and coin. Some of its loans are made payable specifically in coin, whilst others are payable generally in lawful money."

In this case, a debtor attempted to pay off his mortgage in legal tender notes. The creditor demanded the gold that had been stipulated. The lower court ruled for the debtor. The Court in *Trebilcock* reversed the lower court's ruling. The debt had to be paid in gold. This was consistent with the finding in *Bronson*:

> "...when, by the creation of a paper currency, another kind of money, expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in *Bronson v. Rhodes,* to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought."

In no way was Hughes able legitimately to cite *Bronson* or *Trebilcock* in favor of his position that a contract calling for gold could be paid off in some other legal tender currency.

Having made these inapposite citations, Hughes put forth his main argument. Based on the *Legal Tender Cases* (1870) and *Veazie Bank v. Fenno* (1869), he argued that Congress has the power to provide a secure, sound, and national currency. If the gold clauses interfered with this power, they were subject to limitation. Here he cited *Ling Su Fan*:

> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are

> due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange."

This fancy rhetoric covers up what the Court in *Ling* was saying. In plain English, the first sentence asserts that Congress (via control of public policy) has power to abrogate contracts in gold because gold is a legal tender and a medium of exchange. The second sentence says that when Congress certifies a coin's weight and fineness, it gains a general power over that currency (it can impose limitations.) The third sentence says that the sovereign power (U.S. government) fixes the value of the coins it certifies as to weight and authorizes their use in exchange.

This is all historical, economic, and constitutional nonsense. Market exchanges give rise to the value of gold and silver that is termed "intrinsic value." Government certification *of* that value can only occur because that value exists in the first place. The government doesn't fix the value. The market does. The government doesn't authorize the use of coins in exchange. No sovereign power did that in America. People imported and used coins as they saw fit. The certification that a particular coin is suitable in weight and fineness to be what a dollar is supposed to be in no way empowers Congress to abrogate contracts written in terms of gold. The latter doesn't follow from the former.

Nevertheless, the Court, saying that Congress has these powers, ploughed on. It pointed out the many instances in which private contracts were overridden because they checked or hampered a Congressional power. It then argued that the gold clauses hampered the powers of Congress over money:

> "The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority, they cannot stand."

The powers of Congress in the monetary sphere are very limited, which is what Vieira's book is mainly about. The only government-sanctioned currency consists of gold and silver coin. Removing all the gold from circulation and from private ownership is certainly not coining Money from bullion brought to the mint or regulating coin values. The Constitution has no provisions empowering Congress to establish a monetary system of National Banks or a Federal Reserve System.

Nevertheless, the Court, saying that Congress had broad powers over the monetary system, asserted that gold clauses interfered with these powers so much so as to justify their nullification. Hughes echoed the Congressional statements to this effect, supinely accepting its judgment.[234] For example, a Committee report claimed without proof that "These gold clauses render ineffective the power of the Government to create a currency and determine the value thereof." Given the powers of the Federal Reserve, this statement is inexplicable. And how was the government creating a currency by withdrawing all gold from circulation?[235] If individuals contract to pay and be paid in gold, that does not interfere with the constitutional powers to coin Money and regulate the value of coins. Vieira (p. 1177) wonders "How calculating the value of private contracts in any monetary (or, for that matter, other) standard could interfere with the exercise of any Congressional power passes understanding, and certainly was not explained in the *Gold Clause Cases*."

Hughes' reading of the case was that *Norman* came down to a single point: "That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy." If monetary policy is the power to coin Money and regulate coin values, it is questionable whether any private contracts on the form of money can be said to regulate the value of the coinage. They *accept* the values Congress has decided.

Did gold clauses actually interfere with Congressional monetary powers? If they did, then why was it that the government's own Treasury Notes promised to pay in gold or silver or their equivalent up until 1933? This fact (p. 1177) "should conclusively have estopped Congress, at least morally, from asserting in the Joint Resolution the preposterous canard that gold clauses in public and private obligations then extant were 'interfering' with exercises of its monetary powers."

If we accept the premise that gold clauses interfere, the Court's own precedent (see

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[234]Chapter IX has criticized those statements.

[235]My belief is that the Congressional and Supreme Court verbiage is window dressing. After Roosevelt ordered the delivery of gold in his order of April 5, 1933, the gold clauses were a remaining nuisance that needed to be taken care of. The debtors were unable to pay their obligations in gold because holding gold had become illegal. The creditors wanted to be paid in gold. The legal status of these payments was ambiguous. This was a problem. Congress was forced to decide what to do about these clauses because the face value and interest payments on these debts were a large number ($75 billion.) The clauses didn't obstruct any Congressional money policy, including the seizure. They were a loose end.

*Addyston Pipe & Steel Co. v. United States* (1899)), in the analogous case of interference with a regulation of commerce, is that Congress

> "may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce."

Gold clauses were used for a long period for innocent purposes with nary a word of Congressional disapproval. They were not invented directly to interfere with Congressional monetary policy. It was not even clear that they had a substantial effect on that policy. Hughes accused the gold clauses of aiding hoarding and capital flight:

> "...two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country."

Hoarding meant holding. Whether or not banks needed gold, paying private obligations that call for gold requires holding some gold. There is no good reason why the bank or the government should be allowed to take gold for their own purposes while abrogating the right of others to hold some gold in order to make payments. And it actually requires very little holding of gold, since a debtor draws on an account such as a bank account to pay a creditor, who then redeposits gold in some form in his own account, usually at a bank. Gold clauses don't even induce hoarding. They transfer gold from one account to another.

As for capital flight, the facts are otherwise. According to Friedman and Schwartz (p. 360), "the U.S. gold stock rose during the first two years of the contraction and did not decline..."[236] The Fed seemed to be causing a problem by more than counteracting the gold inflows: "We did not permit the inflow of gold to expand the U.S. money stock. We not only sterilized it, we went much further. Our money stock moved perversely, going down as the gold stock went up." George Harrison, who was the Fed governor, acknowledged this in mid-1931 in the minutes of a Fed meeting: "The evils to the world of continued gold sterilization...are so great as to make desirable a careful scrutiny of Federal reserve open market policy." After Britain's departure from the

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[236]Milton Friedman & Anna J. Schwartz, *A Monetary History of the United States, 1857-1960* (1963).

gold standard in September, 1931, gold flowed out of the U.S., but the Fed had ample free gold. Concern over gold "centered not in the Federal Reserve System but in the White House and Treasury." "The problem of free gold was largely an ex post justification for policies followed, not an ex ante reason for them."

The government, not the Fed, was raising needless fears about a shortage of gold in the system when there was no such shortage. In one brief, the government worried that

> "...the gold clause is not merely inconsistent with the parity and legal-tender provisions. It is a serious obstruction to their maintenance...While this tendency to disparity may be met through redemption of currency in specie, and undue strain is put upon the system of redemption, which may ultimately break down completely."

The Court should have been looking at the facts instead of parroting the rationalizations of Congress and absorbing hypothetical fears. It would not have found constitutional or other reason to abrogate gold clauses. It would not even have found reason for the gold seizure. It may have found reason to criticize Federal Reserve policies that were sterilizing gold inflows, except that the Fed seems to have been immune from effective criticism or control.[237]

Once Norman did not contest the gold seizure and once he again and again said that he'd accept a legal tender equivalent of the gold owed him, he lost his case. If Norman did not protest the gold seizure, then he contractually accepted a substitute. If the contract could not be paid in gold, then it could legally be paid in an equivalent. That equivalent was silver dollars. If gold had been properly regulated, he was entitled to far more than 22.5 silver dollars, but he didn't protest the unconstitutional lack of regulation either. He had no legal grounds for claiming damages.

If Norman had claimed payment at the properly regulated gold dollar of 1930, as the bond indenture said, he would have claimed 75.63 silver dollars, in the absence of

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[237]Judging from the fact that the Treasury wrested control over the money supply from the Fed and proceeded to inflate, the entire gold seizure episode can be interpreted as the effort of one arm of the government to gain control over monetary policy from another arm, the Fed, whose policies the Treasury regarded as too deflationary. Congress obediently followed the lead of Roosevelt and the Treasury. The Supreme Court, caught in the middle, sided with the government and rubber-stamped the legislation.

gold, as the silver to gold market exchange rate averaged 53.74 in 1930.[238] If he claimed payment at the parity rate of 1934, which was 72.49, assuming no absence of gold because the seizure was unconstitutional, then he would have claimed 102.01 silver dollars, assuming also that Roosevelt's devaluation was unconstitutional. At the 1934 rate and assuming Roosevelt's devaluation was constitutional, he would have received 60.23 silver dollars.[239]

Norman's lawyers apparently understood neither the importance for his case of protesting the gold seizure nor the proper regulation of value. Otherwise they would have demanded much more than $38.10 in alternative currency. The same failings afflicted Nortz and Perry. Norman failed to put any constitutional issue into question. Norman accepted the gold seizure, so that his case rested on the devaluation being unconstitutional. He asked only for recovery back to the improperly regulated 1930 rate, getting him less value than he would have gotten had he received gold. He should have also used the market rates of exchange to argue that the devaluation rate was improper.

Nonetheless, the Court did badly. Vieira's conclusion:

> "All in all, then, Chief Justice Hughes's opinion in *Norman* added essentially nothing but blunders to the *corpus* of the constitutional law of money. It uncritically repeated the numerous and manifest errors of *Knox*, *Juilliard*, and *Ling Su Fan*...It assumed – without support in history, precedent, or reason – that Congress enjoys the authority to seize privately held gold and to debase gold coinage without any reference to the free-market exchange rate between silver and gold...It concluded, without the benefit of any economic evidence, and contrary to all history and pronouncements of the Supreme Court on the subject, that private gold clauses 'interfere' with the exercise of Congress's monetary powers. And it purported to decide the constitutionality of Congressional abrogation of those clauses when the complainants' cases exhibited fatal defects of pleading, and no real attempts at proof of the material facts. In short, it was a disgraceful abdication of judicial responsibility with perhaps no equal yet in the dark chronicles of the Supreme Court's systematic deconstruction of WE THE PEOPLE'S Constitution."

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[238]22.5 x 23.22 x 53.74/371.25 = 75.63.

[239]The two calculations are 22.5 x 23.22 x 72.49/371.25 = 102.01, and 22.5 x 13.71 x 72.49/371.25 = 60.23.

## Nortz and Perry Cases

*"Nortz v. United States* added no more than *Norman* to the stock of sound legal principles in the monetary field," Vieira informs us (p. 1186). The plaintiff, as in *Norman*, did not contest the gold seizure. This was a fatal error. Given that the gold seizure was constitutional, Hughes was able to argue that even if Nortz had been paid in gold coin, he would have been no better off than being paid in legal tender currency, because he would have been required to deliver the gold coin to the Treasury and been paid with currency at the then-prevailing parity.

Nortz's best argument was that his gold certificates were warehouse receipts for gold, but Hughes disposed of that argument with specious judicial judgment.[240] Vieira (p. 1190):

> "...so intent was the Court on defeating Nortz's claim that it transparently falsified the nature of gold certificates as 'currency' to the exclusion of 'warehouse receipts' – although nothing precluded 'warehouse receipts' from also functioning as 'currency' and *vice versa* – in order doubly to deny that Nortz was ever entitled to receive actual gold."

The Court ruled in the *Perry* case that the Joint Resolution of 1933 didn't apply to obligations of the United States, meaning that Congress could not nullify the gold clauses in U.S. obligations. But

> "The fact that the Government's repudiation of the gold clause of the bond is unconstitutional does not entitle the plaintiff to recover more than the loss he has actually suffered, and of which he may rightfully complain."

As in *Norman* and *Nortz*, the plaintiff could be paid in silver dollars or a currency equivalent, but since he had not argued against the gold seizure and failed to show his damages due to improper regulation of value, he had to accept the face value of his claim, which was $10,000. He held a $10,000 bond payable in gold. He reckoned he should receive $16,931.25.[241] Actually, he was entitled to a great deal more than that

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[240]I've discussed the specious reasoning of Hughes regarding gold certificates and warehouse receipts in *Nortz* in Chapter VII.

[241]For each dollar of debt, he expected 23.22 grains of gold. The devaluation changed that to 13.714286 grains of gold. Then 23.22/13.714286 = 1.693125. Perry accepted both the gold seizure and the constitutionality of the devaluation.

if the gold dollar had been properly regulated, which means his loss to the government was even larger than he and his lawyers thought. For each dollar, he should have gotten 23.22 x 72.49/371.25 = $4.53392. For $10,000, he should have made a case for $45,339.20.

The Court ruled that private contracts in gold could be abrogated but the government's contracts could not.[242] This makes no sense. If private debtors are treating their creditors fairly, according to the Court in *Norman* and *Nortz*, by paying them legal-tender paper that is supposedly at parity, then the government is treating its creditors fairly by paying them in the same paper. By flawed logic and/or the lack of it, however, Hughes reached a different conclusion.

Justice Field's dissent in *Knox v. Lee* (1870) reasoned the matter out logically. If Congress has the power to create a paper money legal tender, which is acceptable for all debts public and private, as the 1870 Court ruled, then it has the power to replace gold coin payments in the government's debts; and that will be consistent with the Constitution.[243]

> "What I have heretofore said respecting the power of Congress to make the notes of the United States a legal tender in payment of debts contracted previous to the act of 1862 and to interfere with contracts has had reference to debts and contracts between citizens. But the same power which is asserted over these matters is also asserted with reference to previous debts owing by the government, and must equally apply to contracts between the government and the citizen. The act of 1862 declares that the notes issued shall be a legal tender in payment of all debts, public and private, with the exception of duties on imports and interest on the public debt. If they are a legal tender for antecedent private debts, they are also a legal tender for such debts owing by the United States, except in the cases mentioned. That any exception was made was a mere matter of legislative discretion...The power to make the notes of the United States the legal equivalent to gold and silver necessarily includes the power to cancel with them specific contracts for gold as well as money contracts generally. Before the passage of the act of 1862, there was no legal money

[242]It appears that the Court fashioned the ruling to suit the situation the government faced. The government would damage its ability to sell its debt if it repudiated the promised payments.

[243]Hence, to avoid the conclusion that Congress can borrow and then repudiate its debts by substitute payments, it must be the case that Congress doesn't have the power to issue legal-tender paper promises as the Court had supposed.

except that which consisted of metallic coins, struck or regulated by the authority of Congress. Dollars then meant, as already said, certain pieces of gold or silver, certified to be of a prescribed weight and purity by their form and impress received at the mint. The designation of dollars in previous contracts meant gold or silver dollars as plainly as if those metals were specifically named.

"It follows, then, logically from the doctrine advanced by the majority of the Court as to the power of Congress over the subject of legal tender that Congress may borrow gold coin upon a pledge of the public faith to repay gold at the maturity of its obligations, and yet, in direct disregard of its pledge, in open violation of faith, may compel the lender to take in place of the gold stipulated its own promises, and that legislation of this character would not be in violation of the Constitution, but in harmony with its letter and spirit."

Hughes got off on the wrong foot immediately when he began

"There is no question as to the power of the Congress to regulate the value of money -- that is, to establish a monetary system, and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States."

We are at a point in these discussions of history where error is piling upon error, so that while we are explaining a later error, we also are letting pass an earlier error. In this case, what Hughes means by regulating the value of money, which is establishing a monetary system and determining the currency of the country, is wildly at variance with the constitutional meaning. We will let that pass, having explained its problems before. The new error here occurs when he predicates his logic concerning legal tender and obligations to be paid in legal-tender paper on the power to regulate value. *Knox v. Lee* did not make legal tender paper constitutional based on that enumerated power. It was based on the enumerated power to borrow (even if wrongly based):

"The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the

> coinage acts, or to multiples thereof..."
>
> "This power is entirely distinct from that of coining money and regulating the value thereof. It is not only embraced in the power to make all necessary auxiliary laws, but it is incidental to the power of borrowing money...It is a pledge of the national credit."

Therefore, the contradiction that Hughes concocted, in order to justify his position, between the power to regulate money and the power to borrow *does not exist.*

There was a single dissent for all the *Gold Clause Cases*, written by Justice McReynolds for himself and three of his Brethren. We extract some of his pointed comments.

> "Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both.
>
> "The fundamental problem now presented is whether recent statutes passed by Congress in respect of money and credits were designed to attain a legitimate end. Or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts, and drive into the Treasury all gold within the country is exchange for inconvertible promises to pay, of much less value.
>
> "Considering all the circumstances, we must conclude they show that the plan disclosed is of the latter description, and its enforcement would deprive the parties before us of their rights under the Constitution. Consequently the Court should do what it can to afford adequate relief.
>
> "The end or objective of the Joint Resolution was not 'legitimate.' The real purpose was not 'to assure uniform value to the coins and currencies of the United States,' but to destroy certain valuable contract rights...Our currency was passing at a material discount; all gold had been sequestrated; none was attainable. The resolution made no provision for restoring parity with the old standard; it established no new one.
>
> "This resolution was not appropriate for carrying into effect any power entrusted to Congress. The gold clauses in no substantial way interfered with the power of coining money or regulating its value or providing an uniform

> currency...The Court must be able to see the appropriateness of the thing done before it can be permitted to destroy lawful agreements. The purpose of a statute is not determined by mere recitals -- certainly they are not conclusive evidence of the facts stated.
>
> "This statute does not 'work harm and loss to individuals indirectly,' it destroys directly. Such interference violates the Fifth Amendment; there is no provision for compensation. If the destruction is said to be for the public benefit, proper compensation is essential; if for private benefit, the due process clause bars the way.
>
> "Congress brought about the conditions in respect of gold which existed when the obligation matured. Having made payment in this metal impossible, the government cannot defend by saying that, if the obligation had been met, the creditor could not have retained the gold; consequently he suffered no damage because of the nondelivery."

Congress reacted to the *Perry* decision on August 27, 1935 with Joint Resolution 348. This resolution said that the United States could not be sued for any claims relating to gold clauses, any coin or currency of the United States, any gold or silver seizure, and any change in the metal content of the dollar or any other regulation of the value of money.

### Collapse of the Statutory "Gold Standard"

By the end of January, 1934, Congress had delegated to the President sweeping powers over gold and silver dollars. He could by proclamation fix the weight of gold and silver and gold and silver dollars. He could provide for their unlimited coinage. He could enter agreements with any foreign government or governments to fix the ratio between gold and any other currency issued by the United States. He could fix the weight of the gold dollar in accordance with such agreement and make it the standard unit of value. The Secretary of the Treasury could then maintain all other currencies at a parity with such a gold dollar. The President could reduce the weight of gold in the gold dollar by at least 50 percent and no more than 60 percent. He had these powers for two years unless he declared that the emergency continued.

As matters turned out, Congress extended the President's powers several times up until June 30, 1943. At that point, the statutory gold dollar had 13.714286 troy grains of fine metal. Since there are 480 grains per ounce, that made a price of 480/13.71 dollars per ounce or $35 per ounce.

On July 31, 1945, Congress approved the Bretton Woods Agreement Act. As part of that agreement, the "par value" of the "gold dollar" was set at the same 13.71 grains of fine metal. Since the U.S. was still on a constitutional silver standard, and the exchange rate between silver and gold was 77.67, the correctly regulated gold dollar should have been 4.78 grains of fine metal (371.25/77.67 = 4.78). Ordinarily, the result of making the gold dollar too heavy would be that gold dollars would not be used in everyday circulation. This didn't matter in the U.S. because gold was illegal anyway.

In 1972, Congress passed the Par Value Modification Act. This created a gold dollar equal to 1/38 ounce of gold. This was 12.63 grains. This devalued the dollar by 7.88 percent from 13.71 grains. The gold price was at that point 34.67 times the silver price, which would have given a gold dollar with 10.71 grains of gold. This Act merely ratified what the President had already agreed to in the Smithsonian agreement of December 18, 1971. Any semblance of constitutional action had long since disappeared.

Prior to this, on August 15, 1971, President Nixon had suspended the convertibility of Federal Reserve Notes into gold for purposes of international exchange. The value of 12.63 grains was to be used domestically whenever the Secretary of the Treasury issued any gold certificates to the Fed in exchange for gold.

In 1973, another devaluation occurred by amending the Par Value Modification Act. The gold dollar became 11.37 grains of fine gold ($42.22 an ounce.) The appropriate weight against silver would have been 9.72 grains at that time. Neither Congress nor the President bothered to regulate the gold dollar in terms of the silver standard. This devaluation was driven by the exchange rate on the dollar. A Senate Committee observed

> "The Committee believes that it is important that a reformed international monetary system calls for a diminished role for gold and eventual removal of gold from the center of the system."

Vieira writes

> "Thus in the years from 1900 to 1973, Congress had completely reversed course: In 1900, gold itself was 'Money', and the statutory standard of value, mandated by Congress. In 1973, gold was destined only for 'eventual removal...from the center of the system' altogether, and its 'Value' (in terms of nominal 'dollars') whatever the President might 'declare' as a result of his reading of the international economy and maneuvering among foreign nations."

In 1976, Congress repealed that part of the Par Value Modification Act that set the par value of gold at $42.22 an ounce. It retained that specific figure only for the domestic bookkeeping purposes of the gold certificates. The current regulations may be found here, here, and here.

## Conclusion

America could not go from a small and limited role of government to a large and unlimited role of government without overcoming the restraints placed upon government growth by its Constitution. At present, the political economy is heavily controlled, influenced, affected, directed, and manipulated by government. We expect to find that all three branches of the federal government have invented a new "Constitution" from the original as a way of justifying the new order. Since we are a society of laws, they have had to absorb the unchanging language of the Constitution and change its meaning in order to rationalize unconstitutional laws that conform with the new ideas, new theories, new power relations, and new political economy that has step by step replaced the old one. Amendments such as the sixteenth and seventeeth have also played an important part.

Monetary policy and the monetary system are a part of that transformation. They are an important part. The three branches of government have all had effectively to rewrite the Constitution without actually changing its words. They accomplished this by spinning new interpretations that obliterated the original meanings. This sidestepped the more difficult task of amending the Constitution.

Government officials in all branches now routinely act and speak as if the power "To coin Money, regulate the Value thereof, and of foreign Coin,..." gives them constitutional powers over money that are diametrically opposed to the conceptions embodied in the Constitution's original meaning. The Supreme Court has aided and abetted the decimation of constitutional meaning. The Court has played a critical part in approving unconstitutional actions of Congress and the Executive.

This chapter completed the story of the removal of gold from the monetary system by looking at the court cases surrounding that removal. At a minimum, the Court provided no resistance to the onslaught of unconstitutional actions emanating from the rest of the government. At a maximum, its own behavior was disgraceful, dishonest, and cowardly, as it abdicated standards of justice. It turned away the case of Frederick Barber Campbell, and in so doing stopped judicial consideration of Roosevelt's and the Congress's gold seizure. His cases raised many legitimate constitutional issues. Instead of airing them, the Court buried them. The Court accepted a series of very

weak cases concerning gold clauses. The plaintiffs failed to raise the central constitutional issues. These served the Court's purposes as a platform for them to keep intact the government's gold policies and to articulate and perpetuate doctrines in support of irredeemable fiat money.

Certain Supreme Court dissents make for refreshing reading. It almost seems at times that the Justices are more willing to speak the truth boldly when they are on the losing side. Reading majority opinions that mangle the Constitution is not very enjoyable. The argumentative methods of lawyers can be a wonderful tool, but it is distressing to see how low Justices can stoop in justifying their groundless assertions with bombast, hand-waving, inappropriate citations, repetition of false doctrines, generalities, *ipse dixits*, question-begging, taking passages out of context, etc. To underscore this, I will close by quoting a typical highly critical description by Vieira of the Court's behavior:

> "Notwithstanding Norman's failure to plead and prove (or, apparently, even to understand) his case properly, the *Norman* majority dilated at length concerning the supposed monetary powers of Congress, its license to invalidate private contracts that allegedly interfered with exercises of its authority, and how private gold clauses supposedly endangered the nation's monetary system.
>
> "First, Chief Justice Hughes reiterated various vapid generalities from *Knox v. Lee* and *Juilliard v. Greenman* (among other inapposite cases), including the ridiculous misinterpretation of the Coinage Act of 1834 and the equally groundless 'aggregate-powers' doctrine first enunciated in those opinions. Hughes justified the government's supposed power to abrogate private gold clauses on the basis of the 'aggregate' of the powers to tax, borrow, regulate commerce, coin money, fix the standard of weights and measures, and enact all laws 'necessary and proper' to the execution of those powers. As did Justices Strong, Bradley, and Gray in *Knox* and *Juilliard*, however, Hughes refrained from explaining precisely how a purported power not clearly within the scope of various admitted powers falls within the ambit of their 'aggregate'. Apparently, he implicitly relied on the idea that 'the whole is greater than the sum of its parts; – a notion self-evidently contradictory of the basic premiss of constitutionalism that the government has only such powers as the Constitution grants.
>
> "Moreover, Hughes added a new, and startingly totalitarian, monetary conception (or, more fittingly, deception) drawn from *Ling Su Fan v. United States*."

Vieira's basic view is that the Constitution's enumerated powers with respect to money and the monetary system provide for a sound hard-money system in which banking can be made to play a proper role. In such a system, the government does not attempt to or in fact control the political economy. His view is that it has taken considerable unconstitutional action and interpretation to create the unsound fiat-money system and government control of the political economy that we now have. His book documents the constitutional and monetary history by which the Constitution has been overcome in the monetary sphere. The removal of gold was a crucial step in this process that Vieira terms "the declension of the monetary system from bimetallism to fiat currency."

# CHAPTER XI

## Federal Reserve Notes Take Over

This chapter continues summarizing Edwin Vieira Jr.'s comprehensive work on the central constitutional aspects of the monetary system of the United States: *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* 2nd revised edition (2002). All page references to his book are in parentheses. This work is unauthorized by Dr. Vieira. Although it is offered as a summary, it cannot capture the depth, detail, emphases, approach, and spirit of Vieira's original work. My style and approach are considerably different from his. He is a lawyer. I am not. I do introduce my own materials at times. Hopefully, this work will prove useful both to those who have never read the original or who may not have access to it, as well as to those who have read it. Although I read Vieira's entire work once through before starting this summary, I have basically proceeded by starting at the beginning and working forward, making available each part as it was completed. This means I may have misunderstood or not fully grasped or explained various ideas that became clearer with further reading. I hope that this has been kept to a minimum. So far I am not aware of any fatal errors of misinterpretation arising from this procedure. Still, the series may be regarded as a first draft, subject to revision. All errors are mine and not Dr. Vieira's.

This part covers Chapters 6, 7, and 8 of Book Two (pp. 1241-1400). That leaves us with about another 263 pages to go. The topics in this part are the removal of silver from the monetary system, the partial reintroduction of gold and silver, and litigation on the monetary powers and disabilities in the years 1968-1992 or so. The law, including constitutional law, is not always as easy to pin down as we might like or as we might anticipate or as we might be used to from other fields of endeavor. The added exposure through the materials in this chapter may help clarify some ambiguities concerning the Constitution and money.

### The Removal of Silver from The System

On Dec. 21, 1933, Roosevelt opened the mint to coinage of standard silver dollars from silver bullion mined in the United States. However, the coinage charges were 50 percent of the silver delivered! This was a far cry from the free coinage legislated in the Coinage Act of 1792. The silver dollar remained at its constitutional 371.25 grains of fine metal.

On June 19, 1934, Congress passed the Silver Purchase Act of 1934. The objective of

the Act was "that the proportion of silver to gold in the monetary stocks of the United States should be increased, with the ultimate objective of having and maintaining, one fourth of the monetary value of such stocks in silver."

The Act authorized the Secretary of the Treasury to purchase silver at his discretion at no more than the market price and at a maximum price of 50 cents a fine ounce.[244] The Secretary was also authorized and directed to issue silver certificates of the same amount as silver purchased and to maintain the silver as security for the certificates. The certificates were made legal tender and redeemable upon demand in silver dollars.

The Secretary of the Treasury was also given complete control over the silver market if "in his judgment" he needed to use it to "effectuate the policy of this Act." This included authority, with the President's approval, "to investigate, regulate, or prohibit, by means of licenses or otherwise, the acquisition, importation, exportation, or transportation of silver..." Whatever regulations, rules, licenses, or orders he promulgated had to be followed at risk of a fine of $10,000 or ten years in prison (maxima) or both.

This was not all. The President was given authority in his judgment to "require the delivery to the United States mints of any and all silver by whomever owned or possessed." It was either to be coined into silver dollars or kept as inventory as he saw fit. He was to pay for it with silver dollars, or any other currency of his choice minus whatever mint charges that the Secretary of the Treasury set with the President's approval, provided that he paid no less than the fair market value for the bullion. Any silver withheld "shall be forfeited to the United States" (complete loss without compensation), and any person failing to comply was subject "to a penalty equal to twice the monetary value of the silver" in question.

This Act, which gave the Executive the powers of a dictator over the silver market, relied neither on emergency nor war as a pretext, not that those would have justified it. Put into action, it meant that the government could seize all the silver bullion in private hands.

All of these measures assured that the government would realize seigniorage profits. They are the difference between the cost of the silver bullion and the value of the dollars minted. With free coinage, any such profits go to the producers; however, competition tends to reduce them to a competitive rate of return.

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[244]The market price of silver bullion was about 50 cents an ounce at that time.

By 1934, the United States government had expanded its control over the monetary system to the point where many layers of unconstitutional actions were present, with origins at various times in the past, often the distant past. The controversies surrounding these origins had died down and been suppressed. Histories treated them as quaint concerns that had once roiled the waters but that were now settled questions of law. In some sense, they were forgotten or at least not raised except by a few persistent people whose voices were ignored or trivialized or marginalized. These origins were not completely forgotten, however. Something of the opposite occurred. They were used to further solidify the anti-constitutional powers of government. Past cases were treated by each branch of government as respected events and precedents that established law that gave powers to the government. In this way, it became harder for persons living under the government even to recognize that their constitutional liberties had been infringed. Laws and powers that once occasioned grumbling and protest hardened into accepted practices. As a consequence, systems were operating unjustly, inefficiently, and often dysfunctionally, but few persons understood why this was the case. Few people knew what to do about it. The government had evolved a rival constitution based upon the unspoken (but sometimes almost spoken) rule that it declared the public good and that it had whatever power was required to do whatever it conceived to be in the public good. If this meant seizing all the gold and silver in the country and making people take paper in return that, in turn, was forced to be legal tender, then that, under this new dispensation, was said to be the law.

All of these statements apply to the present as well.

In terms of legal code, the government is no more than a congressional vote or a presidential proclamation away from dictatorial powers to seize unlimited amounts of the wealth of Americans. To see this, one may wish to read the existing code that regulates not only gold, silver, and currency but also *securities*. It allows for incredible powers over private property *during a time of war*. This is paper-thin protection against future seizures. The President can virtually declare war himself. He can use various acts of Congress to argue that war now exists, as in the war on terror. He can proclaim emergencies. Congress can alter the code to add in the condition of emergency. The roots of the existing code are the legislative acts and executive orders concerning the gold seizure in 1933. This is far from an academic subject.[245]

The silver measures of 1934 have the same kinds of unconstitutional features that we have seen previously for gold, some more deeply buried under layers than others. Since Vieira later devotes Book Three to the "unconstitutionality of America's contemporary

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[245]See here for a more recent essay by Vieira on this subject.

systems of money and banking," an exhaustive treatment is out of place at this point, but the list includes the following:

- Congress has no constitutional power to incorporate national banks,
- Congress has no constitutional power to issue paper money or bills of credit,
- Congress has no constitutional power to set up a banking system,
- Congress has no constitutional power to make paper money, its own or that of banks, into legal tender,
- Congress has no constitutional power to change the dollar,
- Congress has no constitutional power to make anything but gold and silver a legal tender,
- Congress has no constitutional power to cede to the Federal Reserve the power to issue notes that are obligations of the United States,
- Congress has no constitutional power to delegate its powers in an open-ended, standardless manner, to other branches of government or to an agent like the Federal Reserve,
- Congress has no constitutional power to delegate its monetary powers, to either private or governmental bodies,
- Congress has no constitutional power to seize the people's Money, i.e., gold and silver, and
- Congress has no constitutional power to seize the people's Money in exchange for paper money currency.

The Silver Purchase Act of 1934 called for the seizure of whatever silver the Secretary of the Treasury and the President felt like seizing at a price determined by them, since they could set the mintage charges. They could pay in any currency of the United States, which included Federal Reserve Notes (FRNs). This, like the gold seizure, was blatantly unconstitutional.[246] It is a deprivation of property without due process of law (Fifth Amendment), a taking for public use without just compensation (Fifth Amendment), and an unreasonable seizure (Fourth Amendment).

If the compensation for the metal taken is just, it merely gives a person one form of money of equivalent value to another form of money. In that case, what is the public

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[246]This taking can't be justified as an eminent domain procedure. Historically, that is for taking land by certain procedures that safeguard property rights and due process. These include a demonstrable public purpose for the taking, an attempt by government to negotiate a purchase at a fair price, a court action, a hearing at which the government and owner both respond, proceedings to establish a fair price, and an appeal procedure.

purpose of such a seizure?[247] On the other hand, if the person is made to receive a value lower than that being given up, then the compensation is unjust. Hence, seizing money as specie in return for money of another form is unjustifiable.

The delegation of power to the Executive to decide if the silver should be coined or not was unconstitutional, since Congress has the power to coin Money. The boundless and standardless delegations of power to the President and Secretary of the Treasury to act when necessary on their own judgment were unconstitutional. The formula for paying no more than 50 cents an ounce for the silver bullion was unconstitutional for two reasons. First, setting such compensation is a judicial, not a legislative, procedure. Second, if there had been free coinage, which there wasn't, the market price would not have been 50 cents an ounce, it would have been $1.2929 an ounce.[248] At 50 cents an ounce, it would cost 38.67 cents to buy enough bullion to coin into a dollar. The profit would be 0.6133 cents for each coin minted (1.00 - 0.3867). Under free coinage, people would buy up silver bullion and get it coined until this discrepancy was eliminated. The fact that the price was only 50 cents an ounce indicated that the government was not allowing free coinage. Since the government was not allowing free coinage, it was depressing the silver price. Hence, by offering 50 cents an ounce, it was not offering just compensation. It was offering a price that it had driven down and by which it would make all the seigniorage profits. If the government's aim had been only to increase the silver stocks as a percentage of all specie, it could simply have opened the mint to free and unlimited coinage.

The arithmetic we have just done was made crystal clear in the August 9, 1934 proclamation issued by Roosevelt in which he explicitly said that the United States would pay "the monetary value of the silver so delivered (that is, $1.2929+ a fine troy ounce), less a deduction of 61 8/25 percent thereof for seigniorage, brassage, coinage, and other mint charges..." The 61 and 8/25 = 0.6132, almost exactly what we calculated above.

On the same day, Roosevelt *required to be delivered* silver at the prices declared in the proclamation. This edict *excluded* a number of important categories of silver, such as coins, silver less than 0.8 fine, silver mined from natural deposits in the U.S., silver

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[247]Seizure of some metals for strategic purposes is conceivable, but gold and silver were not in that category; nor would that have called for seizing all the gold or silver, if that had been done.

[248]A silver dollar has 0.7734 ounces of pure silver, and at $1.2929 an ounce, it is worth one dollar.

held for business and artistic uses (not to exceed 500 ounces per person), foreign-owned silver, silver as jewelry and ornaments, and silver held under a license. It seems mainly to have reached for silver bullion bars.

By May 31, 1935, the government had acquired almost 400 million ounces of silver, of which 112.85 million ounces were under the nationalization order. Thereafter, the seigniorage charges were varied a few times between 40 and 50 percent. In 1938, Roosevelt ceased seizing and buying silver under the Silver Purchase Act of 1934; he kept intact his Dec. 21, 1933 proclamation.

In mid-1939 and into the 1940s, Congress opened the mint to coinage of silver mined from natural deposits in the U.S. It imposed a 45 per cent seigniorage charge. The Secretary of the Treasury was authorized to sell or lease silver for manufacturing purposes, but to maintain silver in an amount equal to the face value of all silver certificates outstanding. They remained effectively warehouse receipts to the metal they promised to pay. Federal Reserve Notes (FRNs) and silver certificates were both legal tender. The FRNs were redeemable in lawful money, which included silver certificates and silver dollars.

President John F. Kennedy brought about the end of silver as money in America. In a letter to Treasury Secretary Douglas Dillon, written in late 1961, he had "reached the decision that silver metal should gradually be withdrawn from our monetary reserves." His "new policy" was to provide "for the eventual demonetization of silver except for its use as subsidiary coinage." The one-dollar and two-dollar silver certificates were to be replaced by FRNs. Silver would be released from being warehoused for redemption.

Silver was going out, not with a bang, but with a whimper (p 1254): "...here was a President declaring an intent to repeal the Constitution and undo monetary history from Queen Anne's Proclamation of 1704, by stripping silver of its function as the nation's monetary unit and standard of value!"

Congress followed up by enacting the Silver Purchase Repeal Act of 1963. Step one in the changeover was to allow the Treasury to redeem silver certificates in silver bullion, not silver dollars. The Fed was authorized to issue irredeemable $1 and $2 notes. At the same time, the Treasury would retire $5 and $10 silver certificates and replace them with FRNs.

The Coinage Act of 1965 (Act of July 31, 1965) was the next step in demonetizing silver. Congress stopped minting silver dollars for five years. It started minting

fractional coins with a reduced or no silver content. These were clad coins with a base metal core. The clad half-dollar was debased by almost 62 percent. The clad quarters and dimes had no silver at all. Congress declared that all the coins and currencies of the United States, including FRNs, shall be complete legal tender. The "*1965 Act was the first in Anglo-American history in which an* ***explicitly debased coinage*** *received* ***full*** *statutory legal-tender power 'for all debts, public and private',* ***on a par with the constitutional standard of value itself***", (p. 1259).

Silver certificates still circulated, and one could exchange FRNs for silver certificates and then redeem them in silver dollars or silver bullion. That didn't last long. Congress, by the Silver Certificate Act of 1967, gave holders of silver certificates one year to redeem them in silver, after which time "they shall no longer be redeemable in silver but shall be redeemable from any moneys in the general fund of the Treasury not otherwise appropriated." June 24, 1968 was the date on which Congress by statute terminated the silver standard. America's money became a fiat money consisting of FRNs (irredeemable in specie) and clad coins. Irredeemable – every prior government paper money had at least promised to pay off in Money (gold and silver). That included Continental Currency, state bills of credit during the Revolutionary War, Greenbacks, and FRNs prior to 1968.

The Bank Holding Company Act of 1970 ended the debased half-dollar begun five years earlier and reintroduced a debased silver dollar known as the Eisenhower dollar. It repealed the section of the Coinage Act of 1878 that had authorized issuing standard silver dollars. Congress authorized the Treasury to offer to the public its remaining silver dollars. Congress no longer authorized the coining of constitutional Money, which is gold and silver, but money consisting of clad coins or slugs. Vieira writes (p. 1265)

> "Self-evidently, the Act of 1970 was unconstitutional, with respect to both the debased and the 'clad' *pseudo*-'dollars' it purported to authorize...Yet, amazingly, no judicial challenge to the purported power of Congress to destroy the 'dollar[]' ever found its way to the Supreme Court after 1970...And that next to no one appeared to notice what had happened – or to care enough to try to do something about it – is doubtlessly the most telling commentary, not only on those times, but also on the decades since, even unto the present day."

The Coinage Act of 1978 introduced the smaller Susan B. Anthony bogus dollar made of copper and nickel.

The provisions of the United States $1 Coin Act of 1997 for clad coins may be read

here.

**Partial Reintroduction of Gold and Silver**

The Act of September 21, 1973 (Public Law 93-110) repealed Sections 3 and 4 of the Gold Reserve Act of 1934, to take effect when the President found and reported to Congress that this would not adversely affect the United States' international monetary position. The Act of August 14, 1974 (Public Law 93-373) removed the stipulation concerning the President. It had as one purpose "to permit United States citizens to purchase, hold, sell, or otherwise deal with gold in the United States or abroad." It more or less repeated the language of the Pub. L. 93-110, which was

> "No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order under authority of any such law, may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold."

Gold ownership became legal again. Apparently the complete demonetization of gold in August of 1971 had persuaded Congress that nothing was to be feared from allowing private gold ownership. A congressional report in 1973 noted that "the monetary role of gold is declining...The dollar is no longer convertible to gold, and it appears unlikely that such convertibility will be restored."

The Act of October 28, 1977 (Pub. L. 95-147) rescinded the prohibition of gold clauses by providing that the Joint Resolution of 1933 shall not apply to obligations issued thereafter.

The United States still does not pay out any gold or silver coins. The relevant code is here.

In the Act of July 22, 1982 (Pub. L. 97-220), Congress began to mandate the minting of limited-issue commemorative coins. The first in a long series of such coins was the Olympic silver one-dollar coin containing 371.25 grains of fine metal and the ten-dollar coin containing 23.22 grains of gold per dollar. No more than 50 million silver coins and 2 million gold coins were authorized. Both coins chose weights of historic significance. The Act mandated a brassage charge plus a minimum $10 surcharge on each silver coin and a minimum $50 surcharge on each gold coin.

Silver's market price averaged $10.59 per ounce and gold's market price averaged $375.67 per ounce in 1982, a ratio of 35.5. The bullion value of the silver coin was

$8.19, and that of the gold coin was $181.73. Their ratio was 22.19. These coins were worth more than one FRN, and their one-dollar and ten-dollar designations also were misaligned with each other.

Congress made these coins legal tender; but since their value is much higher than their dollar designations, it is cheaper to pay debts in FRNs. One might conceivably have used them at their bullion value to pay debts if creditors agreed to accept them, but the surcharges made such exchanges uneconomic. These coins exchange at prices somewhat in excess (something like 10 percent) of their bullion values, depending on supply and demand. They are not a medium of exchange, but they are a store of wealth.

On July 9, 1985, Congress passed Public Law 99-61, which has two Titles. Title I was the Statue of Liberty-Ellis Island Commemorative Coin Act. A silver dollar and a five dollar gold coin were issued, again at the historic weights, again designated as legal tender, and again sold with surcharges.

The pattern for a long train of commemorative coins thereafter issued was set by the 1982 and 1985 issues, with minor exceptions.

At the very same time, in Title II of Pub. L. 99-61, called the Liberty Coin Act, Congress authorized another legal-tender coin, a Liberty silver dollar containing 1 ounce of 0.999 fine silver to be sold at the market price of bullion plus a brassage charge covering all costs of production. There was no surcharge, and this coin could be issued "in quantities sufficient to meet public demand." These coins, like the commemorative coins, are at present uneconomic to use in everyday exchange. They too sell at a modest premium to bullion value.

Another non-commemorative coin of this sort is the American Eagle series that began in 1985 under Pub. L. 99-185. This includes several gold coins, beginning with a fifty dollar gold coin with one troy ounce of fine gold.

We may lump together the commemorative and non-commemorative coins together, for purposes of thinking about their legal and economic properties. As is apparent from this recitation of some recent coinage history, these coins, commemorative or not, are not designed to serve as a medium of exchange. Their dollar designations are not consistent with their FRN values. They cannot be consistent because the FRNs are not convertible into silver and gold. They are also, by conscious design, internally inconsistent with one another. For example, the ten dollar gold coin issued under Pub. L. 99-185 contains one-fourth troy ounce of fine gold, not the one-fifth ounce that would make it consistent with the other coins in this series. Congress has also issued

dollar coins that contain one ounce of bullion and dollar coins that contain the historical amounts that are less than one ounce.

In sum, Congress didn't see to it that these gold and silver coins were issued for a monetary use. Not only did Congress make these coins unsuitable as a medium of exchange, it maintained a legal system, a banking system, and a payments system oriented around FRNs. The unfavorable tax treatment of these coins, both state and federal, is discussed below.

Congress continues its unconstitutional ways. In Pub. L. 102-390, it delegated its power to coin Money to the Secretary of the Treasury. The law is codified here, where the Secretary is given the power to change the size, weight, design, and fineness as he sees fit, with no standards supplied by Congress whatsoever. The constitutional provision that gives Congress the power "to coin Money, regulate the Value thereof," has not only atrophied in meaning and practice but degenerated into an unconstitutional delegation and exercise of executive power. The only virtue of this deterioration in upholding the Constitution is that the failure to do so is plainly evident to almost anyone who wants to take the time to discern it.

Congress has altogether ceased regulating coin values as the Constitution directs it to do. It has issued gold coins stamped a dollar that contain widely varying amounts of gold. The same goes for silver coins.

Vieira's review of the 1985 legislative history surrounding the non-commemorative coins shows several of the political forces that were at work at that time. These include (i) domestic mining interests, (ii) a sop to political supporters of gold and silver money, (iii) an anti-apartheid strategy to replace the Krugerrand, (iv) gold dealers, and (v) coin collectors.

Rep. Wylie assured members of the House that they need not worry that the gold coins were a camel's nose under the tent:

> "...for those Members who may be concerned that this kind of gold coin will lead us down the path to a gold standard, and that concerned me at first, let me assure you that this is not the case. Similar coins were created when we passed the Olympic coin program and the Statue of Liberty coin program. The coins in this bill really are no different than such coins authorized earlier by this body.
>
> "As Members know, President Reagan's own Gold Commission did not recommend any new role for gold in the Nation's economy.

> "I recognize that this kind of American coin will give people all over the world the opportunity to vote their pocketbooks in favor of a gold coin symbolizing liberty and freedom. The vote today will give all Members the opportunity to go on record against the abhorrent practice of apartheid by voting in favor of a new U.S. gold coin to compete with the Krugerrand in the world market, and send yet another signal that there is no room in the world community for apartheid."

Rep. Roth mentioned 3,000 coin dealers and their 15,000 employees. He mentioned 5 million gold coin investors who could no longer import Krugerrands.

Without realizing it, Rep. Lewis spoke openly of Congress's abdication and flouting of its duties:

> "It is generally understood by those who view these things in the coin world that the designation of a $50 amount on the 1-ounce gold is essentially a fictitious amount..."

Layer upon layer of deviation from constitutional meaning had now reached the point where a Congressman could openly acknowledge that the dollar on a coin didn't have a constitutional meaning. Fiat money FRNs irredeemable in anything had already indicated this.

## The Legal Status of Coins as Money

The special issue, legal-tender, silver and gold coins that we have been discussing that contain high-grade amounts of silver and gold are not being used as a medium of exchange, and they are not designed so to be used. Nor are they likely to be so used with the deck strongly stacked by Congress in favor of using FRNs. An economist who examines this situation will doubt that, in terms of their economic properties, they are money.

But are they money in terms of their legal properties? Are they legally money, nonetheless? The answer is that they are. Since they are gold and silver coins that are coined by the authority of Congress, they are legally Money. They are legal tender, not only by law, but by virtue of their metal content. They are not, however, properly regulated in value against the constitutional silver standard dollar of 371.25 grains of fine silver. And neither are the FRNs.

Congress has constructed a monetary system such that prices are widely quoted in

terms of FRNs. Silver and gold coins, in a bewildering variety recognized by few people and machines, are not going to circulate as money under these conditions, but that is irrelevant to their legal status as money.

A similar situation occurred in 1862. When legal-tender greenbacks were issued during the Civil War, they quickly drove gold coins out of circulation. Gold was priced in terms of the greenbacks. This didn't make greenbacks into the standard of value. The Supreme Court in *Thompson v. Butler* (1877) made it clear that paper currency didn't supplant metal coinage as a standard of value:

> "One owing a debt may pay it in good coin or legal tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises. The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other, but as money -- that is to say, as a medium of exchange -- the law knows no difference between them."

The country has multiple kinds of money. They include FRNs, base-metal coins, and silver and gold coins. Leaving aside their constitutionality, all are equally money and legal tender under the law. They all issue from the Treasury, and all are expressed in dollars, which is what all United States money is expressed in.[249] They are all legal tender.

Another kind of money is silver and gold bullion. This fact is proven in several ways. The Court in *Bronson v. Rodes* (1869) made this clear:

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

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[249]However, the dollars are not regulated to a parity of values. A dollar in silver doesn't exchange for a dollar in an FRN. It might exchange for 10 or 20 or more FRNs, even without any numismatic value.

Current statutes show this. See here, here, here, and here. Historical and current statutes concerning counterfeiting show that coin or bar are both treated as money. See here. When Congress seized gold in 1933, albeit unconstitutionally, it did so as a part of its monetary authority. In doing so, it seized bullion, thereby again showing its monetary character.

Despite the fact that gold and silver coins and bullion are money, many state courts have upheld sales taxes applied to transactions involving them. These judgments are flawed for a number of reasons. Congress has the power to coin Money and the States' reserved constitutional power is to make gold and silver a tender, not to interfere with their use. The Act of Sept. 21, 1973 says that no law may prohibit anyone from buying, selling, holding, and dealing in gold.. All forms of money in the multi-currency system created by Congress are equally legal tender. This disallows state regulations that burden the exchange of one money for another. A tax at the state level is a tax on money. This has long ago been found unconstitutional in *McCulloch v. Maryland* (1819) and other cases. Such a tax privileges FRNs and demonetizes silver and gold. This degrades the power of Congress to coin silver and gold money.

Responsible officials in the three branches of the federal government know that the States are wrongly imposing these taxes, but they do nothing about it. They are quite willing to let the States degrade the monetary character of gold and silver.

Lower federal courts take the side of the tax collectors. This entails giving primacy to FRNs, despite the legally equal status accorded to silver and gold money.[250] Even when taxes are not an issue, the lower courts have a love affair with FRNs and hostility, or ridicule, or other negative feelings toward silver and gold.[251]

In *Joslin v. United States* (1981), the court wrote

> "The facts are undisputed. The taxpayer, an attorney, agreed to provide his client with legal services if the client would pay him in silver dollars. The taxpayer rendered 20 hours of legal services and received 200 silver dollars as his fee. He admits that he routinely bills his services at the rate of 50 'one-dollar' Federal Reserve notes per hour. He also admits that since one silver dollar had a numismatic value of five Federal Reserve notes at the time his

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[250]As with many faulty Supreme Court cases, the judgments of the courts do not engender much confidence in their capacities to avoid biases in favor of government.

[251]The *Solyom* case below is a good example.

> client paid him, his client could have paid him 1,000 Federal Reserve notes rather than 200 silver dollars. Nonetheless, the taxpayer reported only $200 as income from this transaction on his federal income tax return. He was assessed a $252 tax deficiency, the additional amount of taxes due if his income from this transaction was regarded as $1,000. He paid the assessment and brought suit in district court for a tax refund."

The court found against Joslin, who had to pay the added taxes. The court found "no cases addressing whether silver dollars received for services are taxable at their face value or their higher numismatic value..." It turned to "general tax principles" to judge the case. These could not be sufficient for the court to reach an understanding of the legal problem. The court needed to understand, but didn't, that there were two items being expressed in dollars of equal legal standing but with two different exchange values.

The real legal problem that this case unearthed is that Congress does not distinguish the two kinds of currencies, FRNs, which are denominated in dollars but are not dollars, and silver dollars, in the language of its tax statutes. The code assumes that transactions are done in FRNs, or that FRNs provide the basis for making tax computations. If Congress would state that transactions done in silver dollars will be taxed in silver dollars, and transactions done in FRNs will be taxed in FRNs, or if it would state that transactions done in coin have to be translated into FRNs, then it reduces the incentive to receive silver dollars and pay taxes in FRNs. However, Congress would bring to the surface serious constitutional problems if it wrote such a law. Congress has no power to alter the constitutional dollar or to say that it is an FRN. Congress would have to distinguish the two currencies as legal tender. This would infringe the reserved power of the States to make gold and silver a legal tender. Furthermore, on economic grounds, such a law would produce parallel money systems, a result that Congress definitely does not want to happen as that will destroy or severely undermine the FRN's value.[252] And so the *Joslin* court was faced with a tax statute with a loophole that Joslin exploited.

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[252]The sources of value of a fiat money like the FRN are murky. One source is the fiat itself, another is preventing competing monies, while keeping the supply limited in the face of a demand for money. Another source is the tax foundation. If an FRN is accepted by the government as payment in taxes, then people will circulate it at some worth, knowing that it can be used to pay taxes. If Congress allows a competing hard money to arise, the tax foundation of the FRN is undermined. Furthermore, Congress loses control over the money supply, loses banking support for its borrowing, and finds that its costs of tax collection rise.

The court might have ruled in Joslin's favor and by doing that tossed the problem back to the Congress where it belongs. Instead, the court tried to close the loophole itself. It made up a false legal theory, which was that the silver dollars were not just cash, but also property:

> "If a taxpayer receives property other than cash as compensation, the taxpayer's income is measured by the property's fair market value. Treas.Reg. § 1.61-2(d)(1), T.D. 7554, 1978-2 C.B. 263. Unquestionably, a silver dollar has both a face value and a separate value reflecting the coin's numismatic worth. To this extent a silver dollar combines the characteristics of cash and property."

The Treasury regulation cited raises no problem when it says that non-cash compensation is taxable at fair market value. But fair market value measured in what unit? In silver dollars, or in FRNs? That is where a problem arises. The government's hidden assumption is that the FRNs are the standard of value. That raises a legal problem. Congress has not made FRNs the standard of value and cannot do so, since the Constitution uses the dollar as the standard of value and the dollar is a silver standard weighing 371.25 grams. By *Thompson v. Butler*, the law knows no difference between FRNs and silver dollars.

The silver dollar has a face value of one dollar, but it sells for more than one FRN. The court called that "the coin's numismatic worth." The court misconceived the source of the worth. If the worth were mostly numismatic, the source of most of the value would be such features as rarity, beauty, condition, and demand. But most of the source of value in this case was the bullion content of the coin. The weight of silver itself was the main reason why it exchanged for more than 1 FRN. Conversely, a single FRN exchanged for much less than 1 silver dollar because of factors such as its increased supply that had driven down its worth in terms of silver. But while this discussion of value may clarify value, its legal import is *irrelevant*. The *Thompson* court knew this when it wrote

> "The law has not made the note a standard of value any more than coin. It is true that in the market, as an article of merchandise, one is of greater value than the other, but as money -- that is to say, as a medium of exchange -- the law knows no difference between them."

The *Joslin* court did not observe this ruling, for it went on to use the value difference as a basis for its false theory that cash in silver is not simply cash but also property. This is where it says "To this extent a silver dollar combines the characteristics of cash and property." The main problem with this logic is that the law treats silver coins and

silver bullion as cash and a standard of value. The law doesn't treat a silver dollar as property whose value is measured in terms of some other standard of value, such as the FRN. Both silver and FRNs are indeed property, but that characteristic is irrelevant to their legal character as standards of value.

We can see that the court's logic is flawed by applying its theory to the FRN. The FRN is also cash and property by its reasoning. The property consists of engraved paper of little worth, but it is property nonetheless. What legal factors in the tax code make this combination of cash and property any different from some other combination of cash and property, like a silver dollar? There are none. Both the silver dollar and the FRN are legal (statutory) standards of value. Moreover, the silver dollar is the only constitutional standard dollar.

Since the government has failed to regulate their values such that they exchange at a parity of one silver dollar for one FRN and since the government has failed to write a tax code that distinguishes the two dollars, but instead a tax code that implicitly assumes payments in FRNs, the government has the problem of patching up the loophole that Joslin found.

The government is perfectly capable of doing this. Between 1866 and 1870, the internal revenue act made this distinction (Act of July 13, 1866):

> "That it shall be the duty of all persons required to make returns or lists of income or articles or objects charged with an internal tax, to declare in such returns or lists whether the several rates and amounts therein contained are stated according to their values in legal tender currency or according to their values in coined money...And whenever the rates and amounts contained in the returns or lists as aforesaid shall be stated in coined money, it shall be the duty of each assessor receiving the same to reduce such rates and amounts to their equivalent in legal tender currency, according to the value of such coined money in said currency for the time covered by such returns."

Joslin was the attorney for the defense in another tax case, namely, *United States v. Ware* (1979). The *Joslin* court referred to this case in a footnote:

> "Taxpayer insists that Federal Reserve notes are not 'dollars' and carefully tailored his admissions to reflect this belief. We rejected this contention in United States v. Ware, 608 F.2d 400 (10th Cir. 1979), in which Mr. Joslin represented Mr. Ware."

This is the heart of the deeper issue: What is a dollar? The constitutional dollar is only the silver dollar. It is not the FRN. If the FRN has become the standard of value to the exclusion of the silver dollar, *contra Thompson*, then who has made it so, and under what authority? Congress doesn't have that authority, and it has never attempted to exercise such an authority. Making FRNs legal tender is not the same as making them the dollar. Indeed, since the dollar predates the FRN by hundreds of years, it is logically impossible that the FRN is the dollar. The history of the FRN, wherein it was payable in dollars at one time, shows this too.

Ware didn't file tax returns for the years 1973-1975. A lower court found him guilty of failing to file a return, and he was sentenced to one year in jail. On appeal, he lost. The court understood that serious and unusual issues were being raised:

> "This is a case in which an individual is committed to not file tax returns. It is not, however, the ordinary type of income tax opposition. It presents some unusual questions.
>
> "The defendant testified in his own behalf to the effect that he did not believe that he had a legal obligation to file an income tax return for the reason that the income which he received was not dollars, but, rather, Federal Reserve notes which were mere promises to pay and not redeemable in gold or silver. He admitted that he had filed no income tax returns in 1973, 1974 and 1975."
>
> "In his brief, counsel also emphasized that the argument which he was making was intended to be 'profoundly serious.' He added that 'it is based on a very careful, logical and reasonable presentation of the law on the subject, both statutory and judicial. It deserves a judicial analysis of some merit and scholarly courtesy.' What we say will very probably not fully satisfy the request which he makes. It will, however, be based on the law as it exists."

Ware challenged that the FRN is a dollar. The fact that the FRN is not the constitutional dollar but is used in statutes as if it were *the* standard of value manifests itself in the tax code. The code is missing a meaningful definition of dollars as applied to FRNs.[253] Congress has the problem discussed earlier of attempting to tax only in FRNs without defining the dollar as the FRN and without clarifying the code to allow two kinds of dollars. If Congress clearly defines the dollar as the FRN for tax purposes, everyone has an incentive to transact in silver and gold or something other than the

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[253]The definition of the dollar in the code is given below. It means "one" of whatever money is.

FRN in order to avoid taxes. Congress then has to use language such as it did in 1866 to translate any transactions in coin or other media of exchange into the FRN. Otherwise, it will have to tax revenues in several currencies. At present, Congress doesn't want a specie money system parallel to the FRN. Furthermore, if Congress defined an FRN as the dollar, it would raise constitutional issues. Congress prefers to keep this Pandora's Box closed.

The *Ware* court, like the *Joslin* court, faced a legal problem that it lacked the tools entirely to resolve. But as in the *Joslin* case, it had the power to decide the case before it in a legal fashion. Had it done that, it would have ruled in favor of Ware and by doing that tossed the issue back to Congress. But in order to do that, it would have had seriously to address the issues before it. It would have had really to see the law as it exists, not as other courts have interpreted it.[254] The court declined the invitation to come to grips with the issue before it. It abdicated making any independent judgment:

> "Counsel's argument appears to assume that this court is empowered to deal with any law which is contrary to his contention and in essence to establish an entire new approach to monetary policy. We must, of course, decline this invitation. We do so not only because of lack of authority but also because it is not an inviting approach."

Most of the court's vacuous opinion contained references to cases that had nothing to do with Ware's contention that FRNs are not dollars and cannot be legal tender. The court falsely said that it was impotent: "The court does not have the power to declare what is legal tender. That power is in the Congress." It had the power, which it failed to exercise (p. 1326) "to rule that what Congress had purported to declare legal tender could not constitutionally enjoy that character." It had the capacity to learn what a dollar was, "and that Congress had never declared the FRN to be any sort of 'dollar' at any time."

What the court did was to argue that Congress, supported by the Supreme Court, had plenary power over currency that, apparently, had passed beyond the point of contestability. Vieira writes (p. 1327) that, in support of such a stance, Judge Doyle

> "...cited no Act of Congress declaring, or decision of any court holding, that FRNs are 'dollars'; that FRNs are the one and only authorized medium for

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[254]No doubt, the enormity of ruling that Ware broke no law by failing to file his income tax returns was too much for the court to face.

> calculation of the monetary value of 'income'; that income taxes are constitutionally payable in FRNs, exclusively or at all; or that Congress may constitutionally designate FRNs as legal tender."

*Joslin* cited *Ware* as support, but *Ware* provides no support for *Joslin*. In *Joslin*, the court treats silver and FRNs as unequals. The number of silver dollars has to be translated into a larger number of FRNs. The opposite statement is made in *Ware.* There the court argues, as in *Thompson*, that the FRN is "on a par with all other forms of United States currency..."

Justice Anthony M. Kennedy wrote the very brief opinion in *Cordner v. United States* (1982), while he was on the 9th Circuit Court of Appeals. Again we have a case where the two kinds of dollars are an issue. A company paid a dividend in $20 Double Eagle gold coins issued by the United States. The appellants received 275 of these coins and reported the dividend as $5,500. Market value in FRNs was $70,936.

Kennedy used the fallacious *Joslin* theory that gold coins are both cash and property with a higher value – as measured in FRNs:

> "We have no difficulty in holding that the gold coins here, though legal tender and hence 'money' for some purposes, are also 'property' to be taxed at fair market value because they have been withdrawn from circulation and have numismatic worth...When legal tender, by reason of its value to collectors or the intrinsic worth of its contents, has a fair market value in excess of its face value or tender, then it should be deemed property other than money for purposes of section 301(b)(1)(A)."

Gold coins are indeed both cash and property, but there is no legal basis for saying that it is property to be taxed at a fair (higher) market value, for that deems FRNs to have a constitutional and statutory status as a standard of value they do not have.[255] There is no legal basis for saying that if FRNs depreciate in price relative to gold coins, thereby making the gold coins appear to have a higher price or a higher fair market value, that the gold coins "should be deemed property other than money" for tax

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[255]Congress could pass a law saying that the value of gold coins of the United States is their fair market value expressed in FRNs, but it has never done so. Such a law would be unconstitutional, however, because the Constitution recognizes the weight (or intrinsic worth) of gold in the coin as the coin's fair market value, adjusted to the constitutional silver standard or to a statutory gold standard. Even as late as 1933, this was the case in the Joint Resolution of June 5, 1933. That recognition was repealed by the Coinage Act of 1965.

purposes. Such a judgment renders confiscation of one form of money through inflation of another form of money a legal policy of the government.

When Kennedy issued his ruling, a coin's legal tender status was no longer tied to its intrinsic value, which means its weight of precious metal. Section 102 of the Coinage Act of 1965 read

> "All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations), regardless of when coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues."

The law made no physical distinction among the various forms of money, and thus $20 in gold was legally indistinguishable from $20 in FRNs. In 1965, no case such as Ware's could arise because gold ownership was illegal and gold coins were not being issued by the United States. In 1982, such a case was possible. Kennedy circumvented any incisive judgment on the resulting problem. His opinion distinguished the two kinds of dollars, so it contradicted the legal tender law present in the Coinage Act of 1965.

When Kennedy opined that gold coins should be treated as property, as in *Joslin*, he usurped the prerogative of Congress. If the government can demonetize gold or alter its legal tender quality, that power, if it be in government at all, is not in the judiciary. Vieira (p. 1331) concludes

> "So, overall, *Cordner* was yet another decision without an adequate foundation in constitutional or statutory law, judicial precedent, history, or reason."

Kennedy cited as support for his decision *California Federal Life Insurance Company v. Commissioner of Internal Revenue* (1982). The case is similar to *Joslin* and *Ware*. At issue were $20 gold coins reported at face value to the Internal Revenue Service (IRS), which demanded assessment at fair market value so that it could collect more taxes. Judge Canby's decision favored the IRS:

> "We conclude that the Tax Court properly rejected this argument. Section 1001(b) [of the Internal Revenue Code, IRC] is clearly intended to permit a realistic assessment of the economic gain or loss attending a sale or exchange. That purpose would be frustrated by an interpretation that compelled gold coins to be treated at a fraction of their true value. We therefore conclude that 'money' in § 1001(b) refers to the currently circulating medium of exchange,

> while 'property' includes coins that have, by reason of their value to collectors or the intrinsic worth of their contents, a fair market value in excess of their face value. Because the key element is the excess of market over face value, it is immaterial that such coins may be legal tender at their face value."

In this astonishing paragraph, Canby treats the IRC as superior to the legal tender law of Congress.

Furthermore, the court admits that it reasoned backwards from its desired conclusion. We are told that the purpose of the IRS is to collect revenue. That has priority. We are told that since that purpose would be thwarted by treating the value of the gold coins as their face value, the court "therefore" provides an interpretation that allows the collection of money by the IRS, that interpretation being to measure the value of the gold coins as fair market value in FRNs. This demonetizes gold and promotes the FRN to a standard of value.

The interpretation of money that accommodates the IRS then appears. The relevant portion of the IRC may be read here. The court decides that by money, the statute means "currently circulating medium of exchange." The statute says nothing of the sort. In his legislation from the bench, Canby doesn't define or cite any source of "currently circulating medium of exchange" as legal money. The court endorses the *Joslin* theory that the coins are property whose value is to be measured in FRNs. Their legal tender status is termed immaterial. The Tax Court itself treated the legal tender status as an immaterial "technical" matter.

Another case involving coins at face value is *Lary v. Commissioner of Internal Revenue* (1988). This court worked backwards or worse, circularly, even more explicitly:

> "Petitioners concede that the value of the coins received is far in excess of their face value, and that the fair market value of such coins is at least as great as the cost of the items sold...Therefore, we conclude that the Treasury gold and silver coins and the foreign and miscellaneous coins received by petitioners...are 'property' within the meaning of section 1001(b), and are to be valued at their fair market value for purposes of section 1001."

That is, since the fair market value in FRNs exceeds the face value, the coins must be property, and therefore are to be valued at their fair market value in FRNs.

This court made no independent judgment. After mentioning the petitioners' argument

that "by statute gold and silver coins are legal tender at their face value," the court curtly wrote only "We disagree." Discussion ended. "These arguments were considered and rejected in California Federal Life Insurance Co. v. Commissioner, supra, and Joslin v. United States, supra, which we follow."

The appellants in the 7th Circuit Court of Appeals case, *Birkenstock v. Commissioner of Internal Revenue* (1981), converted their FRN receipts on their tax returns into gold dollars by an arithmetical procedure. Their case was not well-founded. The interesting thing here is not that they lost or why they lost but the number of monetary errors appearing in the court's opinion.

The court said that FRNs but not gold were legal tender. This was wrong.

The court said that the gold standard in the Par Value Modification Act applied only to gold certificates. This was wrong.

The court proposed that money and the dollar are and always have been purely nominal and abstract things, akin to Platonic Ideas. This too was wrong:

> "The standard unit of computation is the money dollar, an abstract or ideal unit of account. This standard unit of money has not changed in money value throughout the existence of our monetary system. There have been changes from time to time in the form of the physical representatives of money, but lawful money in the United States has been the same since the Act of Congress of April 2, 1792, provided that 'The money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths, a dime being the tenth part of a dollar, a cent the hundredth part of a dollar, a mill the thousandth part of a dollar * * *.'"

This theory, besides being historically inaccurate, raises more questions than it answers. The name of the unit of account is indeed a "dollar," and the name has not changed. But the court asserted that the dollar "has not changed in money value..." If the dollar is an abstract unit, what money value can it possibly have? Does the Constitution say that Congress has the power to coin the physical representative of Money, or to coin Money? Is the money of account of the United States an abstraction called the Dollar, or is the quote from the Coinage Act of 1792 accurate when it says that the money of account shall be ***expressed*** in dollars or units. If so, isn't the money of account something else that is not abstract? What connects this abstract dollar to a particular money value? What connects it to fair market value? How can a particular representative of money like an FRN gain the status of being the preeminent one in

terms of which the fair market values of other representatives are measured? Why is it that when tax collections are threatened, the sole representative of money becomes the FRN, even though no statute has given it that status?

The power "to coin Money, regulate the Value Thereof" is modest. The government has expanded it (and other powers) immensely in fact and in practice. What is more, existing statutes on money give Congress and the Executive options to create even greater control over the nation. Given the subservience of the Judiciary to the other branches that we have documented time and again in this series, it cannot be expected that any significant resistance would be forthcoming from the Judiciary should the other branches exercise these options.

Some pertinent United States code showing the legal extent of potentially absolute, total, and unchecked power that the government accords to itself over money and banking is here and here. During any "emergency period" declared by the President, the Secretary of the Treasury and President may close any member bank of the Fed or restrict its business as the Secretary sees fit.

> "In the event of natural calamity, riot, insurrection, war, or other emergency conditions occurring in any State whether caused by acts of nature or of man, the Comptroller of the Currency may designate by proclamation any day a legal holiday for the national banking associations located in that State."

During the time of war, the President has powers over domestic activities through any bank whatsoever, in gold or silver coin or bullion, securities, and currencies; as well as powers over any property whatever of foreign countries or nationals. Government officials making any such seizures shall not be liable in any court. The President has the power to change the meaning of the terms in the code:

> "As used in this subdivision the term 'United States' means the United States and any place subject to the jurisdiction thereof; Provided, however, That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision."

The limitation to "time of war" is no real limitation, given that the Congress hardly ever declares war anymore, and the President constantly initiates wars of all sorts, including a 100-year war on terror.

## Court Rulings in Monetary Cases, 1968-1992

The Supreme Court has not heard any case central to the nation's monetary system since the fiat money regime began in June of 1968. State and inferior United States courts have heard many cases. Vieira's (p. 1345) overall appraisal:

> "although the complainants' understanding of the Constitution's monetary powers and disabilities was often imperfect, the judges' comprehension of (or willingness to enforce) monetary law was essentially nonexistent; and...although the complainants apparently prosecuted their actions in good faith and with a sincere desire to promote the principles of American constitutionalism to the best of their understanding, the judges rendered their decisions in an unconcealed and arrogant spirit not only of hostility to the complainants, but also of disdain for constitutional limitations on the national government's supposed 'sovereign power' over money."

Vieira provides brief reviews of a sample of these cases.[256] As we review these, one pattern that emerges is judicial incompetence in the field of money. Another is the citation of inapposite cases to justify rulings. A third is a bias toward defending and bolstering the existing monetary system. A fourth is superficial knowledge of relevant cases, so that the precedents are misapplied or misunderstood.

*Koll v. Wyzata State Bank* (1968). Plaintiff, through his attorney, Jerome Daly, sought damages against, among others, the Federal Reserve Bank of Minneapolis. Koll's complaint alleged that Congress had treasonably surrendered control over coining money by an unlawful delegation to the Fed which passed irredeemable FRNs. The U.S. Court of Appeals dismissed the case for lack of jurisdiction. This was an inadmissible ground for dismissal because Koll had raised a constitutional question, and that is sufficient to support the jurisdiction of a U.S. or state court. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971).

The court ruled that Koll "totally avoids any allegation of fact tending to show the existence of a federal question." This and other such statements should have precluded citing this case as a precedent in other cases. However, courts thereafter cited *Koll* anyway.

*United States v. Daly* (1973). The part of the court's ruling pertinent to money read

[256]The summaries in this article are even briefer, but we are able to provide direct links to some of the court opinions so that interested readers can pursue any case.

> “Defendant's fourth contention involves his seemingly incessant attack against the federal reserve and monetary system of the United States. His apparent thesis is that the only ‘Legal Tender Dollars’ are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed. This contention is clearly frivolous. See Koll v. Wayzata State Bank, 397 F.2d 124 (8th Cir. 1968).”

Daly’s contention on the constitutional issue was not frivolous because it demanded substantial further analysis. A frivolous claim is, according to the Supreme Court, one “so wanting in substance as not to need further argument,” and insubstantiality means that previous Court decisions foreclose the subject and remove any controversy. See *Milheim v. Moffat Tunnel Improvement District* (1923) and *Goosby v. Osser* (1973). The Supreme Court has never ruled that gold and silver dollars are not the unique items subject to constitutional taxation.

Daly’s contention that only gold and silver dollars may be taxed was, however, (p. 1348) “lacking in merit” because the authority of Congress to tax is, in the Court’s words, “exhaustive and embraces every conceivable power of taxation.” See *Brushaber v. Union Pacific Railroad* (1916). Congress might constitutionally tax incomes in FRNs in order to pay for defense, but the constitutionality of use or sanction of FRNs in another context is a separate issue.

The court in *Daly* dismissed Daly’s complaint about legal tender dollars as constitutionally frivolous. It could and should have dismissed it on the weaker ground that he was wrong to argue that only specie dollars are taxable. In the Supreme Court’s words “constitutional issues affecting legislation will not be determined...if the record presents some other ground upon which the case may be disposed of...”. See *Rescue Army v. Municipal Court of Los Angeles* (1947).

The court cited *Koll* as its precedent and authority when nothing was decided of constitutional import in that case. *Daly* provides no precedent for the theory that Congress has the power to declare things such as FRNs that are other than gold and silver as legal tender. That hasn’t stopped courts from citing it as such a precedent.

*Milam v. United States* (1974). Milam wanted a $50 FRN to be redeemed in lawful money as a statute calls for. He lost his case and his appeal.

The *Milam* court cited *Juilliard v. Greenman* (1884) as authority for its ruling.[257]

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[257] That case is discussed in detail in Chapter VI of this series.

*Juilliard* does state unequivocally (albeit incorrectly) that Congress has the power to "establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes..." But this ruling doesn't apply to FRNs, for three reasons. *Juilliard* refers to paper money issued by Congress itself, not an intermediary. Such paper money at the time was redeemable in specie. Congress controlled the amounts issued. It did not permit a private banking cartel to issue or to cause to be issued paper money of the United States at its own discretion.

Hence, when the court judged that "The power so precisely described in *Juilliard* has been delegated to the Federal Reserve System...", it **assumed** (i) that *Juilliard* was consistent with such a delegation, which is not at all obvious, (ii) that the delegation specifically to the Fed is constitutional, which it is not, (iii) that a power to issue irredeemable notes is constitutional, which it is not, and (iv) that FRNs can constitutionally be made legal tender, which they cannot. The court proved nothing via this citation to *Juilliard* and by its reference to delegation to the Fed. It assumed what it should have been justifying as the grounds for its judgment. This court too found the appellant's "contentions frivolous."

Milam didn't have a case, but for other reasons. Since the delegation of money production to the Fed is unconstitutional, FRNs cannot be legal tender. Therefore, they are not constitutionally redeemable in lawful money or gold or silver coin. Having accepted the FRN voluntarily and then demanded redemption in coin, Milam had no grounds for constitutional complaint when the Fed did not comply, even if the Fed is acting unconstitutionally. Milam may possibly have made a civil or criminal case if the Fed failed to live up to its statutory obligation to redeem in "lawful money", but that is not a constitutional matter.

*United States v. Scott* (1975). Scott failed to file income-tax returns on the theory that "federal reserve notes are not legal tender and therefore he did not have to report them as income." Vieira observes (p. 1352) that his theory "was incorrect. Even were FRNs not legal tender, or money, the government could consider their receipt as, or use them as, a measure of 'income'..." Although the court upheld Scott's conviction on other grounds, the case is cited as a monetary precedent.

*United States v. Gardiner* (1976). Gardiner didn't file tax returns on the ground that FRNs are not lawful money. His argument was defective. The IRS taxes taxable income. He didn't need to receive lawful money to be subject to tax. The monetary nature of FRNs was irrelevant to his case. The court in ruling against him improperly cited *Scott* and *Milam*:

> "Gardiner next asserts that he was not subject to the jurisdiction of the IRS because he did not receive 'money' in 1970 and 1971 as the Federal Reserve Notes he received were not lawful money. Such an argument has been summarily found to be without merit, United States v. Scott, 521 F.2d 1188, 1192 (9th Cir. 1975); *cf. Milam v. United States,* 524 F.2d 629 (9th Cir. 1974), and we so find here."

*Milam* (p. 1352) "did not hold that FRNs were 'lawful money', 'taxable income', a valid medium for the payment of taxes, or anything else of like import. It held only that the Federal Reserve System need not redeem them in gold or silver coin. And *Scott* turned on Scott's willful failure to file tax returns, not on the monetary character *vel non* of FRNs."

The court left the impression that a body of authority holds that FRNs are lawful money. This cannot be true because FRNs are not lawful money. They can't be lawful money because the U.S. code says "they shall be redeemed in lawful money on demand..."

*United States v. Wangrud* (1976). Wangrud failed to file federal income-tax returns. His case was very weak. The court could have found against him on various easy and correct grounds, as follows. Congress can tax things even if they are not money. Congress can tax money, such as foreign income, that is not lawful money of the U.S. Congress can tax money and goods derived from illegal activities. Instead, the court made a point of asserting that FRNs are constitutionally legal tender. It cited Article I, Section 8 in its entirety. We have argued earlier in this series that Congress has no power even to issue redeemable legal-tender paper currency, much less delegate, without clear standards and controls, the issuing of an irredeemable, fiat, legal-tender paper currency to a private bank cartel at its discretion.

*United States v. Schmitz* (1976). The court correctly held that appellant's "belief is unfounded that because Federal Reserve Notes are not presently payable either in gold or silver they are not taxable dollars." It then gratuitously and incorrectly added "Federal Reserve Notes constitute legal tender, and defendant's constitutional argument has been summarily found by this court to be without merit," citing *Gardiner, Scott,* and *Milam*, not one of which is appropriate.

*United States v. Whitesel* (1976). The court correctly pointed out that Whitesel had received taxable income and that the IRC doesn't deal in legal tender. The court also cited *Daly*.

*United States v. Hurd* (1977). The opinion concluded that: "The trial court excluded evidence offered by the defendant to the effect that Federal Reserve Notes did not constitute legal tender. The ruling was clearly proper." The cited authority was *Wangrud*. The latter asserted the constitutionality of FRNs, but it by no means showed it or proved it by any argument.

*United States v. Rifen* (1978). Rifen argued that his income tax conviction was invalid "because no evidence was presented on the definition of the symbol for the dollar ($)." The court observed that "federal reserve notes are taxable dollars." Actually, Congress has never said that an FRN is *the* dollar or even *a* dollar. It has made the FRN legal tender, or a substitute for a dollar. The court's statement itself confused FRNs with dollars in the usual colloquial manner, but legally an FRN is not a dollar.

*Mathes v. Commissioner of Internal Revenue* (1978). The taxpayers had calculated their income in gold or silver dollars rather than in FRNs, thereby reducing their income. The court rejected this procedure. The court cited *Juilliard*, which was inapposite. It erred in saying "Congress has made the Federal Reserve note the measure of value in our monetary system." There is no such statute. Vieira reviews the following points:

● FRNs are redeemable in lawful money. This requirement is not consistent with their being the measure of value in the monetary system.

● By statute, "United States money is expressed in dollars." Dollars are the unit of measure. What they are measuring needs to be spelled out, i.e., what the value is or in what item the value is.

● FRNs are denominated in dollars on each note. FRNs are not dollars. A ten-dollar FRN is a ten-dollar *bill* or *note*. What it is ten *of* is another question.

● FRNs are by statute declared a form of United States currency and legal tender.

● The Federal Reserve Act of 1913 made FRNs "obligations of the United States" redeemable "in gold or lawful money..." but not a statutory standard of value. The statutory gold dollar was 23.22 grains of pure gold. Congress ended the redemption of FRNs into gold in 1934, but it did not make the resulting irredeemable FRN into a statutory standard of value.

● Congress has always described various coins of the United States as dollars, be they silver, gold, or base metals. Congress has declared only two as the unit or standard of value, namely, the constitutional silver dollar and the statutory gold dollar.

● The present U.S. Code doesn't explain what a dollar is. The coins are denominated in dollars with none being declared as **the** dollar. The reverse of each coin contains a designation of the value of the coin, but there is no legal standard by

which the value has been set in the Code.

*United States v. Anderson* (1978). After citing the same inappropriate litany of *Juilliard*, *Gardiner*, *Daly*, and *Wangrud*, the judge declared "There can therefore be no challenge to the legality of federal reserve notes." Many more similar cases in the federal courts contain the same kind of judicial reasoning, which evidences a settled, hardened, narrow-minded, and ignorant conviction that no possible constitutional challenges can possibly dethrone the existing monetary system.[258]

*Leitch v. State* (1974). Leitch attempted to pay state taxes with checks payable in gold and silver on the theory, under Article I, Section 10, Clause 1, that "No State shall...make any Thing but gold and silver Coin a Tender in Payment of Debts..." Insofar as taxes are not debts, Leitch wrongly asserted that the Clause supported his case. Instead of ruling against Leitch on this straightforward ground, Judge Langtry wrote that Clause 1 applies only to the States and

> "Plaintiff has no cognizable complaint in this regard, for it is the federal government, not the state, that has made '[a]ll coins and currencies of the United States * * * legal tender * * *.'"

**Digression on Article I, Section 10, Clause 1**

To understand fully the erroneous constitutional doctrines concerning money that contemporary courts are propagating, it is helpful to review some material on legal tender.

Article I, Section 10, Clause 1, of the Constitution states that "No State shall...make any Thing but gold and silver Coin a Tender in Payment of Debts..."

Clause 1 restricts Congress by being absolute.[259] In a number of cases, the Supreme Court has ruled that Clause 1 is absolute, not conditional. For example, the Court wrote in *Holmes v. Jennison* (1840) that "In the first paragraph [Clause 1], the limitations are absolute and unconditional." Unlike Clauses 2 and 3, the consent of Congress is not mentioned in this Clause; hence, Congress is not at all allowed to override its statements. In *Edwards v. Kearsey* (1877), the Supreme Court wrote "No state can

[258]The judicial method of building up supposedly solid authority from the precedents of inapposite cases is highly inappropriate.

[259]This discussion draws on Vieira (pp. 92-112.)

invade it [Clause 1], and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is."

The States are required to pay their debts in gold and silver coin. Congress cannot constitutionally authorize, enable, or compel them to do otherwise, as Langtry asserted in *Leitch*.[260] If Congress passes laws such that the Fed emits legal-tender notes, and if the States *elect* to use them as a tender to pay debts, the States *voluntarily* violate the Constitution. States cannot excuse such violations by claiming that the federal government made them do it.

When Congress outlawed gold clauses for both private citizens and the States, that indirectly made FRNs a compulsory legal tender for both. Chief Justice Hughes in *Norman v. Baltimore* mentioned that the gold clause prohibition applied to States, an error that was corrected in *Perry v. United States*. In the gold clause instance, the States were entitled to interpose, i.e., not accede on constitutional grounds to the gold clause prohibition, because FRNs are a thing other than gold and silver coin.

Congress has only a narrow, common-law derived power regarding legal tender, which is that the coins it issues that have a certain intrinsic value or weight of metal cannot be revalued by the States and made a legal tender by the States at other than the intrinsic value. Congress regulates coin values, and that coincides with this narrow legal-tender power. If Congress fails to regulate value properly, the States have a reserved power to do so. *Hepburn v. Griswold* (1869) made clear that Congress has no *express* power to declare something as legal tender:

> "It has not been maintained in argument, nor indeed would anyone, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts."

The *Legal Tender Cases* (1870) claimed such a power *implied* in other of the enumerated powers, especially the power to borrow. Justice Field's dissent rebutted that proposition.

In addition, Field argued that the power to coin money and regulate value was inconsistent with anything but gold and silver being legal tender. The reason is that the

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[260] In addition, Congress cannot make the States use some specific thing or currency for payment of a State's taxes.

constitutional power requires known weights of specie, so that a tender to pay a debt would be made in a known amount and thus be fair and legal. By contrast, paper money is a debt obligation whose value fluctuates and is unknown. Its value is impossible to regulate:

> "The power of regulation conferred is the power to determine the weight and purity of the several coins struck, and their consequent relation to the monetary unit which might be established by the authority of the government -- a power which can be exercised with reference to the metallic coins of foreign countries but which is incapable of execution with reference to their obligations or securities.

Field's dissent provided a coordinated, integrated, and logical understanding of most of the monetary aspects of the Constitution: what money is (coined specie), money as a standard of value, the federal power to coin money and regulate its value, the legal tender aspect of coining money, the prohibition to the States of making anything other than gold and silver a legal tender, and the prohibition for any government, State or federal, to issue bills of credit (which they might then attempt to make legal tender.) For that reason, I quote it at length.

> "Now money in the true sense of the term is not only a medium of exchange, but it is a standard of value by which all other values are measured...
>
> "Money being such standard, its coins or pieces are necessarily a legal tender to the amount of their respective values for all contracts or judgments payable in money, without any legislative enactment to make them so...
>
> "The power to coin money is therefore a power to fabricate coins out of metal as money, and thus make them a legal tender for their declared values as indicated by their stamp. If this be the true import and meaning of the language used, it is difficult to see how Congress can make the paper of the government a legal tender. When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject...
>
> "Besides this, there cannot well be two different standards of value, and consequently two kinds of legal tender for the discharge of obligations arising from the same transactions.

> "The inhibition upon the states to coin money and yet to make anything but gold and silver coin a tender in payment of debts must be read in connection with the grant of the coinage power to Congress. The two provisions, taken together, indicate beyond question that the coins which the national government was to fabricate and the foreign coins the valuation of which it was to regulate were to consist principally, if not entirely, of gold and silver.
>
> "The framers of the Constitution were considering the subject of money to be used throughout the entire Union when these provisions were inserted, and it is plain that they intended by them that metallic coins fabricated by the national government, or adopted from abroad by its authority, composed of the precious metals, should everywhere be the standard and the only standard of value by which exchanges could be regulated and payments made."
>
> "If anything is manifest from these [constitutional] debates, it is that the members of the Convention intended to withhold from Congress the power to issue bills to circulate as money -- that is, to be receivable in compulsory payment, or, in other words, having the quality of legal tender -- and that the express power to issue the bills was denied under an apprehension that if granted, it would give a pretext to Congress, under the idea of declaring their effect, to annex to them that quality."

Once Congress made paper money a legal tender in 1862 and once the Supreme Court approved that action in 1870, they disrupted the essential unity of the Constitution's monetary system, as explained by Field. They set it on a course of destruction. Almost every part of the monetary powers was damaged or open to damage or outright destruction. Money was no longer coin; it could be paper. Congress could no longer regulate the value of money. Money no longer necessarily had intrinsic worth because of its weight. The standard of value became ambiguous or could be made ambiguous. Specie no longer functioned as the sole legal tender. The government could issue bills of credit or delegate their issue. The meaning of what a dollar is would be buried and eventually lost.

However, the prohibition against States using anything but gold and silver as legal tender could *not* be destroyed, as the language is too clear and unequivocal. Instead, Congress and the courts could ignore it, or else concoct a false theory that the federal government had total power over a national paper currency that it could make legal tender everywhere. With this understanding, we can profit by looking at more court cases.

## More Court Cases

*Chermack v. Bjornson* (1974). The Supreme Court of Minneapolis rejected Chermack's demand that he be paid his tax refund in gold and silver coin pursuant to Article I, Section 10, Clause 1. Chermack had no legal case and suffered no damage because he had paid (and overpaid) his taxes in FRNs. This didn't stop the court from proclaiming its theory, without proof:

> "The courts have consistently held that the Constitution leaves the power to declare what shall be legal tender for the payment of all debts to Congress. The mere utilization of a standard of legal tender prescribed by Congress is not state action as prohibited by U.S.Const., Art. I, § 10, but rather an effectuation of validly exercised constitutional power of Congress under U.S.Const., Art. I, § 8."

Both these statements are wrong. Congress has no power to determine the medium of payment of a State's taxes, and, as the discussion in *Leitch* showed, a State is responsible for the tender it selects, anything other than gold and silver leaving it open to a constitutional challenge.

This court cited the expansive "aggregate powers" doctrine of *Norman*. Ignoring or forgetting or not knowing Article I, Section 10, Clause 1, it wrote that "Whatever power there is over the currency is vested in Congress."

*Radue v. Zanaty* (1975). As in *Leitch*, Radue had no recognizable constitutional claim, but the Alabama Supreme Court in ruling against him blundered. Had it been ruling that taxes were not debts, it would have been correct when it wrote that the State had not made paper money a tender in payment of debts. What it actually meant was that the State had not made paper money a legal tender because "the Congress of the United States has made paper money a tender for payment of debt...[and] the power of Congress to establish paper money as a legal tender has long been decided." However, both parts of what it said were wrong. The State did of its own accord choose paper money as a tender, and Congress cannot make paper money a legal tender for the States.

*Rush v. Casco Bank & Trust Company* (1975). This case was a case in contracts. The case involved a purely private contract in $. The court could have dismissed the defendant's complaint on the ground that the intent of the voluntarily contracting parties was to transact in what is usually understood to be $, namely, any legal tender including FRNs, even if FRNs are not dollars and gold was unavailable, as the

defendant argued. The contract did not call for payment in a particular kind of money, which was why the defendant had no valid constitutional case. Instead of sticking with contract law, the court claimed a federal power to impose FRNs as legal tender on the States:

> "...federal law outlawed agreements requiring payment in a particular kind of coin and provided that every obligation calling for payment in money shall be discharged by whatever may be 'legal tender' at the time of payment...31 U.S.C. § 462 [making FRNs legal tender] was enacted by the United States Congress which is free of the constitutional restriction imposed upon the States."

*State v. Pina* (1977). Vieira tells us (p. 1364) that the judge

> "ruled against Pina on the authority of *Chermack* and *Leitch*. *Pina* is thus an example of how one State court neglected its duty carefully to investigate a constitutional issue by mechanically deferring to opinions of other State courts that themselves had failed to address that issue intelligently."

As in *Rush*, the court seemed to think federal power overruled the State's absolute disability to use anything other than gold and silver as a tender for debt, writing: "The contention is based on a patent misreading of a constitutional provision limiting the powers of states, but not Congress."

*Allen v. Craig* (1977). The defendant argued that he was constitutionally prohibited from paying his taxes in FRNs. (He tried to pay in a check payable in silver dollars.) This claim is not true. The court repeated the same error of earlier courts, which is that when a State refuses payment in silver dollars, this "is not *state* action that makes anything other than gold and silver coin tender in payment of debts." However, as noted earlier, federal action in making something a legal tender cannot bypass the absolute character of Article I, Section 10, Clause 1's prohibition. If a State chooses FRNs as a tender for debts, it violates this provision. This court cited the authority of *Norman*, *Juilliard*, *Leitch*, *Radue*, *Chermack*, *Rush*, and *Wangrud.* None of these actually dealt with (p. 1364) "the unconstitutionality of irredeemable paper currency."

*Trohimovich v. Director of Department of Labor and Industries* (1978).[261] Again in contradiction to Article I, Section 10, Clause 1, this state court of appeals ruled that "Congress is the only entity empowered to declare what shall be legal tender." The

[261] I am unable to locate this and some other cases online.

judge fined the defendant for his attempt to get the State to assess insurance premiums in a price reflecting the London gold price rather than the paper dollars represented by FRNs.

*Dorgan v. Kouba* (1979). The defendant, who did not file State income-tax returns, had no case because the State may tax its citizens in anything it wishes to without violating the Constitution (as long as the taxes are not debts and as long as the process does not make the State (p. 1366) "complicit in the emission of 'Bills of Credit.'") Citing *Wangrud*, which involved federal not State taxes, the court recited the usual conventional wisdom:

> "We are not convinced that the state tax department violates Article I, Section 10, by recognizing the monetary system established by Congress. It has been settled in federal cases that federal reserve notes are on an equal basis with other coins and currencies of the United States, and are legal tender for all debts, including taxes."

*Middlebrook v. Mississippi State Tax Commission* (1980). Judge Walker erroneously declared that "Congress has made the Federal Reserve Note the measure of value in our monetary system..."

*City of Colton v. Corbly* (1982). In ruling against Corbly, the Court contended that Article I, Section 10 limits

> "the power of the states, [but] the constitution does not limit Congress' power to declare what shall be legal tender for all debts. *Julliard [sic] v. Greenman*...Congress has declared that federal reserve notes constitute legal tender for all debts...In recognition of established legal principle, we conclude that appellant's contention regarding payment of the fee is without merit."

Vieira comments (p. 1367):

> "Of course, *Juilliard* did *not* say that Congress has constitutional power to make even actual United States Notes (let alone Federal Reserve Notes) 'legal tender for *all* debts", but construed Congress's power as applying only to 'the national government or private individuals' – because, of course, *Lane County v. Oregon* had previously held Congress without power to impose a legal tender on the States for the purpose of payment of their taxes. So, the 'established legal principle' was quite the opposite of what the *Corbly* court imagined."

*Cohn v. Tucson Electric Power Company* (1983). Despite the clear language of Article I, Section 10, Clause 1, the Arizona Court of Appeals did not agree "that the state can require payment of taxes *only* in gold and silver." Their disagreement was not on the ground that taxes are not debts. Rather,

> "Such a holding would run totally contrary to the intent of the framers of the Constitution that the power to regulate the national currency and to establish the same as legal tender should be vested solely in Congress."

Insofar as this refers implicitly to FRNs as a national currency, it is wrong. Even if it referred to coins, it is wrong. The "power" to make coin legal tender was not to "establish" it. The power was a common-law power inherent in the value of such coins. Furthermore, it is wrong to say it was vested only in Congress. The States have a reserved power to make gold and silver a legal tender. What is more, the People have a power to make anything they want to into legal tender by voluntary contractual arrangements.

This court also repeated the error of other courts:

> "United States coins and currency are legal tender for the payment of debts and taxes in Arizona not because of any action by the state, but rather because Congress has made them so..."

*People v. Lawrence* (1983). The court adopted the opinion of the Attorney General of Michigan that Article I, Section 10 "does not require the State of Michigan to pay its debts or receive payment for debts exclusively in either gold or silver coin." Article I, Section 10 actually says the very opposite.

*Herald v. State* (1984). The court ruled incorrectly that "federal reserve notes are lawful money." FRNs are redeemable in lawful money, so they can't be lawful money. The ruling also suggested that when a State requires tax payments "in lawful money of the United States, [it] does not create a new form of legal tender; it simply acknowledges the existing forms of tender established by Congress." The State doesn't have to *create* a new form of legal tender to act unconstitutionally; it merely has to *make* an existing non-specie item into a legal tender.

*People* ex rel. *Bosworth v. Robert L. Jungles Family Trust* (1984). The court's amazingly superficial reason for dismissal was that the federal reserve note said on its face that "this note is legal tender for all debts, public and private."

*Walton v. Keim* (1984). Walton refused to pay state taxes in FRNs, citing a Colorado statute, still extant, that explicitly makes gold and silver coin a legal tender. Ignoring the plain language of State law, the court ruled that the illegality of paper money had been rejected by every court for fifty years. Its citations included many of the inapposite cases already discussed above. The court cited *Juilliard* but omitted its key qualification that States do not fall under the congressional power to create a national currency. The court noted "Congress has exercised this power by delegation to the federal reserve system,." without questioning the constitutionality of that delegation. This court, like others before it, again fell back on the canard that there is a supposedly unlimited congressional power to declare what is and is not a legal tender. From this it inferred that "there can be no valid challenge to the legality of federal reserve notes." Nowhere in its opinion did the court address the Colorado statute.

*May v. Bailey* (1985). A dentist refused payment from the State of Missouri in FRNs and demanded silver coins in keeping with a Missouri statute, still extant, making silver a legal tender. The court wrote that the statute's enacting clause, which is "silver a legal tender," didn't mean that the statute meant to make silver a legal tender, and apparently neither did its opening sentence "The silver coins of the United States are hereby declared a legal tender, at their par value..." Rather, according to the court, the purpose was to rid commerce of tenders of small-denomination silver coins.

The court further erred in stating that the Supremacy Clause meant that a federal declaration of legal tender overruled Missouri's declaration. Vieira discusses this issue at pp. 132-133. The Supremacy Clause states that the Constitution "shall be the Supreme Law of the Land." What does this Law say? It says that States may not make anything but gold and silver a tender for debts. That reserves or allows such a power to the States. The Tenth Amendment says that powers not delegated to the United States (and not prohibited to the States) are reserved to the States or the people. If the power to make gold and silver is reserved to the States, as Article I, Section 10, Clause 1 does, then it cannot have been delegated to the United States. We know also that the Constitution nowhere explicitly gives that power to the United States. Therefore, a federal declaration of legal tender doesn't override a Missouri declaration.

The court relied on the *Legal Tender Cases* even though *Juilliard* excepts the States as does *Lane County v. Oregon* (1869). One of the problems with the decision in the *Legal Tender Cases*, which shows that it must be flawed, is that it sets up an insoluble conflict. The federal government is said to have an implied power to declare something other than specie a legal tender, while the States may declare only specie as legal tender. Which is the Supreme Law of the Land? This is not settled, as the Missouri court tried to do, by citing *McCulloch v. Maryland* (1819), for the ruling in *McCulloch*

is that the Constitution is supreme over "the constitution and laws of the respective states"; but the conflict in the Missouri case is between two parts of the Supreme Law of the Land. This conflict strongly suggests that Congress has no implied power to establish a legal tender that conflicts with the legal tender allowed to the States, which is gold and silver. That gets rid of the conflict. It also accords with the way in which Justice Field interpreted all the constitutional provisions on money as an integrated and logical whole.

Vieira follows up with one more logical and legal outcome:

> "The States cannot make anything but gold and silver a 'Tender' because of Article I, Section 10, Clause 1. Congress cannot make anything but gold and silver coin a tender because of Article VI, Clause 2 [the Supremacy Clause] and the common-law interpretation of Article I, Section 8, Clause 5 [amplified by Field]. And, therefore, only WE THE PEOPLE – through voluntary contractual arrangements among themselves – can make anything but gold and silver coin a legal tender."

*State v. Gibson* (1985). Gibson argued that he couldn't be made to pay a fine in FRNs. The court, ignoring *Lane*, stated the opposite of *Lane*: "State officials are bound by the definition of legal tender promulgated by Congress."

*Brand v. State* (1992). The court succinctly linked a number of questionable propositions:

> "We hold that Congress: 1) has the power under the United States Constitution to establish a national paper currency; 2) has delegated this power to the Federal Reserve System; and 3) has designated the Federal Reserve Note as legal tender. Therefore, Federal Reserve Notes are 'lawful money,' and Texas statutes imposing fines payable with Federal Reserve Notes for traffic violations are constitutional."

Congress doesn't have the power in #1. If it did, it hasn't delegated it constitutionally in #2. If it had, it still couldn't make FRNs into legal tender. Even if #1, #2, and #3 were all accepted, it doesn't follow that FRNs are lawful money. No matter what the Congress legislated on FRNs, it doesn't follow that Texas statutes requiring fines payable in FRNs are constitutional insofar as they are debts, because that conflicts with Article I, Section 10, Clause 1.

There are many more cases like these. In many or most cases, the complainants argued

for themselves and presented confused constitutional arguments. That doesn't excuse the incredible number of errors on the side of the judges. One might think that their sloppy thinking is due to the lack of sophistication of the litigants. This is not so, as is shown by cases in which attorneys argued the cases in a sophisticated way and the courts still didn't address the constitutional issues or else addressed them in a haphazard, unthinking, dishonest, or slipshod way.[262]

*Daniels v. Arkansas Power and Light Co.* (1980). In this case, an eminent domain procedure resulted in payment in FRNs to which the property owners objected. The court dismissed the argument as having no merit with the assertion that federal reserve notes are legal tender. This was not a good faith judgment since that was the very statute that the litigants were assailing.

*Solyom v. Maryland-National Capital Park and Planning Commission* (1982). This case was another eminent domain case. Solyom sought to be paid in a fair market value equivalent to FRNs in gold, according to the requirement that a State tender only gold and silver. Although he stood to gain nothing, the State refused to pay in specie. This led to claims and counterclaims in which Solyom sought to mount a sophisticated case. The Circuit Court, however, denied his pre-trial motion to present expert witnesses in monetary history and theory, economics, and banking and financial practices.[263]

At trial, the court denied his motion to instruct the jury that damages at fair market value were payable only in gold and silver coin. It denied another motion to call expert witnesses and to cross-examine the Commission's witnesses, but it allowed affidavits of his expert witnesses. The court denied his motion to cross-examine the Commission's appraiser. The court denied his motion for a directed verdict. In the end, the court deposited the condemnation award to him without any evidence having been introduced that it transferred fair market value.

After he lost this case, Solyom appealed to the Special Court of Appeals which

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[262]Once the courts fall into error, their method of citing precedents perpetuates the error. Only if lawyers can sway them by new arguments in new cases can an error be corrected. If the courts are biased, changing is made that much more difficult.

[263]Vieira dedicated the second, revised edition of *Pieces of Eight* to Richard L. Solyom, who (p. v) "for decades...was a committed, tireless, and articulate advocate for the cause" of "sound money and honest banking." Solyom "provided crucial assistance in publishing the first edition of *Pieces of Eight*..."

affirmed the trial outcome, granting no new trial. It said little except that the State's use of FRNs was not a state action as prohibited by Article I, Section 10, Clause 1. Solyom raised numerous other issues that the court ignored.. He had argued that the eminent-domain judgment created a debt, and that payment should have been in gold or silver coin. He argued that interposition of FRNs did not negate that duty. He argued that the Due Process clause of the Fourteenth Amendment entitled him to just compensation, of which fair market value was the measure; and the Commission could not repudiate paying fair market value with FRNs. Even if FRNs could transfer fair market value, Congress was disabled from emitting such a currency or from declaring anything but silver coin a dollar. Even if it could emit a note, it could not be through the Federal Reserve System or private banks. Maryland's courts had plenary jurisdiction and an obligation to hear the case and he had a right to develop all the facts at a new trial.

Solyom's case raised many constitutional questions in a legally acceptable way, but the courts didn't allow them to be aired. Let us go through them. (1) The payment by the State was indeed a "state action." This requires what was present, namely, "an infusion of conduct by officials, panoplied with State power." See *Terry v. Adams* (1953). (2) The Supreme Court has never ruled on the phrase "make...a Tender in Payment of Debts." Solyom had reasonable grounds to argue that it applied to his case. (3) The Supreme Court in many cases has ruled that Congress cannot set aside the prohibitions in Article I, Section 10, Clause 1. This implies that it also cannot set aside its implied duties. (4) In eminent domain cases, it is an established procedure to measure fair market value. Solyom's compensation was set without the trial establishing a factual basis for fair market value. (5) *Perry v. United States* (1935) indicates that Congress may not repudiate obligations of the United States through payments of legal-tender paper money. This implies that it may not license the States to do the same with FRNs. (6) *Knox v. Lee* held that legal-tender paper's constitutionality depends upon its redeemability in gold or silver. Solyom's questioning of FRNs on the basis of irredeemability had a basis. (7) In both *A.L.A. Schechter Poultry Corp. v. United States* (1935) and *Carter v. Carter Coal Co.* (1936), the Court found Congress had no power to delegate legislative power to private groups. The Federal Reserve System is such an organization. (8) Many Supreme Court cases have held (p. 1381) "that State courts of general jurisdiction have the power and duty to enforce the provisions of the Constitution..."

We have seen in this and the other cases a high degree of ignorance in the courts of the Constitution's provisions with respect to the monetary system. Much worse, there is a high degree of one-sided bias in favor of the monetary *status quo*. This shows up time and again in evasions, silence on points raised, disregard of claims, faulty

arguments, improper citations of precedents, *non sequiturs*, illogical reasoning, constitutional misinterpretations, ridicule of complainants, pejorative descriptions like frivolous and spurious, refusal to hear evidence, and failure to take arguments or the constitutional problems seriously.

In general, the courts are highly protective of government power and the existing monetary system. On money issues, the courts play "follow the leader". They don't rock the boat. They view monetary questions as settled. If they are devoted to justice, it is not obvious. If they are devoted to law and the Constitution, it is not obvious. They are highly deferential to what the Supreme Court has held on money question, or what they think it has held.

*United States v. Shields* (1980). The court ruled against the appearance for the defense of "a conceded expert in the area of Constitutional law" and "the Federal Reserve." The judge explained that the testimony would "put in question...the value of the dollar and the monetary system."

*Milam v. United States* (1974). This was mentioned earlier. The court misinterpreted Milam even though he made it perfectly clear what he was saying. He asked for redemption of an FRN in lawful money, as the statute promises, but he didn't say this had to be gold or silver. Indeed he asked for either a United States Note or demand Treasury notes, the point being that these are indeed lawful money by statute, being issued by the United States, whereas FRNs are not lawful money. The court, ascribing to him what he did not demand, wrote "Appellant is entitled to redeem his note, but not in precious metal." The court didn't say what the medium of redemption was, however. It did say that Milam had refused for his $50 FRN "an equivalent value in Federal Reserve Notes" as well he might since FRNs of any denomination are not lawful money.

*United States v. Moon* (1980). Dr. Paul Hein, subject to an IRS inquiry, inquired of the IRS to define the "money of account"of the United States. The IRS referred him to the relevant U.S. statute. At that time, 31 U.S.C. § 371 read that "money of account of the United States shall be expressed in dollars." Hein was really inquiring what the "dollar" was and getting no official answer from an agency of the United States that speaks of "dollars" while collecting FRNs.

The answer to his question would have been straightforward in 1792, for the Coinage Act of 1792 declared that "the money of account of the United States shall be expressed in dollars or units...," and it defined the "DOLLARS or UNITS – each to be of the value of a Spanish milled dollar as the same is now current, and to contain three

hundred and seventy-one grains and four sixteenth parts of a grain of pure, or four hundred sixteen grains of standard silver." In 1980, Congress didn't provide the IRS with an answer other than 31 U.S.C. § 371.

Hein lost his case and filed a motion for a rehearing. He accused the court of "a sweeping malevolence" because the court condemned him "for arguments which I did not make." In particular, he did not claim that FRNs are not taxable dollars and cannot be declared legal tender by Congress. He disavowed the argument that money must be gold and silver. He expressed his willingness "to pay a tax on bank liabilities received, or Federal reserve notes tendered..." What then did he want?

> "My problem arises from being required to make statements, under penalty of perjury, that these instruments are 'dollars', for that would make them units of the money of account...the IRS has stated...that 'Voluntary compliance places on the taxpayer the responsibilities for filing an income tax return. You must decide whether *the law* requires you to file a return.'...I believe I have the right, before signing any statements under penalty of perjury, to be convinced that those statements are true, according to existing law. Accordingly, I have asked for a definition of the money of account. The IRS, which boasts that it provides comprehensive information to millions of taxpayers every year, will not only not give me the one sentence answer I require but instead fills...legal briefs with fantastic arguments which I have never made..."

*In re Jerome Daly* (1971). The Supreme Court of Minnesota disbarred Jerome Daly in 1971.

*Rothacker v. Rockwall County Central Appraisal District* (1985). Judge Howell (p. 1397) "opined (on the standard thoughtless grounds canvassed heretofore) that the government did not violate Article I, Section 10, Clause 1 by collecting FRNs in payment of *ad valorem* taxes, and that FRNs 'are dollars'". Howell noted that Rothacker argued that Congress "has exceeded its constitutional authority and that the Supreme Court has erred in its decisions upholding the acts of Congress." Howell went on to express his deference to these authorities:

> "However, we are not only obligated to follow the Constitution, we are obligated to follow the decisions of the United States Supreme Court applying and construing the Constitution. The Supreme Court has upheld the power of Congress to establish a system of fiat currency...For the lower courts to do otherwise would not only be tyrannous but would reduce the system to chaos."

Chapter I contains a reasonably complete section debunking the notion of judicial supremacy. The points that Vieira emphasizes by reference to Howell are as follows. If a lower court has before it a case, it should decide that case thoughtfully and responsibly on its own and taking account of the particular facts of that case. A Supreme Court decision on some other case, related or not to some degree, may provide useful considerations or guidance, but it cannot be followed (p. 1398) "mechanically, thoughtlessly, and irresponsibly..." The lower court judges take an Oath or Affirmation to support the Constitution. That is not the same as following the opinions of the Supreme Court, who also take such an oath. Logically, the Supreme Court Justices are not obligated to follow their predecessors; otherwise they could never change a ruling. Their obligation is to the Constitution and discovering the true law, not to past decisions. The same must hold for the lower courts. This must be so if past errors and incomplete understandings are to be corrected.

Judge Howell's attitude was far too deferential and disposed to support existing monetary institutions, i.e., conservative, as opposed to considering the merits of the arguments in the case before him. Judges are often activist, but when it comes to protecting the monetary system, they become highly conservative.

Vieira concludes Book Two with this sentence:

> "For any reasonably intelligent individual who studies monetary law will quickly realize that 'our national monetary system' is unconstitutional through and through."

### What is Contemporary Money?

Sometime of late, Congress changed the U.S. Code. It got rid of "money of account of the United States" and replaced it with "United States money." The U.S. Code in 31 U.S.C. § 5101 now reads

> "United States money is expressed in dollars, dimes or tenths, cents or hundreths [sic], and mills or thousandths. A dime is a tenth of a dollar, a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar."

Paul Hein's question now becomes "What is United States money?" The Constitution says that it is Coin of gold and silver. What is the contemporary answer provided by Congress?

Congress has not directly answered the question: What is a "dollar"? But we can figure

it out. This section of code, 31 U.S.C. § 5101, is titled "Decimal system." Money is expressed in decimals, it tells us. The integer or real number "one" is called "dollar", we are told. Congress is telling us that the "dollar" is another name for the number one as applied to money. Money amounts are expressed in numbers with special names, this code says. The number 0.1 is a "dime". The number 0.01 is a "cent". The number 1.0 is a "dollar". The contemporary congressional idea of a dollar is a *number*, as best as I can tell, but a number that applies to United States money.

But what thing does a dollar number? What are dollars amounts of? What is United States money?

We used to know the answer. Congress has abandoned or indefinitely suspended the constitutional "dollar", which is a unit of value of a certain weight of silver. By statute of Congress, the government no longer deals in coin for receipt and payment. Such a course of action is unconstitutional. Congress has no power to suspend the constitutional dollar. What has it replaced it with? Officially or *de jure*, nothing. *De facto*, FRNs and the associated bank money.

Title 31 of the Code is called "Money and Finance." Its sections are presumably about United States money. To find out what money officially and legally is according to these statutes, if we can or to the best of our ability, we may examine this Title. After reading it, there is little doubt that the money, practically but *not legally*, that is referred to in various sections is primarily of two kinds: either physical FRNs or bank deposit liabilities that are convertible into FRNs.[264]

What is missing from the Code, however, is any statute that declares that a single FRN is one unit or one dollar of United States money, that is, a *legal* statement, such as Hein asked for, that the FRN is included in United States money. If we turn to the nearby § 5103 we come close:

> "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts."

But although the preceding code comes close, it doesn't define Unites States money.

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[264]The courts know this, as do most people. The courts repetitively recite various legal-sounding slogans and sentences in order to provide the gloss of lawfulness to FRN money that is absent.

It says that the FRN is a United States *currency*. That's not good enough. Currency is not a constitutional term. Money is. The Constitution gives Congress the power to "*coin Money*." Obviously, FRNs are not coined, and the Code doesn't say that FRNs are United States money.[265]

Another part of the Code, namely, 12 U.S.C. § 411, reads

> "Federal reserve notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank."

This says that FRNs are "obligations of the United States," which is why, following the principle of set-off, they are receivable for payment of taxes, customs, and other public dues. Obligations are debts. In what are these debts payable? In "lawful money." They are redeemable in lawful money. The FRNs are not lawful money. They are promises to pay lawful money.

Can something that is not lawful money be legal tender under the Constitution?

The redemption payments on FRNs are indefinitely suspended. They are not only suspended, such payments are outlawed by law:

> "The United States Government may not pay out any gold coin. A person lawfully holding United States coins and currency may present the coins and currency to the Secretary of the Treasury for exchange (dollar for dollar) for other United States coins and currency (other than gold and silver coins) that may be lawfully held."

Gold and silver coins are included in the category lawful money, but Congress is not paying them out as redemption for FRNs. Although 12 U.S.C. § 401 says that FRNs shall be redeemed in lawful money, 31 U.S.C. § 5118 excludes gold and silver coin

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[265]In fact, it raises a question: What is United States currency?

from being paid out. FRNs are irredeemable obligations of the United States. Is that constitutional?

The Constitution says that Congress has the power "To borrow money on the credit of the United States." Where is the borrowing of money when an FRN obligation is created? There is none. No money in the constitutional sense of gold and silver coin flows into the Treasury when an FRN is created. Instead, directly or indirectly, the government gains command over goods and services by paying with an FRN or an equivalent bank deposit. This amounts to a forced loan that is not ever payable in anything. This procedure is unconstitutional.

This is only the beginning of the questions of constitutionality that afflict FRNs. Book Three goes into this in depth.

On money, Congress has exactly the monetary system and the laws that it wants to have. They are not the Constitution's monetary system and law. Congress has set aside the Supreme Law of the Land. The Supreme Court has approved of this. The courts throughout the land defend this. They all pretend that FRNs are the constitutional money of the United States when they are not.

Congress wants the FRN and bank deposits convertible into the FRN to serve as United States money without officially and legally making it United States money. It has what it wants. Neither Congress nor the Supreme Court, and certainly not the lower courts, want to go any further in law than they have to. Congress does not want to raise constitutional questions that are currently suppressed and left hanging. It far prefers to overturn the Constitution quietly and ambiguously than to have to face issues openly that entail a change in the entire power structure of the government and nation. In this, it has ample and unswerving cooperation and support from the courts. The Supreme Court set the pattern of support in the *Legal Tender Cases* and again in the gold seizure and *Gold Clause Cases*. The lower courts have followed a heretofore successful strategy of marginalizing any individuals who challenge the constitutionality of the monetary system.

CHAPTER XII

## The Unconstitutionality of America's Money and Banking System

### Preface

This chapter summarizes Book Three of Edwin Vieira's *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution*, second revised edition, 2002. The relevant page numbers are pp. 1403-1524, omitting pp. 1482-1512, which excerpt congressional comments pertinent to the Banking Act of 1935. As in earlier parts of this series, the summary is unauthorized by Dr. Vieira. It attempts to convey what I conceive to be the essence of his thought and research in an understandable way. This requires distilling and sometimes introducing a different kind of exposition than his. The result is a hybrid that would have been impossible to produce so quickly without his extensive, detailed, and path-breaking thought. I am fully responsible for all errors, misunderstandings, and distortions.

Obviously I would not have undertaken this project had I not thought his work of great importance to efforts at monetary reform. This does not mean I subscribe to his every thought, emphasis, constitutional interpretation, or recommendation. It means that I think that his work is a first-rate representative of that line of thought which is attempting to reform America within the original meaning of her Constitution, and, as such, deserves respect, a full hearing, and consideration. Providing an exposition of his thought in this form is for me more an exercise in raising my own level of understanding and sharing what truth I discover in his work with others than anything else.

### Introduction

America's contemporary money and its banking system are both unconstitutional. Exactly in what ways is the *money* unconstitutional? Exactly in what ways is the *banking system* unconstitutional? This article analyzes each to pinpoint the distinct sources of the unconstitutionality.

Over and above America's unconstitutional coinage, there are four reasons why Federal Reserve money is unconstitutional and three more reasons why the Federal Reserve banking system is unconstitutional. If the Federal Reserve were reformed by alteration or termination, the unconstitutional money would remain. That is to say, if the government entirely carried out the money power as now conceived and executed,

the money would still be unconstitutional.

**Unconstitutionality of Base-Metal Coinage**

America's clad coins that are made of base metal are unconstitutional in several respects. They are declared to be legal tender at their full nominal values, but their values by weight of metal in the coins have been less than the nominal values.[266] If a coin has lower market or "intrinsic" value against the constitutional silver standard than its nominal value, then its legal tender quality should be correspondingly reduced. Congress did this in the Coinage Acts of 1853 and 1879, following a pre-Constitutional common-law tradition. The Coinage Act of 1965 departed from this principle. Secondly, to be legal tender at all, the Constitution explicitly requires coins to be gold or silver. Third, the Treasury does not exchange clad coins for gold or silver. It couldn't without losing on such exchanges. This is because Congress has not properly regulated the values of the coins as the Constitution instructs it to do.

**Unconstitutionality of Federal Reserve Notes (FRNs)**

The money we use daily (or that is current or currency) is mostly hand-to-hand printed Federal Reserve Notes (FRNs) and bank deposit liabilities such as demand deposits that are convertible into FRNs. These may be lumped together for simplicity because they are highly interconvertible. Call them simply FRNs. *Both* FRNs and the slug coins are unconstitutional. Since most of the money is FRNs, we consider that in depth.[267]

To grasp the reasons for the unconstitutionality of the *money* and the separate reasons why the *banking system* is unconstitutional, we need to consider FRNs by themselves and the banking system by itself. We need to abstract from the workings or structure of the Federal Reserve System (FRS), which is the banking system part.[268] An easy way to make that separation is to think about greenbacks, which were the legal-tender notes that the United States Treasury issued in the Civil War. Then there is no banking

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[266]The nickel is getting close or may already be an exception.

[267]Defining the contemporary money supply is always a controversial problem. Fortunately, it is not one that needs to be addressed in order to analyze the constitutionality of America's money. One workable definition is the True Money Supply. This is what I have in mind for the money of the United States that is current and denominated in dollars. Gold and silver are the constitutional money, but they are not current.

[268]Chapter VIII describes the structure of the FRS. The FRS doesn't comprise the entire banking system, but it's a very important part and the part we are considering.

system to confuse matters. There is no Federal Reserve.

Instead of the term greenbacks, I use their longer name, which is United States Notes. I call these USNs. Let us suppose that the United States issues United States Notes (USNs). Assume that they have many of the same properties that today's FRNs possess, including mainly that they are *not redeemable* in precious metal and that they are *legal tender*. The Treasury prints today's FRNs and sends them on to the Federal reserve. It could just as easily print USNs and place them into circulation. The USNs are printing-press money.

Most everything we will say about USNs holds for FRNs. The FRNs are, in important respects, the same as USNs, except that they are controlled by the Federal Reserve, whereas the Treasury controls USNs. The similarity was recognized by Rep. Hollister in 1935 in a speech to the House of Representatives, even though he didn't use the terms USNs and FRNs:

> "If the time ever comes that the Government is in a position to force upon an unwilling lot of buyers its own obligations against their will, then the time has come when the credit of the country is beginning to fall. Most of us know that the financing of continuing Government deficits by fiat money is the road to ruin. By 'fiat money' is meant merely the printing of greenbacks, obligations behind which there is nothing but the promise of the Government. When the Government once starts to pump out such obligations and compels individuals to take currency of that nature instead of currency which has something behind it, either the Government is on the road to ruin or its people are, because it means ultimately a partial or total default, to the extent that the value of those obligations goes down and prices go up correspondingly."

In the above, Hollister speaks of USNs as fiat money with nothing behind it but promises. A promise is a promise to redeem in some other medium, like gold and silver. There is an even lower form of fiat money, which is an empty or almost empty "obligation", or a currency that has the form of an obligation but not its substance. This is an *irredeemable* fiat money. FRNs are irredeemable in any other medium of exchange but slug coins. Hollister speaks of the Government printing this money, which is an accurate description of USNs. In the next paragraph of his speech, he goes on to say that issuing greenbacks that must be accepted as fiat money is no different than a Government *compelling* the purchase of interest-bearing bonds:

> "If the Government, by compelling buyers to acquire Government obligations which bear interest, which are called 'bonds', as distinguished from

> Government obligations bearing no interest, which are called 'greenbacks', forces its promises on its people, there is absolutely no difference in the procedure or the result. It is a compulsory process, and it means that the credit of the Government is gone; that the Government may no longer sell its obligations in the open market."

It is uncommon to hear or think about forcing government bonds on buyers. If it were done, the interest paid on the bonds wouldn't matter. The government could just print more bonds with which to pay the interest. The difference between greenbacks and the bonds would vanish, as Hollister suggests. The relevance of cramming down government bonds is that this is what the Federal Open Market Committee does when it buys bonds and makes the Federal Reserve banks take them.[269]

Hollister points out next that the Federal Reserve Board, acting with its money power, *compels* the private Federal Reserve banks to buy bonds. He doesn't mention that in the process of buying these bonds, the system issues FRNs (or their equivalent); but this is well-known:

> "One of the chief objections to this bill is through the provisions by which the Federal Reserve Board is given power to compel Federal reserve banks to enter into open-market operations on the buying side. When that is once passed, then we have put into the control of the Federal Reserve Board a most dangerous instrument. We have reached the point then where, if sufficient Treasury control is exercised on the Federal Reserve Board, the Federal Reserve Board in turn may compel the Federal Reserve banks of the country...to keep on buying and buying Government obligations..."

The point that he makes, in so many words, is that FRNs are little more than a disguised or roundabout method of issuing USNs. In other words, the resulting currency is little different if the Treasury runs a printing press to print USNs that it spends, or if the FRS buys bonds from the Treasury and issues FRNs to the Treasury that it spends.[270]

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[269]Furthermore, most of the interest on the bonds reverts back to the U.S. Treasury.

[270]A common misconception is that FRNs cost the public more than USNs because banks create money via loans, and loans are at interest. Suppose the Treasury issues USNs. Then regular banks (member banks) may use these as reserves from which to create interest-bearing loans in the same way that they today use FRNs to create interest-bearing loans. The only difference between USNs and FRNs is that the latter are created by the Federal Reserve banks

Assume that the government creates as much USN money as it wants and spends it. Would issuing such USNs be within the constitutional powers of Congress?[271] Before answering that question, let's spell out this situation in a bit more detail in order to show how alike the USNs and FRNs really are.

Congress can pass its usual appropriation bills for the USNs to be spent by the government. One way to pass this money into circulation is for people to have bank accounts that are credited in dollars of USNs when the government spends this money. If government pays a retiree 1000 USNs, it sends a person a check for that amount or else direct deposits that amount in the person's bank as an electronic or e-credit. People transfer these USNs in e-credit form among themselves by check or other means the same way they do today. A second way the USNs can pass into circulation is in printed form. The Treasury prints some USNs in paper form and delivers them to the banks upon request in return for the same number of e-credits in the bank. People withdraw USNs in paper form from the banks. These are the standard $1, $5, $20, and $50 bills but they say on them "United States Note". For our purposes, we lump paper USNs and e-credit USNs together and call them both USNs. They are interconvertible.

There is nothing either surprising or radical about any of this. It's been done before. There have been times when a variety of paper moneys were circulating, including USNs, silver certificates, gold certificates, national bank notes, and FRNs.

To mirror the exact reality of today's FRNs, assume that Congress passes a law making the USNs full legal tender for all debts, public and private, public charges, taxes, duties, and dues. Congress passes another law saying that it will not redeem the USNs in anything but the slug or base-metal coins in circulation today. As with today's FRNs, Congress passes a third law saying that the USNs are "obligations" of the United States. It even passes a law, as it has for FRNs, saying that the USNs are redeemable in "lawful money", and then does not allow redemption in anything but slug coins.

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buying U.S. bonds. However, the lion's share of the interest goes back to the Treasury. Hence, the public is no more disadvantaged by FRNs than by USNs on the count of interest.

[271]Whether or not irredeemable USNs are constitutional, their political economic effect is to enlarge the government by removing the necessity for the government to obtain gold and silver to redeem USNs. With irredeemable USNs, the government is empowered to inflate at will, with all its attendant ills and evils. The necessity directly to tax in order to obtain gold and silver is reduced. This effect also increases the incentive for government to enlarge.

Where are we going with this? If USNs are unconstitutional for identifiable reasons, then FRNs, which have the *same exact* properties, are also unconstitutional. The FRS, America's main banking system, may be (and is) unconstitutional for yet *further* identifiable reasons.

So, are these USNs constitutional? Is the United States government allowed by the Constitution to issue USNs, redeemable, irredeemable, or anything in between?

If USNs are constitutional, the Constitution must give Congress the power to issue them, for the Constitution is a document that enumerates government powers. One way to prove the latter is to examine the Tenth Amendment to the Constitution, which reads

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

There are other good ways, but that subject is not our main concern in this article.

The two enumerated money powers with which we are concerned are Article I, Section 8, Clause 5 and Article I, Section 8, Clause 2. The former is the power

> "To coin Money, regulate the Value thereof, and of foreign Coin..."

The latter is the power

> "To borrow money on the credit of the United States".

Since USNs are not coins of any sort, either slugs or precious metals, but instead are a form of paper or e-credits, the coinage clause doesn't justify issuing them. This is argument 1 for their unconstitutionality. If USNs are issued, Congress is overstepping its constitutional power, which is limited to *coining* Money.[272] We are not entitled to rewrite the Constitution and interpret "To coin Money" as meaning something it doesn't say.

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[272]The political economic effect of restricting government money to coin or disallowing USNs, redeemable or not, is to keep government smaller. The framers disallowed all USNs, redeemable or not. They knew that redeemable USNs are a step towards irredeemable USNs. They also knew that irredeemable USNs combined with legal tender quality abused rights and created economic evils, so they required all government tenders to be in gold or silver. These bulwarks against big government lasted from 1789 to 1861.

USNs are a form of *bills of credit*, and the framers intentionally disabled the government from issuing bills of credit by not enumerating their issuance as a power; and they stayed disabled for a long time. This is argument 2 for their unconstitutionality. Discussions of bills of credit appear in Chapter I, Chapter II, Chapter III, Chapter IV, Chapter VI, and Chapter VII of this book.

Here's a quick review. The Money referred to in the Constitution is strictly gold and silver. The phrase "coin Money" occurs twice. Congress is enabled to coin Money, and the States are disabled from coining Money. The word "coin" appears five times. The other three times are that Congress has power to regulate the value of foreign coin, Congress has power to punish the counterfeiting of securities and coin, and the States may not make anything except gold and silver coin a tender in payment of debts. The dollar, which was a silver coin, is referred to twice. All these references show that Money means gold and silver in the Constitution. The power to punish counterfeiting distinguishes paper securities from coin, which is further supporting evidence. Only gold and silver can be made a tender for paying debts, not paper money, which is still more supporting evidence. Beyond all this, we know that the framers at the Convention purposely disabled the emission of bills of credit by Congress and the States. No power to emit them is present as it is with coining Money.

Finally, we know that for 72 years after the Constitution was adopted, Congress didn't issue bills of credit; and the record shows many statements in which politicians and others spoke of the Constitution's Money as gold and silver. According to the Supreme Court in *Myers v. United States* (1926), the longevity of congressional approbation of a construction of the Constitution that is constitutional means that Congress cannot suddenly decide to pass a law changing that construction:

> "Nor can we concur in Mr. Webster's apparent view that, when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may, by its mere subsequent legislation, reverse such construction. It is not given power by itself thus to amend the Constitution."

All the evidence points in the same direction. The framers were not fools, and they didn't construct the Constitution haphazardly. They knew exactly what they were doing. They disabled the issuance of bills of credit. USNs are bills are credit. Ergo, USNs are unconstitutional. Ergo, FRNs, being the same as USNs except for the somewhat roundabout way in which they are issued, are unconstitutional, although we have to do more work to prove this definitively.

Advocates of government paper money have always wanted to get around the constitutional prohibition. They have succeeded. They have had to dream up plausible arguments to rationalize the constitutionality of paper money being issued by the government.

One might possibly argue that Congress has the power, as a necessary and proper device, to print USNs in order to facilitate borrowing Money, which constitutionally is gold and silver.[273] However, why would the framers, who were well aware of both kinds of money, systematically enable gold and silver money in the Constitution, while burying and hiding the power to issue paper money in the Necessary and Proper Clause?

The framers knew the ills and evils of USNs, which is why they do not appear as a power of Congress in the Constitution.[274] Hence, even if USNs, or banks, or banknotes help the government borrow and float its debt, that doesn't make it constitutional for the government to print USNs.

Another way to get around the prohibition against bills of credit is to argue that issuing USNs is itself a valid form of borrowing. Justice Bradley in *Knox v. Lee* (1870) ruled that greenbacks (or USNs) are valid under the power to borrow on the credit of the United States.[275] He interpreted a greenback as a forced loan.[276] He and the Court

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[273]Historically, the argument was that banks and bank notes facilitate government borrowing of money. This was used to justify government creation of banks and banking systems, as a necessary and proper power to enable borrowing of money on government credit. Banks and bank notes do facilitate government issuance of debt and borrowing in paper money, especially when the bank notes are given legal tender quality of any sort, such as being made acceptable for tax payments. They also facilitate government borrowing of coin from the banks. The overall effect is to enlarge the government. Therefore, advocates of larger government often embrace bank notes with legal tender quality. There are also advocates of larger government who are anti-banking. They favor USNs and cutting out the banks from being involved with government issues of money.

[274]The initial battles between constitutional hard money advocates and advocates of banks and bank notes were fought over the incorporation of the First and Second Bank of the United States between 1791 and 1836. See Chapter IV.

[275]Bradley contradicted his own concurrent ruling (*Thomas v. City of Richmond* (1870)) in which he sharply distinguished borrowing and issuing long-term securities from issuing bills of credit. He wrote there "Such city securities as those authorized by the charter are totally different from bills issued and used as a currency or circulating medium. The distinction is well

found the greenbacks constitutional, but only as promises to be redeemed in gold or silver. The Court disavowed "making that money which has no intrinsic value."

> "We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof...It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value."

If there is any case at all to be made that emitting paper money is constitutional under the borrowing power, then the paper *has to be redeemable* so that the borrowing can be repaid.[277] That is logically necessary. That is the case that Bradley and the Court adopted. By interpreting borrowing on credit as a forced loan, they bypassed – really they busted – the Constitution's prohibition against paper money. They bypassed due process as well, insofar as people were forced to accept paper money that had a lower value than specie. They bolstered these essentially destructive judgments with doctrines of expansive government power (see Chapter VI).

Since our hypothetical USNs are *not* redeemable in gold and silver, this is argument 3 for their unconstitutionality. This implies that, even under the doctrine that the borrowing power enables paper money issues, the contemporary FRNs can't be justified, as they are irredeemable.

Although we hold that the Court was wrong and that USNs, being bills of credit, are unconstitutional whether or not they are redeemable in gold or silver coin, the Court's decision is relevant in another respect by premising the constitutionality of USNs on

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understood and recognized by the whole community."

[276]In Chapter VI, I argue that a credit transaction by definition is voluntary. It relies on the creditor's assessments of the borrower's willingness and ability to pay back the loan. A "forced loan" is not borrowing. While it has the *form or appearance* of a loan, admittedly forced upon the pseudo-creditor, it is seizure.

[277]In actuality, the greenbacks were not redeemed for 17 years. People made to take them were not sure whether they would ever be redeemed or how much they'd get for them or when they'd get it.

their being redeemable. Not being redeemable, the USNs are *not convertible into gold and silver by the government*, but gold and silver are the only constitutional legal tender. Hence, a USN that is made into legal tender is an unconstitutional legal tender. This is argument 4.

Of these 4 arguments that apply to USNs, numbers 1, 3, and 4 apply to FRNs directly and immediately: They are not coin, they are not redeemable, and they have no ground for being legal tender. These are three reasons why FRNs are unconstitutional.

Are FRNs bills of credit? Without any doubt, they are, just as USNs are. Apply, for example, Justice Marshall's test in *Craig v. Missouri* (1830):

> "...'bills of credit' signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

For further details and tests of what is a bill of credit, see Chapter II. FRNs pass criteria that I presented there and they pass Vieira's criteria outlined there, which I repeat here:

> "Vieira (p. 454) mentions three criteria, any one of which suffices. The legislature intends the paper to circulate throughout society as a medium of exchange (whether it is actually suitable for that purpose or not.) The paper is suitable as a circulating medium of exchange, whatever the legislative intent. The paper actually circulates as a medium of exchange, whatever the legislative intent or its suitableness in theory."

That leaves us with one more question. Are FRNs *government* bills of credit or *private* bills of credit? If FRNs are government bills of credit, then argument 2 applies, as it did for USNs: FRNs as government bills of credit are constitutionally prohibited. We then have 4 reasons why FRNs are unconstitutional.

To decide if the FRNs are government or private bills of credit, we need to bring in more realistic detail. Suppose that Congress alters the issuance procedure for USNs. It stops printing them itself. It stops spending them itself. It goes out of the business of creating and spending USNs.

Instead, it creates a Federal Reserve Board (FRB) that has the power and discretion to issue the USNs. They will now be called FRNs. Next, Congress issues bonds. It

authorizes the FRB to buy these bonds and pay for them with FRNs.[278] Congress *ends up with FRNs to spend* just as it had USNs to spend, and the bonds end up being held by the Fed. The FRB is to the government something like a captive finance subsidiary is to an automobile company. It is a kind of off-balance sheet entity organized separately for various reasons but still designed to further the aims of the parent enterprise. From this perspective, FRNs are government bills of credit.

There are actually 8 features of this arrangement that suggest the resulting FRNs are *government* bills of credit. They are that (1) the FRNs are given full legal tender quality by Congress, (2) the government ends up with new FRNs to spend, just as it had new USNs to spend, (3) the FRNs are obligations of the government, (4) the FRB is a government dominated board with its main appointments made by the government, (5) the FRB works closely with the Treasury, (6) the FRB reports to Congress and acts as an agent to carry out a congressionally-delegated power, not as a private commercial enterprise, (7) the government promises to redeem FRNs at the Treasury in "lawful money", (8) FRNs are not consistent with the letter and spirit of the Constitution.

The eighth feature requires explanation. Judge Marshall in *McCulloch v. Maryland* (1819) wrote

> "We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. 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 with the letter and spirit of the Constitution, are Constitutional."

Since the Constitution disables government emission of bills of credit *directly*, does it enable their emission *indirectly* in the manner described, which is to interpose the FRB as an agent with discretion to issue FRNs for purposes internal to the privately-owned Federal Reserve banks? Direct disablement and indirect enablement are contradictory. This is evidence that the FRB and the FRNs are not consistent with the

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[278] The actual situation can be more roundabout. Congress may issue the bonds to the public which pays in FRNs. The FRB then buys the bonds (via Federal Reserve banks) from the public. The government ends up with FRNs to spend and the Federal Reserve banks end up with government bonds.

letter and spirit of the Constitution. The ends for which the FRS has been created and the means it uses are discussed in Chapter VIII. The ends are not legitimate and the means are inappropriate. On these counts too, the FRS fails Marshall's criteria.[279] But all of this is just to prove #8. We also have the other 7 aspects that suggest that FRNs are a government paper money.

This completes the discussion of why America's main money, FRNs, is unconstitutional. There are 4 basic reasons. (1) FRNs are not coined gold and silver, which is the only constitutionally-enabled money. (2) FRNs are government bills of credit, which is a constitutionally-disabled form of money. (3) Even if government bills of credit are deemed constitutional by virtue of being redeemable into gold and silver, the FRNs fail this constitutional criterion because they are not redeemable in gold and silver. (4) As legal tender, FRNs are unconstitutional because legal tender must be gold and silver.

**Additional Comments**

In order for there to be constitutional FRNs, Congress has to have power to delegate their creation to the FRS. This means that Congress has to have constitutional power to create USNs. The Supreme Court ruled that redeemable USNs were constitutional in the *Legal Tender Cases.* The constitutionality of irredeemable USNs has been denied a Supreme Court hearing. We really do not know what kind of justifications that supporters of FRNs would devise if their constitutionality were ever put to a serious test.

If Congress has the power to issue irredeemable USNs at its discretion, it is a very great power. It is what is sometimes called the ***money power***. It means that without taxation, Congress is able to buy whatever it decides to buy in any amounts. It means that Congress has the power to create and provide money (USNs) to whomever it decides to be a beneficiary of these USNs, as long as the program or transfer comes

[279] In Chapter III, we examined a series of Supreme Court cases involving bills of credit at the State level. We noted there that the decision in *Briscoe v. Bank of Kentucky*, however mistaken it might be, justified concluding that FRNs would *not* be government bills of credit. As Vieira puts it (p. 1417), "through the Supreme Court's spectacles," FRNs are "the notes of those banks, not the notes of the United States..." If we entertain that line of legal thought, then supporters of the Federal Reserve System and FRNs *cannot* justify them as deriving from some implied government power to emit bills of credit. They have to explain under what power or powers the government has set up the FRS and showered various benefits on it and the FRNs.

under one of its enumerated powers.[280] The money power can be used not only to target specific groups, companies, corporations, and persons that are its beneficiaries, but also to affect the entire economy. It is monetary and fiscal policy rolled into one or very nearly so. It means that fiscal policy finds an automatic means of financing. It is power over the economy. The Constitution ***denies*** Congress the money power in the sense being described. Coining money is a money power, but it is not at all this kind of expansive and big government money power.

Congress hasn't issued USNs for a long time. Instead, it has commissioned the FRS to issue lookalike FRNs. The central bank method, popular among nearly all modern governments, is apparently chosen because it allows the government to become larger and larger more quickly. Governments that issue USNs directly find that the notes are not as well accepted as governments who arrange for banks to take up government bonds with FRNs.[281] The government directs spending, indirectly pressures the central bank, and becomes larger, but an accompanying result is that quite a lot of money power over the economy is given to the central bank. Central banks like the FRS create booms and busts, recessions, depressions, inflations, and hyperinflations. This brings us to our next topic, the constitutionality of that commission or delegation.

**Unconstitutionality of the Federal Reserve System (FRS)**

The preceding section shows that the money of the United States is unconstitutional. It also shows that the money would be unconstitutional even if there were no Federal Reserve System and the United States itself issued USNs with the main features of FRNs. We now argue that, in addition to unconstitutional money, the United States has an unconstitutional system for creating (and destroying) its money. This is the FRS. This is the central bank of the United States and the banking cartel that it leads.

The FRS is not unconstitutional only because it creates unconstitutional money. There are other reasons. To grasp this clearly, we follow the same strategy as before of separating money from the banking system. Above, we analyzed money without the banking system by imagining USNs that were virtually FRNs, except issued by the United States. Now we analyze the banking system without worrying about the kind

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[280]This is no constraint for modern Congresses that routinely violate the Constitution.

[281]Hamilton and Jefferson, who took opposite sides on the First Bank of the United States, recognized this effect. Hamilton, who favored bigger government, therefore favored the Bank while underestimating the follow-on effects of paper money inflation and depression. Jefferson favored smaller government and was much more sensitive to the negatives of paper money.

of money it issues or whether or not that money is constitutional.

To begin with, suppose that the power to coin Money or some other enumerated power or the Necessary and Proper Clause gives Congress a constitutional power to issue USNs. Would this give Congress the power to delegate this power to an institution like the FRS? Would this give power to Congress to create an institution like the FRS with the powers that it has? We are going to argue that the answer to these questions is "No," which means that the FRS itself is unconstitutional, over and above the money it issues.

Congress has delegated powers to the FRS through the Board of Governors and the Federal Open Market Committee (FOMC).

The main power is the power to issue currency under the aegis of the United States. Imagine that Congress has a constitutional power to issue USNs.[282] It decides how many to issue and when to issue them. Instead of issuing USNs, suppose Congress creates the FRS. It writes a law that says that the Board of Governors may issue FRNs that have the properties of the USNs. That is actually what Congress has done. Congress has delegated its (supposedly constitutional) power to issue a paper currency (USNs) to the FRS, which calls these selfsame notes, FRNs. The code reads

> "Federal reserve notes, to be issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal Reserve bank."

In delegating this power, Congress no longer has control over the amounts of such notes issued or their timing, and it doesn't provide the FRS much guidance in these matters. The Board of Governors has "discretion" according to the above code.

[282] When the Supreme Court upheld USNs as constitutional, it did so under the power to borrow money. See *Knox v. Lee* (1870) and *Juilliard v. Greenman* (1884). See also *Bank v. Supervisors* (1868). The FRS claims its power to issue USN lookalikes derives from the power to coin money.

A second power given to the FRS is power to augment "monetary and credit aggregates." This power relies on the first power, since the Fed augments these aggregates by issuing FRNs. The relevant code reads

> "The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."

These broad and undefined terms give the Board of Governors enormous discretion, just as the code gives it discretion over FRNs.

Chapter 3 of Title 12 of the U.S. Code spells out in more detail the powers that these two powers comprise. In general, the Federal Reserve banks have very broad powers to lend FRNs (or their equivalent credits) to a broad range of parties on a broad range of collateral at interest rates they choose.[283] This includes foreign banks and their branches. It includes Federal intermediate credit banks, members banks, individuals, partnerships and corporations, and agricultural credit corporations. The Federal Reserve banks have power to deal in the open market by buying and selling a range of securities and assets, including bonds and notes of the United States, gold coin, bullion and certificates, bankers' acceptances, bills of exchange, commercial paper, municipal securities, debentures, and debt of agencies of the United States. Purchases are paid for with the creation of FRNs (or equivalent credits.) Other powers include banking powers of accepting deposits and clearing checks.

The code that governs the open-market operations vests the power in the Federal Open Market Committee (FOMC) and provides this guidance:

> "The time, character, and volume of all purchases and sales of paper described

[283]The loans are of various kinds enumerated in 12 U.S.C. § 341 to § 361. They include discounting notes, drafts and bills of exchange arising out of commercial transactions including agriculture; rediscounting for any member bank the notes, drafts, and bills of any person, partnership, corporation, or association; discount of acceptances; advances to member banks on their promissory notes; advances to member bank groups; advances to member banks on time and demand notes; advances to individuals, partnerships, and corporations on promissory notes; discounts to foreign banks and their branches; notes, drafts, and bills based on livestock; rediscounts for Federal intermediate credit banks; obligations of cooperative marketing associations.

> in sections 348a and 353 to 359 of this title as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country."

Again the code gives the FOMC complete discretion over critical components of the creation and destruction of the nation's money and credit. Having gotten at least a partial idea of what is involved in replacing USNs with FRNs, we return to the question: Is the degree of discretion given to the Federal Reserve constitutional?

Congress cannot constitutionally divest itself of its legislative powers in an uncontrolled and very broad way. If Congress has the money power, which includes issuing USNs in the amounts it wants, at the times it wants, and to the persons it wants, it cannot constitutionally turn this power over to another entity, be it a public, a private, or a mixed public-private institution. It cannot turn this power over to another branch of the government either. The Constitution says

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

*Vested* means fully and unconditionally. If Congress divests its powers to an agent, the accountability to the People diminishes, since the People lack direct control over the agents and do not elect them.

Imagine, for example, that Congress turns over its power to tax to a Board of Governors of the United States Conference of Mayors. Imagine that Congress turns over its power to regulate commerce to a Board of Governors of the United States Chamber of Commerce or the Conference Board. Imagine that Congress turns over its power to provide for the common defense to a Board of Governors of the National Defense Industrial Association.

Such actions obviously bust the Constitution wide open. They change the form of government radically because they send the enumerated powers into new hands that the People have not authorized to hold those powers.

In all these instances, a significant portion of the federal government's power is taken over by some other organization. Congress then is legislating *in conjunction with* another organization, be it public, private, or mixed. The other organization is *making law*. It is *governing*. Does the Constitution say that WE THE PEOPLE elect a Congress so that it can then divide the government into subgovernments over which

congressional control is attenuated and the People's control even more attenuated? Does it say that these subgovernments may then be governed by unelected persons responsive to narrower interests than the general welfare and justice? Does it say that these organizations may be run by nonconstitutional rules and not subject to constitutional checks and balances? Does it say that they may conduct their operations in secret and be less subject to auditing and monitoring than actions of Congress are? Can any or all of this be consistent with the letter and spirit of the Constitution? Does it accomplish legitimate ends with appropriate means?

Obviously, the Constitution says none of these things. Every one of these questions has "No" for an answer.

We hold that in delegating to the Federal Reserve *overly broad discretionary power* over the nation's money and credit, the Congress has unconstitutionally divested itself of a portion of its money power – assuming that the money power, which is the power to issue USNs, is constitutional (and we have argued that such a power is unconstitutional.) This is argument 5 that the Federal Reserve is unconstitutional.

Article I, Section 9, Clause 7 reads

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

The Federal Reserve draws money from the Treasury in the form of FRNs *without* appropriations made by law, and it does not publish an account of the receipts and expenditures of the money in as complete a fashion as Congress shows for its accounts. The code showing that it draws money from the Treasury is here and here. The Treasury prints the FRNs and delivers them. I quote some of this code:

> "In order to furnish suitable notes for circulation as Federal reserve notes, the Secretary of the Treasury shall cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of $1, $2, $5, $10, $20, $50, $100, $500, $1,000, $5,000, $10,000 as may be required to supply the Federal Reserve banks.
>
> "When such notes have been prepared, the notes shall be delivered to the Board of Governors of the Federal Reserve System subject to the order of the

> Secretary of the Treasury for the delivery of such notes in accordance with this chapter."

Argument 6 that the Federal Reserve is unconstitutional is that it draws money from the Treasury without going through the appropriations process.

Let's now look into argument 5, the unconstitutionality of a delegation of money power *per se*, in more depth. The money power belongs to the people. WE THE PEOPLE have vested that right with Congress via the Constitution. In *Ettor v. Tacoma* (1913), the Supreme Court's ruling noted that

> "The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

A vested right cannot be done away with by later legislation. Applied to the money power, this implies that the Congress cannot constitutionally defeat the people's constitutional right to the money power by legislation that removes control over that power to the Federal Reserve.

A blunt statement of this principle appears in *Panama Refining Co. v. Ryan* (1935), in which the Court held

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

*Opp Cotton Mills, Inc. v. Administrator* (1941) allowed a *limited* delegation for fact-finding prior to implementing a statutory command "in conformity to previously adopted legislative standards."

> "Where the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow, and the record of its action which is required by the statute to be kept, or which is in fact preserved, are such that Congress, the courts, and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function."

Does the Federal Reserve pass these tests of standards? That is a key question. It doesn't look that way at all. Congress has supplied the Federal Reserve with vague and undefined standards that use terms that have no fixed or agreed-upon meanings and no

operational definitions: growth, the monetary and credit aggregates, the long run, production, the economy, the economy's potential, commensurate, increase production, maximum employment, stable prices, and moderate long-term interest rates.[284] All of these mean many different things to many different people.

Congress has directed the Federal Reserve with no instructions or procedures to follow to reach these vague objectives. Congress has given no hint as to how to reconcile these objectives when they conflict. Lacking sound knowledge of these matters and of how the Federal Reserve implements them, and lacking information reported by the Federal Reserve on its activities, no one can "ascertain whether the agency has conformed to the standards which Congress has prescribed."

In sum, Congress has failed the tests mentioned in the *Opp Cotton Mills* case.

*Wayman v. Southard* (1825) provides a description of broad conditions under which the legislature can constitutionally delegate power:

> "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself...
>
> "The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."

The Federal Reserve doesn't squeeze in under this language either. It cannot be said that their exercise of the money power is "of less interest" than the exercise of that power by Congress itself. Congress has delegated one of "those important subjects which must be entirely regulated by the legislature itself..." The broad economic effects of money and credit on the economy alone verify that fact, such as in the World War I inflation, the 1920-21 deflation, the 1920s inflation, the 1930s deflation, and the 1930s Great Depression.

There are other cases in which the Supreme Court has spelled out when a delegation

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[284]The Constitution doesn't give Congress power to control these things in the first place. They are never mentioned in the Constitution. They are not even hinted at. The notion of the government controlling these things is foreign to the Constitution. The very use of such a power is unconstitutional. The Constitution enacts a monetary system of gold and silver, but it does not enact an economic system of government control over the economy such as this code authorizes.

by Congress is allowable:

1. "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad* (1931).

The "prescribed standard" of the FRB consists of too many terms that conflict and too many ill-defined terms to be an operational standard.

2. Congress "has stated the legislative objective, has prescribed the method of achieving that objective...and has laid down standards to guide the administrative determination." *Yakus v. United States* (1944).

Since there are many possible long-runs, many possible long-run growth rates, and many kinds of monetary and credit aggregates, the operational objective is unclear. The ultimate objectives that include maximum employment, stable prices, and moderate interest rates are also both impossible to measure and ill-defined. Congress certainly has not "laid down standards to guide the administrative determination" of these. Instead it has explicitly given the Federal Reserve *discretion.*

3. "Congress shall lay down by legislative act an intelligible principle to which the body or person authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States* (1928).

There is no evident "intelligible principle" to which the Federal Reserve must conform. If there were, there would be years of experience measuring its conformity to that principle.

4. "...look to the statute to see whether Congress...has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."

The Federal Reserve fails this test. Assuming for the sake of the analysis that Congress has the money power, then it has the power over *monetary policy.* Congress has delegated the whole of this power to the Federal Reserve, which itself writes

> "Monetary policy is made by the Federal Open Market Committee (FOMC), which consists of the members of the Board of Governors of the Federal Reserve System and five Reserve Bank presidents."

Economists confirm this because they routinely teach that the central bank controls monetary policy and the government controls fiscal policy. Congressional comments pointing out this delegation are not hard to find.

On the other hand, we can find yet other cases in which the Court has given Congress great leeway in delegating power. In *American Power & Light Co. v. SEC* (1946), the Court held

> "The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems...The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied, and to formulate specific rules for each situation. Necessity, therefore, fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

As usual, whenever the Constitution is to be sacrificed, those administering the axe appeal to "necessity". This passage adds a new rationalization, which is complexity. It also waves the banner of economic and social problems. The one thing it fails to mention is emergency.

The last sentence, which mentions protecting private rights by court access, hasn't worked in practice because court after court has denied standing to complainants about the Federal Reserve, and quite often the denial has been on grounds that the complexity of the situation prevented the complainant from making a case for damages, as in *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System* (1985).

But none of the Court's rationalizations for broad delegations of congressional power that appear in this and other cases stand up against the fact that upholding the Constitution comes first, as it is the Supreme Law of the Land, and not necessity, complexity, social problems, economic problems, or emergency. The Court's language in *INS v. Chadha* (1983) sticks closer to the Constitution:

> "...the fact that a given law or procedure is efficient, convenient, and useful in

> facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government..."

Just as emergency does not allow the Constitution to be set aside, neither do necessity, complexity, social and economic problems, efficiency, usefulness, and convenience.

Similarly, the unconstitutionality of the Federal Reserve is not negated by the argument that Congress is incapable of handling its money power itself, or cannot handle monetary policy itself, but must delegate it to the Federal Reserve out of necessity, complexity, lack of technical expertise, efficiency, or any other such criterion.[285]

This completes the argument that the delegation of the money power to the Federal Reserve fails to meet appropriate constitutional standards laid down by the Supreme Court.

We turn now to a different reason why the delegation is unconstitutional. Congress has delegated public power to *private* parties, these being the Federal Reserve banks and the member banks linked to them. Both the Supreme Court and State courts have found such delegations in other cases to be unconstitutional or illegal.[286] This is argument 7 that the Federal Reserve System is unconstitutional.

The Federal Reserve System is an organization that has both public and private components. This mixed character permeates the system, but the system doesn't have to be fully private for the government's delegation of power to it to be unconstitutional. The mixed elements are self-evident in the brief descriptions given below.

Chapter VIII describes the Federal Reserve System. The U.S. Code that applies to the system is here. The government has organized the banking system and made up its rules. They hold by law. The result is a government-enforced cartel.

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[285]This conclusion is reached while still analyzing the delegation issue under the assumption, with which we disagree, that Congress has the money power, i.e., the power to issue USNs with the properties of FRNs.

[286]This structure of government joined to corporate or private enterprise is what is called a corporative-state organization.

The 12 Federal reserve banks are *private* corporations owned by the thousands of member banks in the system. Each bank has 9 directors. The member banks choose 6; the Board of Governors of the FRS chooses 3, one of whom is the board chairman and "Federal reserve agent." The Federal reserve banks pay the directors, none of whom are government employees. The Board of Governors approves the compensation.

The Board of Governors has 7 members, all appointed by the President with the advice and consent of the Senate. The President chooses the Chairman and Vice-Chairman. The Federal reserve banks pay the salaries and expenses of the Board.

One section of code, § 246, suggests that the Board is related to or even part of the Executive branch of government. The history of the Board suggests the same. This raises a thorny question that we only mention briefly. If the Board of Governors is an Executive agency, then Congress has delegated some of its money power to the Executive branch, directly violating the Constitution's separation of powers.

The boards of directors of the 12 Federal reserve banks select one person each to serve on the Federal Advisory Council. The Council confers with the Board of Governors directly. It calls for and makes recommendations on all the important areas of the system, including open-market operations.

The FOMC completely controls open-market policy and operations. Congress has delegated money power primarily to it. It has 12 members that include the Board of Governors and 5 officers of the Federal reserve banks, specifically presidents or vice-presidents.

The 5 officers on the FOMC are privately-employed parties privately chosen. The member banks choose 6 directors of each Federal reserve bank, who then, as part of the board of directors, choose the president and vice-president of each Federal reserve bank. The boards of directors of the Federal reserve banks then have a voting procedure by which they choose 5 from this pool.

From these descriptions, it is clear that Congress has delegated money power to private parties. Quite a lengthy list of court cases finds this kind of delegation in other instances unacceptable.[287]

*Toussaint v. State Board of Medical Examiners* (1985). A statute that required

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[287]Lawyers and courts do not hold uniform views on the questions that surround the delegation of legislative powers to private parties.

membership in a private organization, the Medical Association, as a condition to be a member of the State Board of Medical Examiners violated South Carolina's constitution: "...it unconstitutionally delegates the power of appointment to a private organization."

In the case of the FOMC, the 5 members must be members, indeed officers, of the private Federal reserve banks in order to be members of the FOMC.

*Fink v. Cole* (1951). A New York statute gave a private association, the Jockey Club of New York, the "power to license horse owners, trainers and jockeys at running races." The court found this an invalid delegation. It noted

> "...in the exercise of the broad discretion vested in them in the issuance of licenses – essentially a sovereign power – the...officers of The Jockey Club...are neither chosen by, nor responsible to the State government. They are not sworn as public officials, nor are they removable as such."

The same can be said of the 5 private members of the FOMC. They exercise a purportedly sovereign money power but they are not sworn in as public officials and not removable as such. The court bluntly criticized the Legislature:

> "...the delegation by the Legislature of its licensing power to the Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of...the Constitution of this State which provides: 'The legislative power...shall be vested in the Senate and Assembly.'"

*Hetherington v. McHale* (1974). A Pennsylvania statute allowed three private organizations to select 8 out of 17 members of a committee that disbursed private funds. The court, in finding this unconstitutional, wrote that "the people are to be governed only by their elected representatives." The court noted that the people have no voice in the selection, cannot reject them, and cannot remove them in any clear fashion.

Evidently, the power of spending government revenues can't constitutionally be turned over to private unelected parties. Funds have to be appropriated by Congress. Yet the FOMC creates, lends, and spends public money.

Another court case pinpointed the problem as a conflict of interests or "other motivations." Even those who favor such delegations of power realize that conflict of

interests is a severe problem with them. For example, David M. Lawrence believes that such delegations are feasible but should be subject to procedural reviews by courts. His approach replaces the Constitution by a new form of government in which legislatures delegate their powers to private groups with oversight by the judiciary. Even so, his recommendations highlight the problems of conflicts of interest, incentives, and accountability.[288]

> "First, a court would assess the risks of conflict between public and private interest inherent in the delegation. Second, it would analyze whether the delegation is accompanied by sufficient safeguarding mechanisms to guard against the risk. The most common safeguards for delegations of lawmaking powers would be a lack of any private interest in the delegate, a parallel interest between the delegate and the public, and for the delegate to include, by representation or directly, all those affected by the decision. Delegations of other governmental power could be safeguarded by these mechanisms or by others, such as state agency review, liability in damages to those harmed by a misuse of the delegated power, standards, or requirements that the delegate be specially qualified to act pursuant to basically fair procedures."

Leaving aside questions of constitutionality, if we apply his criteria to the FOMC, we still find the arrangement deficient. The banks have a strong private interest in controlling the volume, timing, and placement of newly created money. There is no obvious reason why their interest runs parallel to or coincides with the public's interests. The safeguards that Lawrence mentions are absent. Those affected by the FOMC's decisions have absolutely no representation or voice in the decisions. They do not even know what those decisions are in any detail. The Congress engages in no review of the FOMC's decisions, except to hear broad testimony and receive similarly broad reports. Congress doesn't act upon or control the FOMC decisions. There is no known liability when the FOMC makes decisions. The courts have shown hostility even to well-constructed cases that claim damages from the FOMC and the FRS. In fact, the FOMC is an exemplary example of how *not* to resolve the problems that Lawrence thinks that legislatures and courts can overcome when they replace the Constitution's government with government by agencies.

The delegation of legislative power to private parties is unconstitutional because it violates the separation of powers expressed in the Tenth Amendment:

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[288]David . Lawrence, "Private Exercise of Governmental Power," 61 *Indiana Law Journal* (1985-86), pp. 647-695.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Let us see more precisely the ways in which delegation of legislative power by Congress to private parties is unconstitutional.

WE THE PEOPLE – as a body – are the sovereigns who possess the sovereign powers. Call them P. We delegate some of P to the federal government, call it F, and some to the States, call it S. Our reserved powers are P - F - S = R. Suppose that Congress breaks off a portion of P, call it D, and delegates it to private parties. This does several unconstitutional things. (1) It unilaterally undoes our delegation of P to F. Our elected agents are no longer upholding their oaths. They have given up legislative power allocated to them that is their sworn duty to perform. They are breaking the contract. (2) Their action transforms WE THE PEOPLE, which is a body, into two unequal bodies: those of us who do not have D and those who do have D. A portion of WE THE PEOPLE who ceded power to F now finds that another portion of the people has D of that power, not F. This is not what we bargained for. (3) The parties who gain D are private, so they are not bound by Oath or Affirmation to support the Constitution. This means that they can act for their own private interest and against the public interests laid out in the Preamble. (4) Our power to control the delegation and exercise of power that we have made to Congress is through elections of members of Congress. That power is diluted. (5) To the extent that Congress allows D to be exercised in a *discretionary* fashion, we are subject to laws and government that are not even controlled indirectly by Congress.

Fortunately, the Supreme Court in a moment of constitutional loyalty and clarity disallowed one of the more egregious delegations of power. The National Industrial Recovery Act (NIRA) of June 16, 1933, attempted to reorganize the American economy along corporative-state lines. It authorized trade and industrial associations to create codes of "fair competition" binding on all members of a trade or industry, with criminal sanctions for violations. The codes included powers to fix prices, production, and so on. The Supreme Court found NIRA unconstitutional in *A.L.A. Schechter Poultry Corporation v. United States* (1935). The Court found that the codes were laws, and that law-making power was being delegated to private groups. Knowledge of their industries was no rationale for such a delegation, the Court found:

> "A delegation of its legislative authority to trade or industrial associations, empowering them to enact laws for the rehabilitation and expansion of their trades or industries, would be utterly inconsistent with the constitutional

> prerogatives and duties of Congress."
>
> "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."

Another case along the same lines is *Carter v. Carter Coal Company* (1936). Vieira's assessment of a broad range of cases is that the nondelegation doctrine has legs. He does mention a number of cases where the Court has allowed delegation, such as *New Motor Vehicle Board of California v. Orrin W. Fox Co.* (1978).

This completes our discussion of argument 7.

### Summary and Conclusions

With some study of the material that Vieira has placed before us, it becomes more and more obvious that the money of the United States is unconstitutional and that the Federal Reserve System is unconstitutional. The reasons why they are unconstitutional become more and more clear.

Vieira has provided us with 7 arguments as follows

- Federal Reserve Notes are not coined gold and silver, which is the only constitutionally-enabled government money.
- Federal Reserve Notes are government bills of credit, which is a constitutionally-disabled form of government money.
- Even if government bills of credit are deemed constitutional, they must be redeemable in gold and silver to be so regarded. Federal Reserve Notes, being unredeemable, are unconstitutional for this reason.
- Government cannot make anything but gold or silver legal tender. As legal tender, Federal Reserve Notes, not even being convertible into gold or silver, are unconstitutional.
- Congress has unconstitutionally delegated its money power without appropriate standards, limitations, and accountability, even if that power in the first place is unconstitutionally construed in an overly expansive way.
- The Federal Reserve draws money from the Treasury without appropriations by law.
- Congress has unconstitutionally delegated its money power to private parties.

This list and the exposition of the reasoning behind it are a beginning. Further elaboration along various lines may be helpful. There are other possible constitutional

reasons why America's money and the Federal Reserve are unconstitutional. For example, Vieira alludes to the possibility that the Federal Reserve Board is an Executive agency. I alluded to the fact that Congress is delegating powers over the economy to the Federal Reserve that Congress is unconstitutionally exercising.

There are other reasons beyond the constitutional ones for criticizing America's money and the Federal Reserve System. But all efforts at reform either have to be done within a constitutional context or not. If they are to be done within the Constitution, then there has to be an understanding of what the Constitution allows and disallows. For example, we have shown that ending the Federal Reserve and replacing Federal Reserve Notes with similar United States Notes would still saddle Americans with an unconstitutional money. Setting up some sort of gold standard in which the government intervened in markets to stabilize the price of gold would be unconstitutional. A system of stabilizing a price index, which was popular among Congress in the 1930s and has been adopted in other nations, would be unconstitutional. Not only would measures like these be unconstitutional, they would fail because of their economic flaws.

The next material to be covered in this series will be Vieira's suggestions for reforms that comport with the United States Constitution.

May 29, 2010

CHAPTER XIII

## Reconstruction of America's Constitutional Systems of Money and Banking

### Introduction

Book 4 of *Pieces of Eight* consists of two chapters on reform. Chapter One tells us practical and *legal* steps, recommendations, that will reform America's money and its banking and make them constitutional. Each step follows logically from the previous analysis in the book. It adds up to a program for monetary and banking reform. Vieira ruminates on various aspects of reform in Chapter Two. He tells us why the country's money and banking have reached the present condition, where the country is headed if the money and banking system remains in place, and (p. 1588) "whether a practical legal means to transform it exists." Much of this chapter is about which of the five parts of America's federal government (p. 1607) "should be the locus of reform." His answer is WE THE PEOPLE.[289]

Many of Vieira's essays are collected here. A number of these concern monetary matters and monetary reform, such as here, here, here, here, a 7-part essay here, and recent essays here, here, and here. Vieira wrote these starting in 2005, so they are up to date. They will help anyone understand his work better. They too provide a picture of his program. The first few essays in his 7-part series summarize many of his recommendations.

### Why Change?

Before launching into this exposition of what a constitutional money system looks like, let's understand why it should be done. There are transition costs, but the costs of keeping the existing unconstitutional system in place are immensely higher than any transition costs. The benefits of a solid and constitutional system are a significant improvement in our lives and those of our children, and the avoidance of some very bad outcomes. If we do not reform the money system, change will come anyway from other directions, because the established system is increasingly falling apart and requiring larger and larger measures to keep it going, which measures themselves are having and will have larger and larger negative effects on the system's functioning and

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[289]These five parts are Congress, the President, the Judiciary, the several States, and WE THE PEOPLE.

the welfare of those living under it.

A variety of future scenarios is possible, some of them beneficial, many of them devastating. It's in our interest to create the future rather than let it happen to us.

Why change? It will be a *better* system for most Americans. The value of the dollar won't be in the hands of a select group of central bankers who do what they please behind closed doors. The government won't have a ready source of newly-created money that it can borrow and spend, creating endless boondoggles and more taxes on Americans.

It will be a *workable* system. Sure, it's different from what we are accustomed to, but metal money historically worked decently for hundreds of years, while government paper money has often run the economy into severe problems such as we are now experiencing. These problems are predictably getting worse. They're not going to go away. Our money and our banking need fundamental reform

It will be a *progressive* system. Part of the reform is to open up the economy to monetary innovation. Right now, the government and banks are in cahoots with a single kind of credit and payments system. We're not getting the innovation of which the market system is capable.

It will be a *time-tested* system. The framers of the Constitution chose a monetary framework based on many years of economic experience and legal history of money. They didn't go about this in a haphazard way. The legislative histories of our present money system reveal that Congress frequently made monetary changes in ignorance and haste. They made plenty of mistakes. History shows that the Supreme Court rubber stamped these mistakes, while concocting theories filled with holes.

It will be a *trustworthy* system. People will know that their money is actually worth something in and of itself. They won't be placing their misplaced trust in central bankers and government officials who are not being held to keep their word. If the government can seize all the gold in the country, how can it be trusted? If the Federal Reserve can print up a trillion dollars and bail out a government-sponsored enterprise, how it can it be trusted to look after your interests?

It will be a *lawful and legal* system. Vieira is a firm constitutionalist who believes in constitutionalism. He links constitutional law back to the natural law expressed in the Declaration of Independence and to British common law. He considers the American people still a people and still WE THE PEOPLE. The founding documents express the

quintessential American idea or ideas. He believes that living up to their content is the best bet for preserving and extending those ideas, which are endangered in this land.

It will be a *limited government* system. One of the supports of big government is the existing fiat money central banking system. It helps support the American Empire and the welfare-warfare State. Without a central bank to support its borrowing, the government has to compete on an equal footing with other enterprises. This helps to restrain its size.

It will be a *more stable* system. The fiat money central banking system is prone to speculative booms followed by depressions. Excessive debt buildup in the economy accompanies the boom. The levels of debt in the United States are so high that all sorts of defaults and/or currency and banking crises are occurring and will continue to occur. Gold and silver money avoid this problem because they are asset-money, not debt-money.

It will be a *fairer* system. The currency ups and downs in the existing system invariably produce wealth redistributions that are insidious and hard to identify by those whose wealth is being extracted. Gold and silver money are much more fair in this respect, because they greatly mitigate inflation and deflation. Furthermore, their stability produces lower interest rates.

It will be a more *people-oriented* system. The leaders of America installed the existing fiat money central banking system. They comprise the Establishment. Naturally, they constructed a system that served their own ends and goals. Their goals were their own wealth, position, power, fame, and status, among other things. The people came second or third or last, if at all. Gold and silver are the people's money. The people control the money when the money is gold and silver, not the politicians, not the bankers, and not the intellectuals.

**The General Goals**

There are two general goals that Vieira outlines: change the money and disestablish the Federal Reserve System.

Constitutional reform of the money requires the government to change from paper money to gold and silver (specie). This precludes any issuance of United States Notes, with or without legal tender privileges. It precludes government issues of gold and silver coin certificates. It precludes extending legal tender privileges to any paper currency of any other governmental or private entity. The Constitution disallows

government issue of any form of fiat money and any form of government money based on promises. The Constitution disallows any debt-based or liability-based money. It allows only asset-money, specifically specie (gold and silver).

Constitutional reform of the banking system requires the government to cut its ties with the Federal Reserve System. The government has to separate itself from this system in every way.[290]

On a scale of 1 to 10 where 1 is easy, this is a 3 or even a 2, if Congress wanted to do it.

The obstacle is that Congress doesn't want to do it. It isn't even the faintest of glimmers in their Potomac-fevered brains. The government of 2009-2010 is moving in the opposite direction. It is building up the corporative-state system still further. The legislation now working its way through Congress, which is being sold as a "Financial Reform Bill" doesn't reform the system. It maintains and augments it. Both the Senate and House versions *increase* the regulatory powers of the Federal Reserve.

The corporative-state system of money and banking has failed America and Americans. It has greatly weakened the economy. It has thrown million of Americans out of work. Unless Americans understand how and why this system is harming them and actively thwart it and undo it, the inevitable direction it will take is what we are seeing – greater and greater centralized control and regimentation of Americans accompanied by less and less liberty and reduced standards of living.

**Changing the Money**

The Constitution refers to Money six times. The Money referred to is coin, and that coin is gold and silver. Gold and silver are mentioned once explicitly. Silver is referred to twice implicitly by reference to "dollars". Paper money is referred to once in a clause forbidding States to issue it.

To be constitutional, all of the financial operations of the national government that

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[290]Financial reform also includes large problem areas that Vieira does not address. These include (1) laws for banks that properly treat their credit creation, default, insolvency, and bankruptcy, and (2) the many unconstitutional government loan and guarantee programs. These include Fannie Mae, the Federal Deposit Insurance Corporation, and the Pension Benefit Guaranty Corporation.

involve Money have to be in gold and silver. These include receipts from taxes, making payments to creditors, receiving payments for asset sales, and borrowing. The national government will do its business in specie, not in paper currency of the Federal Reserve, not in paper notes issued by any banks, not in their substitutes such as a bank's demand deposits, and not in paper notes issued by the United States.

To be constitutional, the securities of the United States that signify borrowing must promise payments in coined specie, and creditors must deliver specie when they buy government bonds. Since constitutional borrowing is on the credit of the United States (by Article I, Section 8, Clause 2), the government has to pledge that it will not (p. 1536)

> "seize, sequester, or in any way render illegal or impossible the rights of private parties to hold the silver and gold the bonds pledge to pay, or their rights to transfer or otherwise deal freely with such specie in domestic and foreign commerce; and never to invoke sovereign immunity, or any other like defense or plea, against judicial enforcement of any term or condition of the bond, as written."

This is a pledge against another government seizure of specie or limitations on its being held privately. To enforce this pledge, public officials and judges must be subject to penalties for "any knowing and intentional refusal or failure...to honor or enforce the contract embodied in a United States specie coin bond..." The sanctions may include "impeachment, criminal penalties, and civil liability for damages, both compensatory and punitive, wherein no defense of purported immunity shall be heard."

Since the national government has no constitutional authority to lend and since it is supposed to draw all money from the Treasury, managing its money constitutionally means holding its money in its own Treasury, not in private banks or other kinds of private securities. Keeping its money in its own depositories is consistent with "equal protection of the laws", as it avoids favoring any specific private banks with government deposits. This revives an historical institution called the sub-Treasury.

As for the States and their subdivisions, according to Article I, Section 10, Clause 1, they (p. 1539) "may conduct none of their own financial operations in such wise as to 'make any Thing but gold and silver Coin a Tender in Payment of Debts.'"

A supply of coins has three potential constitutional sources: coins minted by the United States government, coins minted in foreign lands, and coins minted privately in the United States. (The several States are prohibited from coining Money.) At present, the

government has dammed up all three sources. Congress has stopped minting coins made out of silver and gold for general circulation.[291] It has stopped regulating the value of coins, domestic and foreign. It has restricted and impeded the use of private coins as currency.[292]

Each of these three sources should be opened up. The government should once again mint silver and gold coins for general use. Congress should open the Mint to free coinage of gold and silver coins in the denominations authorized by Congress. The government should make payments in coin that it mints from its stockpiles of gold and silver. Silver coins should be minted with the dollar designations, as the country returns to the constitutional silver standard with one dollar containing 371.25 grains of fine silver. Gold coins should not have a dollar designation. This avoids Gresham's law problems. They should be stamped with their weight of fine gold.

The government can regulate the value of foreign coins by declaring their metal contents. By accepting them as payments, they also become part of the money supply. Alternatively, the mint can be open to melting them and recoining the bullion into American coins.

The Constitution says what the government may use for its official Money. It doesn't say what private parties may or may not use. That arena is wide open for innovation, including electronic forms of money based on gold or other assets and liabilities. It includes the use of private coins as currency. At present, the law precludes their use (see here) unless authorized by law and even if of original design. The only law that is needed on private coins is one that forbids counterfeiting, fraud, and misrepresentation of a coin's metal content, no matter what its origin.

The tax law punishes exchanges that use silver and gold by taxing them as

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[291]Commemorative coins are not designed to and don't serve this purpose.

[292]This prevents specie from competing as currency with Federal Reserve Notes (FRNs). That, in turn, facilitates more government borrowing and spending, because of the easily expandable supply of FRNs. Between 1982 and the present, the U.S. government expanded its borrowing and spending and interest rates fell to amazingly low levels. The resulting distortions or bubbles in asset prices have been quite remarkable. This worldwide system is moving into a new and apparently terminal phase due to insolvent banking systems, debt defaults, bursting asset price bubbles, higher risk premiums on sovereign debts, much increased government and public debt, inability of governments to match promises with payments, severe economic slowdowns, and increased risks of hyperinflation.

"collectibles." All taxes of any kind on the exchange of silver and gold for any other currency or as a currency or on the purchase or sale of silver and gold need to be entirely eliminated.

It is likely that entrepreneurs will devise methods to economize on the use and transportation of specie, so as to reduce costs of using gold and silver money. This may include checks written on specie bailment accounts, e-credit transfers on specie bailment accounts, and hand-to-hand warehouse certificates for specie. However, the government has no constitutional authority to issue such certificates or deal in such media of exchange.[293] They are a form of government paper money.

None of the above recommended changes to metal coins poses any great practical problems. The large problem is resistance to such a change in the monetary system from those who prefer the much larger government that accompanies the fiat money system. Monetary reform means that government is going out of the business of controlling money, credit, the money supply, and monetary policy.

**Transition and Dual Prices**

When metal coins are introduced, two sets of prices may emerge. There are existing (or old) Federal Reserve Note (FRN) dollar prices and new silver standard prices. A silver dollar that contains 371.25 grains of fine silver is now worth about 14 FRNs at a price of 18 FRNs per ounce of silver, which is the current price as of this writing. An auto that sells for 14,000 FRN dollars sells for about 1,000 silver dollars.

If someone owes 14,000 FRN "dollars" for an auto, they shouldn't be made to pay 14,000 silver dollars when the new silver dollar goes into effect. Contracts in FRNs need to be honored in FRNs.[294] New contracts in silver dollars need to be transacted in silver dollars.

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[293]The result will likely be that companies specializing in collections and payments and who make final payments to the government will arise and locate near government specie depositories.

[294]The law should allow them also to be paid in silver priced *at the same instant* or within 15 minutes that an FRN payment is made. If one owed 1,000 FRNs and the price of silver was 20 FRNs per ounce at that time, one could pay 1,000 FRNs or pay with 50 ounces of silver (64.65 silver dollars), or with the equivalent value in gold or foreign coin or a warehouse receipt on such an account agreeable to the recipient.

When there are dual or multiple currencies that fluctuate quite a lot against one another, one has to decide in what currencies to denominate one's receipts and payments. This is the *existing* situation in the world. One may consider gold and silver as being among the existing currency choices, even though they are not being used as a general medium of exchange.

Most Americans pay no attention to these choices because they are paid their wages and salaries and everything else in FRNs and they spend in FRNs. They are more or less automatically hedged. Companies that do international business or can issue debt in other currencies pay much greater attention to the movements of different currencies.

If a monetary reform occurs and there is a period of dual domestic currencies, FRNs and specie, then the choice between FRNs and specie will come to most people's attention, even if their dealings are fully domestic. The automatic hedge that they enjoy will attenuate. If they are paid in FRNs and goods or assets are priced in silver, the exchange rate of FRNs for silver may change while they are holding the FRNs.

The point is that there are always ongoing portfolio decisions among currencies, including specie, even without a monetary reform. People think about how any change in currency prices affects them. They actively rearrange their holdings according to their anticipations of future changes.[295] There is always a looking ahead into the future, which is speculation. This includes speculation about the role of specie in other people's portfolios and in the monetary system as a medium of exchange. This has always been the case, but for many of us for many years it has been a trivial issue. Money reform proposals, such as Vieira's or those of other economists, have been raised for decades, without much effect. Suppose that changes. Suppose one of these proposals makes political headway. Then prices of specie will be affected. If a State should adopt specie as legal tender, or if a major figure in the government should mention specie, or if a commission to study the introduction of specie should be set up, the market will alter its expectations.

This is already happening. It has always happened. That is my point. The Euro has recently declined a great deal. This affects very great numbers of persons in many complex ways. The same is happening to the dollar and has happened in the past. Introducing gold and silver as a government currency is going to be factored into

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[295]This is actually an argument for using specie as money and sticking with it. When fiat money runs into such severe problems that currency reform becomes likely, a great deal of wealth redistribution and uncertainty prevail.

prices in a myriad of ways. It already is being factored in, because people already can buy gold and silver. They've had this option in America for almost 35 years now.

If people at large begin to expect that FRNs will lose their privileged status and that specie will become a new currency, the demand for FRNs will fall. Sellers will have to be paid more FRNs to hold them, and buyers will be more willing to dispose of FRNs in exchange for goods. This means that prices in FRNs will rise.

There are going to be wealth effects before, during, and after a political process of introducing a specie currency.

People who are owed FRNs (creditors) and people who maintain holdings of assets whose values are fixed in terms of FRNs are likely to lose wealth due to *unanticipated* depreciation in the value of FRNs. However, they could have hedged and didn't. Everyone is speculating willy-nilly all the time on in what currency to hold wealth and make contracts. Hence, everyone takes their chances.[296]

It might be a good idea to choose some date that is 9-12 months or so in the future, and to establish that date as the day on which the new silver standard will begin for purposes of contracts involving FRNs. To avoid any possible price manipulation, the initial exchange rate of silver for FRNs might be taken as an average of 20 trading days, 10 before the official day and 10 after the official day.

### Disestablishing the Federal Reserve Organizationally

Severing the relations between government and the Federal Reserve is rather easy

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[296]In a weak moment, Vieira (p. 1565) mentions that Congress might mandate that an old contract in FRNs be paid in the amount of silver that exchanged for FRNs at the date the contract was initiated. I strongly disagree. Besides being an *ex post facto* interference with the contract, it undoes intentional portfolio decisions and harms people who may have judged the future correctly. Suppose, for example, you owe 1000 FRNs and silver is 20 FRNs per ounce. You decide that FRNs are going to depreciate, and so you set aside 1000 FRNs for repayment, not 50 ounces of silver. Subsequently, silver becomes 40 FRNs per ounce as you expected. You pay off your debt with the 1000 FRNs. The *ex post facto* solution would have you pay off with 50 ounces of silver; but with 1000 FRNs you can only buy 25 ounces. You are forced to come up with another 1000 FRNs. This negates your forecast. If your creditor hedged his expected receipt of FRNs, he too could be harmed. This method creates far more problems and injustices than it supposedly solves.

legally, if there is a will to do it.[297] All it takes is changes in certain key parts of the U.S. Code.

Controlling the resulting price changes is impossible. There are going to be wealth effects before, during, and after disestablishing the Federal Reserve. If silver and gold are coming into use and the Federal Reserve business model is being revamped, then people are going to anticipate the changes that reduce the importance of FRNs. Unless such changes are a complete surprise, which is unlikely, people are going to start moving out of FRNs well before any political decisions are legislated, or promulgated by a President, and announced.

What changes are we talking about? What needs to be done to remove the unconstitutional features of the Federal Reserve? It is quite simple: Cut the life support systems from the government to the Fed. Totally cut the connections between government and the Fed, so that it is left to die or refashion itself as a fully-private entity. Anything less than this, such as making FRNs convertible into gold, or reinstituting some sort of gold standard, or linking the Fed to some sort of international system in which gold has a role and paper money has a role, does not create a constitutional system. It merely retains the same system in a different incarnation. The same, if not worse, ills and evils will be the result.

There is no need to repeal the entire Federal Reserve overnight and outright. It shouldn't be done anyway because of its possibly disruptive effects. There is no need to take risks when the same result can be achieved in a different way. If critical government supports to FRNs are removed, while coins are being introduced, a dual system will result in which FRNs will either go out of existence or be transformed by the member banks, if the system survives, into something else.

The general strategy should be to give the Federal Reserve banks a grace period during which they reorganize themselves into a new company.

The Federal Reserve banks have certain operations that permeate the entire banking system, such as clearing. These 12 banks are reportedly the largest automated clearinghouse operator, with a 60% market share. This is a profitable business that has member banks and others as customers. It might be that the Federal Reserve banks jointly maintain this as a core banking operation, or it might be that it is spun off as a

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[297]Congress reserved the right in Section 30 of the Federal Reserve Act of 1913 "to amend, alter, or repeal" its provisions. This implies that anyone who uses FRNs does so at their own risk.

separate organization. At a minimum, this operation is going to survive.

The steps below alter the government's connections to the Federal Reserve at the organizational level. This is not an exhaustive list. It is enough to give the idea of essential measures. This will be followed by another list with the steps needed to alter the government's support of FRNs. The Federal Reserve banks need to know that all the government support is being withdrawn, so that they can map out a reorganization.

(1) Terminate the federal charters (incorporation) of the 12 Federal Reserve banks. They may continue operations if they wish by obtaining State charters. This also means removing the Code that requires specific election procedures for the boards of directors. Any new incorporation will outline new procedures. It also implies that the Code creating the Federal Open Market Committee becomes obsolete. There is a good deal of Code that spells out specific organizational and operating procedures for the FRS. This Code becomes obsolete when the banks reorganize.

(2) Free the member banks to leave the Federal Reserve System if they wish to. No longer require membership.

(3) Terminate the selection of the Board of Governors by the President of the United States. If the 12 Federal Reserve banks wish to maintain an overall organization with such a Board, they may do so on their own.

(4) Terminate the congressional mandates to the Board of Governors and the Federal Open Market Committee (FOMC) concerning economic goals and monetary policies. These organizations, if they survive, are freed to do what they choose to do.

(5) Terminate the mandate to report to Congress on economic goals and monetary policies.

(6) Rescind the authorization of the Board of Governors to monitor and control the regional and member banks (see here). Leave it up to a reorganized Federal Reserve to decide on the relations between the enterprises comprising the organization and its top officers and directors.

(7) The government should stop using the Federal Reserve as its fiscal agent. It should remove all government deposits from the Federal Reserve. Use a newly-formed sub-Treasury system instead.

(8) Tax the Federal Reserve banks as any other corporation is taxed if they choose to

remain in business as a corporation.

(9) Enforce the constitutional restriction against State bills of credit, so that States do not form their own corporative-state banking systems.

(10) Address the legal structure of fractional-reserve banks. At a minimum, clarify the legal status of two possible kinds of banks: 100% reserve banks and fractional-reserve banks.

**Disestablishing Federal Reserve Notes**

If a privatized umbrella organization like the Federal Reserve System survives as a banking and not just a clearing operation, it will do so because the member banks find it useful. That may depend heavily on the willingness of the public to use a new fully-privatized note of the FRS as a medium of exchange. How a new system might want to create notes, i.e., on what collateral and criteria, is up to it.

It is not difficult to change the Code in order to remove the government's connection to the old or existing FRNs. Private fractional-reserve banks typically produce their own bank notes for hand-to-hand circulation. It is possible that the system might survive in this way, as a fully-privatized institution producing a private money.[298] Suppose that the new system is called the Consolidated Reserve System (CRS) and the new notes are called Consolidated Reserve Notes or CRNs.[299]

The idea is that the CRNs have no connection to the government. The following steps accomplish this by appropriate changes to the U.S. Code. All of this is relatively simple, if Congress wanted to do it.

(1) The Treasury stops printing notes for the old FRS, which is now the new CRS. The CRS prints its own CRNs.

(2) That Code that makes FRNs "obligations" of the United States is repealed. The CRNs will be fully obligations of the CRS.

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[298]The government might require a name change to remove the name "Federal" so that people won't think the money is government money. There are private companies like Federal Express that use the name, but they don't produce money that people have long associated with the government.

[299]There are many other possibilities. Look at all the names of the various credit cards.

(3) That Code that says that FRNs are to be redeemed by the Treasury in "lawful money" is repealed. The same section of Code also allows persons to redeem FRNs at Federal Reserve Banks. A harmless alteration could require the banks to redeem them in silver and gold coins at the prevailing rate of exchange of FRNs for gold. Since anyone can do this for himself and the banks can obtain specie at the going rate, this legal alteration does virtually nothing except adhere to the letter of the law and prevent a repudiation. Vieira's legal analysis of this step concludes that this is allowable and not a debt repudiation.

Thereafter, whatever rights of redemption that CRNs will have is up to the CRS to decide.

(4) That Code that says FRNs are legal tender and/or receivable for all debts, public charges, taxes, and dues is repealed. The only legal tender the *government* accepts or makes is gold and silver in the new system. Private parties can contract to make payments in media of their choosing, and they may choose CRNs, depending on whether their properties place them in demand.

There can be a period of transition in which the government continues to accept FRNs, but it will not accept the new CRNs, should they come into existence. The rate of exchange of such FRNs should be in terms of the exchange rate between silver dollars and the FRNs.

(5) 12 U.S.C. § 354 should be altered. This should be extended to include silver coin, the reference to United States securities should be removed, and the authority to redeem CRNs for gold or silver be added. This change allows the Federal Reserve banks to provide convertibility of their notes into specie, which is a traditional function of banks that issue paper money. It helps support the value of the notes. Simultaneously, it enforces a discipline on note-issuing banks.

(6) Securities of the national and State governments should no longer be allowed to serve as collateral for the issuance of CRNs. If this is allowed, it indirectly gives government a way to issue bills of credit through the CRS. All other collateral, including foreign securities, are potential backing for issues of CRNs.

**A Summing Up**

The immediate results of the changes in the money and in dissociating the government from the Federal Reserve are as follows.

● Government money is silver and gold coin. There is no government paper money. All government money dealings are in silver and gold coin.

● The constitutional dollar is the silver dollar containing 371.25 grains of fine metal. Silver is the medium of account. This dollar is the unit of account.

● The government mints silver coins in various denominations of a dollar. It mints gold coins without any dollar denomination; they are denominated by weight.

● The Mint is opened to free and unlimited coinage of privately owned silver and gold.

● Congress regulates the values of foreign silver and gold coins.

● All domestic and regulated foreign silver and gold coins are legal tender at their regulated Values (really weights or weights adjusted to the silver standard dollar.) Government legal tender is only silver and gold coin.

● Private parties may deal in any kind of currencies – paper, electronic, specie, mixed, or whatever they devise. They may make them legal tender in their contracts.

● The FRS is entirely privatized. Member banks may leave the system freely. The 12 Federal Reserve banks are free to form one or more new companies. They may issue a new bank note. It may not use any government securities as collateral.

● Fractional-reserve banking is reformed.

With these reforms, America will no longer have a central bank attempting to manage economic variables via monetary policy and, in the process, mismanaging. Americans will have a choice between silver and gold money and a variety of privately-produced monies. The system will be a multiple-money system, open to innovation and competition.

**Ownership of the National Gold Stock**

Who owns the gold in the national stockpile?

Before providing Vieira's answer, note that he has a footnote on p. 1568 that is relevant. Gold was seized both from private parties and from banks, including Federal Reserve banks, in 1933. This was done without proper compensation. The statute of limitations may have run out, in which case only Congress could allow lawsuits "in order finally to right the historic wrong." But the claims might be justiciable because Congress in 1935 improperly invoked sovereign immunity against lawsuits on gold claims, and so it prevented lawsuits within the allowed time frame. It is possible to lodge a valid claim, according to *United States v. National Bank of Boston* (1877):

> "But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone

> into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

The claims of parties who have been defrauded of their gold come first, if such matters are adjudicated.

Beyond that, do the Federal Reserve banks own the gold? The answer is "No." They carry an asset on their books known as "gold certificates." They are carried at a statutory price of $42.22 per fine troy ounce. The sum total is $11.041 billion. Vieira cites what the Board of Governors says in an older edition of one its publications:

> "*GOLD CERTIFICATE ACCOUNT*...comprises certificates that are issued to the Federal Reserve by the Treasury and backed by gold held by the Treasury. In return, the Reserve Banks issue an equal value of credits to the Treasury deposit account...computed at the statutory price of $42.22 per fine troy ounce. Through such transactions, the Treasury 'monetizes' gold. Because all gold held by the Treasury...has been monetized, the Federal Reserve Banks' gold certificate account of $11.1 billion represents the nation's entire official gold stock. New gold certificates may be issued only if the Treasury acquires additional gold or if the statutory price of gold is increased. If the gold stock is reduced, the Treasury must redeem an equal value of gold certificates from the Federal Reserve in exchange for a reduced Treasury deposit at the Federal Reserve."

The Treasury holds the gold, whose owner is the United States. The Treasury issues gold certificates to the Federal Reserve as collateral. They are carried at a price of $42.22 per fine troy ounce. The Federal Reserve credits the Treasury account with the Fed for a like amount. The Treasury can then draw down or spend that amount. This is what is meant by monetizing the gold. It's the same as getting a loan from a pawnbroker or a bank on some collateral. That turns the item into cash or monetizes it. Paying off the pawn ticket or the loan redeems the item or ends the loan. The Treasury can do the same. It can pay the Fed $11.1 billion and terminate the loan. The gold is worth approximately $314 billion, so the Treasury is not about to let the Fed have it. A more recent statement online statement in the 1999 Annual Report of the Federal Reserve Bank of San Francisco makes it even more clear that the Treasury can terminate the loan at a price of $42.29 a fine troy ounce or $11.04 billion in total:

> "**Gold Certificates**
> The Secretary of the Treasury is authorized to issue gold certificates to the

> Reserve Banks to monetize gold held by the U.S. Treasury. Payment for the gold certificates by the Reserve Banks is made by crediting equivalent amounts in dollars into the account established for the U.S. Treasury. These gold certificates held by the Reserve Banks are required to be backed by the gold of the U.S. Treasury. The U.S. Treasury may reacquire the gold certificates at any time and the Reserve Banks must deliver them to the U.S. Treasury. At such time, the U.S. Treasury's account is charged and the Reserve Banks' gold certificate accounts are lowered. The value of gold for purposes of backing the gold certificates is set by law at $42 2/9 a fine troy ounce. The Board of Governors allocates the gold certificates among Reserve Banks once a year based upon Federal Reserve notes outstanding in each District at the end of the preceding year."

Detailed analysis of the steps in the gold seizure verify that the Federal Reserve doesn't own the gold.

### Vieira's Thoughts on Political Reform

Vieira is very highly critical of the Supreme Court. In the money area, Vieira has emphasized wrong decisions in *Knox v. Lee* and *Juilliard v. Greenman*, in which the Supreme Court invented a congressional power to issue paper money (or emit bills of credit.) In the 1930s, again in the money area, the Court allowed Congress to loot gold in the *Gold Clause Cases* and refused to hear cases involving money and banking.

In areas other than money and banking, the Court in *United States v. Butler* (1936) allowed (p. 1595) "Congress an unlimited authority to spend public moneys for whatever legislators claim constitutes 'the general welfare.'" In the *Mellon* cases (*Massachusetts v. Mellon* (1923) and *Frothingham v. Mellon* (1923)), the Court stripped "both the States and private citizens of any right to challenge the constitutionality of the national government's expenditures in most instances." This removes (p. 1596) "for all practical purposes, any limitation on Congress's dissipation of the Treasury." In *Wickard v. Filburn* (1942), the Court opined

> "It is hardly lack of due process for the Government to regulate that which it subsidizes."

This has enabled "Congress to employ the carrot of spending to impose the stick of regulation, even where Congress lacks an independent power to regulate the subject matter of its largesse." *Butler* combined with *Wickard* have licensed "Congress to exercise constitutionally unlimited – that is, totalitarian – power to 'tax and tax, spend

and spend, inflate and inflate, control and control.'"

In this 2002 edition, Vieira predicted the bubble produced by the inflated irredeemable legal-tender paper currency would burst (p. 1597). "First will come economic distress...the national government will radically expand its operations until, in coöperation with the Federal Reserve System, it assumes totalitarian control over the economy as a whole."

Vieira predicts that the tendency is toward the welfare state's self-destruction, accompanied by high inflation and strong-man government. If this scenario transpires, demagogues will take control. He predicts that nationalized health care, even more than Social Security, fosters this trend because of its lack of any limitations.

Vieira does not pessimistically forecast this outcome, nor does he optimistically expect monetary reform. He answers pessimists as follows. The Court has indeed licensed an "anything goes" government. Its judgments indeed reflect the notion that the Constitution is a "living" Constitution, that the law is what the Justices say it is, and that the Court's perceptions of utility overrule ideas of permanent right and wrong. Its decisions have indeed augmented the power of the government and diminished the rights of the People.

But only the doctrine of original meaning makes sense for a Constitution's law. Its words and phrases cannot be (p. 1603) "legalistic mumbo jumbo." They cannot mean one thing in 1792 and the opposite in 1913 or 1933. Aristotle's Law of Identity holds: A is A. To coin Money cannot mean to print paper. Or to apply the Law of Identity in another way: A Constitution *is* fixed law. Since this is so, then the Court's judgments that have created unconstitutional money powers must be wrong. If these constitutional constructions are wrong,

> "then by what *right* are America's rulers governing in the monetary realm? *Not by dint of the Constitution, but by a bare-faced forgery.* The Constitution's words regarding 'Money' are clear enough – indeed, in their historical context, pellucid. To get around them for the purpose of generating first a legal-tender paper currency redeemable in specie, and then an effectively *fiat* currency, required some of the most tortuous, deceitful misconstructions in American history. These were no mere mistakes that the Constitution caused, allowed, or even suggested. Rather, they were *crimes* steeped in *mens rea*. So, those who continue to misrule this country under color of these perversions of her supreme law are accessories after the fact to these crimes and all the other crimes they have engendered – and *a fortiori* are usurpers, tyrants, or both. Thus, to agree

> that original intent is the proper rule of constitutional construction, and nonetheless to assert that the Founding Fathers' Constitution has been permanently superseded, is to admit *sotto voce* that America has been transmogrified into a *fundamentally lawless* society; that her pretended government is no true *government* at all, but instead a criminal – yea, a racketeering – enterprise based on fraud and extortion, and that this pretended government's decrees are not true laws, but instead demands driven by special-interest groups' selfish desires, backed by brute force."

Vieira argues that "The Constitution was well designed as a political fortress" but it does not defend itself. That takes people with sagacity, tenacity, and courage. This is why a new Constitution is no solution. "***Restoration of the constitutional monetary system requires a resurgence of political responsibility by WE THE PEOPLE"*** (p. 1605).

Of the five parts of federal government, which "should be the focus for reform?"

Congress, he says (p. 1607), "is a major cause of the problem." His criticism is unsparing. By and large, Congressmen do not have what it takes to identify the source of the monetary and banking problems, to understand that every failure must be met with a constitutional response, to devise responses "with scrupulous regard only to 'the general welfare'", and to struggle unceasingly for reform and stand against the Establishment. What don't they have? "...native intelligence; the essential knowledge of history, economics, and law; the especial devotion to public service; and the uncompromising moral courage..." Statesmen they are not. And yet in the long run, a veto-proof Congress (p. 1609)

> "offers the *only* final solution to America's woes – for only Congress exercises the plenitude of constitutional power necessary fully to rectify the present mess into which Congress, more than any other Branch of the national government, has dumped the country..."

Congress will be an essential source of reform at some point, but the "Judiciary is quite hopeless." Anyone who ventures even small steps into the area of the courts, who reads the decisions, who reads law review articles, and who encounters modern law theories, is bound to agree with Vieira that the situation is horrendous. To expect monetary reform from the courts has been shown throughout this series to be a futile hope. Courts bow to political winds and pressures. They twist the law so as to satisfy preconceived outcomes that they desire.

The States have on occasion enacted resolutions to repeal the Federal Reserve Act, but nothing came of them as they were (p. 1620) “misdirected”, depending on “either Congress or the Supreme Court – which had shown then, and continue to show today, no interest in restoring (or even talking about) constitutional money and banking.”

The States may individually introduce silver and gold coin as legal tender, as the Constitution explicitly implies in Article I, Section 10, Clause 1. Vieira has sought support at the State level for a model bill that does just that. The plan calls for a State to make available an electronic gold currency. Some legislators in New Hampshire, Indiana, Colorado, Missouri, Georgia, Nevada, and Montana have taken up this effort. See here and here.

Electronic transactions based on gold deposits are feasible. They compete directly with FRNs. Should enactment by one or two States occur, it will have significant effects. It will create a dual payments system, providing competition to FRNs. It will start to lower network costs of using metallic money. Enactment will bring publicity. This will stimulate “debate”. The Establishment press, intellectuals, and politicians can be expected to attack the system in every way possible in order to turn public opinion against it. It will take continuous effort, education, organization, communication, and political skill to parry such attacks by the entrenched opponents of sound money. With luck, a cascade effect might benefit the e-gold movement.

A variety of Supreme Court cases provides constitutional support for the general principle that a State may choose gold and silver as money for any transactions connected to its sovereignty and that Congress could not stop (p. 1630) “the States from refusing to use the national government’s base-metallic coin or paper currency in all the monetary transactions related to their sovereign functions.” See *Lane County v. Oregon* (1869), *Hagar v. Reclamation District, 111* (1884), *Taub v. Kentucky* (1988), *Perry v. United States* (1935), and *Pollock v. Farmers’ Loan & Trust Company* (1895). However, it is to be expected that the national government will fight tooth and nail any such efforts at the State level. There are bound to be arguments made that the national government cannot provide for the common defense, cannot tax, and cannot borrow unless there is a national currency, that FRNs are the national currency, and that the States are interfering with the constitutional powers of the national government.

Vieira regards (p. 1631) the States as possibly providing “highly desirable” consequences “firmly grounded in law”, but facing high political obstacles that include getting the first State to act and coordinating action among several States.

The President is another possible focus of action. He can act or not act, depending on his assessment of the constitutionality of laws passed by Congress.[300] How so? His oath of office is stronger than that of the Justices of the Supreme Court. They are sworn "to support this Constitution." He is sworn to "preserve, protect, and defend" it. If the Supreme Court's duty includes deciding upon constitutional questions that arise in the doing of their jobs, even more so does the President's duty require him to do the same. If he is asked by Congress to execute what he thinks is an unconstitutional law, and, at the same time, he is required to "take Care that the Laws be faithfully executed" and the Constitution is included among those laws, it being part of "the supreme Law of the Land," then he may choose to set aside what he thinks is an unconstitutional law in order to preserve, protect, and defend the Constitution. Vieira (p. 1634) reminds us of *Huntington v. Worthen* (1887):

> "An unconstitutional act is not a law; it binds no one, and protects no one."

Also, *ex parte Siebold* (1880):

> "An unconstitutional law is void, and is as no law."

The President (p. 1634) "can on his own initiative" treat certain "policies as null and void as far as the Executive Branch is concerned, shifting to Congress the burden to cure the problems *sine die*." "The worst of Congress's unconstitutional actions" in the area of money are (1) failure to mandate free coinage of the constitutional dollar and of silver and gold coins properly regulated in value against that dollar, (2) failure to regulate the values of foreign silver and gold coin and declare them as legal tender so that they can be part of the United States money supply, (3) establishing the Federal Reserve System, (4) emitting FRNs and attaching properties to them of being (i) obligations of the United States, (ii) receivable for all taxes, customs and public dues, (iii) redeemable in lawful money at the Treasury, and (iv) legal tender.

A determined President can wield the veto power in order to press Congress to enact an a constitutional monetary system. This may set off a battle with the President on one side and Congress and the Judiciary on the other. The impeachment power will be useless in such a battle because the President will have committed no high crimes and misdemeanors, no treason, and no bribery. To win, he or someone holding his position needs to be reelected, and Congressmen holding the opposite position need to be voted

[300]Chapter I discusses briefly the fallacious concept of judicial supremacy. Vieira's essay on judicial supremacy explains why the Supreme Court cannot and should not claim judicial supremacy.

out of office.

This brings us to the fifth part of the federal system of government, which is WE THE PEOPLE. The Declaration of Independence begins with “one people” that finds it “necessary” to “assume” its “separate and equal station” “among the powers of the earth”, as distinguished from “nature’s God” who has entitled them to such a station. Governments derive “their just powers from the consent of the governed.” Their purpose is to “secure” various Creator-given “unalienable rights” among which are “life, liberty and the pursuit of happiness.” It follows that the Constitution is WE THE PEOPLE’s Constitution. In his essay on judicial supremacy, Vieira concludes with

> “Admittedly, ‘We the People’ are having a hard time controlling Congress and the president, let alone the judiciary, today. This is because all too many Americans have forgotten that self-government requires self-reliance and self-assertion. But once the people recognize that *they* are the masters of their own Constitution, that the Constitution provides them with efficacious means to assert that mastery, and that those means must be put into effect in order to make them meaningful, things will change for the better very quickly.”

People have to awaken and realize their own power, as opposed to (p. 1636) “docilely and dumbly” acquiescing in “every misconstruction, perversion, and even demolition of the constitutional systems of money and banking” foisted upon them by the government, bankers, “and their mouthpieces among the *intelligentsiia*...”

Vieira sees no other source for durable reform but WE THE PEOPLE. Since people have been *taught* to acquiesce in false law, false history, false economics, and false politics, sweeping (p. 1639) “America’s political stables clean...will require long and arduous preliminary work in the forge of public education.”

People also have been bought off. The Establishment tenders social, academic, economic, and political rewards to gain adherents. It also metes out punishments to critics.

The traditional routes to effect reform are “lobbying, litigation, and electioneering.” Vieira thinks lobbying Congress and litigating in the courts are mostly dead ends. That leaves elections and voting, primed by public education counter to the Establishment’s version.

In the last few pages of *Pieces of Eight*, Vieira writes about an unfamiliar topic: imposing (p. 1643) “real legal responsibility” on “public servants” by “sanctions more

severe than simple deprivation of future electoral support." The economic basis for such an idea is sound. The economic reason for this is that public servants can do broad and long lasting damage that far exceeds their personal cost of perhaps losing their office or position. Sanctions would make them think far more seriously before enacting legislation that might result in their being sued for damages, or losing their license to practice law, or being exposed to criminal penalties.

Underlying the idea of sanctions on public servants is the idea that public office involves a public trust. Various courts over many years have written "A public office is a public trust,' they owe "a duty of loyalty to the public no less than that of an agent to his principal," and "an agent is a fiduciary," and thus that a "public official is a fiduciary toward the public." In fact, it is useful to think of the Constitution as in instrument of a principal-agent relation between THE PEOPLE and their government.[301]

In *Mapco Inc. v. Carter* (1978), a federal court of appeals was presented with a case in which several oil exploration businesses in Oklahoma were the plaintiffs and the President and members of his administration in the Department of Energy were defendants. The government had shifted its oil policies unexpectedly and the plaintiffs claimed harm. They lost their case, but its strength is not the reason for our interest.

The plaintiffs argued that they had a Ninth Amendment right, in the court's words, "to trust the Federal Government and to rely on the integrity of its pronouncements." It is clear from the nature of public office as a public trust that such a right exists. It is clear from explicit language in many court cases. It is clear from the American idea of government expressed in the Declaration. It makes no sense for people to consent to be governed and to give such strong powers as the State wields except in a fiduciary relation by which the principal "bears a special relationship of trust, confidence, and responsibility to others." It is clear from the language of American Presidents up until 1905.[302] Last, it is clear from supposing the contrary, which leads to absurdity. If public officials have no enforceable duty to obey the law, then they need not secure the rights they are sworn to uphold.

The court could have ruled that such a right exists, but that the facts of the case didn't justify applying it. It could have ruled that, following the rule that constitutional issues should be avoided wherever possible, it would rule on other grounds. Instead, the court

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[301]This is examined here, here, and here.

[302]See here.

went to the other extreme. It ruled that under no circumstances was there any possible constitutional right to trust the government.

The plaintiffs appealed to the Supreme Court, which refused to hear the appeal. This case shows the absurd lengths to which courts go to protect government power. They are not even willing to admit that people place a trust in government, which makes government responsible and accountable to the people they serve.

Vieira favors *absolute liability* (p. 1652) "if a public official is positioned and possessed of the authority to prevent an unconstitutional action (as by voting against a bill, vetoing legislation, holding a statute unconstitutional), and refuses or fails to do so." One court wrote in *State ex rel. Preissler v. Dostert* (1979) that a public official accepts the burdens and obligations of office:

> "As such, the office is a public trust created in the interest of and for the benefit of the people, and it imposes upon the officer who assumes it certain duties for the public good. One who accepts a public office does *so cum onere,* that is, he assumes the burdens and the obligations of the office as well as its benefits, subjects himself to all constitutional and legislative provisions relating to the office, and undertakes to perform all the duties imposed on its occupant; and while he remains in such office he must perform all such duties...A public officer is in the position of a fiduciary and he is under an obligation to serve the public with highest fidelity and undivided loyalty. 67 C.J.S., Officers § 201. The public officer is bound to act primarily for the benefit of the public and must perform the duties of his office honestly, faithfully and to the best of his ability."

The Supreme Court, like the *Mapco* court, has gone in the other direction. It has weakened the liability of officeholders and thereby strengthened their capacity to flout laws at will. The Court's test appears in *Harlow v. Fitzgerald* (1982):

> "Henceforth, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."

For an officeholder to be prosecuted, he has to violate what are called clearly established rights. But in modern courts, rights are not clearly established. Courts are constantly reversing decisions, amending them, evolving new concepts, and having 5-4 decisions. If an officeholder can find a single precedent on his side, he can argue that

the plaintiff's right is not clearly established. Further, if a right occurs in a case that has not been previously established, then the plaintiff is out of luck. Also, who knows what a "reasonable person would have known"?

This is an area in which the Court has worked to the end of shielding officeholders from being held to do their duty and being held responsible for doing it. They should be held responsible, given the immense powers they wield. After all, they are the ones who *seek* office and claim that they are qualified. Vieira concludes (p. 1659)

> "...the long and the short of it is that the Supreme Court has discovered numerous dodges for public officials to avoid personal liability notwithstanding that the Constitution in pellucid language precludes such a result except in one narrow area."[303]

If WE THE PEOPLE are the principals and officeholders are our agents, it is absurd to suppose that the agents have the power to invent immunities for themselves against their principals. The Court's excuse is galling Orwellian doubletalk.

*Tenney v. Brandhove* (1951), citing language from an 1808 case:

> "These privileges are thus secured not with the intention of protecting the members [of the legislature] against prosecutions for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."

We are told that it is for our own good that lawmakers are immune from sanctions and our hands are tied. It is so that they can make laws unimpeded by fear of penalties. The exercise of power must be absolute to be exercised properly, we are told.

We have reached the end of Vieira's book and the end of this book. Here's the last paragraph of Vieira's book (p. 1662):

> "*In fine*, all this shows that bringing about constitutional reform in money and banking – and retaining such reforms as are achieved – will be no promenade. Perhaps WE THE PEOPLE will never learn enough, muster the wit and the courage, or raise up from amongst ourselves the leaders necessary to assert their constitutional rights in those domains. But then Americans will have only their own fecklessness to blame for what fatal consequences befall them and their

[303]This refers to Article I, Section 6, Clause 1.

country."

**Postscript**

Adam Smith saw the "invisible hand" working to our benefit.[304] Friedrich A. Hayek explained how and why it worked to our benefit.[305]

Hayek criticized the idea that mankind could consciously design the good society, much less the Great Society. He regarded this as a pretense, a "Fatal Conceit." To make the invisible hand work, we needed markets and the price system. In the words of Alan Ebenstein summarizing Hayek:

> "Rather, by following rules that enforce contracts, promote and preserve private property, and encourage exchange, mankind can produce the most and be freest and happiest."

The Constitution is far from being a perfect document. It was a compromise. It is fair to say, however, that the original meaning of the Constitution is far more compatible with this quotation than the "living Constitution" we have today in which the government constantly diminishes liberty, markets, secure contracts, private property, and the price system, while replacing them with the conceits of government planning and control.[306] We've come a long way, baby, from a government that secures unalienable rights to life, liberty, and property that we work out for ourselves and with others in a decentralized way, to a government that controls half or more of our property, replaces liberty with its directives and controls, and delivers or promises to deliver welfare and security to all. This system doesn't work to our general benefit. It *cannot possibly* work to our benefit, and Hayek explains why it doesn't and can't work to our benefit.

WE THE PEOPLE have been roped into an anti-constitutional, anti-American, anti-

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[304]See, for example, Milton Friedman's one-minute explanation here.

[305]Hayek's explanation appears in his superb paper "The Use of Knowledge in Society." He builds upon the essential insight of von Mises that "without the price system we could not preserve a society based on such extensive division of labor."

[306]Anti-federalists recognized the severe problems with the Constitution. Lysander Spooner was a savage critic of its failure even to be a legitimate document. See here, here, and here.

market, anti-liberty, anti-property, anti-life, and anti-happiness construct. We are partners in the fatal conceit that government can make a good society.[307]

The people who hold to this fatal conceit, who are the Establishment, find ready partners and supporters in interest groups in our society including all of those that now are represented by Departments and agencies in the government. One need only list them to see their vast range. Supporters of the Constitution are few and far between these days. The society we have is already a corporative-state society and becoming more so with every passing day.

Von Mises and Hayek explained the perils of centralized and/or monopolized planning. They showed why any society that adopts such systems goes downhill. We have as a people spurned their wisdom. Central banking in the form of the Federal Reserve shows that our society hasn't learned what they taught. The Founding Fathers gave us a Constitution without a government-planned and government-controlled monetary system. Neither did it have a government-controlled economy in which Congress delegated to the Federal Reserve the power to control monetary policy in such a way to affect a host of vague macroeconomic variables. In fact, Hayek's 1945 paper points out the fallacies in such statistical aggregates.

The constitutional money system is nearly completely decentralized. The jobs of government in that system with respect to money are the modest ones of coining Money and assuring that what is called a "dollar" in metals of different kinds all have the same market worth. It is totally absurd and ridiculous even to entertain for an instant the idea that today's system is constitutional. It is completely obvious that Congress and the Supreme Court have replaced the constitutional system, which was at least a workable facsimile of a free market decentralized system, with an unconstitutional system that is, for all practical purposes, its polar opposite.

Judicial supremacy is a joke. The Supreme Court's behavior again and again is as dishonest as it can get. This is far from saying that it is always dishonest or dishonest through and through. Vieira cites many fine passages from Court rulings. There is a core of sound sentiments and interpretations to draw on. But the Court is often wrong. It often gives out with false doctrines, holds to unconstitutional reasoning, cites inapposite precedents, spurns cases it should be hearing, bows to political forces, and twists words so as to achieve the results it desires. It is foolish to think that this

[307]How we became partners is another story. Government power energizes competition for its uses. It pays those in government to encourage such competition. Government growth results. See here and here

institution is supreme in stating law or what the Constitution means. It obviously hasn't done it in the area of money and other important areas it has touched. The other branches of government, which include Congress, President, States, and People, all should be speaking up and acting for what is constitutional and what is not, that is, if they subscribe to constitutionalism at all and if they want to make it work.

The existing fiat-money corporative-state system, created and championed by the Establishment, is increasingly dysfunctional. It's *necessarily* dysfunctional by the nature of its organization and the poor incentives it has. It's basically an evil system that produces ill results. It's not serving Americans at all well. The system is really bankrupt. This is showing up in unemployment, large economic inefficiencies, and lower standards of living. Soon it will show up in other and worse ways. The system should be scrapped. Instead, the authorities, in their own interests, are papering over the system's failures. The game is really over, but they are going into overtime. The authorities are "saving" the system with so-called financial reform. This actually means saving their own skins and bailing out their friends. It means centralizing and expanding the same corporative-state arrangement. This will only cause America to degenerate further.

We now have a paper-thin pretense of constitutionalism, while the government enacts anti-constitutional measures of greater and greater scope. These are putting in place a ruinous tyranny, a ruinous welfare-warfare state, and a growing police state. The degree of regimentation can only rise unless WE THE PEOPLE thwart it. Acquiescence means a worse life for your children.

It is useless to choose between Establishment Democrats and Establishment Republicans. Washington and most Statehouses are Augean stables. If the people choose election politics to resolve the looming problems, they need to bring about a radical cleaning. Let the money and banking issue be one way to determine which candidates are for the Establishment (themselves) and which are for the People. If the people choose election politics, let them *focus* on only a handful or less of *important* issues so that congressional majorities are possible on these issues and so that candidates can be held accountable if they are elected. The money power is one of these issues. Who shall have the money power, the people or the government, the people or the Federal Reserve? The constitutional answer is clear: WE THE PEOPLE.

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