

THE MONETARY POWERS AND DISABILITIES
OF THE
UNITED STATES CONSTITUTION

A Study in Constitutional Law
Prepared for the
United States Gold Commission

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INTRODUCTION

Inflation is contemporary America's most pressing economic, social, and political problem. Reliable sources are available to describe the history of inflation in this and other societies, to explain its cause of effects, and to indicate the policies necessary to eradicate it.^{1/} Unfortunately, the vast majority of the American people receives its information on this subject, not from capable economists and historians, but instead from the electronic media -- the performance of which draws into serious question the competence, if not the motives, of leading reporters and commentators.^{2/} Yet even many of those knowledgeable about the mechanisms of fiat paper currency, unlimited central-bank credit-expansion, and the other paraphernalia of inflation fail to realize that the solution to the problem does not require development of a new, anti-inflationary policy based on the "gold standard", or on the "degovernmentalization" of money. Rather, it merely requires convincing or compelling Congress to implement the old, anti-inflationary policy the United States Constitution enunciated from the beginning.

Of course, those who view the battle against inflation as one of political "policy" correctly observe that Congress has the constitutional power to end inflation tomorrow by legislation. Whether it has the will to exercise this power, in the face of incessant pressure from special-interest groups for the continuation and expansion of spending-programs by the

1/ The so-called "Austrian School" alone has elaborated a comprehensive analysis of money integral to general economic theory. See, e.g., L. von Mises, The Theory of Money and Credit (H. Batson transl., new ed., 1971); idem, Human Action: A Treatise on Economics (3d rev. ed. 1963), chs. xvii-xx, xxxi; M. Rothbard, Man, Economy, and State: A Treatise on Economic Principles (1970), chs. 3, 11, 12.

2/ T. Bethell, Television Evening News Covers Inflation: 1978-79 (Media Institute 1980).

national and state governments, is less than certain, however. More important than the constitutional power of Congress to end inflation, though, is its constitutional duty to do so -- or, put another way, its constitutional disability to cause or permit inflation in the first place. About this, hardly anyone says anything. To the contrary: Many legally trained opponents of inflation claim that, at a minimum, a constitutional amendment is necessary to end governmental manipulation of money.^{3/} Nothing could be further from the truth.

The chief mechanism of inflation today is the ability of the Federal Reserve System to generate an endless stream of paper currency that: (i) is purportedly a legal tender for all debts, public and private; and (ii) is not redeemable in gold or silver coin or bullion. Amazingly, the supposed authority of Congress, under the Constitution, itself to issue irredeemable, legal-tender paper currency, or to delegate such a power to the Federal Reserve System, finds no basis in either the Constitution or even in any decision of the United States Supreme Court. Indeed, no challenge to these assumed powers has ever come to the Supreme Court for adjudication, let alone been adjudicated!

This study investigates what monetary powers and disabilities the Constitution contains, and the extent to which they deny Congress the authority to maintain the contemporary system of "fiat currency" that most Americans erroneously treat as "money".

ANALYSIS

I. The monetary powers and disabilities in Anglo-American common law and in the Constitution

What does the Constitution say on this subject? Here,

^{3/} H. Holzer, Government's Money Monopoly, Its Source and Scope and How to Fight It (1981), at 195-203.

adversion to its legal history, its language, and its practical interpretation by Congress in the early years of the republic is illuminating. For the first step towards elucidating the true meaning of the Constitution's monetary provisions is "to review the background and environment of the period in which that constitutional language was fashioned and adopted",^{4/} "to place ourselves as nearly as possible in the condition of the [Framers]",^{5/} and "to recall the contemporary or then recent history of the controversies on the subject" that still "were fresh in the memories of those who achieved our independence and established our form of government".^{6/}

A. The monetary powers and disabilities under English common law

Pre-constitutional English common law is one of the most important legal-historical sources of the meaning of many constitutional provisions.^{7/} During the late 1700's, Black-

4/ Everson v. Board of Educ., 330 U.S. 1, 8 (1947). Accord, e.g., Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 558 (1895); Maxwell v. Dow, 176 U.S. 581, 602 (1900); Grosjean v. American Press Co., 297 U.S. 233, 245-49 (1936).

5/ Ex parte Bain, 121 U.S. 1, 12 (1887). Accord, e.g., South Carolina v. United States, 199 U.S. 437, 450 (1905).

6/ Boyd v. United States, 116 U.S. 616, 624 (1886).

7/ E.g., Moore v. United States, 91 U.S. 270, 274 (1876); Ex parte Bain, 121 U.S. 1, 12 (1887); Smith v. Alabama, 124 U.S. 465, 478-79 (1888); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 570-72 (1895); United States v. Wong Kim Ark, 169 U.S. 649, 654-55 (1898); Schick v. United States, 195 U.S. 65, 68-70 (1904); South Carolina v. United States, 199 U.S. 437, 449-50 (1905); Kansas v. Colorado, 206 U.S. 46, 94-95 (1907); Patton v. United States, 281 U.S. 276, 287, 290 (1930); Dimick v. Schiedt, 293 U.S. 474, 476-82, 487 (1935); United States v. Wood, 299 U.S. 123, 133-39 (1936).

See, e.g., 2 J. Story, Commentaries on the Constitution of the United States (5th ed. 1891), § 1339, at 212. Story's Commentaries are recognized as a standard work in constitutional law. E.g., Field v. Clark, 143 U.S. 649, 670-71 (1892).

stone's Commentaries^{8/} was the most satisfactory exposition of the common law of England available to Americans.^{9/}

Blackstone's discussion of the English "monetary powers" was detailed:

Money is an universal medium, or common standard, by comparison with which the value of all merchandize may be ascertained: * * * a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it it's own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

* * * *

The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that it's value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

With regard to the materials, sir Edward Coke lays it down, that the money of England must either be of gold or silver; and none other was ever issued by the royal authority till 1672, when copper farthings and half-pence were coined by king Charles the second * * * . But this copper coin is not upon the same footing with the other in many respects * * * .

8/ W. Blackstone, Commentaries on the Laws of England (Amer. ed., 4 vols. & App., 1771-1773).

9/ "At the time of the adoption of the Federal Constitution, [the Commentaries] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." Schick v. United States, 195 U.S. 65, 69 (1904).

As to the impression, the stamping thereof is the unquestionable prerogative of the crown * * * .

The denomination, or the value for which the coin is to pass current, is likewise in the breast of the king * * * . In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called sterling metal * * * . And of this sterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III c. 13. So that the king's prerogative seemeth not to extend to the debasing or inhancing the value of the coin, below or above the sterling value * * * . The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. But this * * * ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. 10/

Blackstone also recounted royal abuses of the "borrowing power" that had led to a constitutional crisis in England:

For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6, it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm.

* * * *

And as this fundamental law had been shamefully evaded under many succeeding princes by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I, that no man shall be compelled to yield any gift, loan, benevolence, tax, or such like

10/ 1 W. Blackstone, Commentaries, ante note 8, at 276, 277-78 (footnotes omitted).

charge, without common consent by act of parliament. ^{11/}

Thusly, Blackstone elaborated five monetary principles of the common law --

First, the precious metals are "most proper" for money, the "universal medium, or common standard".

Second, the "coin of the kingdom", must consist of gold or silver "of the true standard", in terms of weight and fineness. Or, under English common law prior to 1789, the only "money" possible was undebased "gold and silver coin". ^{12/}

Third, the common-law power to coin money by "impression" or "stamping", and to "fix the value" (or "denomination") thereof, was an executive, not a legislative, power.

Fourth, "to fix the value" of domestic or foreign money meant to establish its "intrinsic value" by comparing "the weight and the fineness of the [precious] metal" in a coin with "the true standard, * * * sterling metal". ^{13/} This procedure precluded "debasing or inhancing the value of the coin, below or above the sterling value".

^{11/} Id. at 140. "Indeed when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, * * * and other domestic grievances, clouded the morning of that misguided prince's reign; which * * * at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement." 4 id. at 429-30.

^{12/} From 1603 through 1816, England followed a bimetallic monetary policy, whereby the law made no change in the character of the silver coinage, but altered the weight and denomination of the gold coinage in order to secure the concurrent circulation of both. S. Breckinridge, Legal Tender: A Study in English and American Monetary History (1903), at 43-46.

^{13/} Blackstone could easily have substituted for his language "fix the value" the equivalent phrase "regulate the value" as later appeared in Article I, § 8, cl. 5 of the Constitution. For the two verbs are synonymous. E.g., Black's Law Dictionary (4th rev. ed. 1968), at 1451, defines "regulate" as "[t]o fix, establish, or control * * *".

Fifth, common law denied the Executive any power to levy "compulsive loans * * * extorted without a real and voluntary consent" by the people through their legislative representatives.

Revealingly, nowhere did Blackstone discuss "bills of credit" or other paper currency, redeemable or irredeemable, as part of the money of England. In its continuing oversight of the American Colonies, however, the English Parliament had several occasions to deal with the subject. The power of the Colonies to coin money, or to regulate the value of foreign coin, was virtually non-existent.^{14/} From an early date, though, they claimed the authority to declare various things legal tender -- including wampum,^{15/} corn,^{16/} bullets,^{17/}

^{14/} The charter of Virginia in 1606 granted a power to coin money. 3 F. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America (1909), at 3783, 3786.

Massachusetts and Connecticut fixed the values of certain foreign coins during the late 1600's. But in 1707 Parliament intervened to end this practice by statute. H. Bronson, "An Historical Account of Connecticut Currency, Continental Currency, and the Finances of the Revolution", New Haven Historical Society Papers, No. 1 (1865), at 14, 26; Davis, "Currency and Banking in the Province of Massachusetts Bay" (pt. 1), Pubs. Amer. Econ. Ass'n (3d ser.), Vol. 1, No. 4 (1900), at 38; J. Felt, An Historical Account of Massachusetts Currency (1839), at 26.

^{15/} E. Groseclose, Money and Man: A Survey of Monetary Experience (2d ed. 1967), at 132; 1 Documentary History of Banking and Currency in the United States (H. Krooss ed. 1977), at 9-13.

^{16/} 1 T. Hutchinson, History of Massachusetts from the First Settlement Thereof, in 1628, Until the Year 1750 (3d ed. 1795-1828), at 76; C. Bullock, Essays on the Monetary History of the United States (1900), at 125-26 (North Carolina).

^{17/} J. Felt, Massachusetts Currency, ante note 14, at 28; Potter & Rider, "Some Account of the Bills of Credit or Paper Money of Rhode Island from the First Issue in 1710, to the Final Issue, 1786", Rhode Island Historical Tracts, 1st Series, No. 8 (1880), at 3.

tobacco,^{18/} pitch and tar,^{19/} country produce,^{20/} and bills of credit.^{21/} In 1690, Massachusetts first emitted bills of credit receivable in all public payments, but without general legal-tender character.^{22/} Within two years, however, the bills' rapid depreciation caused the Province to declare them a legal tender, to "pass current * * * in all payments equivalent to money".^{23/} Further issues followed. And from 1712 onward

18/ J. Hickcox, A History of the Bills of Credit or Paper Money Issued by New York from 1709-1789 (1866), at 4 (Maryland); E. Groseclose, Money and Man, ante note 15, at 122 (Virginia).

19/ C. Bullock, Monetary History, ante note 16, at 125-26 (North Carolina).

20/ 1 H. Phillips, Historical Sketches of the Currency of the American Colonies Prior to the Adoption of the Federal Constitution (1865), at 12-13. (Pennsylvania).

21/ "[A]s regards the various colonial laws, making corn, tobacco, etc., receivable in payments of debts and taxes, these commodities were never a medium of exchange in the economic sense of a commodity, in terms of which the value of all other things is measured. They were to be taken at their market price in money. * * * The laws merely put into the hands of debtors a method of liberating themselves in case of necessity, in the absence of other more usual means." Innes, "What is Money?", 30 Banking L.J. 377, 378-79 (1913).

22/ E.g., E. Groseclose, Money and Man, ante note 15, at 122; 2 J. Story, Commentaries, ante note 7, § 1362, at 231; J. Felt, Massachusetts Currency, ante note 14, at 50-52. "This was the origin of paper money in Massachusetts, in the American Colonies, in the British Empire, and almost in the Christian world." 2 E. Channing, History of the United States (1905), at 500.

23/ J. Felt, Massachusetts Currency, ante note 14, at 52.

there existed a paper currency throughout New England.^{24/}

Other Colonies also emitted bills of credit, some with legal-tender character, some without.^{25/}

By the middle 1700's, a time of hopeless monetary confusion in the Colonies,^{26/} the ill effects of this paper currency had become apparent, both to Americans and to Parliament. In Connecticut, Roger Sherman (later a member of the Federal Convention of 1787) inveighed against the injustice of permitting Rhode Island's and New Hampshire's bills of credit to have legal-tender character in Connecticut, his home State.^{27/}

"[I]t is a principle that must be granted", he wrote,

^{24/} For example, a Massachusetts bill of 1736 declared:

This bill of TWENTY SHILLINGS due from the Province of Massachusetts Bay in New England, to the possessor thereof, shall be in value equal to three ounces of coined silver, Troy weight, of sterling alloy, or gold coin at the rate of eighteen shillings per ounce; and shall be accepted by the Treasurer and receivers subordinate to him in all payments * * * .

BOSTON. By order of the Great and General Court or Assembly.

The authorizing legislation empowered the Treasurer to apply the bills to pay wages, grants, and "such other matters and things as [the Legislature] shall either by law or orders provide for the payment of, out of the publick treasury". Act of 2 July, 1736, §§ 14-15, Acts and Laws Passed by the Great and General Court or Assembly of His Majesty's Province of the Massachusetts-Bay in New England. Begun and Held at Boston, Upon Wednesday the Twenty-Sixth Day of May, 1736.

^{25/} E.g., 2 J. Story, Commentaries, ante note 7, §§ 1366-67.

^{26/} See, e.g., the description of Davis, "Currency and Banking in the Province of Massachusetts Bay", ante note 14, at 172. For a contemporary analysis of the politics of paper money, see 1 T. Hutchison, History of Massachusetts, ante note 16, at 151-52, 340-41; 2 id. at 187-89.

^{27/} In the Federal Convention, Sherman proposed the amendment making absolute the prohibition in Article I, § 10, cl. 1 of the Constitution against "Bills of Credit" and "Tender[s]" of "any Thing but gold and silver Coin". Post, pp. 44-46.

that no Government has a Right to impose on its subjects any foreign Currency to be received in Payments as Money which is not of intrinsic Value: unless such Government will assume and undertake to secure and make Good to the Possessor of such Currency the full Value which they oblige him to receive it for. Because in so doing they would oblige Men to part with their Estates for that which is worth nothing in it self and which they don't know will ever procure him any Thing. * * * And since the Value of the Bills of Credit depend wholly * * * on the Credit of the Government by whom they are emitted and that being the only Reason and Foundation upon which they obtained their first Currency * * * , and therefore when the Publick Faith and Credit of such Government is violated, then * * * there remains no Reason why they should be any longer current.

* * * *

[I]f what is us'd as a Medium of Exchange is fluctuating in its Value it is no better than unjust Weights and Measures, * * * which are condemn'd by the Laws of God and Man, and wherefore the longest and most universal Custom could make the Use of such a Medium either lawful or reasonable.

Now suppose that Gold and Silver Coines that pass current in Payments * * * should have a considerable Part of their Weight filed or clipp'd off will any reasonable Man judge that they ought to pass for the same Value as those of full Weight. But the State of R-----I-----d Bills of Credit is much worse than that of Coines that are clipp'd, because what is left of those Coines is of intrinsic Value: But the General Assembly of R----I-----d having depreciated their Bills of Credit have thereby violated their Promise from Time to Time, and there is just Reason to suspect their Credit for the Future * * * . 28/

Parliament went beyond mere suspicion. In 1751, an act applicable to New England recited how the "Bills of Credit have, for many Years past, been depreciating in their Value, by

28/ Philoeunomos [Roger Sherman], A Caveat Against Injustice, or an Inquiry into the evil Consequences of a Fluctuating MEDIUM OF EXCHANGE (1752), at 5-6, 8.

means whereof all Debts of late Years have been paid and satisfied with a much less Value than was contracted for, which hath been a great Discouragement and Prejudice to the Trade and Commerce of his Majesty's Subjects, by occasioning Confusion in Dealings, and lessening of Credit in those Parts" -- and then declared that: (i) the colonial governors should assent to no new emissions of paper currency "created or issued under any Pretence whatsoever", no extension of the time set "for the calling in, sinking, or discharging of such Paper Bills", and no "depreciat[ion] in Value" or "new and further Currency" of the bills; (ii) all outstanding bills of credit should be "duly and punctually called in, sunk and discharged", and "be no longer current"; and (iii) bills permitted for limited purposes should not be "a legal Tender in Payment of any private Bargains, Contracts, Debts, Dues or Demands whatsoever".^{29/} Parliament did provide, none the less, that the Colonies might issue "Paper Bills * * * for securing such reasonable Sum or Sums of Money, as shall be requisite for the current Service of the Year", or "as shall * * * be necessary or expedient upon sudden or extraordinary Emergencies of Government, in case of War and Invasion". Yet, in the first case, it required that "sufficient Provision be made to secure the calling in, discharging and sinking of the [bills], within a short reasonable Time, not exceeding * * * two Years"; and, in the second, it mandated that "due Care be taken to ascertain the real Value of all such * * *

29/ An Act to regulate and restrain Paper Bills of Credit in his Majesty's Colonies or Plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire in America, and to prevent the same being legal Tenders in Payments of Money, 24 Geo. II., ch. 53, §§ I., II., VII.

Sums * * * , and also the Interest to be paid", and "to establish and provide an ample and sufficient Fund for the calling in, discharging and sinking, within as short a reasonable Time as may be, not exceeding five Years".^{30/}

In 1764, Parliament extended the act of 1751 throughout America, outlawing both: (i) the emission of new "Paper Bills, or Bills of Credit" as "legal Tender in Payment of any Bargains, Contracts, Debts, Dues, or Demands whatsoever"; and (ii) the "prolong[ing of] the legal Tender of any Paper Bills * * * which are now subsisting and current * * * , beyond the Times fixed for the calling in, sinking and discharging of such * * * Bills of Credit".^{31/} Parliament also repealed by implication the provisions of the 1751 act that licensed the emission of sufficiently funded "Paper Bills" "as shall be requisite for the current Service of the Year" or "as shall * * * be necessary or expedient upon sudden and extraordinary Emergencies of Government, in case of War and Invasion" -- indicating that nothing could justify the emission of "Paper Bills", including even the ever-ready political appeals to "necessity" and "emergency". To make this total and absolute prohibition crystal-clear, Parliament further enacted that any governor who might "give his Assent" to the emission of legal-tender bills of credit "shall * * * forfeit and pay the Sum of one thousand Pounds, and shall be immediately dismissed from his

^{30/} 24 Geo. II., ch. 53, §§ III., IV.

^{31/} An Act to prevent Paper Bills of Credit, hereafter to be issued in any of his Majesty's Colonies or Plantations in America, from being declared to be a legal Tender in Payments of Money; and to prevent the legal Tender of such Bills as are now subsisting, from being prolonged beyond the periods limited for calling in and sinking the same, 4 Geo. III., ch. 34, §§ I., II.

Government, and for ever after rendered incapable of any publick Office or Place of Trust".^{32/}

In 1773, however, Parliament relented somewhat, and passed another act, qualifying its earlier prohibitions with the language:

That * * * any certificates, Notes, Bills, or Debentures which shall or may be voluntarily accepted by the Creditors of the Publick within any of the Colonies in America, as a Security for the Payment of what is due and owing to the said publick Creditors, may be made and enacted by the several General Assemblies of the said Colonies respectively to be a legal Tender to the publick Treasurers in the said Colonies, for the Discharge of any Duties, Taxes, or other Debts whatsoever, due to, and payable at, or in the said publick Treasuries of the said colonies, * * * and in no other Case whatsoever * * * .^{33/}

Parliament, then, was willing to countenance paper instruments of debt with legal-tender character -- but only in the discharge of public dues by creditors who had voluntarily accepted such instruments "as a Security".

B. The monetary powers and disabilities of the States and the Continental Congress prior to ratification of the Constitution

Such was the common law of England, as applied in the Colonies, when the Revolution removed parliamentary control. The newly independent States immediately claimed plenary

32/ 4 Geo. III., ch. 34, § III. Compare U.S. Const. art. I, § 3, cl. 7: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States * * * ."

33/ An Act to explain and amend an Act, made in the Fourth Year of His present Majesty, intituled, An Act to prevent Paper Bills of Credit, hereafter to be issued in any of His Majesty's Colonies or Plantations in America, from being declared to be a legal Tender in Payments of Money, and to prevent the legal Tender of such Bills as are now subsisting from being prolonged beyond the Periods limited for calling in and sinking the same, 13 Geo. III., ch. 57, § I.

legislative powers to coin money, to emit paper currency, and to make such currency (and other things as well) legal tender in payment of debts. In the Articles of Confederation, the organic law of the United States from which the Constitution evolved, the States delegated to Congress the authority to coin money and regulate its value, to borrow money, and to emit bills of credit.^{34/}

Even before the Articles became operative in 1781, however, the vast expenses of the War of Independence had rationalized a flood of congressional paper currency. From 1775 through 1779, Congress authorized numerous issues of "Continental Currency" and other bills of credit,^{35/} ostensibly redeemable in silver Spanish milled dollars,^{36/} with the Colonies^{37/} or "the faith of the United States"^{38/} pledged for

^{34/} Arts. of Confed'n art. IX.

^{35/} Library of Congress, 2 Journals of the Continental Congress, 1774-1789 (W. Ford ed. 1905), at 103, 105-06, 207, 221-22; 3 id. at 279, 390, 398, 407, 422-23, 457-59, 467; 4 id. at 157, 164-65, 339-40, 380-81; 5 id. at 599, 651; 7 id. at 36-37, 161, 373; 8 id. at 377-80; 9 id. at 873, 10 id. at 28, 82-83, 174-75, 223, 309, 337-38, 365; 11 id. at 524, 627, 731-32; 12 id. at 884, 962, 1100, 1218; 13 id. at 64, 139, 209, 408-09; 14 id. at 548, 687-88, 848-49; 15 id. at 1076-77, 1171-72, 1285, 1324-25.

^{36/} E.g., 2 id. at 103, 106; 3 id. at 407; 4 id. at 164, 381; 8 id. at 378; 12 id. at 962; 13 id. at 64. Typically the bills carried the inscription:

CONTINENTAL CURRENCY

No. _____ Dollars

This bill entitles the bearer to receive
Spanish Milled dollars,
or the value thereof in gold or silver,
according to the resolutions of Congress * * *

2 id. at 106.

^{37/} 2 id. at 103; 3 id. at 457; 4 id. at 339-40.

^{38/} 10 id. at 82, 174, 223, 309, 337, 365; 11 id. at 524, 627, 731; 12 id. at 884, 962, 1100, 1218; 13 id. at 64, 139, 209, 408; 14 id. at 548, 687, 848; 15 id. at 1076, 1171-72, 1285, 1324.

their redemption. Already by 1776, though, Congress complained that "several evil disposed persons * * * have attempted to depreciate the bills of credit", and resolved

[t]hat if any person shall hereafter be so lost to all virtue and regard for his country, as to "refuse to receive said bills in payment," * * * such person shall be deemed, published, and treated as an enemy of his country, and precluded from all trade or intercourse with the inhabitants of these colonies. ^{39/}

Conceding that the power it assumed to emit bills of credit did not include a further power to declare those bills a legal tender, in 1777 Congress resolved "[t]hat all bills of credit * * * ought to pass current in all payments, trade, and dealings, in these states, and be deemed in value equal to the same nominal sum in Spanish milled dollars", and "recommended to the legislatures of the united States, to pass laws to make the bills of credit * * * a lawful tender, in payment of public and private debts". ^{40/} Many States complied. ^{41/} Yet, notwithstanding both these efforts and Congress' further requests that the States adopt wage-and-price controls, ^{42/}

^{39/} 4 id. at 49.

^{40/} 7 id. at 35, 36.

^{41/} E.g., 1 H. Phillips, Currency of the American Colonies, ante note 20, at 79 (New Jersey); 2 id. at 30, 145 (Rhode Island, Virginia); C. Bullock, Monetary History, ante note 16, at 264 (New Hampshire); J. Felt, Massachusetts Currency, ante note 14, at 174 (1839) (Massachusetts). Typical of these severe legal-tender measures was an early resolution of the Pennsylvania Council of Safety, providing "That if any person * * * shall refuse to take Continental Currency in payment of any Debt or Contract whatsoever, * * * the person * * * shall * * * be considered as a dangerous Member of Society, and forfeit the * * * debt Contracted, * * * and * * * pay a fine * * * to the State". Resolution of 27 December 1776, 11 Colonial Record of Pennsylvania, 1776-1779 (1851-1853), at 70-71.

^{42/} 7 Journals of the Continental Congress, ante note 35, at 124-25; 9 id. at 957; 15 id. at 1289-90.

"[t]his course of violence and terror, so far from aiding the circulation of the paper, led to still further depreciation".^{43/}

Throughout 1778 and 1779, Congress "still held out to the public the delusive hope of an ultimate redemption of the whole at par".^{44/} First, it excoriated as "false and derogatory

to the honor of Congress" the "report * * * that Congress would not redeem the bills of credit * * *, but would suffer them to sink in the hands of the holder".^{45/} Later, in a

circular letter to its constituents, it claimed that "[t]o raise the value of our paper money and to redeem it, will not * * * be difficult". "Without public inconvenience or private distress, the whole of the debt incurred in paper emissions * * * may be cancelled in a period so limited as must leave the possessor of the bills satisfied with his security."^{46/}

Finally, admitting in another circular letter the existence of a certain "distrust * * * entertained by the mass of the people, either in the ability or inclination of the United States to redeem their bills", Congress argued that "the natural wealth, value and resources of the country" would suffice to pay the debt.^{47/} "Congress", the letter intoned, "have pledged the faith of their constituents for the redemption of [the bills]"; "their constituents have actually ratified their acts by receiving their bills, passing laws establishing their currency"; and, therefore, "the people

^{43/} 2 J. Story, Commentaries, ante note 7, § 1359, at 229.

^{44/} Id.

^{45/} 12 Journals of the Continental Congress, ante note 35, at 1261.

^{46/} 13 id. at 60.

^{47/} 15 id. at 1055-57.

have pledged their faith for the redemption of [the bills], not only collectively by their representatives, but individually".^{48/} Moreover, Congress assured its readers, there was no reason "to apprehend a wanton violation of the public faith": Because "your representatives here are chosen from among yourselves", "it is no more in their power to annihilate your money than your independence". It was "political heres[y]", Congress contended, to say that "as the Congress made the money they also can destroy it; and that it will exist no longer when they find it convenient to permit it". "A bankrupt faithless republic would be a novelty in the political world, and appear among reputable nations like a common prostitute among chaste and respectable matrons."^{49/} Besides, argued Congress, "indulg[ing] in still more extraordinary delusions",^{50/} "paper money is the only kind of money which cannot 'make unto itself wings and fly away.' It remains with us, it will not forsake us, it is always ready and at hand for the purpose of commerce or taxes, and every industrious man can find it".^{51/}

Yet, even while penning paeons to paper currency, Congress was recording the stark economic and social disaster its uninhibited emissions of bills of credit had caused. As early as 1777, Congress recognized that

paper currency * * * is multiplied beyond the rules of good policy. No truth being more evident, than that where the quantity of money * * * exceeds what is useful as a medium of commerce, its comparative value must be proportionately reduced. To this cause * * * are we to ascribe the depreciation of our currency: the consequences to

^{48/} Id. at 1058.

^{49/} Id. at 1059, 1060.

^{50/} 2 J. Story, Commentaries, ante note 7.

^{51/} 15 Journals of the Continental Congress, ante note 35, at 1057.

be apprehended are equally obvious and alarming. They tend to the depravity of morals, -- decay of public virtue, -- a precarious supply for the war, -- debasement of the public faith, -- injustice to individuals, and the destruction of the honour, safety, and independence of the United States. Loudly, therefore, are we called upon to provide a seasonable and effectual remedy. ^{52/}

And even in its circular letter of 1779, otherwise praiseful of bills of credit, Congress admitted to its constituents that "the depreciation of the currency has * * * swelled the prices of every necessary article", and "is to be removed only by lessening the quantity of money in circulation".^{53/} Again and again from 1777 to 1781, it "earnestly recommended to the united States, to avoid, as far as possible, further emissions of paper money",^{54/} "not to issue any more but by advice or consent of Congress",^{55/} and finally "to issue no more bills of credit * * * as directly tending to ruin the public funds".^{56/} As for itself, in 1779 it publicly promised "on no account whatever" to emit more than \$200,000,000 in paper-currency,^{57/} a pledge it failed to fulfill.^{58/}

Moreover, by 1780 Congress had encouraged the States to "revise their laws * * * making the continental bills a tender", and "amend the same in such manner as they shall

^{52/} 9 *id.* at 954.

^{53/} 15 *id.* at 1053, 1054.

^{54/} 7 *id.* at 125. See 9 *id.* at 955-56; 12 *id.* at 1074; 19 *id.* at 378.

^{55/} 18 *id.* at 1159.

^{56/} 20 *id.* at 501.

^{57/} 15 *id.* at 1053.

^{58/} 2 J. Story, *Commentaries*, ante note 7, § 1360, at 230, reckoned the emissions as "amount[ing] to the enormous sum of upwards of three hundred millions".

judge more conducive to justice, in the present state of the paper currency".^{59/} The next year, Congress first asked the States to declare "that such bills shall not be a tender in any other manner than at their current value compared with gold or silver",^{60/} then recommended bluntly that "the States immediately repeal any of their laws that may yet be in force making paper money of any kind a legal tender".^{61/}

In 1780, Congress called in the old continental bills of credit, replacing them with new, interest-bearing emissions at the rate of twenty to one.^{62/} But

[t]his new scheme of finance was equally unavailing. Few of the old bills were brought in, and * * * few of the new were issued. At last the continental bills became of so little value, that they ceased to circulate; and, in the course of the year 1780, they quietly died in the hands of their possessors. Thus were redeemed the solemn pledges of the national government! Thus was a paper currency, which was declared to be equal to gold and silver, suffered to perish in the hands of the persons compelled to take it; and the very enormity of the wrong made the ground of an abandonment of every attempt to redress it! ^{63/}

^{59/} 16 Journals of the Continental Congress, ante note 35, at 269.

^{60/} 19 id. at 266.

^{61/} 20 id. at 501. "That experience having evinced the inefficacy of all attempts to support the credit of paper money by compulsory acts, it is recommended to such states, where laws making paper bills a tender yet exist, to repeal the same * * * ." Id. at 524. On the repeal of these laws, see, e.g., 1 A. Bolles, The Financial History of the United States (1884), ch. xiii.

^{62/} 19 J. of the Continental Congress, ante note 35, at 164.

^{63/} 2 J. Story, Commentaries, ante note 7, § 1360, at 230 (footnotes omitted). One study calculated the "aggregate loss" from Continental Currency at almost \$200,000,000 -- or "near three times the whole revolutionary debt". "Report from Senator Levi Woodbury of New Hampshire on Continental Currency, 1844", in J. Elliot, The Funding System of the United States and of Great Britain (1845), at 175-76.

Apparently, though, Congress learned a lesson from this experience -- as reflected, for example, in a report of its Board of Treasury in 1786, condemning "the revival of a Paper Currency", and "the rage for another experiment in this fallacious Medium [that] has so far prevailed as to enter into the system of Revenue of several States".^{64/}

Indeed, many of the States never appreciated what their own history taught about the "fallacious Medium" of paper currency. Largely the result of the preceding inflation, economic chaos reigned nationwide from 1783 until after the Constitutional Convention in 1787.^{65/} Unemployment, the collapse of agricultural markets, depreciation in real-estate values, and extremely high rates of interest were common problems.^{66/} Under these conditions, political strife between creditors and debtors was endemic, leading in many communities to what The Federalist later described as "[a] rage for paper money, for an abolition of debts, for an equal division of property", and for "other improper and wicked project[s]".^{67/} Armed bands even prevented the collection of revenue and plotted the overthrow of the governments of Rhode Island and Massachusetts.^{68/}

64/ 30 Journals of the Continental Congress, ante note 35, at 364.

65/ See the excellent summaries in Edwards v. Kearzey, 96 U.S. 595, 604-07 (1878), and Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453-58 (1934) (Sutherland, J., dissenting).

66/ E.g., A. Nevins, The American States During and After the Revolution, 1775-1789 (1924), at 534. The rate of interest in Pennsylvania, for instance, was said to be twenty-five percent. O. Libby, The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution (1894), at 34.

67/ The Federalist No. 10.

68/ 2 S. Arnold, History of the State of Rhode Island (1860), at 489.

In 1786, Shay's Rebellion broke out, prompting General Henry Knox to inform George Washington that

[t]he people who are the insurgents * * * feel at once their own poverty * * * and their own force, and they are determined to make use of the latter to remedy the former.

Their creed is, that the property of the United States * * * ought to be the common property of all; and he that attempts opposition to this creed is the enemy of equality and justice, and ought to be swept from the face of the earth. In a word, they are determined to annihilate all debts, public and private, and have agrarian laws, which are easily effected by the means of enforced paper money, which shall be a tender in all cases whatever. ^{69/}

Although the economic and social emergency called for legislation, the creditor- and debtor-parties could not agree upon a common course of action. Obtaining majorities in several state legislatures, debtor-parties immediately enacted laws declaring depreciated paper money or property legal tender for all debts, providing for payment of debts by installments, and closing the courts. ^{70/} By 1786,

under the universal depression and want of confidence, all trade had well-nigh stopped, and political quackery, with its cheap and dirty remedies, had full control of the field. In the very face of miseries so plainly traceable to the deadly paper currency, it may seem strange that people should now have begun to clamour for a renewal of the experiment which had worked so much evil. Yet so it was. * * * [A] craze for fictitious wealth in the shape of paper money ran like an epidemic through the country. ^{71/}

^{69/} Letter of 23 Oct. 1786, quoted in N. Brooks, Henry Knox, A Soldier of the Revolution (1900), at 194.

^{70/} A. Nevins, The American States During and After the Revolution, ante note 66, at 570. See I G. Bancroft, History of the Formation of the Constitution of the United States of America (1882), ch. vi.

^{71/} J. Fiske, The Critical Period of American History, 1783-1789 (1888), at 168.

The results of such aberrant monetary policies were predictable: They "prostrated all private credit and all private morals"; "introduced a system of fraud, chicanery, and profligacy, which destroyed * * * all industry and enterprise"; and "entailed the most enormous evils on the country".^{72/} "Nothing but the ardor of the most elevated patriotism could overcome the difficulties and embarrassments growing out of this state of affairs."^{73/}

C. The monetary powers and disabilities in the Constitution

The answer to these calamities, however, was already at hand. As early as 1776, Congress had begun to develop a national system of silver and gold coinage, pursuant to what became its explicit power in the Articles of Confederation "of regulating the alloy and value of coin struck by [Congress'] own authority, or by that of the respective states".^{74/}

Still presuming that "the holders of bills of credit * * * will be entitled * * * to receive * * * the amount of said bills in Spanish milled dollars, or the value thereof in gold and silver", a committee of Congress recognized that

the value of such dollars is different in proportion as they are more or less worn, and the value of other silver, and of gold coins, * * * when compared with such dollars, is estimated by different rules and proportions in these states, whereby injustice may happen to individuals, to particular states, or to the whole Union * * *, which ought to be prevented by declaring the precise weight and fineness of the s'd Spanish milled dollar * * * now becoming the Money-Unit or common measure

^{72/} 2 J. Story, Commentaries, ante note 7, § 1371, at 243 (footnote omitted).

^{73/} Craig v. Missouri, 29 U.S. (4 Pet.) 410, 452 (1830) (McLean, J., dissenting).

^{74/} Arts. of Confed'n art. IX.

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 estimate their comparative value * * * . 75/

The committee then suggested the "principle" that "all silver coins * * * ought to be estimated * * * according to the quantity of fine silver they contain", and "all gold coins * * * according to the quantity of fine gold they contain and the proportion * * * which the value of fine gold bears to that of fine silver" in the marketplace. 76/ By this "rule", the committee established a table of values of various silver and gold coins relative to the Spanish milled dollar. 77/

The next year, a congressional committee further recommended

That a Mint be forthwith established for coining money * * * [under] a proper plan for regulating the same * * * .

That as much Gold and Silver bullion as can be procured * * * be purchased * * * , and that the bullion * * * be coined into money, of such value and denominations as shall hereafter be ordered by Congress. [And]

That any person who will bring gold and silver to the mint may have it coined on their own account. 78/

In 1785, Congress considered a plan proposing the Spanish milled dollar as "the Money-Unit", and in favor of which it argued that "the Dollar * * * has long been in general Use. Its Value is familiar. This accords with the natural modes of

75/ 5 Journals of the Continental Congress, ante note 35, at 724-25.

76/ Id. at 725.

77/ Id. at 726. See 4 id. at 381-83.

78/ 7 id. at 138.

keeping Accounts".^{79/} Soon thereafter, Congress resolved "That the money unit of the United States of America be one dollar",^{80/} but did not determine the number of grains of fine silver that should constitute the dollar. In 1786, the congressional Board of Treasury "concluded that Congress * * * intended [by this resolution to adopt as the 'Money-Unit'] the common Dollars that are Current in the United States", and calculated that "[t]he 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 Board also determined "the Difference that Custom has established between Coined Gold and Coined Silver, in the United States" as a basis for establishing the relative value between coinage of the two metals.^{81/}

Perhaps not surprisingly, the coinage-policy of the Continental Congress thus paralleled the traditional common-law approach. First, Congress retained the precious metals, silver and gold, as money. Second, it established a physical measure of silver, defined by weight and fineness, as the national "Money-Unit". Third, it fixed the values of all other coinage by comparing their weights, fineness, and customary market exchange-ratios to that of the "Money-Unit". And fourth, it recognized the propriety of permitting the market to trade freely in gold and silver, and to determine the quantity of money in circulation through the free coinage of those metals. In this manner, Congress made the dollar an

^{79/} 28 id. at 355.

^{80/} 29 id. at 499-500.

^{81/} 30 id. at 162-63. See 31 id. at 503-04.

absolute constant of weight, and permitted the purchasing-power of money and all monetary exchange-ratios to reach the levels the market set.

Given the unlimited monetary powers the States claimed as part of their "sovereignty", and the less-expansive but still broad authority that Congress exercised pursuant to the Articles of Confederation, such a monetary system was unlikely of attainment -- particularly in the face of incessant political pressure for new emissions of paper currency. Therefore, fundamental legal change was necessary.

The States had long arrogated to themselves the powers to coin money and regulate its value, to emit bills of credit, and to make almost anything a legal tender in payment of debts. To permit them to continue to exercise the first of these powers would derange any national system of coinage by injecting "different rules and proportions" for estimating the value of silver and gold coins as against Spanish milled dollars. To allow the second and third powers to exist any longer merely encouraged new local experiments with the "fallacious Medium" of paper currency. As far as the States were concerned, then, the proper course lay in denying them any powers to coin money or to emit bills of credit, and in limiting their legal-tender power to silver and gold coins (which, under common law, had always been legal tender for their intrinsic values anyway).

Under the Articles of Confederation, Congress had the powers to coin money and regulate its alloy and value, to borrow, and to emit bills of credit. To retain the first and second of these was mandatory. And to extinguish the third was vital to a sound monetary system no less at the national than at the state level. Finally, Congress had had no general

legal-tender power in any event (only a specific power in so far as its coinage of silver or gold would have had common-law legal-tender character for its intrinsic value) -- and, therefore, there was no need to deny it that already non-existent authority.

The Constitutional Convention of 1787 provided the opportunity for these conceptions to reach legal fulfillment. Called for the express purpose of revising the Articles of Confederation,^{82/} the Convention prepared a Constitution that faithfully reflected the Framers' monetary experiences under the former organic law.

Including the Bill of Rights, the Constitution contains six major provisions dealing with or referring to money:^{83/}

Article I, § 8, cl. 2. The Congress shall have Power * * * To borrow Money on the credit of the United States[.]

Article I, § 8, cl. 5. The 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, § 8, cl. 6. The Congress shall have Power * * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States[.]

Article I, § 9, cl. 1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

82/ See Documents Illustrative of the Formation of the Union of the American States, H. Doc. No. 398, 69th Cong., 1st Sess. (1927), at 38-46.

83/ In addition to the clauses described in the text, the Constitution contains two other references to money: viz., in Art. I, § 8, cl. 12, and Art. I, § 9, cl. 9. These clauses, however, have no direct bearing on the nature and extent of the monetary powers.

Article I, § 10, cl. 1. No State shall * * * coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts * * * .

Amendment VII. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * * .

A proper interpretation of the Constitution must interrelate all these provisions in a coherent structure -- not only because they are parts of the same document,^{84/} but also because they arose from the same historical circumstances and prior law, address the same subject in the same words, and bespeak a consistent purpose and policy.^{85/}

1. The purpose and policy of the monetary powers and disabilities

The purpose of the monetary powers and disabilities is "to preclude us from the embarrassments of a perpetually fluctuating and variable currency",^{86/} by stopping "[t]he floods of depreciated paper-money, with which most of the States * * * were inundated".^{87/} Thus these provisions aim at "secur[ing] money] from debasement",^{88/} "secur[ing] a wholesome and uniform currency throughout the Union",^{89/} establishing a "fixed and uniform standard of value",^{90/} and "preserv[ing] a

^{84/} E.g., United States v. Wong Kim Ark, 169 U.S. 649, 653-54 (1898).

^{85/} Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 265 (1827) (opinion of Washington, J.). See Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 452-53 (1805).

^{86/} 2 J. Story, Commentaries, ante note 7, § 1118, at 58.

^{87/} Id., § 1119, at 59.

^{88/} Id., § 1118, at 58.

^{89/} Id., § 1119, at 59.

^{90/} Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 265 (1827) (opinion of Washington, J.). Accord, 2 J. Story, Commentaries, ante note 7, § 1372, at 243.

proper circulation of good coin of known value".^{91/} Their goal is to "facilitate exchanges, and thereby to encourage all sorts of industry and commerce"^{92/} under a regime of economic justice.^{93/}

The monetary powers and disabilities reflect a "hard-money" policy based on extinguishing or limiting the pre-existent authority of the States to "coin Money", "emit Bills of Credit", and declare what should be a "Tender in Payment of Debts",^{94/} while rendering exclusive the ability of Congress to "coin" precious metals as "Money".^{95/} "The great end and object of this restriction on the power of the states * * * was * * * to exclude everything from use, as a circulating medium, except gold and silver * * * . That the real dollar may represent property, and not the shadow of it."^{96/} To this end, the monetary provisions not only explicitly define the authority of Congress, but also implicitly establish its "trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union", one with "intrinsic value".^{97/}

On their face, the monetary powers and disabilities are

^{91/} 2 J. Story, Commentaries, ante note 7, § 1118, at 58.

^{92/} Id. See Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934).

^{93/} See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 269-70 (1827) (opinion of Washington, J.).

^{94/} U.S. Const. art. I, § 10, cl. 1.

^{95/} U.S. Const. art. I, § 8, cl. 5. Cf. Arts. of Confed'n art. IX.

^{96/} Craig v. Missouri, 29 U.S. (4 Pet.) 410, 442-43 (1830).

^{97/} United States v. Marigold, 50 U.S. (8 How.) 560, 566-69 (1850).

eminently suitable for these goals: By denying the States any power to "coin Money" or "emit Bills of Credit", Article I, § 10, cl. 1 eradicates the "fallacious Medium" of paper currency and eliminates multiple systems of coinage throughout the country. The clause also limits the States' legal-tender power to "gold and silver Coin", thereby establishing specie as the sole constitutional medium for governmentally enforced "Payment of Debts". By empowering Congress "To coin Money, [and] regulate the Value thereof", Article I, § 8, cl. 5 creates a national system of coinage with uniform intrinsic value in every State. By explicitly referring to "dollars", Article I, § 9, cl. 1 and the Seventh Amendment fix in the Constitution the silver Spanish milled dollar as the "money unit", by which Congress should "regulate the Value" of all other coinage. By not including the language "emit bills" that the Articles of Confederation contained,^{98/} Article I, § 8, cl. 2 disables Congress from issuing paper currency of any sort. And by limiting Congress' power to punish counterfeiting to "Securities" and "Coin", Article I, § 8, cl. 6 confirms that Congress may "coin Money" itself, or raise money by "borrow[ing]", but not "emit", "issue", "create", "make", or "declare what shall be" money in any other way.

More specifically --

2. Article I, § 10, cl. 1

Of all the monetary provisions in the Constitution, Article I, § 10, cl. 1 most completely evidences the Framers' overall intent and plan. To understand this requires separate consideration of: (a) its several different prohibitions on

^{98/} Arts. of Confed'n art. IX.

state action, and their legal implications as to the corresponding powers or disabilities of Congress; (b) what constitutes "mak[ing] * * * a Tender" under that clause; and (c) the absolute nature of the clause's prohibitions.

a. The several monetary disabilities of Article I, § 10, cl. 1

Article I, § 10, cl. 1 carefully distinguishes among the powers to "coin Money", "emit Bills of Credit", and "make any Thing but gold and silver Coin a Tender in Payment of Debts" -- all of which powers it denies to the States. The reason for this enumeration is historically obvious: Although of the same general character, and affecting the same economic and social interests, these powers were separately used by the States, and only in part delegated by them to the Continental Congress under the Articles of Confederation.^{99/} The States and Congress might have "coin[ed] Money" without "emit[ting] Bills of Credit"; and the States might have done so without making anything but specie a "Tender in Payment of Debts". The States and Congress might have emitted, and did emit, bills of credit without coining money; and the States might have done so without making their bills, or Congress', legal tender. And the States might have made, and did make, various non-monetary "Thing[s]" legal tenders without coining money or emitting bills of credit; but Congress had no power to declare such things a legal tender at all.

The legal implications of this enumeration are also obvious: First, the power the States once claimed to "coin Money" did and does not include a power to "emit Bills of Credit", and vice versa. Otherwise, the double prohibition in

^{99/} Arts. of Confed'n art. IX.

Article I, § 10, cl. 1 would be redundant -- an interpretation at odds with basic canons of constitutional analysis.^{100/}

Moreover, because "[t]hese prohibitions, associated with the powers granted to Congress 'to coin money, and to regulate the value thereof, and of foreign coin,' most obviously constitute members of the same family, being upon the same subject, and governed by the same policy",^{101/} Article I, § 10, cl. 1 unequivocally demonstrates that the power to "coin Money" in Article I, § 8, cl. 5 also does not include the power to "emit Bills of Credit".

^{100/} E.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) (opinion of Taney, C.J.) (equally divided Court):

In expounding the constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article * * *, because the whole of this short section is directed to the same subject; that is to say, it is employed altogether in enumerating the rights surrendered by the states; and this is done with so much clearness and brevity, that we cannot for a moment believe, that a single superfluous word was used, or words which meant merely the same thing.

^{101/} *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 265 (1827) (opinion of Washington, J.).

Second, the disability of the States under Article I, § 10, cl. 1 to "emit Bills of Credit" does not reasonably imply a lack of authority to borrow money on the public credit by issuing securities not intended to function as paper currency.^{102/} This, however, reciprocally suggests that the power to "borrow Money" in Article I, § 8, cl. 2 does not include a power to emit such bills -- further in keeping with the strict distinction between those two powers observed in the Articles of Confederation.^{103/}

And third, the prohibition in Article I, § 10, cl. 1 against the States "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts" proves that their former powers to "coin Money", to "emit Bills of Credit", and to borrow money were not the source of the general power the States claimed prior to ratification of the Constitution to declare what is a legal tender.^{104/} Otherwise, the Framers would not have inserted in that clause a special prohibition against all but one form of legal tender, or left that prohibition itself unqualified as to the continued vitality of the borrowing-power.

^{102/} Circulation as paper money is an essential attribute of "Bills of Credit" under the Constitution. *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 431-32 (1830); *id.* at 452-54 (McLean, J., dissenting); *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 312-14, 318-19 (1837); *Poindexter v. Greenhow*, 114 U.S. 269, 284 (1885); *Houston & T.C.R.R. v. Texas*, 177 U.S. 66, 85-87 (1900).

^{103/} Arts. of Confed'n art. IX. See post, pp. 92-97.

^{104/} E.g., on the non-essentiality of legal-tender character for a "Bil[l] of Credit", and (therefore) on the absence of any inherent legal-tender power in the authority to "emit Bills of Credit", see *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 433-36 (1830); 2 J. Story, Commentaries, ante note 7, §§ 1365-67.

What is not immediately obvious about Article I, § 10, cl. 1 is why it leaves to the States the authority to "make * * * gold and silver coin a Tender in Payment of Debts". After all, the selfsame clause disables the States from coining any form of "Money" themselves, including gold and silver. And, as analysis shows, Congress has a narrow legal-tender authority co-extensive with its power under Article I, § 8, cl. 5 "To coin Money, [and] regulate the Value thereof" -- an authority that derives from common law and embraces only gold and silver coin as general media of payment.^{105/} Self-evidently, if Congress coined a silver "dollar", of X grains intrinsic value in weight of fine metal, and declared that coin a legal tender for its intrinsic value -- then, for a State to declare such a "dollar" legal tender for more, or less, than that intrinsic value would inject chaos into the monetary system, contrary to the basic purpose of the Founders. Therefore, the reservation of legal-tender authority to the States cannot reasonably operate so as to conflict with the parallel authority of Congress.

It could operate, however, where Congress failed to act: For example, if Congress neglected to provide domestic silver and gold coinage sufficient to meet the needs of commerce or of the States themselves, the States could declare foreign coins, properly "regulate[d]" in "Value" as against the constitutional standard,^{106/} to be legal tender "in Payment of Debts" within their respective jurisdictions. Or, if Congress unconstitutionally purported to "regulate the Value" of various domestic gold or silver coins improperly with respect

^{105/} Post, pp. 76-81.

^{106/} See post, pp. 61-70.

to the constitutional standard, in order to favor debtors, creditors, or some other politically influential special-interest group in defiance of "the general Welfare",^{107/} the States could declare those domestic coins legal tender for the coins' properly "regulate[d]" worth within their respective territorial limits.

The Founders, however, were probably little concerned with remote possibilities such as these for congressional failures and defaults. More likely, they added the carefully worded phrase "make any Thing but gold and silver Coin a Tender in Payment of Debts" to Article I, § 10, cl. 1 in order, not only to eradicate the general legal-tender power the States had abused both as Colonies and as independent confederates in favor of influential private debtors, but also to impose on the States a rule of "just compensation" in the "Payment" of their own "Debts".^{108/} To understand this requires separate consideration of the meaning of the verb "make" in Article I, § 10, cl.

b. What constitutes "mak[ing] * * * a Tender" under Article I, § 10, cl. 1

Article I, § 10, cl. 1 denies the States power to "make any Thing but gold and silver Coin a Tender in Payment of Debts"; whereas, it also denies them power to "pass any Bill of Attainder, ex post facto Law, or Law impairing the

^{107/} U.S. Const. preamble.

^{108/} "Just compensation" in constitutional law has two components: (i) determination of fair market value; and (ii) ascertainment of a medium of payment that transfers that value from the debtor to the creditor. Article I, § 10, cl. 1 fixes the medium of payment for the States as debtors.

Obligation of Contracts".^{109/} Unless the Framers had had some special purpose in mind by distinguishing between the verbs "make" and "pass", economy of language would have caused them to phrase Article I, § 10, cl. 1 so as simply to interdict State authority to "pass any Bill of Attainder, ex post facto Law, Law impairing the Obligation of Contracts, or Tender Law". Analysis of the meaning of the verb "make", in the context of the typical relations arising between creditors and debtors, illuminates the Framers' design.

A basic canon of constitutional interpretation is that, where the Constitution limits governmental authority, it operates upon and confines every governmental action on the subject.^{110/} If the constitutional language is general, it applies in an all-inclusive manner,^{111/} without any unstated qualifications.^{112/} Another fundamental precept of constitutional law is that, "[t]o get at the thought or meaning expressed in * * * a constitution, the first resort * * * is to the natural signification of the words".^{113/} Indeed, "[t]o disregard * * * a deliberate choice of words * * * would be a

^{109/} Article I, § 10, cl. 1 makes many subtle verbal distinctions, denying the States power to "enter into" treaties, to "grant" letters of marque or titles of nobility, to "coin" money, to "emit" bills of credit, to "make" tenders, and to "pass" certain laws.

^{110/} E.g., *Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (White, J., concurring).

^{111/} E.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 199-200, 204-05 (1819).

^{112/} E.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 722 (1838); *Richfield Oil Co. v. Board of Equalization*, 329 U.S. 69, 76, 77-78 (1946).

^{113/} *Lake County Commissioners v. Rollins*, 130 U.S. 662, 670 (1889).

departure from the first principle of constitutional interpretation".^{114/} This is particularly true in the case of Article I, § 10, cl. 1, concerning which the Supreme Court long ago held that "it would ill become this court, under any circumstances, to depart from the plain meaning of the words used".^{115/}

The "plain meaning of the words used [in Article I, § 10, cl. 1]" is their popular usage. The Framers of the Constitution employed words in "their natural sense";^{116/} in their "natural signification";^{117/} with their "natural meaning";^{118/} in their "normal and ordinary * * * meaning";^{119/} with the meaning they had "in common use",^{120/} in "common parlance",^{121/} or in "common acceptance";^{122/} in a "sense most obvious to * * * common understanding";^{123/} and, generally, in their

^{114/} Wright v. United States, 302 U.S. 583, 588 (1938).
^{Accord}, Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819); Lake County Commissioners v. Rollins, 130 U.S. 662, 671-72 (1889).

^{115/} Bronson v. Kinzie, 42 U.S. (1 How.) 311, 318 (1843) (emphasis supplied).

^{116/} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824);
McPherson v. Blacker, 146 U.S. 1, 27 (1892); South Carolina v. United States, 199 U.S. 437, 449 (1905).

^{117/} Lake County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).

^{118/} Wright v. United States, 302 U.S. 583, 588 (1938).

^{119/} United States v. Sprague, 282 U.S. 716, 731 (1931);
Green v. United States, 356 U.S. 165, 210 (1958) (Black, J., dissenting).

^{120/} Tennessee v. Whitworth, 117 U.S. 139, 147 (1886).

^{121/} United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 (1944).

^{122/} Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 328c (1837) (Baldwin, J., concurring).

^{123/} Eisner v. Macomber, 252 U.S. 189, 219-20 (1920) (Holmes, J., dissenting). ^{Accord}, Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930).

"plain, obvious, and common sense".^{124/} Moreover, the "usual and most known signification" of the Constitution's words refers to "[w]hat * * * those who framed and adopted it underst[oo]d the terms to designate and include"^{125/} -- "that sense in which [the words were] generally used by those for whom the instrument was intended",^{126/} the common understanding "when the Constitution was adopted",^{127/} "the common parlance of the times in which the Constitution was written",^{128/} or "according to their accepted meaning in that day".^{129/} To be sure, "in the course of time, as is often the case with language, the meaning of words or terms is changed"; but, even so, "the meaning of the constitution is not therefore changed".^{130/} "What it meant when adopted it still means for the purpose of interpretation",^{131/} notwithstanding swings in public opinion

^{124/} 1 J. Story, Commentaries, ante note 7, § 451, at 345.

^{125/} Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 558 (1895).

^{126/} Ogden v. Saunders, 25 U.S. (12 Wheat.) 265, 332 (1827) (Marshall, C.J., dissenting).

^{127/} Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930); Eisner v. Macomber, 252 U.S. 189, 219-20 (1920) (Holmes, J., dissenting).

^{128/} United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 539 (1944).

^{129/} Scott v. Sandford, 60 U.S. (19 How.) 393, 418 (1856).

^{130/} N. Chipman, Principles of Government: A Treatise of Free Institutions (1833), at 254. The "meaning [of constitutional provisions] is changeless; it is only their application which is extensive". Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting).

^{131/} Smiley v. Holm, 285 U.S. 355, 365 (1932). Accord, South Carolina v. United States, 199 U.S. 437, 448-49 (1905).

at home or abroad,^{132/} changes in "the ebb and flow of economic events",^{133/} or shifts in "public policy".^{134/}

These precepts apply particularly to Article I, § 10, cl. 1. Interpreting that provision in Briscoe v. Bank of Kentucky, Justice Baldwin noted that, "[w]ith the universal consent of every statesman and jurist, the terms * * * have been received and taken according to their known definition * * * and common understanding * * * . No man ever doubted * * * that the words * * * were used and must be taken in their ordinary meaning and acceptation."^{135/}

What, then, is the "ordinary meaning and acceptation" of the phrase "make any Thing but gold and silver Coin a Tender in Payment of Debts"? The verb "make" had many common

^{132/} "No one * * * supposes that any change in public opinion or feeling, * * * in the * * * nations of Europe or in this country, should induce the [Supreme Court] to give the words of the Constitution a [different] construction * * * than they were intended to bear when the instrument was framed and adopted. * * * [W]hile it remains unaltered, it must be construed as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States. And any other rule of construction would abrogate the judicial character of [the Supreme Court], and make it the mere reflex of the popular opinion or passion of the day." Scott v. Sandford, 60 U.S. (19 How.) 383, 426 (1856).

^{133/} West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

^{134/} Patton v. United States, 281 U.S. 276, 306 (1930). "Policy and Humanity" are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion." Edwards v. Kearzey, 96 U.S. 595, 604 (1878).

^{135/} 36 U.S. (11 Pet.) 257, 328c (1837) (concurring opinion).

meanings in the late eighteenth century,^{136/} just as it does today.^{137/} For instance, "make" can mean "enact (a law)" -- and, therefore, a State can "make * * * a Tender" if its legislature enacts a law containing such an explicit statutory provision, or if its judiciary interprets and applies a state statute to that effect. Again, "make" can mean "create" or "cause the existence of" -- and, therefore, a State can and does "make * * * a Tender" if its legislature or executive branch emits "Bills of Credit" or base-metal coins with legal-tender character, and if its judiciary imposes this currency on judgment-creditors in the State's courts. But "make" can have yet another meaning. In general, the verbal phrase "make an X" means the same as the verb "do X". Thus, the phrases "make an offer", "make an attempt", and "make a suggestion" are equivalent to the verbs "offer", "attempt", and "suggest", respectively. Similarly, the phrase "make * *

^{136/} 2 S. Johnson, A Dictionary of the English Language (1755) defined the verb "make" as follows:

- 1. To create. * * *
- 7. To do; to perform; to practice; to use. * * *
- 8. To cause to have any quality. * * *
- 9. To bring into any state or condition. * * *
- 15. To compel; to force; to constrain. * * *
- 22. To pay; to give.

^{137/} 2 Oxford English Dictionary (compact ed. 1971), at 1700-01, defines the verb "make" as follows:

- * * * 8. To cause the existence of . . . by some action * * *
- 10. To give rise to; . . . to be the cause of * * *
- 12. . . . to enact (a law) * * *
- 49. . . . a. To cause . . . to be or become * * *
- c. To determine (a thing compl.); to be (what is expressed by the law, penalty, etc.) * * *
- 51. To regard as, consider or compute to be * * *
- 59. With subs. expressing the action of vbs. . . . , make forms innumerable phrases approximately equivalent in sense to those verbs.

* a Tender" is equivalent to the verb "tender" -- or, the phrase "make any Thing but gold and silver Coin a Tender in Payment of Debts" is equivalent to the phrase "Tender any Thing but gold and silver Coin in Payment of Debts". Therefore, a State also can and does "make * * * a Tender" if any of its instrumentalities proffers to a creditor of the State the paper currency or base-metal coins of entities other than the State itself, and if the State's judiciary holds that proffer binding.^{138/}

On the other hand, "make" does not reasonably connote "accept" or "receive". And, for that reason, a State can and does not "make * * * a Tender" if one of its instrumentalities, acting as a creditor, merely accepts from a debtor something other than gold or silver coin in discharge of a debt owed to the State. In this case, the debtor "make[s] * * * a Tender" (in the sense of tendering); and the State simply agrees to treat the thing tendered as a satisfactory payment of the debt.^{139/} This result reflects the reality that, in the

^{138/} Common law recognized judgments as debts before, contemporaneously with, and after ratification of the Constitution. E.g., compare 2 W. Blackstone, Commentaries, ante note 8, at 464-65; 3 id. at 158-59, with Respublica v. Lacaze, 2 U.S. (2 Dall.) 118, 123 (Pa. 1791), and with Hagar v. Reclamation Dist. No. 197, 111 U.S. 701, 706-07 (1884). This is more than sufficient to bring judgments within Article I, § 10, cl. 1.

^{139/} As the discussion in the text indicates, the prohibitions of Article I, § 10, cl. 1 apply to every branch, agency, and instrumentality of state government. The Constitution contains several provisions explicitly prohibiting a "State" from exercising certain powers. E.g., U.S. Const. art. I, § 10, cls. 1-3 ("No State shall * * *"); amend. XIV, § 1 ("No State shall * * *"); amends. XV, XIX ("The right * * * to vote shall not be denied or abridged * * * by any State"). These prohibitions "nullif[y] and mak[e] void * * * State action of every kind". Civil Rights Cases, 109 U.S. 3, 11 (1883). "The vital requirement is State responsibility -- that * * * there be an infusion of conduct by officials, panoplied with State power." Terry v. Adams, 345 U.S. 461, 473 (1953) (opinion of Frankfurter, J.). If such infusion exists, even in the conduct of private parties, "state action" exists; and the

Founders' experience, "mak[ing] * * * a Tender" in the connotation the Constitution outlaws involved a coercive act:

imposing some "Thing" on an unwilling creditor for the purpose of benefitting the debtor, at the creditor's expense. Where a State enacts or enforces a law that requires one private party to accept from another private party "any Thing but gold and silver Coin" as a "Tender in Payment of Debts", it coerces an unwilling creditor. So, too, where a State itself tenders such a "Thing" in purported payment of its own debts, and denies the victimized creditor any relief in its courts.

Conversely, where a State agrees to accept in payment some "Thing" that a debtor tenders, no coercion at all is involved; and, although the debtor may benefit, the creditor benefits as well, as in every voluntary exchange in the market.

The operation of the phrase "make any Thing but gold and silver Coin a Tender in Payment of Debts" thus addresses each possible creditor-debtor relationship with which the Framers were familiar. For example, from their earliest days as Colonies, the States had claimed power to make all sorts of "Thing[s]" legal tenders, and to impose these "Thing[s]" on

(FOOTNOTE 139 CONT'D)

prohibitions apply. *Griffin v. Maryland*, 378 U.S. 130 (1964). See, e.g., the discussion of "state action" in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

The mere title a State gives to one of its agencies or instrumentalities has no constitutional significance -- for constitutional issues turn on substance, not labels. See, e.g., *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830); *New York Times Co. v. Sullivan*, 371 U.S. 254, 269 & nn.7-12 (1964). Neither does the mere location of such an agency or instrumentality in one or another branch of state government have any bearing on the matter. E.g., *Virginia v. Rives*, 100 U.S. 313, 318 (1880); see generally *Cooper v. Aaron*, 358 U.S. 1, 16-17 (1958); *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948). If the actor "mak[ing] * * * a Tender" is "clothed with the State's power", his "act is that of the State". Ex parte *Virginia*, 100 U.S. 339, 347 (1880).

unwilling private creditors at the request of private debtors. During the War of Independence, such "Thing[s]" included the Continental Currency Congress emitted. Again, from their earliest days as Colonies, and especially during and immediately after the War of Independence, the States as debtors had claimed power to impose various legal tenders on their private creditors, including the States' own "Bills of Credit" and Congress' Continental Currency. Both of these activities had proven themselves serious social, economic, and political evils -- and had been so recognized: initially by Parliament's^{140/} ban on legal-tender "Paper Bills" in the Colonies, immediately by the Continental Congress' requests that the States cease the emission of bills of credit and limit or repeal their legal-tender laws,^{141/} and ultimately by the nation's intervention in Article I, § 10, cl. 1. On the other hand, from their earliest days as Colonies, the States had accepted warrants, notes, certificates and other paper evidences of state debt from private parties in satisfaction of

^{140/} An Act to regulate and restrain Paper Bills of Credit in his Majesty's Colonies or Plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire in America, and to prevent the same being legal Tenders in Payments of Money, 1751, 24 Geo. II., ch. 53; An Act to prevent Paper Bills of Credit, hereafter to be issued in any of his Majesty's Colonies or Plantations in America, from being declared to be a legal Tender in Payments of Money; and to prevent the legal Tender of such Bills as are now subsisting, from being prolonged beyond the Periods limited for calling in and sinking the same, 1763, 4 Geo. III., ch. 34; An Act to explain and amend an Act, made in the Fourth Year of His present Majesty, intituled, An Act to prevent Paper Bills of Credit, hereafter to be issued in any of His Majesty's Colonies or Plantations in America, from being declared a legal Tender in Payments of Money, and to prevent the legal Tender of such Bills as are now subsisting from being prolonged beyond the Periods limited for calling in and sinking the same, 1773, 13 Geo. III., ch. 57.

^{141/} Emission of bills of credit: 7 Journals of the Continental Congress, ante note 35, at 125; 18 id. at 1159; 20 id. at 501. Legal-tender laws: 16 id. at 269; 19 id. at 266; 20 id. at 501.

the latters' obligations to the States. Yet this activity Parliament explicitly sanctioned by statute,^{142/} probably in recognition of the equitable doctrine that "[e]very debtor may pay his creditor with the notes of that creditor".^{143/} And the acceptance of their own notes in payment of debts owed to them hardly involved the States in the historic abuses of legal tender to which the people directed Article I, § 10, cl. 1.^{144/}

^{142/} An Act to explain and amend an Act, made in the Fourth Year of His present Majesty, intituled, An Act to prevent Paper Bills of Credit, hereafter to be issued in any of His Majesty's Colonies or Plantations in America, from being declared a legal Tender in Payments of Money, and to prevent the legal Tender of such Bills as are now subsisting from being prolonged beyond the Periods limited for calling in and sinking the same, 1773, 13 Geo. III., ch. 57.

^{143/} United States v. Robertson, 30 U.S. (5 Pet.) 641, 659 (1831).

^{144/} See Houston & T.C.R.R. v. Texas, 177 U.S. 66, 85-90 (1900), in which the Supreme Court upheld the State's use of "treasury warrants" against a challenge that such warrants were unconstitutional "Bills of Credit". Overruling the challenge, the Court noted that,

[a]lthough the State directed its officers to receive the warrants as money, in payment of certain dues to the State, and to deliver them to those who would receive them as money in payment of dues from the State to such persons, yet * * * this direction was only another mode of expressing the idea that, as between the State and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made.

Id. at 89 (emphasis supplied). The similarity between this decision and the relevant parliamentary statute is striking. Compare 13 Geo. III., ch. 57. Self-evidently, use of the warrants in this case also did not embody the historic abuses of legal tender because: (i) their initial circulation was wholly voluntary, being only "to those who would receive them as money in payment of dues from the State to such persons"; (ii) "such persons" could not impose the warrants as legal tender on any other, unwilling private parties; and (iii) acceptance of the warrants by the State in payment of debts owed to it merely reflected the old equitable doctrine of counterclaim or set-off.

c. The absolute nature of Article I, § 10,
cl. 1

Finally, comparison of the first clause of Article I, § 10 with the second and third clauses establishes the full extent of these monetary prohibitions. The first clause of that Article differs significantly from the second and third, in that the first clause begins "No State shall", whereas the others commence with the phrase "No State shall, without the consent of Congress". Evidently, this language imports an absolute prohibition with respect to the matters within the first clause, and a conditional prohibition with respect to the matters in the second and third clauses: Congress may permit the States to do what the second and third clauses of Article I, § 10 prohibit; but it has no authority to license any State to do anything within the first clause of that Article and section.

Revealingly, evolution of the Constitution in the Convention re-inforces this literal interpretation.^{145/} Various early drafts of the Constitution licensed the States to emit "Bills of Credit" and to "make any Thing but Specie a Tender" with the consent of Congress.^{146/} On 28 August 1787, the Convention took up one proposed draft providing, in relation

^{145/} On the relevance of the early drafts of the Constitution and the records of the Federal Convention in constitutional interpretation, see, e.g., *Kansas v. Colorado*, 206 U.S. 46, 84 (1907); *Missouri v. Illinois*, 180 U.S. 209, 221-24 (1901); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 562-64 (1895).

^{146/} 2 The Records of the Federal Convention of 1787 (M. Farrand ed. 1966), at 144 ("no State to be perdr. in future to emit Paper Bills of Credit witht. the App: of the Natl. Legisle nor to make any Thing but Specie a Tender in paymt of debts"), 169 ("No State shall * * *, without the Consent of the Legislature of the United States, emit Bills of Credit"), 187 ("No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make any thing but specie a tender in payment of debts").

to monetary disabilities, only that "No state shall coin money".^{147/} In James Madison's words,

Mr. Wilson & Mr. Sherman moved to insert after the words "coin money" the words "nor emit bills of credit, nor make any thing but gold & silver coin a tender in payment of debts" making these prohibitions absolute, instead of * * * with the consent of the Legislature of the U.S. [i.e., Congress].

Mr. Ghorum thought * * * an absolute prohibition of paper money would rouse the most desperate opposition from its partizans * * *

Mr. Sherman thought this a favorable crisis for crushing paper money. If the consent of the Legislature could authorize emissions of it, the friends of paper money would make every exertion to get into the legislature in order to license it. ^{148/}

On the amendment outlawing "bills of credit", the States voted eight for, one against, one divided; whereas, on the provision pertaining to "tender[s]", the motion carried nemo constante.^{149/}

In his report on this evolution to the Maryland Legislature, Luther Martin, an able lawyer who had dissented from the amendment,^{150/} explained the legal import of the change:

By the tenth section every State is prohibited from emitting bills of credit. As it was reported by the committee of detail, the States were only prohibited from emitting them without the consent of Congress; but the convention was so smitten with the paper money dread, that they insisted the prohibition should be absolute. It was my opinion * * * that the States ought not to be totally deprived of the right to emit bills of credit, and that, as we had not given an authority to the general government to retain it in the

^{147/} Id. at 439 & n.14.

^{148/} Id. (footnotes omitted).

^{149/} Id.

^{150/} Id. n.17.

States. * * * I therefore thought it my duty to vote against this part of the system. 151/

Martin's comments, of course, accurately reported "the paper money dread" with which, not only the Convention, but also the country as a whole "was so smitten". The Framers of, and the people who ratified, the Constitution well-knew that the Continental Congress had emitted bills of credit, that the States had given this (and their own) paper money legal-tender character, and that both Congress and the States had forced this and other paper currencies and "Thing[s]" on unwilling creditors in payment of private and governmental debts. If the Framers and the people had desired to enable "the friends of paper money" to continue these practices, they would have located the phrases "emit Bills of Credit" and "make any Thing but gold and silver Coin a Tender in Payment of Debts", not in the first clause of Article I, § 10, but rather in the second or third clause of that section. They would have established a conditional prohibition -- to wit, "No State shall, without the Consent of Congress, emit Bills of Credit, or make any Thing but gold and silver Coin a Tender in Payment of Debts" -- instead of the absolute prohibition the Constitution contains. That they did not is overwhelming proof they sought the result the plain meaning of Article I, § 10, cl. 1 requires: namely, that no State may treat any paper currency as a

151/ 3 id. at 214; 1 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d ed. 1836), at 376. The Supreme Court described Martin's report as "his well-known communication", and explicitly relied upon it, in Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429, 565 (1895).

"Tender in Payment of Debts", whether emitted by a State or by Congress.^{152/}

The explicit powers of Congress "To coin Money, [and] regulate the Value thereof" and "To borrow Money"^{153/} cannot override Article I, § 10, cl. 1 through operation of the Supremacy Clause. The Supremacy Clause provides that "the Laws of the United States which shall be made in Pursuance [of the Constitution] * * * shall be the supreme Law of the Land" -- but this supremacy is as against "any Thing in the Constitution or laws of any State to the contrary", not as against prohibitions of the Constitution itself.^{154/} Moreover, if the monetary powers of Congress could override the textually absolute prohibitions of Article I, § 10, cl. 1, simply because the Constitution confers those monetary powers on Congress, there would be no need for the "without-the-Consent-of-Congress" qualification in Article I, § 10, cls. 2 and 3 -- because the actions of the States those clauses conditionally prohibit also refer to things that Congress has explicit constitutional power to do, such as to "lay any Imposts or Duties on Imports",^{155/} "keep Troops, or Ships of War in time

^{152/} The Framers were capable of making fine distinctions in the area of congressional authorization of otherwise prohibited state actions. Compare U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation") with U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power"). They made no such distinction concerning "Bills of Credit" or legal tender, however.

^{153/} U.S. Const. art. I, § 8, cls. 5, 2.

^{154/} U.S. Const. art. VI. See National Prohibition Cases, 253 U.S. 350, 401-02 (1920) (McKenna, J., dissenting).

^{155/} Compare U.S. Const. art. I, § 10, cl. 2, with art. I, § 8, cl. 1, and contrast art. I, § 9, cls. 5-6.

of Peace",^{156/} or "engage in War".^{157/} But, to construe this qualification as meaningless or supererogatory would be to violate a basic canon of constitutional interpretation.^{158/} Moreover, the various powers and prohibitions of Article I, §§ 8 and 10 "are of equal dignity, and neither must be enforced so as to nullify or substantially impair the other".^{159/} To construe the general powers of Congress as overriding the specific prohibition of Article I, § 10, cl. 1, though, would be to "neutralize [that] positive prohibition", and thereby, "not to give effect to the Constitution, but to destroy a portion thereof".^{160/}

Not surprisingly, therefore, the United States Supreme Court early and repeatedly recognized the absolute nature of the prohibitions in Article I, § 10, cl. 1. In Ogden v. Saunders, Chief Justice Marshall spoke of that clause as dealing with matters "entirely prohibited", and as "consisting of total prohibitions" with "no exception from it".^{161/} In Poole v. Fleeger, Justice Baldwin referred to the strictures of that clause "which in their terms are absolute, operating, without any exception, to annul all state power over the

^{156/} Compare U.S. Const. art. I, § 10, cl. 3, with art. I, § 8, cls. 12-13, 15-16.

^{157/} Compare U.S. Const. art. I, § 10, cl. 3, with art. I, § 8, cl. 11.

^{158/} E.g., Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840) (opinion of Taney, C.J.).

^{159/} Dick v. United States, 208 U.S. 340, 353 (1908).

^{160/} South Dakota v. North Carolina, 192 U.S. 286, 328 (1904) (White, J., dissenting).

^{161/} 25 U.S. (12 Wheat.) 213, 334-35 (1827) (dissenting opinion).

prohibited subjects".^{162/} In Rhode Island v. Massachusetts, the Court noted that "no power under the government could * * * dispense with the constitutional prohibition".^{163/} In Holmes v. Jennison, Chief Justice Taney wrote that, in the first clause of Article I, § 10, "the limitations are absolute and unconditional", and contrasted it with the second clause, wherein "the forbidden powers may be exercised with the consent of congress". Justice Barbour also remarked that the first clause "absolutely prohibits the states" from doing certain things.^{164/} In Gunn v. Barry, the Court held that "congress cannot, by authorization or ratification, give the slightest effect to a State law * * * in conflict with" Article I, § 10, cl. 1.^{165/} And in Edwards v. Kearzey, the Court made clear that "[t]he prohibition contains no qualification, and we have no judicial authority to interpolate any". Moreover, it opined, "[n]o State can invade it; 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".^{166/}

In sum, Article I, § 10, cl. 1 encapsulates the lessons of the nation's early monetary history as it outlines the Constitution's monetary policy. Its restrictions on the States relate to two distinct monetary subjects: (i) "those on which the constitution had granted express powers to the

^{162/} 36 U.S. (11 Pet.) 185, 212 (1837) (separate opinion).

^{163/} 37 U.S. (12 Pet.) 657, 724-24 (1838).

^{164/} 39 U.S. (14 Pet.) 540, 570, 588 (1840) (separate opinions).

^{165/} 82 U.S. (15 Wall.) 610, 623 (1872).

^{166/} 96 U.S. 595, 604, 607 (1878) (emphasis supplied).

federal government -- to * * * coin money"; and (ii) "those on which the constitution made no grant of any power, by either express words, any necessary implication, or any reasonable interpretation -- to emit bills of credit, [and] make anything but gold and silver coin a legal tender in payment of debts".^{167/} And these restrictions are absolute, binding not only the States, but also Congress to the extent that any of its powers could even arguably be construed to permit the emission of "Bills of Credit" or the declaration of legal tender other than "gold and silver Coin".

3. Article I, § 8, cl. 5

The powers of Congress do not extend so far, however, as consideration of Article I, § 8 shows. Foremost among the monetary powers in that section are those of clause 5, which authorizes Congress "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures". To understand the reach of this clause requires separate consideration of: (a) what constitutes the power "To coin Money"; (b) how that power relates to the allied authority to "regulate the Value [of coined Money], and of foreign Coin"; (c) whether any power exists to debase the coinage; and (d) in what way "coin[ing] Money" involves the creation of "legal tender", and why only gold and silver coin may constitutionally assume that character.

a. The power "To coin Money"

The lineage of the authority in Article I, § 8, cl. 5 "To coin Money" traces directly to linguistically similar -- and operatively identical -- language in the Articles

^{167/} Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 328b (1837) (Baldwin, J., concurring).

of Confederation,^{168/} later successively modified in the Federal Convention of 1787.^{169/} Clause 5 sets out the sole, express constitutional grant of power to bring "Money" into existence, and unmistakably limits that power to a single, specific means of achieving its end: the act of "coin[ing]". Nowhere in the Constitution or in any of its antecedents does or did another explicit power exist to "print", "issue", "emit", "make", "create", or "declare what shall be" "Money".^{170/} Therefore, on its face, the first phrase of Article I, § 8, cl. 5 grants to Congress a power that that body can constitutionally exercise only on "Money" that admits of being coined -- and thereby constitutionally defines the "Money" of the United States, the "Money" the United States may itself bring into existence, as coin alone.^{171/} For, in constitutional

^{168/} Arts. of Confed'n art. IX: "The united states in congress assembled shall * * * have the sole and exclusive right and power of regulating the allow and value of coin struck by their own authority, or by that of the respective states * * * ."

^{169/} Documents in the records of the Committee of Detail, for example, contain several versions of the power: viz., (i) "S & H.D. in C. ass. shall have the exclusive Right of coining Money"; (ii) "10. * * * The exclusive right of coining money"; (iii) "The Legislature of U.S. shall have the exclusive Power * * * of coining Money"; and (iv) "to coin Money". 2 Records of the Federal Convention, ante note 146, at 136, 144, 158-59, 167. The Reports of the Committees of Detail and Style both contain the language: "To coin money". Id. at 182, 595. See also id. at 569.

^{170/} The Articles of Confederation and early drafts of the Constitution included explicit powers to "emit bills of credit". Post, pp. 92-94. And the Constitution incorporates a prohibition against the emission of such "Bills" by the States. In the late 1780's, however, "Bills of Credit" were not synonymous with "Money", but denoted only promises to pay "Money". Indeed, at that time, the standard definition of "Money" was "[m]etal coined for the purpose of commerce". 2 S. Johnson, Dictionary, ante note 136.

^{171/} Under Article I, § 8, cl. 2, the United States arguably may "borrow Money" it has not itself coined. Post, pp. 109-10.

interpretation, "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed".^{172/}

Besides the doctrine of expressio unius exclusio alterius, basic considerations of constitutional federalism compel the same conclusion. One of the fundamental principles of our society is that the very existence of the Constitution necessarily implies the definite and limited nature of the power of the government of the United States.^{173/} Indeed, by legal hypothesis, the Constitution contains no "independent and unmentioned power[s]"; for the contrary assumption would fatally "conflict with the doctrine that this is a government of enumerated powers".^{174/} There are no undefined and general powers, that some "theoretical government" might possess.^{175/} Instead, every claim of power must find direct support in a constitutional grant, "either in terms or by necessary implication".^{176/} And the "burden of establishing a delegation of power to the United States * * * is upon those making the claim".^{177/} This is especially true in the case of the power

^{172/} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

^{173/} Id. at 176-80; Kansas v. Colorado, 206 U.S. 46, 89-90 (1907); Myers v. United States, 272 U.S. 52, 230-31 (1926) (McReynolds, J., dissenting).

^{174/} Kansas v. Colorado, 206 U.S. 46, 88-89 (1907).

^{175/} Id. at 81; Myers v. United States, 272 U.S. 52, 230 (1926) (McReynolds, J., dissenting).

^{176/} Kansas v. Colorado, 206 U.S. 46, 83-84 (1907); Downes v. Bidwell, 182 U.S. 244, 288 (1901).

^{177/} Bute v. Illinois, 333 U.S. 640, 653 (1948).

Even the oft-misunderstood Necessary and Proper Clause is no exception to this rule. U.S. Const. art. I, § 8, cl. 18 authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Article I, § 8], and all other Powers vested by this

(FOOTNOTE CONT'D NEXT PAGE)

"To coin Money", an authority that belonged generally to the States before the Articles of Confederation, and then the Constitution, limited their monetary jurisdiction.^{178/} Even if, prior to adoption of the Constitution, the Framers had recognized an inchoate, general authority in the States to "print", "issue", "emit", "make", "create", or "declare what is to be" money, in addition to the specific authority to "coin Money", they nevertheless denied the States the authority and granted Congress the power only to "coin Money" in Article I, § 10, cl. 1 and Article I, § 8, cl. 5, respectively. This exact, literal coincidence of prohibition and empowerment, in conjunction with the Tenth Amendment,^{179/} proves conclusively that Congress received only what the States lost.^{180/}

(FOOTNOTE 177 CONT'D)

Constitution in the Government of the United States, or in any Department or Officer thereof". However, that clause "is not the delegation of a new and independent power, but simply provision for making effective [other constitutional] powers". *Kansas v. Colorado*, 206 U.S. 46, 88 (1907). Accord, *Kinsella v. Singleton*, 361 U.S. 234, 247 (1960). It does not extend any power beyond that power's legitimate scope within the letter and spirit of the Constitution. *Reid v. Covert*, 354 U.S. 1, 20-22 (1957) (opinion of Black, J.). Neither does it permit the limitless "implication" of new powers "by conjecture, supposition or mere reasoning on the meaning or intention of the writing" in the Constitution. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838).

^{178/} Arts. of Confed'n art. IX ("The united states in congress assembled shall * * * have the sole and exclusive right and power of regulating the alloy and value of coin struck * * * by [the authority] of the respective states"); U.S. Const. art. I, § 10, cl. 1 ("No State shall * * * coin Money").

^{179/} U.S. Const. amend. X: "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."

^{180/} The existence of an amorphous, unlimited power in the States to "print," "issue", "emit", "make", "create", or "declare what is to be" money is doubtful in the extreme -- (i) money being the creation of the economic process, through

(FOOTNOTE CONT'D NEXT PAGE)

If the extent of the power of Congress to bring "Money" into existence self-evidently confines itself to coin, the substance of that power defines itself with equal obviousness. Then,^{181/} just as now,^{182/} the verb "coin" in common parlance denoted "fashion[ing] pieces of metal into a prescribed shape, weight, and degree of fineness, and stamp[ing] them with prescribed devices, * * * in order that they may circulate as money".^{183/} And that the Framers intended the verb to be taken in its strict denotation, rather than in some other, loose connotation, the further reference to "foreign

(FOOTNOTE 180 CONT'D)

the market, not of the political process, through the government; and (ii) this insight being at least implicit in the common-law view that only specie could satisfactorily serve as money in the strict sense of the term. Compare L. von Mises, Human Action, ante note 1, at 405-08 (economic explanation of origin of money), with 1 W. Blackstone, Commentaries, ante note 8, at 276 (King's prerogative is not to create money, but only "to give it authority or make it current" in law).

The terms of Article I, § 10, cl. 1 are broad enough, nevertheless, to cover even such an extreme claim of monetary authority. On the one hand, if a State generated a non-specie, presumably paper "money" ostensibly redeemable in specie, of the type that ordinary people might willingly accept in their day-to-day financial transactions until its quantity far outreached the supply of specie available for redemption, the prohibition against "emit[ting] Bills of Credit" would be applicable. On the other hand, if a State generated a non-specie "money" frankly irredeemable in specie, of the type that people would likely shun in their day-to-day transactions unless declared a legal tender for its face-value in precious metal (and therefore compelling the State so to declare), the prohibition against "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts" would apply.

^{181/} 1 S. Johnson, Dictionary, ante note 136, defined the verb "coin" as: "To mint or stamp metals for money."

^{182/} 1 Oxford English Dictionary, ante note 137, at 461, defines the verb "coin" as: "To make (metal) into money by stamping pieces of definite weight and value with authorized marks or characters * * * ."

^{183/} Black's Law Dictionary, ante note 13, at 326.

Coin" in Article I, § 8, cl. 5 renders inescapable,^{184/} as does the later distinction Article I, § 8, cl. 6 makes between the "Securities" (presumably notes, certificates, and other paper evidence of indebtedness) and "current Coin of the United States".

Equally apparent from a comparison of the power of Congress "To coin Money" in Article I, § 8, cl. 5 to the disabilities of the States to "coin Money" and to "emit Bills of Credit" in Article I, § 10, cl. 1 is the inescapable constitutional distinction between "coin[ing] Money", on the one hand, and "emit[ting] Bills of Credit", on the other. The power "To coin Money", then, on its face does not include a power to generate "Bills of Credit" in addition to or in lieu of coin, even if those bills are ostensibly redeemable on demand, unit for unit, in lawful coin. This reflects the Framers' understanding that, unlike "Money" itself, a "Bill of Credit" amounts only to a promise to pay "Money",^{185/} bottomed upon the government's credit.^{186/} Whether the power "To coin Money" includes an implied authority to issue "money certificates" (that is, warehouse-receipts for coin secured in the

^{184/} E.g., Black's Law Dictionary, ante note 13, at 326, defines the noun "coin" as: "Pieces of gold, silver, or other metal, fashioned into a prescribed shape, weight, and degree of fineness, and stamped * * * with certain marks and devices * * * ."

^{185/} Under the Constitution, a "Bill of Credit" must express on its face a promise of the government to pay "Money" at a future day. E.g., Craig v. Missouri, 29 U.S. (4 Pet.) 410, 431-32 (opinion of the Court), 454 (McLean, J., dissenting) (1830); Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851); Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15-17 (1851).

^{186/} Craig v. Missouri, 29 U.S. (4 Pet.) 410, 431-32 (1830); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 318 (1837); Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851); Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15-17 (1851).

government's vaults and absolutely payable to the bearer on presentation) is arguably a different matter, however.^{187/}

Finally, taken in conjunction with the complementary disability of the States, the power "To coin Money" compellingly imports an authority to furnish and preserve, not to withhold or destroy, a sound system of coinage based on "a uniform and pure metallic standard of value".^{188/} Article I, § 8, cl. 5 does not say of what this "metallic standard" should consist -- although Article I, § 10, cl. 1 emphasizes the pre-eminent place the Constitution provides for silver and gold in its monetary schema; and both Article I, § 9, cl. 1 and the Seventh Amendment refer explicitly to the "dollar", a standard silver coin.^{189/} The heritage of the coinage-power in common law, however, indicates with as much clarity as History provides that the "Money" of the United States presumptively should be of the same "materials" as the "money of England": "either * * * of gold or silver", with the use of "copper coin" permitted in limited instances "not upon the same footing with the other [precious metals]".^{190/}

Common law also records the traditional method of furnishing the country with "Money": the system of "free coinage" of gold and silver. This policy had a long history, extending from at least the reign of Henry V., during which Parliament

^{187/} Compare and contrast 2 J. Story, Commentaries, ante note 7, § 1120, at 60, with id., § 1368, at 239-41.

^{188/} United States v. Marigold, 50 U.S. (8 How.) 560, 566-69 (1850).

^{189/} Post, pp. 59-63.

^{190/} Compare 1 W. Blackstone, Commentaries, ante note 8, at 277, with the authorities cited ante note 7.

enacted "that all they that will come to the Tower of London, there to have money of new coined, they shall have money coined, and thereof shall be delivered within eight days, according to the very value of that that they shall bring thither, paying the seignorage and coinage [at specified rates], and no more".^{191/} In the reign of Charles II., Parliament went even further. Finding "[t]hat the Plenty of current Coins of Gold and Silver of this Kingdom is of great Advantage to Trade and Commerce", it decreed that "whatsoever Person or Persons, Native or Foreigner, Alien or Stranger, shall * * * bring any Foreign Coin, Plate or Bullion of Gold or Silver, into his Majesty's Mint * * * shall have the same there assayed, melted down and coined with all convenient speed, without any Defalcation, Diminution or Charge for the Assaying, Coinage or Waste in Coinage",^{192/} the costs of such coinage to be borne by special impositions on certain imports.^{193/}

By these statutes, Parliament surrendered all but its police power over money, retaining only the authority to certify by impression that domestic silver and gold coins had a particular weight and fineness of precious metal -- in effect, applying to money the same control it exercised over the standardization of weights and measures.^{194/} The political and economic significance of this policy was immense:

^{191/} All men may resort to the King's exchanges, or to the Tower, to have new money coined, 1421, 9 Hen. V., Stat. 2, ch. 2.

^{192/} An Act for encouraging of Coinage, 1666, 18 Car. II., ch. 5, § I.

^{193/} 18 Car. II., ch. 5, §§ VI.-IX.

^{194/} On the close connexion between the standardization of money and of weights and measures in Parliament's view, see An Act for regulating and ascertaining the Weights to be made use of in weighing the Gold and Silver Coin of this Kingdom, 1774, 14 Geo. III., ch. 92.

The principle of free coinage has proved its practical worth as a deterrent to debasement and depreciation. Where coinage is on private account there is no profit to the state in tampering with the standard * * * . The circulation of coins of similar appearance and denomination but of uncertain standard, the arbitrary and unpredictable modifications in the standard of autocratic government, the temptations to profit which were constantly dangled before despotic rulers -- these were evils which had perplexed and harassed society and hindered the natural growth of economy since the days when coined money first appeared. By a stroke they were swept away. At the same time, the institution of free coinage, by giving stability and character to one of the chief instruments of organized economy, made possible a more vigorous and healthy commercial life * * * . 195/

The power "To coin Money" in Article I, § 8, cl. 5, then, presumptively includes a power to provide for free coinage of silver and gold, financed either through traditional minting-charges or by other special taxes or dues.

Finally, common law teaches that the power "To coin" does not include any license to interfere with free trade in the precious metals, or to confiscate silver or gold from their holders. 196/ As early as 1663, for example, Parliament recognized that "several considerable and advantageous Trades cannot be conveniently driven and carried on without the Species of Money or Bullion", and recounted the finding of "Experience, that ['Money or Bullion'] are carried in greatest abundance (as to a Common Market) to such Places as give free Liberty for exporting the same". Therefore, "the better to keep in and increase the current Coins of this Kingdom", Parliament declared it "lawful to and for any Person or

195/ E. Groseclose, Money and Man, ante note 15, at 172.

196/ The power "To lay and collect Taxes, Duties, Imposts and Excises", of course, includes the power to require payment thereof in silver or gold coin. U.S. Const. art. I, § 8, cl. 1.

Persons whatsoever, to export * * * all Sorts of Foreign Coin or bullion of Gold or Silver, * * * without paying any Duty, Custom, Poundage or Fee".^{197/} By this act, Parliament abandoned any significant claim to control the market's monetary mechanism through intervention in the international flow of the precious metals.^{198/} Revealingly, Parliament explained this policy as in aid of "keep[ing] in and increas[ing] the current Coins of this Kingdom". If, therefore, the major purpose of the power "To coin Money" is to supply the nation with sound coinage of silver and gold; and if the power "To coin Money" derives from common law, with all the qualifications and limitations of that law except as expressly modified in the Constitution -- then, presumptively, the power "To coin Money" does not include any authority to interdict free trade in coin or bullion of the precious metals.

Moreover, the parliamentary statute providing for free coinage under Charles II. indicated a further inherent limitation in the constitutional power "To coin": the implied disability to seize the people's silver and gold. Parliament, of course, had had earlier experience with Charles I. and his unconstitutional notions concerning appropriation of specie from unwilling citizens.^{199/} In that context, and realizing the need "for the further Encouragement and Assurance of such

^{197/} An Act for the Encouragement of Trade, 1663, 15 Car. II., ch. 7, § XII.

^{198/} This rejection of mercantilist monetary theory amounted to "a revolution as signal as that produced in the relations to labor and capital by the disuse of the old [medieval] labor laws". W. Shaw, History of Currency, 1252-1894 (1892), at 160-61.

^{199/} Post, pp. 97-104.

as shall bring any Gold or Silver into his Majesty's * * * Mint * * * to be coined", Parliament enacted "[t]hat no Confiscation, Forfeiture, Seizure, Attachment, Stop or Restraint whatsoever shall be made in the said Mint * * * of any Gold or Silver brought in to be coined * * * upon any * * * Account or Pretence whatsoever".^{200/} By this act, Parliament denied the King any opportunity to mis-use his prerogative over coinage as a means to expropriate silver and gold from private citizens who had entrusted it to his custody for the purpose of minting. And, if this addition to the unwritten English constitution defined the King's coinage-power absolutely not to include a power to seize the citizens' bullion or coin already "in the said Mint", it must also have precluded any power to confiscate specie in private possession outside the mint. Or, the power "To coin Money" in Article I, § 8, cl. 5 impliedly disables Congress -- "upon any * * * Account or Pretence whatsoever" -- from confiscating, forfeiting, seizing, attaching, stopping, or restraining the people's silver and gold, whether in their own custody or temporarily in the custody of the government.

In sum, under the unwritten English constitution, power over coinage was part of the King's prerogative.^{201/} Parliament, however, had authority to add to, or delimit, this power by statute -- such enactments becoming part of the English constitution as legislative definitions of the coinage-power under common law. At the time the Founders drafted the Constitution, the statutes providing for free trade in and

^{200/} An Act for encouraging of Coinage, 1666, 18 Car. II., ch. 5, § V.

^{201/} 1 W. Blackstone, Commentaries, ante note 8, at 276-78.

free coinage of specie, and proscribing its seizure, described (in part) the power of the King, the English Executive, to coin money. The Founders transferred this power to Congress by enumerating it in Article I, § 8, cl. 5.^{202/} Under the English constitution, of course, Parliament retained the overriding authority to change the English coinage-power by statute. But once the Founders enumerated that power in the Constitution, they placed it beyond the ability of Congress to transform by simple legislative enactment.^{203/} The Founders thus took the legislative definitions of the coinage-power that existed under common law in the late 1700's and made them the implied constitutional definitions of that power under Article I, § 8, cl. 5 from ratification of the Constitution onward.

b. The power "To * * * regulate * * * Value"

As with the power "To coin Money", the allied power in Article I, § 8, cl. 5 "To * * * regulate the Value thereof, and of foreign Coin" traces its ancestry to linguistically similar -- and operatively identical -- language in the Articles of Confederation,^{204/} later successively modified

^{202/} 1 W. Crosskey, Politics and the Constitution in the History of the United States (1953), at 411-14, 421.

^{203/} E.g., United States v. Brignoni-Ponce, 422 U.S. 873, 877-87 (1975); Miranda v. Arizona, 384 U.S. 436, 491 (1966).

^{204/} Arts. of Confed'n art. IX: "The united states in congress assembled shall * * * 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 -- fixing the standard of weights and measures throughout the united states * * * ."

in the Federal Convention of 1787.^{205/} Of no little significance is the Framers' consistent association, throughout its evolution, of the power "To * * * regulate * * * Value" with the cognate power "To * * * fix the Standard of Weights and Measures". Again, as with the power "To coin", nowhere in the Constitution or in any of its antecedents does or did another explicit power exist to "regulate the Value" of "currency", "securities", "bills", "notes", or anything other than United States and foreign coin. Therefore, on its face, the second and third phrases of Article I, § 8, cl. 5 grant to Congress a power that that body can constitutionally exercise only on the "Money" it, or a foreign nation, coins. The verb "regulate" thus refers to a particular, specific activity relating to coinage, rather than "granting general powers of legislation" to declare what shall have "Value" as "Money".^{206/}

The specificity for coin of the power "To * * * regulate the Value thereof" unequivocally limits the substance of that power. "Regulate" meant then,^{207/} as it does today,^{208/} "[t]o adjust by rule or method", or "[t]o adjust, in respect

^{205/} Documents in the records of the Committee of Detail, for example, contain two versions of the power: viz., (i) "16. S. & H.D. in C. ass. shall have the exclusive Right of coining Money -- regulating its Alloy and Value -- fixing the Standard of Weights and Measures throughout the U.S."; and (ii) "to coin Money; to regulate the [Alloy and] Value of foreign Coin; to fix the Standard of Weights and Measures". 2 Records of the Federal Convention, ante note 146, at 136, 167 (words in brackets crossed out in original version). The Reports of the Committee of Detail and the Committee of Style and Arrangement both contain the language: "To coin money; to regulate the value of foreign coin; to fix the standard of weights and measures". Id. at 182, 569. The final Report of the Committee of Style adopted the constitutional text. Id. at 595.

^{206/} See Scott v. Sandford, 60 U.S. (19 How.) 393, 440 (1856).

^{207/} 2 S. Johnson, Dictionary, ante note 136.

^{208/} Black's Law Dictionary, ante note 13, at 1451.

of * * * quantity * * * , with respect to some standard".^{209/}
"The word ordinarily implies not so much the creating or establishment of a new thing, as the arranging in proper order and controlling that which already exists."^{210/} Such an "arranging in proper order" quite succinctly describes what "regulating" coinage meant, in governmental practice and public understanding, prior to ratification of the Constitution.

For instance, in his Commentaries, Blackstone outlined the common law concerning "[t]he denomination, or the value for which the coin is to pass current":

In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called sterling metal * * * . And of this sterling metal all of the coin of the kingdom must be made * * * . The king may also * * * legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. But this * * * ought to be by comparison with the standard of our own coin * * * .^{211/}

Interestingly, Blackstone equated "the value for which the coin is to pass current" with its "denomination", or mere name -- thereby indicating that the process of "fix[ing] the value" of both domestic and foreign coins at common law was more-or-

^{209/} 2 Oxford English Dictionary, ante note 137, at 2473.

^{210/} State ex rel. Hollywood Jockey Club v. Stein, 133 Fla. 530, 543, 182 So. 863, 868 (1938). Accord, e.g., Jeschor v. Town of Guilford, 143 Conn. 152, 159, 120 A.2d 419, 422 (1956); Cole v. Village of Highland Park, 173 Mich. 201, 216, 139 N.W. 69, 74 (1912).

^{211/} 1 W. Blackstone, Commentaries, ante note 8, at 278 (footnotes omitted).

less a mechanical and objective comparison of the weight and fineness of precious metal in a particular "denomination" to "the true standard" of that metal, rather than an attempt to manipulate the coins' purchasing-power according to some arbitrary "policy".

Blackstone spoke, of course, of "fix[ing] the value" of coins; but he could just as easily have said "regulat[ing] the Value thereof", the verbs "fix" and "regulate" being reasonably synonymous in this context.^{212/} An early example of such usage appears in Queen Anne's Proclamation of 1704, and the Parliamentary Act of 1707, wherein the Queen referred to "a Table of the Value of the several foreign Coins which usually pass in Payments in our said Plantations, according to their Weights, and the Assays made of them in our Mint, thereby shewing the just Proportion which each Coin ought to bear to the other", and then commanded that various foreign coins "stand regulated, according to their Weight and Fineness, according and in Proportion to the Rate before limited and set".^{213/}

The Continental Congress proceeded in the same manner. In 1776, a committee "appointed to * * * ascertain the value of the several species of gold and silver coins current in these colonies, and the proportions they ought respectively to bear to Spanish milled dollars", prepared a table of "rates", showing the name and weight of the various coins, and their "Value in Dollars".^{214/} The similarity of this procedure to

^{212/} E.g., Black's Law Dictionary, ante note 13, at 765 ("fix" means "[a]djust or regulate"), 1451 ("regulate" means "fix, establish, or control").

^{213/} An Act for ascertaining the Rates of foreign Coins in her Majesty's Plantations in America, 6 Anne, ch. 30, § I. (emphasis supplied).

^{214/} 4 J. of the Continental Congress, ante note 35, at 381-82.

that in the 1707 Act nearly three-quarters of a century earlier -- even to the use of the nouns "proportion", "rate", and "value", and of the verb "ascertain" -- is both striking, and hardly accidental.

Later that year, another committee submitted a more detailed report on the same subject. The committee defined its task as, first, "declaring the precise weight and fineness of the * * * Spanish milled dollar * * * now becoming the Money-Unit or common measure of other coins in these states"; and, second, "explaining the principles and establishing the rules by which * * * the said common measure shall be applied to other coins * * * in order to estimate their comparative value".^{215/} Having stated the weight of the Spanish milled dollar, "as it comes from the mint, new and unworn", the committee then set out the rules for regulating the value of silver and gold coins: (i) "[A]ll * * * silver coins * * * ought to be estimated * * * according to the quantity of fine silver they contain." And (ii) "all gold coins * * * ought to be estimated * * * according to the quantity of fine gold they contain and the proportion * * * which the value of fine gold bears to that of fine silver in those foreign markets at which these states will probably carry on commerce", "the several proportions at the said markets * * * [being] averaged".^{216/} Although it found this average to be "nearly as one to fourteen and * * * one half", the committee nevertheless recognized that, "as in long tracts of time the proportional values of gold and silver at market are liable to vary, whenever such variation shall have become sensible, this house [i.e.,

^{215/} 5 id. at 725.

^{216/} Id.

Congress] ought to make a corresponding change in the rates at their treasury".^{217/} It then presented a table of "values", showing the various silver and gold coins, their "Proportion of fine metal", "Weight", amount of "Fine metal", and "Value in Dollars" (to six decimal places).^{218/}

This conception of "fix[ing]" or "regulat[ing]" the value of coinage was widely understood among the public as well. For instance, Adam Smith noted how,

as people become gradually more familiar with the use of different metals in coin, and consequently better acquainted with the proportion between their respective values, it has in most countries * * * been found convenient to ascertain this proportion, and to declare by a public law, that a guinea (of gold), for example, of such a weight and fineness, should exchange for one and twenty shillings (of silver) or be a legal tender for a debt of that amount. In this state of things, and during the continuation of any one regulated proportion of this kind, the distinction between the metal which is the standard, and that which is not the standard, becomes little more than a nominal distinction. ^{219/}

In sum, the power "To * * * regulate the Value [of United States coin], and of foreign Coin" consists solely of a power of comparison and declaration: (i) comparing the amount of fine silver in particular silver coins to that contained in the "Money-Unit or common measure of other coins in these states", the "dollar",^{220/} and declaring this proportion in "dollar"-values; or (ii) ascertaining the amount of fine gold in particular gold coins, calculating the market-equivalent of

^{217/} Id. at 725-26.

^{218/} Id. at 726.

^{219/} A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776), Bk. I, ch. 5 (emphasis supplied).

^{220/} See post, pp. 85-91, 118-26.

fine silver, comparing the latter amount to the "Money-Unit", and declaring this proportion in "dollar"-values. Thus, under the power "To coin Money", Congress has discretion to set the weight, purity, form, and impression of all silver, gold, and copper coins it mints (excepting, of course, the intrinsic value of the "Money-Unit" itself). Whereas, under the power "To * * * regulate the Value thereof", it has a duty accurately to determine the proportions between the fixed "Money-Unit" and the coinage it, and foreign nations, mint.

In so far as the proportions between various gold coins and the (silver) "dollar" are concerned, it may have been reasonable in the late 1700's and immediately thereafter to declare by statute the exchange-ratio customarily prevailing in the market between gold and silver -- the transmission of financial information throughout the country, let alone the world, being both slow and uncertain. Even so, the Continental Congress recognized that, because "the proportional values of gold and silver at market are liable to vary", the government had a duty "whenever such variation shall have become sensible, * * * to make a corresponding change in the rates".^{221/}

Today, with almost instantaneous transmission of sound market-data available, any rigid statutorily declared ratio of value between gold and silver is unreasonable, and therefore unconstitutional.^{222/} Rather, in exercising the power "To * * * regulate * * * Value" under contemporary economic circumstances, the government should simply permit the value of domestic and

^{221/} 5 J. of the Continental Congress, ante note 35, at 726.

^{222/} That the application of constitutional principles may change with changes in economic and social facts is a commonplace of constitutional law. E.g., Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954); Block v. Hirsh, 256 U.S. 135, 155 (1921).

foreign gold coinage to "float", as against the "Money-Unit", from one market-level to another, as changing exchange-rates become "sensible" in commerce.

The Framers' consistent association of the power "To * * * regulate Value" with the power "To * * * fix the Standard of Weights and Measures", then, was no mere caprice.^{223/} Although the purchasing-power of money varies with economic conditions, and ultimately is beyond government's power to control,^{224/} at any particular point in time the relationship of money to economic values parallels that of weights and measures to physical quantities. Just as the Constitution gave Congress the power "To * * * fix the Standard of Weights and Measures" in order to establish uniformity therein throughout the country,^{225/} so, too, did it confer the power "To * * * regulate Value" in order (as much as possible in economic life) "to produce uniformity of value throughout the Union, and thus to preclude us from the embarrassments of a perpetually fluctuating and variable currency".^{226/} "[F]luctuating and variable", that is, in terms of political phenomena in the market.

But a "Standard of Weigh[t]" must itself be a weight, and a "Standard of * * * Measur[e]" a measure. So, too, to "regulate * * * Value" implies the existence of a unit

^{223/} See ante, notes 204-05. The association was commonplace in English common-law monetary practices. E.g., An Act for regulating and ascertaining the Weights to be made use of in weighing the Gold and Silver Coin of this Kingdom, 1774, 14 Geo. III., ch. 92.

^{224/} L. von Mises, Human Action, ante note 1, at 408-12.

^{225/} The Federalist No. 42.

^{226/} 2 J. Story, Commentaries, ante note 7, § 1118, at 58.

of "Value". Here, the two phrases "fix the Standard" and "regulate * * * Value" subtly diverge in shades of meaning, if not in ultimate intent: The phrase "fix the Standard" empowers Congress to define the basic units of "Weights and Measures"; whereas, the phrase "regulate the Value" empowers Congress only to apply the basic unit of "Value", which the Constitution elsewhere explicitly identifies as the "dollar", a known, historically fixed weight of silver.^{227/} Moreover, whereas the verb "fix" as applied to "Weights and Measures" implies "stability and confirmation",^{228/} the verb "regulate" as applied to coinage implies continuous adjustment. Here, then, is another striking example of the Framers' linguistic precision, in one phrase selecting the verb that connotes the establishment of permanent "Standard[s]", without which a system of "Weights and Measures" could not serve its purpose; and, in the other, choosing the synonym that connotes a process of inter-comparisons among changing forms of coinage, according to a set "Money-Unit", without which a monetary system involving both gold and silver could not achieve its end.

In short, the Framers interpreted the constitutional "Value" of "Money" as something not subject to the vagaries of governmental edict -- but rather, as Blackstone taught, as something identical with "the weight and standard (wherein consists the intrinsic value)".^{229/}

^{227/} See post, pp. 85-91, 118-26.

^{228/} Cochnow v. United States, 248 U.S. 405, 408 (1919). 1 S. Johnson, Dictionary, ante note 136, defined the verb "fix" to mean "[t]o settle; to establish invariably".

^{229/} 1 W. Blackstone, Commentaries, ante note 8, at 276.

c. The disability to debase "Money" below the constitutional standard.

The power to "regulate the Value [of Money]" is distinct from the power to debase its value. For example, to "regulate the Value" of a silver coin means to compare the weight of pure silver that it contains to the weight of pure silver in the monetary standard, and to declare the coin's value in terms of that standard. Thus, if a silver coin contains $185\frac{5}{8}$ grains of fine silver, and the standard "dollar" contains $371\frac{1}{4}$ grains of silver,^{230/} then the "Value" of the former coin, properly "regulate[d]", is one-half of a "dollar". Conversely, to debase a silver coin means to declare its value without proper reference to the standard, or to lower the silver-content of the standard. Thus, as possible instances of this practice, the hypothetical silver coin in the previous example would be debased if minted of only 150 grains of silver, yet still declared to be one-half of a "dollar"; if minted of $185\frac{5}{8}$ grains of silver, yet declared to be one "dollar"; or if minted of $185\frac{5}{8}$ grains of silver, and declared to be one "dollar", based upon a standard "dollar" decreased from $371\frac{1}{4}$ to $185\frac{5}{8}$ grains of silver.^{231/}

Historically, there is no question that, from time to time, the Kings of England engaged in the practice of debasing coinage.^{232/} Whether they rightfully enjoyed the power to do so under the unwritten English constitution, however, is

^{230/} See post, pp. 118-26.

^{231/} During the Middle Ages, these forms of debasement were known as la mutacion des poids, la mutacion de l'appellation, and la mutacion de la matiere. See E. Groseclose, Money and Man, ante note 15, at 67.

^{232/} See generally S. Breckinridge, Legal Tender, ante note 12, ch. 5.

highly questionable.^{233/} In any event, even if the Kings actually had this authority under English law, the people of the United States clearly denied it to Congress under the Constitution. The Framers of the Constitution explicitly enumerated the coinage-power in Article I, § 8, cl. 5 because: (i) under common law, that power had been executive in nature; and, therefore, (ii) without enumeration among the legislative powers of Congress in Article I, it might have passed to the Executive by implication among the general powers in Article II.^{234/} And this result, of course, the Framers sought to forefend. The Framers, after all, were conversant with the dolorous history of excesses various English monarchs had perpetrated,^{235/} and were aware how "in former ages" the crown had "greatly abused" its prerogative of coinage: "for base coin was often coined and circulated by its authority, at a value far above its intrinsic worth, and thus taxes of a burdensome nature were laid indirectly on the people".^{236/} Therefore, the Framers made clear by the placement of the coinage-power that Congress, not the Executive, was to exercise it; and they made equally clear by the language of that power that it included no authority to debase "Money", but only to "regulate [its] Value" according to a fixed standard. Indeed, the sole power concerning the "Value" of Money is the power in Article I, § 8, cl. 5 to "regulate" -- which, at

^{233/} See post, pp. 73-75.

^{234/} 1 W. Crosskey, Politics and the Constitution, ante note 202, at 411-14, 421.

^{235/} See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring).

^{236/} 2 J. Story, Commentaries, ante note 7, § 1118, at 59 (footnote omitted).

common law, meant only the process of properly comparing the coin needing regulation to the monetary standard, not falsifying that comparison or changing the standard.^{237/} And the monetary standard itself the Constitution fixes in historically unmistakable terms.^{238/} Thus, even if the English Kings had had a license to debase the coinage by falsely certifying its intrinsic value, or permuting the monetary standard, the Constitution denied any such license to Congress, by permitting it only to "regulate the Value [of Money]", according to a legislatively unchangeable standard.

This limitation upon the "sovereign prerogative" over coinage is particularly fitting under a republican Constitution that prohibits the "depriv[ation] of * * * property without due process of law" and the "tak[ing]" of "private property * * * for public use without just compensation".^{239/} Especially during the reign of the profligate Henry VIII., a major purpose of debasement had been to secure revenue for the King's expenses, many of which were purely personal in nature. "The United States", however, "do not and cannot hold property, as a monarch may, for private or personal purposes",^{240/} and may not apply any of its powers to such ends. If, therefore, the authority of the English King to debase the coinage (assuming arguendo it existed at all) rested in large measure on his need to augment his own personal income; and if, conversely, Congress (or any other branch of the United States

^{237/} See ante, pp. 61-69.

^{238/} See post, pp. 85-91.

^{239/} U.S. Const. amend. V.

^{240/} Van Brocklin v. Tennessee, 117 U.S. 151, 158-59 (1886).

government) has no such monarchical powers of a personal nature; then, logically, Congress has no need for any authority to debase the national coinage -- and the entire absence of that authority from the Constitution reflects the inherent dissimilarity between the English and American forms of government.

The assumption that the English Kings ever enjoyed a constitutional authority to debase the coinage is fallacious, though, at least in the context of the late 1700's and early 1800's. For, by then, the "abuses of the Coinage" of Henry VIII. and others had "[f]or over two centuries * * * ceased on the part of the English government".^{241/} And the great commentators on the common law at that time rejected any notion that this long cessation of abuse constituted merely an historical hiatus in a legitimate practice, rather than the recognition of a constitutional prohibition. Blackstone, for example, contented himself with the simple statement that "the king's prerogative seemeth not to extend to the debasing or inhancing the value of the coin, below or above the sterling value".^{242/} Chitty discussed the issue in more detail:

Whether the King can legally change the established weight or alloy of money, without an Act of Parliament, seems to be quite clear. By the statute of 25 Ed. 3 st. 5 c. 13. it is "accorded and established that the money of gold and silver which now runneth, shall not be impaired in weight nor in alloy; but as soon as a good way may be found that the same be put in the antient state as in the sterling." Lord Coke, in his comment of articuli super cartas, ch. 20, 21. cites, among other acts and records, this statute of

^{241/} S. Breckinridge, Legal Tender, ante note 12, at 91.

^{242/} 1 W. Blackstone, Commentaries, ante note 8, at 278 (footnote omitted).

the 25 Edw. 3. and the Mirror of Justices, ch. 1 s. 3. ("Ordein fuit que nul roy de ce realme ne poit changer sa money ne impayre ne amender ne autre money faire que de or ou d'argent, sans assent de tous ses counties,") in support of his opinion against the King's right to alter money in weight or alloy. Lord C.J. Hale differs with Lord Coke, and relies 1st upon the 'case of mixt monies;' 2dly, on the practice of enhancing the coin in point of value and denomination, which he observes has nearly the same effect as an embasement of the coin in the species; and lastly, on the attempts which have been made to restrain the change of coin without consent of Parliament. In the case reported by Sir John Davies, it appears that Queen Elizabeth sent into Ireland some mixed money, and declared by proclamation that it should be current and lawful Irish money. This money was certainly held to be legal coin of Ireland; but it is most probable that as the case was in Ireland, the statute 25 Edw. 3. and the other Acts cited by Lord Coke, were not considered in discussing it; as it is clear from one of Poyning's laws they might have been. As it is a fair presumption that those statutes were not brought before the Court, no mention being made of them, though Sir M. Hale himself admits that the statute of Edw. 3. is against his opinion. As to the practice mentioned by Lord Hale of enhancing the coin in point of value and denomination, that seems very distinguishable from altering the species or material of coin, by changing its weight or alloy. Even admitting the existence of a practice to imbase coin in the alloy, still little importance will be attached to it, when it is remembered how frequently some Kings have endeavoured to extend the limits of their prerogatives. The attempts which have been made to restrain the change of coin without consent of Parliament, prove but little in favor of Lord Hale's opinion; for those attempts might have been so made in order to restrain the exercise of a prerogative which was denied, and it does not appear that they were made in order to overturn a prerogative, the legal existence of which was admitted. The authority of Sir Wm. Blackstone may perhaps turn the scale in favor of Lord Coke's opinion, if that opinion required it. * * * It need only be added, that the statute of 14 Geo. 3. ch. 92. seems to furnish an inference that the standard weight of the gold and silver

coin of the kingdom is unalterable, but by
Act of Parliament. * * * 243/

To like effect were the exegeses of Hawkins and East. 244/

And even those few who admitted a broad kingly prerogative to alter the coinage conceded that "[t]he policy in relation to the coin is, that the value remains unalterable; for the standard cannot be varied without manifest injustice". 245/

Of course, from Chitty's statement that "the standard weight of the gold and silver coin of the kingdom is unalterable, but by Act of Parliament" follows the inference that Parliament perhaps retained a power to alter the coinage through statutory debasement. This possibility is irrelevant to the issue of what powers Congress may exercise pursuant to the Constitution, however. For the Constitution itself fixes the monetary standard as the (silver) dollar, beyond any legislative authority to alter without constitutional amendment.

In sum, under English common law, the King exercised all power to coin and regulate the value of money. By the late 1700's, Parliament had defined this royal prerogative as not including the authority to debase the coinage, either

243/ J. Chitty, Jr., A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject (1820), at 197-99 (footnotes omitted). Chitty was quite correct to dismiss as unreliable the opinions of Lord Hale. For Hale's Pleas of the Crown exude his royalistic sentiments, and have been widely condemned as "brief and inaccurate". 8 Dictionary of National Biography (1917), at 905.

244/ 1 W. Hawkins, A Treatise of the Pleas of the Crown; or, A System of the Principal Matters Relating to that Subject, Digested Under Proper Heads (J. Curwood, 8th ed., 1824), ch. III, pt. II, § 16, at 43; 1 E. East, A Treatise of the Pleas of the Crown (Amer. ed. 1806), at 148.

245/ 6 M. Bacon, A New Abridgement of the Law (C. Dodd, 7th ed. 1832), at 414. This commentary erroneously relies on Hale. See ante, note 243.

not including the authority to debase the coinage, either directly or by changing the "sterling" standard. The Constitution transferred this executive power to the legislative branch of government in Article I, § 8, cl. 5. Simultaneously, it removed from legislative control the monetary standard itself. Thus, the Constitution outlawed the debasement of "Money" by enjoining Congress properly to "regulate the Value thereof" against the standard, and by precluding Congress from tinkering with that standard under any legislative pretext whatsoever.

d. The power to declare "Money" a legal tender

Article I, § 8, cl. 5 neither grants a power to declare, nor even mentions, "legal tender". Indeed, the term "Tender" appears in the Constitution only in Article I, § 10, cl. 1 -- reserving to the States a portion of their pre-constitutional legal-tender authority for "gold and silver Coin" alone. Analysis of the nature of legal tender and constitutional "Money" explains this apparent omission.

To understand the concept "legal tender" requires distinguishing between "money" in the economic sense, as the common medium of exchange, and "money" in the juristic sense, as the common medium of payment (or settlement of debts). In a market-economy, something can become a medium of payment only by virtue of already being a medium of exchange; and something can function satisfactory as a medium for fulfilling obligations not contracted in terms of money only if it is also a satisfactory medium of exchange. In theory, law can assign the character of a medium of payment (legal tender) to anything, including the three forms of money: "commodity

money", "fiat money", and "credit money".^{246/} But granting such juristic character to something is insufficient to make that something "money" in the economic sense. In a market-economy, things become media of exchange only through their use as such in commercial transactions, at exchange-ratios the market establishes. Commerce, of course, may adopt as media of exchange such things as the law declares to be media of payment; but it need not do so.

Article I, § 8, cl. 5 of the Constitution evidently uses the noun "Money" in its economic, as well as its juristic sense, for two reasons. First, linguistically, the clause refers to a "Money" capable of being "coin[ed]" -- which, of necessity, identifies that "Money" as "commodity money", not "fiat money" or "credit money". Second, historically, the "commodity money" of England and America for hundreds of years prior to ratification of the Constitution consisted only of silver, gold, and (to a lesser degree) copper -- which became "money" through the course of trade, not through the dictates of government, and to which government merely extended legal-tender character in recognition and adoption of established commercial practices. Therefore, presumptively, whatever commodity could serve as "Money" under Article I, § 8, cl. 5 could also -- and consequently -- serve as legal tender

^{246/} "Commodity money" is money that is simultaneously a commercial commodity, such as silver or gold. The "money" is the metal itself.

"Fiat money" is money composed of (otherwise essentially valueless) things with a special legal qualification. The "money" is not the material bearing the stamp of authority, but the stamp alone.

"Credit money" is money that constitutes a claim which is not both payable on demand and absolutely secure. The "money" is the promise to pay at a future time.

because, as traditionally was the case, the medium of payment that contracting parties intended in commercial agreements creating monetary obligations was the medium of exchange extant in the community; and this medium was generally satisfactory for fulfilling obligations not contracted in money, too.

Reference to common law establishes what commodities can serve as "Money" under Article I, § 8, cl. 5. At common law, "the money of England" had to be of either gold or silver, with "copper coin * * * not upon the same footing"; and coin of these precious metals was, merely upon its coinage and even without explicit declaration to that effect, legal tender for its intrinsic value.^{247/} If (as it did) the power "To coin Money" derived from the common-law coinage-power, it presumably must also have included ab initio and even sub silentio an implied power to give legal-tender character to all silver and gold coins properly "regulate[d]" in "Value" as against the "Money-Unit" -- but, as well, an implied disability to make base-metal coins a full legal tender, or even to impose gold or silver coins as such where improperly "regulate[d]" in "Value". And so much the adoption of the (silver) "dollar" as the "Money-Unit" in Article I, § 9, cl. 1 and the Seventh Amendment, and the limitation of "Tender in Payment of Debts" to "gold and silver Coin" in Article I, § 10, cl. 1 indicate.

Now, the constitutional "Money-Unit" of the nation's coinage-system is the (silver) "dollar". Indeed, as a matter of commercial practice, it was the unit of exchange in the States even before the Federal Convention of 1787, and even

^{247/} Compare 1 W. Blackstone, Commentaries, ante note 8, at 277, with, e.g., Dixon v. Willoughs, 2 Salk. 446, 91 Eng. Rep. 387 (1696).

before its adoption as the legal unit by the Continental Congress under the Articles of Confederation. Obviously, then, the dollar is necessarily legal tender for its commodity-value as a medium of exchange: that is, its intrinsic (or market) value in terms of weight in fine silver.

If Congress coined other silver and gold coins, "regulat[ing] the Value thereof" in proper proportion to the dollar according to the market exchange-ratio between the precious metals, all of these coins would be equally available as economically equivalent means of paying debts. Under such circumstances, if a contract explicitly specified the medium of payment as "dollars", or as some other standard silver or gold coin, then (by hypothesis) that specified coin would be legal tender for satisfaction of the contractual obligation, even absent any explicit statutory or constitutional authorization. The question is whether, in satisfaction of such a contractual obligation, other standard coins might not also serve as legal tender to the extent of their intrinsic values in weight of precious metal. For (again, by hypothesis), if properly "regulate[d]", these other coins in proportionate amounts would have the selfsame economic worth (exchange-value) as the contractually specified coins. The issue in such a case would be whether the contract used the specific designation of a particular coin literally, to identify that coin as the unique means of payment, or merely figuratively, to symbolize by that designation "Money" in a general sense. In the former circumstances, only the specified coin could be a legal tender, consistently with the Fifth or Fourteenth Amendment's Due Process Clauses; whereas, in the latter, the payment of one coin, or of its market-equivalent in some other coin, would be equivalent acts in terms of satisfying

the contractual obligation for a determinable value of "money" in the economic sense.

On the other hand, where a debt arose in a non-contractual setting (such as damages adjudicated in a common-law tort action), the economic value of that debt would be the same whether denominated and paid in "dollars" or in any other properly "regulate[d]" silver or gold coin. Therefore, in cases of this kind, all forms of constitutional "Money" would be capable of functioning as legal tender.

The implicit reservation of the States' legal-tender authority for "gold and silver Coin" in Article I, § 10, cl. 1 substantiates this interpretation. The Framers understood that, even if Congress derived a common-law legal-tender power for silver and gold coin in Article I, § 8, cl. 5, Congress nevertheless received no authority in any constitutional provision under the federal system to interfere with the inherent governmental powers and duties of the States.^{248/} Yet they also knew that the States would often amass debts in the performance of those powers and duties -- and might well, as experience during the War of Independence taught, attempt to default on those debts by tendering to their creditors "Thing[s]" other than "gold and silver Coin". To preclude this within the federal structure, the Framers included in Article I, § 10, cl. 1 the prohibition against "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts", so as to constitutionalize for the States in their governmental capacities the monetary rule otherwise applicable to the national government and the people generally through Article

^{248/} National League of Cities v. Usery, 426 U.S. 833, 840-46 (1976); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76-77 (1869).

I, § 8, cl. 5. This, however, reciprocally shows that the Constitution does tolerate "gold and silver Coin" as "Tender in Payment of Debts" -- presumably at the properly "regulate[d]" intrinsic value in relation to the (silver) dollar.

4. Article I, § 9, cl. 1 and the Seventh Amendment

None of the more obvious monetary provisions of the Constitution implicitly identifies the unit of national "Money" by which Congress is to "regulate" all other monetary "Value[s]". Yet neither (a) the Constitution nor (b) its historical development is silent or equivocal on this matter.

a. The "dollar" in the Constitution

Both Article I, § 9, cl. 1 and the Seventh Amendment refer 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". To be sure, nowhere does the Constitution define this "dollar". But, in the late 1700's, no explicit definition was necessary: Everyone conversant with political and economic affairs knew that the word imported the silver Spanish milled dollar.

Indeed, had not such an understanding been catholic, powerful contending forces might never have agreed to support the Constitution at all. For example, the traditional interpretation of Article I, § 9, cl. 1 is that it elliptically refers to the slave-trade, and represents a compromise between pro- and anti-slavery forces that was vital to ratification of the Constitution. Evidently, the pro-slavery faction would never have accepted the "Tax or duty" phrase unless they already knew that the "dollar" identified therein as the

measure of the "Tax" had a fixed value, and what its value was. Otherwise, by monetary manipulation aimed at vastly increasing the purchasing-power of the "dollar", anti-slavery forces in Congress might have eliminated the slave-trade altogether. On the other hand, the meaning of the Seventh Amendment is self-evident. But equally evident is that the proponents of the fundamental right to jury-trial would never have accepted the "dollar"-limitation identified therein unless they already knew that that "dollar" had a fixed value, and what its value was. Otherwise, monetary manipulation might have eliminated common-law juries altogether. Yet both these groups also were aware of the doctrine that, if Congress had discretion to change the value of the "Money-Unit", there could be no limits to the changes it might make.^{249/} Therefore, their support of these provisions establishes inferentially what a literal reading of them straightforwardly suggests: namely, that the noun "dollar" refers, not to a mere name applicable to whatever Congress whimsically might decide thereafter to call a "dollar", but instead to a particular coin so familiar in American experience as to be beyond political transmogrification.

An interpretation of the term "dollar" as signifying merely the label the Constitution gives to whatever Congress decides to make the "Money-Unit", if consistently applied to other undefined terms in the document, would render the Constitution nonsensical. For example, the noun "Year" appears repetitively in Article I -- particularly in § 2, cl. 1 ("The House of Representatives shall be composed of Members

^{249/} See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-33 (1819).

chosen every second Year"), and § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years"). Self-evidently, the Framers used this term with the presumption that everyone would implicitly understand it to mean the time the earth actually requires for one complete revolution around the sun -- rather than a mere empty shorthand label for a unit of time within the discretion of Congress to adopt or change. Yet, if the word "dollar" need have no fixed, historically ascertainable meaning, neither need the word "Year". The principle of constitutional interpretation is the same in both cases. And then Congress could enact laws "redefining" the "Year" so as to extend, for instance, the terms of the House and Senate to ten, twenty, one hundred, or any other number of earthly revolutions.

Of course, Congress may, with constitutional propriety, appoint astronomers, physicists, and other qualified experts to determine with scientific precision what the "Year" actually is. It has no authority, however, to decide for itself what the "Year" ought to be. Analogously, Congress may, with constitutional propriety, appoint economists, monetary historians, and other experts to determine with cliometric accuracy what the "dollar" actually was in the late 1700's. In fact, this is what Congress did do, under both the Articles of Confederation and the Constitution.^{250/} Congress has no authority, however, to decide for itself what the "dollar" ought to be.

Besides constitutional history and logic, economic reasoning supports an interpretation of the noun "dollar" as

^{250/} Post, pp. 85-91, 118-26.

an ascertainable historical fact that Congress was obliged to determine, rather than as a mere political label that Congress could assign to whatever it deemed expedient. The nominalistic view that would treat the term "dollar" as simply a convenient, historically vacuous name for whatever Congress chooses to declare the "unit of value" is incapable of answering the questions: "What is an abstract 'unit of value'?" and "What was the 'dollar' before ratification of the Constitution that it ceased to be thereafter?" Obviously, before adoption of the Constitution, the "dollar" was a fixed weight of fine silver -- for the very reason that, in those days, no one conversant with economics and commercial practices conceived of monetary values as abstractions divorced from known weights of the precious metals.

Anglo-American monetary history records that merchants traditionally tendered and accepted coins, not by tale without consideration of those coins' qualities, but only as pieces of precious metal of specific weights and fineness. Where commercial practice accepted payment of coins by tale, it was always with the definite belief that those coins' stamps assured them to be of the correct weights and usual fineness for their types. Absent grounds supporting this assumption, merchants regularly resorted to weighing and chemical analyses. Thus, commercial practice always insisted that the "value" of coins was not their face-values as governmental tokens, but only their market-values as pieces of metal. And whenever circumstances indicated that a stamp no longer reflected a coin's actual content, merchants ceased relying on the official monetary "value", and substituted their own system for measuring the coin's worth in precious metal.

From an early day, the law applicable to America con-

formed to this age-old commercial understanding. Queen Anne's Proclamation of 1704, for example, spoke not of abstract values, but of "the value of * * * coins which usually pass in payment in our said plantations [in America], according to their weight, and the assays made of them in our mint", and specifically referred to the "Sevil, Pillar, or Mexico pieces of eight" (various forms of Spanish silver dollars) as having "the full weight of seventeen penny-weight and an half" -- thereby recognizing that the "value" of a coin lay in its "weight" and "assay" according to a fixed standard, or "full weight".^{251/}

Thus, at the time of ratification of the Constitution, no economically literate person would have attributed any meaning to the noun "dollar" other than (for example): "a silver coin with a value of such-and-so grains of precious metal when at full weight".

b. Adoption of the "dollar" as the "Money-Unit" prior to ratification of the Constitution

The Founders did not need explicitly to adopt the dollar as the national "Money-Unit" or to define the word in the Constitution -- because the Continental Congress had already performed that task.

The dollar did not begin with the Continental Congress, however. Monetary historians generally first associate the dollar with one Count Schlick, who began striking such silver coins in 1519 in Joachim's Thal, Bavaria. Then called "Schlicktenthalers" or "Joachimsthalers", the coins became known simply as "thalers", which transliterated into "dollars".

^{251/} In An act for ascertaining the rates of foreign coins in her Majesty's plantations in America, 1707, 6 Anne, ch. 30, § I. (emphasis supplied in part).

Interestingly, the American Colonies did not adopt the dollar from England, but from Spain. Under that country's monetary reforms of 1497, the silver real became the Spanish money-unit, or unit of account. A new coin consisting of eight reales also appeared. Various known as pesos, duros, piezas de a ocho ("pieces of eight"), or Spanish dollars (because of their similarity in weight and fineness to the thaler), the coins quickly achieved predominance in financial markets of the New World because of Spain's then-important commercial and political position.^{252/} Indeed, by 1704, the "pieces of eight" had in fact become a unit of account of the Colonies, as Queen Anne's Proclamation of 1704 recognized, when it decreed that all other current foreign silver coins "stand regulated, according to their weight and fineness, according and in proportion to the rate before limited and set for the pieces of eight of Sevil, Pillar, and Mexico".^{253/}

By the time of the War of Independence, the Spanish dollar was, for all practical purposes, rapidly becoming the money-unit of the American people. Not surprisingly, the Continental Congress first used, and then took formal steps to adopt, the dollar as the nation's standard of value. On 22 May 1776, a congressional committee reported on "the value of the several species of gold and silver coins current in these colonies, and the proportions they ought to bear to Spanish milled dollars", in which Continental Currency was payable.^{254/}

^{252/} See Sumner, "The Spanish Dollar and the Colonial Shilling", 3 Amer. Hist. Rev. 607 (1898).

^{253/} An Act for ascertaining the Rates of foreign coins in her Majesty's Plantations in America, 1707, 6 Anne, ch. 30, § I.

^{254/} 4 J. of the Continental Congress, ante note 35, at 381-82.

On 2 September of that year, a further committee-report undertook to "declar[e] the precise weight and fineness of the * * * Spanish milled dollar * * * now becoming the Money-Unit or common measure of other coins in these states", and to "explai[n] the principles and establis[h] the rules by which * * * the said common measure shall be applied to other coins * * * in order to estimate their comparative value".^{255/}

Meanwhile, Congress and its agents were carefully exploring the basis of, and possible structures for, a national monetary-system. In his letter to Congress of 15 January 1782, Robert Morris, Superintendent of the Office of Finance, commented that, "[a]lthough most nations have coined copper, yet that metal is so impure, that it has never been considered as constituting the money standard. This is affixed to the two precious metals, because they alone will admit of having their intrinsic value precisely ascertained".^{256/} "Arguments are unnecessary to shew that the scale by which every thing is to be measured ought to be as fixed as the nature of things will permit of", wrote Morris, concluding that "[t]here can be no doubt therefore that our money standard ought to be affixed to silver".^{257/} Although Morris personally favored creating an entirely new standard coin, he recognized that "[t]he various coins which have circulated in America, have undergone different changes in their value, so that there is hardly any which can be considered as a general standard, unless it be Spanish dollars".^{258/}

^{255/} 5 id. at 725.

^{256/} Propositions respecting the Coinage of Gold, Silver, and Copper (printed folio pamphlet presented to the Continental Congress 13 May 1785), at 4.

^{257/} Id.

^{258/} Id. at 5.

In a plan first published on 24 July 1784, Thomas Jefferson strongly concurred that "[t]he Spanish dollar seems to fulfill all * * * conditions" applicable to "fixing the unit of money".^{259/} "Taking into our view all money transactions, great and small," he ventured, "I question if a common measure, of more convenient size than the dollar, could be proposed."^{260/} "The unit, or dollar," he wrote, already equating the one with the other, "is a known coin, and the most familiar of all to the minds of people. It is already adopted from south to north; has identified our currency, and therefore happily offers itself as an unit already introduced. Our public debt, our requisitions and their apportionments, have given it actual and long possession of the place of unit."^{261/}

Yet Jefferson recognized the necessity of certain practical steps to adopt the dollar as the "Money-Unit": "If we determine that a dollar shall be our unit, we must then say with precision what a dollar is. This coin as struck at different times, of different weight and fineness, is of different values."^{262/} This, though, Jefferson saw as a problem for economic science to solve through objective measurement, not as a matter for politics to dictate according to arbitrary "policy". "If the dollars circulating among us be of every date equal, we should examine the quantity of pure metal in each, and from them form an average for our unit.

^{259/} "NOTES on the Establishment of a MONEY MINT, and of a COINAGE for the United States", The Providence Gazette and Country Journal, Vol. XXI, No. 1073 (24 Jul. 1784), in Propositions, ante note 256, at 9.

^{260/} Propositions, ante note 256, at 9.

^{261/} Id. at 10.

^{262/} Id. at 11.

This is a work proper to be committed to the mathematicians as well as merchants, and which should be decided on actual and accurate experiments."^{263/} "The proportion between the value of gold and silver," he added, "is a mercantile problem altogether."^{264/} Given "[t]he quantity of fine silver which shall constitute the unit", and "the proportion of the value of gold to that of silver", Jefferson went on, "a table should be formed * * * classing the several foreign coins according to their fineness, declaring the worth * * * in each class, and that they should be lawful tenders at those rates, if not clipped or otherwise diminished".^{265/}

Concluding, he encouraged Congress

To appoint proper persons to assay and examine, with the utmost accuracy practicable, the Spanish milled dollars of different dates in circulation with us.

To assay and examine in like manner the fineness of all the other coins which may be found in circulation within these states.

* * * *

To appoint also proper persons to enquire what are the proportions between the values of fine gold and fine silver, at the markets of the several countries with which we are or probably may be connected in commerce; and what would be a proper proportion here, having regard to the average of their values at those markets * * * .

^{263/} Id.

^{264/} Id.

^{265/} Id. at 12. "Here the legislatures [of the States] should co-operate with Congress in providing that no money should be received or paid at their treasuries, or by any of their officers, or any bank, but on actual weight; in making it criminal in a high degree to diminish their own coins, and in some smaller degree to offer them in payment when diminished." Id.

To prepare an ordinance for establishing the unit of money within these states * * * on the * * * principle[:]

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 * * * shall shew to be contained on an average in dollars of the several dates in circulation with us. 266/

On 13 May 1785, a committee presented Congress with "Propositions Respecting the Coinage of Gold, Silver, and Copper", which referred to the "Plan * * * which proposes * * * that the Money Unit be One Dollar". 267/ "In favor of this Plan," the committee reported, is "that a Dollar, the proposed Unit, has long been in general Use. Its Value is familiar. This accords with the national mode of keeping Accounts * * * ." 268/ Later, the report referred to the dollar as the "Money of Account", thereby equating that term with the term "Money-Unit". 269/

On 6 July 1785, Congress unanimously "Resolved, That the money unit of the United States be one dollar". 270/ Almost another year elapsed until, on 8 April 1786, the Board of Treasury reported to Congress on the establishment of a mint:

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.

We have concluded that Congress by their Act aforesaid, intended the common

266/ Id.

267/ 28 J. of the Continental Congress, ante note 35, at 355.

268/ Id.

269/ Id. at 357.

270/ 29 id. at 499-500.

Dollars that are Current in the United States, and we have made our calculations accordingly. * * *

* * * *

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. 271/

Shortly thereafter, on 8 August 1787, Congress adopted this standard as "the money Unit of the United States". 272/

In sum, the constitutional "dollar", the constitutional "Money-Unit" or "Money of Account" of the United States, is an historically determinate, fixed weight of fine silver -- in essence, a unit of measure -- adopted, not created, first by the American market and then by the Continental Congress well-before ratification of the Constitution.

5. Article I, § 8, cl. 2

As with the power "To coin Money" in Article I, § 8, cl. 5, the power "To borrow Money on the credit of the United States" is linguistically precise and unequivocal. It authorizes Congress to borrow money, not to "emit", "issue", "make", "create", or "declare what shall be" money. Moreover, distinguishably from the power "To coin", the Constitution annexes to the power "To borrow" no ancillary power "To * * * regulate * * * Value". Thus, on its face, the power "To borrow Money" permits Congress to obtain money from willing lenders, but not itself to create money, or to change the value of money, in

271/ 30 id. at 162-63. After ratification of the Constitution, Congress made a more accurate determination of the value of the dollar, setting it at 371-1/4 grains of fine silver. Post, pp. 118-26.

272/ 31 J. of the Continental Congress, ante note 35, at 503.

the course of "borrow[ing]" or otherwise. Or, by implication, Article I, § 8, cl. 2 disables Congress from (a) issuing paper currency of any kind, or (b) levying forced loans, as a means of "borrow[ing] Money".

a. The disability to emit bills of credit

Comparison of the borrowing-power under the Articles of Confederation and under the Constitution shows the narrow ambit of Article I, § 8, cl. 2. Under the Articles, Congress had power "to borrow money, or emit bills on the credit of the united states".^{273/} The Constitution adopted the same language, excising only the phrase "or emit bills". This identity of the language retained presumptively implies an identity of operative meaning in both documents.^{274/}

There is, of course, no dispute as to the construction of the borrowing-power the Continental Congress entertained under the Articles. Pursuant to that document, Congress borrowed money, and emitted bills of credit ostensibly redeemable in money (Continental Currency) -- but did not even attempt to declare these bills a legal tender, instead requesting that the individual States do so.^{275/} This establishes that, under the Articles as Congress and the States understood and applied

^{273/} Arts. of Confed'n art. IX.

^{274/} Such was the rule of construction at the time, and consistently thereafter. E.g., 2 T. Rutherford, Institutes of Natural Law (1754-1756), at 331-32, quoted in 1 W. Crosskey, Politics and the Constitution, ante note 202, at 376; 1 W. Blackstone, Commentaries, ante note 8, at 60; Tucker v. Oxley, 9 U.S. (5 Cranch) 34, 42 (1809); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 18 (1829); McDonald v. Hovey, 110 U.S. 619, 628 (1884); Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 572 (1887); Warner v. Texas & Pac. Ry., 164 U.S. 418, 422-23 (1896); Willis v. Eastern Trust & Banking Co., 169 U.S. 295, 307-08 (1898).

^{275/} Ante, p. 15.

them, the power "to borrow money" by definition did not include a power "to * * * emit bills; and, the power "to * * * emit bills" by definition did not include a power to make those bills a legal tender.

In the Federal Convention of 1787, the initial draft of the Constitution reported by the Committee of Detail copied the language of the Articles almost word for word.^{276/} But, by a vote of nine States to two, the Convention deleted the phrase "and emit bills".^{277/} On its face, this action fixed the meaning of the phrase "To borrow Money" by definition as necessarily not including any authority to "emit bills" -- and, because under the Articles even the phrase "emit bills" had not implied a power to make those bills a legal tender, as necessarily not including any legal-tender authority, either.

Such, indeed, was the view of Maryland's representative, the shrewd lawyer Luther Martin, in his report on the Convention to that State's legislature:

By our original articles of confederation, the Congress have a power to borrow money and emit bills of credit, on the credit of the United States; agreeably to which, was the report on this system as made by the committee of detail. When we came to this part of the report, a motion was made to strike out the words "to emit bills of credit." Against the motion we urged, that it would be improper to deprive the Congress of that power * * * . But, Sir, a majority of the convention,

276/ 2 Records of the Federal Convention, ante note 146, at 182: "To borrow money, and emit bills on the credit of the United States".

277/ Id. at 303-04. As reported by Madison, the animadversions on this phrase were extreme, one member recalling that "[t]he mischiefs of the various experiments [in paper money] * * * had excited the disgust of all the respectable part of America"; another warning that "the words, if not struck out, would be as alarming as the mark of the Beast in Revelations"; and a third declaring that he would "rather reject the whole plan than retain the three words". Id. at 309-10.

being wise beyond every event, and being willing to risk any political evil, rather than admit the idea of a paper emission, in any possible event, refused to trust this authority to a government, to which they were lavishing the most unlimited powers of taxation, * * * and they erased that clause from the system. * * *

* * * *

By the tenth section every State is prohibited from emitting bills of credit. As it was reported by the committee of detail, the States were only prohibited from emitting them without the consent of Congress; but the convention was so smitten with the paper money dread, that they insisted the prohibition should be absolute. It was my opinion, Sir, that the States ought not to be totally deprived of the right to emit bills of credit, and that, as we had not given an authority to the general government for that purpose, it was the more necessary to retain it in the States. * * * I therefore thought it my duty to vote against this part of the system. 278/

And such, too, was the opinion of Chief Justice Marshall on the effect of an analogous deletion elsewhere in the Constitution. 279/

This historical evolution is decisive of the issue whether the authority "To borrow Money" includes a power to emit bills of credit, with or without legal-tender character. But further evidence is available in the language of the Constitution: The existence of the prohibitions against "emit[ting] Bills of Credit" and "mak[ing] any Thing but gold and silver coin a Tender in Payment of Debts" in Article I, § 10, cl. 1 shows two things: First, that the emission of such

278/ 3 id. at 205-06, 214; 1 J. Elliot, Debates, ante note 151, at 369-70, 376.

279/ McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819): "The men who drew and adopted this amendment [to the Constitution] had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments."

"Bills" is not inherent and inescapable in the government's act of borrowing, even if some paper certificate of the government's indebtedness evidences that act. A "Bil[1] of Credit" is not merely any note, security, warrant, or other paper promise memorializing a debtor-creditor relationship involving the government, but instead only a particular type of document that purports to function as something more than a record of a simple and direct debtor-creditor arrangement. For, if every act of recording governmental debt necessarily implied the emission of a "Bil[1] of Credit", Article I, § 10, cl. 1 would deny the States any power to borrow, an obviously absurd construction. This means, however, that simply because, under Article I, § 8, cl. 2, Congress may (and, as a practical matter, must) issue paper evidences of the United States' obligations as a debtor does not imply that it may also issue other instruments intended to function as "paper money" among citizens not parties to the original debtor-creditor relationship with the government.

Second, Article I, § 10, cl. 1 shows that "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts" is not involved where the government merely accepts from one of its debtors, in satisfaction of his debt, a paper evidence of one of its own debts. For otherwise, Article I, § 10, cl. 1 would extinguish the ancient equitable doctrine of set-off or counterclaim,^{280/} for no discernible purpose, again an obviously absurd construction. This means, however, that simply because Congress may accept evidences of the debts of the United States in payments of debts owed to the United States does not

^{280/} E.g., United States v. Robertson, 30 U.S. (5 Pet.) 641, 659 (1831).

imply that it may also require other creditors to receive those evidences from their debtors in payment of what those debtors owe to them.

The same overall conclusions follow from considerations extrinsic to the constitutional text. By its very nature, the economic concept of "borrow[ing] Money" repels the implication of creating an instrument to perform the functions of money,^{281/} particularly one with legal-tender character. When government "enters the markets of the world and becomes a borrower, she lays aside her sovereignty and takes upon herself the position of * * * an individual, and is bound accordingly".^{282/} And the words "To borrow Money" in Article I, § 8, cl. 2 suggest nothing else. Now, in the normal debtor-creditor relation, the conditions of the transaction are matters of contractual arrangement between the parties themselves, and them alone. The concept of "borrow[ing]", in either economics or law, does not imply that the debtor can assure his creditor of repayment on the basis of property, rights, or privileges which he (the debtor) does not possess, but which belong instead to other persons. Thus, if the debtor seeks to annex to his note a legal-tender quality as against such other persons, he must first establish his power to interfere in those persons' otherwise independent rights of property (including the freedom to contract). Such a power does not and cannot derive simply from the debtor's self-interested act of borrowing -- in logic, in economics, or in law. Therefore, to discover a legal-tender power in the

^{281/} See Thomas v. City of Richmond, 79 U.S. (12 Wall.) 349, 353-54 (1870).

^{282/} Antoni v. Greenhow, 107 U.S. 769, 795 (1882) (Field, J., dissenting). Accord, Hall v. Wisconsin, 103 U.S. 5, 11 (1880).

Constitution, other than that for properly "regulate[d]" gold and silver coin, demands recourse to some provision besides Article I, § 8, cl. 2.

In short, the Constitution explicitly outlaws the emission of "Bills of Credit" and the "mak[ing]" of "Tender[s]" by the States in Article I, § 10, cl. 1 because the States had always claimed these powers as an inchoate part of their "sovereignty" -- against which only explicit prohibitions could have been effective.^{283/} Congress, conversely, had an authority to "emit bills" only by virtue of that power's explicit enumeration in the Articles of Confederation, and conceded its total disability under the Articles to make these "bills" a legal tender. For that reason, the Federal Convention needed only to delete the offensive words "emit bills" from the original drafts of Article I, § 8, cl. 2 to establish an implicit prohibition against that action. Moreover, if the power "to borrow money, or emit bills" in the Articles did not provide Congress with an ancillary legal-tender power, self-evidently the mere power "To borrow Money" could do no more -- thereby rendering the deletion of the words "emit bills" an implicit prohibition of congressional legal-tender "paper money" as well.

b. The disability to levy forced loans

One further aspect of Article I, § 8, cl. 2 deserves attention: namely, whether the power "To borrow Money" includes a power to compel unwilling creditors to loan "Money" to the government. On its face, the concept of "borrow[ing]" repels such an interpretation. Common-law precedents, moreover,

^{283/} See, e.g., T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (7th ed. 1903), at 124-31, 241-42.

support this common-sense construction with the strongest historical authority.

For hundreds of years, Parliament had struggled against the King's claimed "sovereign prerogative" to compel his subjects to grant him "Aids, Tasks, and Prises".^{284/} In the reign of Charles I., assertion of the supposed prerogative caused more than one political crisis. First came the Case of the Five Knights in 1627.^{285/} "[H]aving deprived himself of the prospect of all parliamentary Aids, by dissolving the parliament," Charles

project[ed] all possible ways and means of raising money; to which end letters were sent to the Lords Lieutenant of the counties, to return the names of the persons of ability, and what sums they could spare; and the Comptroller * * * issued forth letters * * * to several persons returned for the Loan-Money * * * . This assessment of the general-Loan did not pass currently with the people, for divers persons refused to subscribe or lend at the rate proposed; the non-subscribers of high rank * * * were bound over by recognizances * * * , and divers of them committed to prison: which caused great murmuring. But * * * only five of them brought their Habeas Corpus * * * .^{286/}

^{284/} Aids, Tasks, and Prises granted to the King shall not be taken for a Custom, 1297, 25 Edw. I., ch. V; The King or his Heirs will take no Aids or Prises, but by the Consent of the Realm, and for the common Profit thereof, 1297, 25 Edw. I., ch. VI; A Release of Toll taken by the King for Wooll; and a Grant that he will not take the like without common Consent and good Will, 1297, 25 Edw. I., ch. VII; The King and his Heirs shall have no Tallage or Aid without Consent of Parliament, 1306, 34 Edw. I., Stat. 4, ch. I; How Aid granted to the King shall be taxed, 1327, 1 Edw. III., Stat. 2, ch. VI; The King's Grant, that the foresaid Subsidy of the Ninth Lamb, etc. shall be no Example, nor prejudicial to his Subjects: All shall be spent in his Wars, 1340, 14 Edw. III., Stat. 2; No new imposition shall be put upon merchandises, 1387, 11 Ric. II., ch. 9; The subjects of this realm shall not be charged by any benevolence, etc., 1483, 1 Ric. III., ch. 2.

^{285/} Proceedings on the HABEAS CORPUS, brought by Sir Thomas Darnel, et al., Case No. 127, 3 Cobbett's Complete Collection of State Trials (1809), at 1.

^{286/} Id. at 1-2.

The King's servile judges, however, refused to grant the writs, instead sheltering themselves behind doubtful precedents, and asking disingenuously: "[W]hat can we do but walk in the steps of our forefathers?"^{287/} Later, the King released the prisoners -- but the affair caused Parliament immediately to ventilate "the Grievances, as Loans by Benevolence * * * , and the imprisoning certain Gentlemen who refused to lend upon that Account".^{288/}

Arguing against any parliamentary grant of further subsidies to the King until the grievances were settled, Sir Francis Seymour asked how Parliament could

think of giving of subsidies, till we know, whether we have anything to give or no? For if his majesty be persuaded by any to take from his subjects what he will, and where it pleaseth him; I would gladly know what we have to give! * * * [I]t is ill * * * with those princes which shall use force with those laws; that this hath been done, appeareth by the billeting of Soldiers * * * ; this also appeareth by the last Levy of Money against an Act of Parliament.^{289/}

Sir Thomas Wentworth agreed, submitting a motion "that no Levies be made, but by parliament; secondly, no billeting of Soldiers".^{290/} Sir Edward Coke, great exponent of the common law, was

not able to fly at all Grievances, but only at Loans. * * * [W]ho will give subsidies, if the king may impose what he will? * * * The king cannot tax any by way of Loans: * * * I will begin with a noble Record, * * * 25 E. 3; it is

^{287/} Id. at 59 (Hyde, L.C.J.).

^{288/} Id. at 60.

^{289/} Id.

^{290/} Id. at 62.

worthy to be written in letters of gold; Loans against the will of the Subject, are against Reason, and the Franchises of the Land, and they desire restitution: what a word is that Franchise? * * * Franchise is a French word, and in Latin it is Libertas. In Magna Charta it is provided that "Nullus liber homo capiatur vel imprisonetur aut disseisietur de libero tenemento suo, etc. nisi per legale iudicium parium suorum vel per legem terrae;" which Charter hath been confirmed by good kings above thirty times. 291/

These spokesmen thus recognized that a "sovereign prerogative" to impose forced loans was inconsistent with private property, was unreasonable, and contravened Magna Charta.

Parliament then unanimously resolved "[t]hat it is the antient and indubitable right of Every Freeman, that he hath a full and absolute property in his goods and estate; that no Tax, Taillage, Loan, Benevolence, or other like charge ought to be commanded, or levied by the king, without common consent by act of parliament".^{292/} And after much debate in the Houses of Commons and Lords, with interplay from the King in support of his claimed prerogatives, Parliament drew up a Petition, "containing the substance of Magna Charta, and the other Statutes, that do concern the Liberty of the Subject".^{293/}

To the objection that this bill was but a "confirmation" of previous acts, and therefore useless against the very forced loans that the King had exacted in the face of these statutes, parliamentary lawyers such as Mr. Hackwell of Lincoln's Inn demurred: "If we can get all these good laws * * * which are

291/ Id. at 63.

292/ Id. at 83.

293/ Id. at 175.

expositions of Magna Charta * * * to be confirmed and put in one law, to the easy view of all men, is not our case far better * * * ? * * * Will not the Resolution of this house * * * be a great means to stay any judge hereafter from declaring any judgment to the contrary * * * ?"^{294/}

Sycophants of the King in the House of Lords none the less attempted to dilute the effect of the Petition by inserting an "Addition" that sought "with due regard to leave intire that Soverign Power, wherewith your majesty is trusted for the protection, safety, and happiness of the people".^{295/} The debate on this "Addition" in the House of Commons was heated:

Mr. Pymm. * * * All our Petition is for the Laws of England, and this power seems to be another distinct power from the power of the law. I know how to add sovereign to his [i.e., the King's] person, but not to his power: And we cannot leave to him a sovereign power, when we were never possessed of it.

* * *

Sir Edward Coke. * * * Look into all the Petitions of former times, they never petitioned, wherein there was a saving of the king's sovereignty: I know that prerogative is part of the law, but "sovereign power" is no parliamentary word. In my opinion, it weakens Magna Charta, and all our statutes; for they are absolute, without any saving of sovereign power. * * * Magna Charta is such a fellow, that he will have no sovereign. * * * If we grant this, by implication we give a sovereign power above all these laws * * * .

Sir Thomas Wentworth. * * * [O]ur laws are not acquainted with sovereign power * * * .

^{294/} Id. at 178, 179.

^{295/} Id. at 192-93.

* * * *

Mr. Selden. * * * The sum of this addition is, that our right is not to be subject to Loans * * * , but by sovereign power. * * * We have a great many petitions and bills of parliament in all ages, in all which we are sure no such thing is added. * * *

In Magna Charta there were no such clauses * * * .

Mr. Mason spake his opinion in manner following:

* * * *

[I]f we recite those statutes, and say, we leave the sovereign power intire, we do take away that restraint which is the virtue and strength of those statutes, and set at liberty the claim of the sovereign power of a conqueror, which is to be limited and restrained by no laws * * * .

* * * *

[T]he Addition being referred to each part of the Petition, will necessarily receive this construction: that none ought to be compelled to make any gift, loan, or such like charge, without common consent, or act of parliament, unless it be by the sovereign power, with which the king is trusted for the protection, safety, and happiness of his people.

* * * [A]nd then the most favorable construction will be, that the king hath an ordinary prerogative, and by that he cannot impose taxes * * * : but that he hath an extraordinary and transcendent sovereign power for the protection and happiness of his people, and for such purpose he may impose taxes * * * ; and we may assure ourselves, that hereafter all loans * * * will be said to be for the protection, safety, and happiness of the people. 296/

Finally, after procedural sparring, the King acceded to the Petition of Right, and its provision (based on Magna Charta) "That no Man hereafter be compelled to make or yield

296/ Id. at 193-94, 196-98.

any Gift, Loan, Benevolence, Tax, or such-like Charge, without common Consent by Act of Parliament".^{297/} Thus, wrote Blackstone, "the English constitution received great alteration and improvement".^{298/}

Apparently, Charles I. and his counselors learned little from this straitening experience. In 1640, Parliament indicted and tried the Earl of Strafford for treason.^{299/} Of interest here is one specification of the general charge that the Earl "hath traitorously endeavoured to subvert the fundamental laws and government of the realms of England and Ireland, and instead thereof, to introduce an arbitrary and tyrannical government against law"^{300/} -- to wit,

XXV. That * * * he, the said Earl, did advise the king to go on vigourously in levying the Ship-Money * * * .

And a great Loan * * * was demanded of the city of London; and the lord mayor, and sheriffs, and alderman of the said city were often sent for, by his advice, * * * to give an account of their proceedings in * * * furthering of that Loan; and were required to certify the names of such inhabitants of said city as were fit to lend * * * .

XXVI. That the said Earl by his wicked counsels having brought his majesty into excessive Charge, without any just cause, he did * * * counsel and approve two dangerous and wicked projects, viz. To seize upon the Bullion and the money in the Mint. And to imbase his majesty's Coin with the mixtures of brass. -- And accordingly he procured 130,000 [pounds], which was then in the Mint, and belonged

^{297/} 3 Car. I., ch. 2, §§ IV., X. (1627).

^{298/} 4 W. Blackstone, Commentaries, ante note 8, at 430.

^{299/} The Trial of Thomas Earl of Strafford, Lord Lieutenant of Ireland, for High Treason, Case No. 150, 3 T. Howell, A Complete Collection of State Trials (1812), at 1382.

^{300/} Id. at 1385.

to divers merchants, strangers, and others, to be seized on and stayed to his majesty's use. And when divers merchants of London, owners of the said bullion and money, came to his house to let him understand the great mischief that course would produce * * * he, the said Earl, told them * * * that it was the course of other princes to make use of such monies to serve their occasions.

And when * * * the officers of his majesty's Mint came to him, and gave him divers reasons against the imbasing the said money, he told them, That the French king did use to send commissaries of horse with commissions to search into men's estates, and to peruse their accounts, that so they may know what to levy of them by force, which they did accordingly levy. 301/

To the testimony supporting these charges, the Earl "did with all his heart condescend unto it", but pleaded in extenuation "[t]hat there was a present necessity of money; that all the Council-Board had 'so voiced with him * * * ; and that there was then a Sentence of the Star-Chamber for the right of paying Ship-Money. For his part, he would never be more prudent than his teachers, nor give judgment against the Judges".^{302/} Parliament was not impressed by the citation of these supposed authorities, and convicted the Earl for his many misdeeds. He was then executed, as shortly thereafter was his master, Charles I.

These precedents established that Parliament, ultimate expositor of the English constitution, looked with abiding disfavor on forced loans, the seizure of privately held bullion and money, and the "imbas[ing]" of coin. To be sure, the constitutional struggle in the mid-1600's was between Parliament and the King, involving the former's ultimately successful attempts to bridle the latter's pretensions to

301/ Id. at 1399-400.

302/ Id. at 1450.

unlimited "sovereign power" over money and, indeed, almost all other aspects of English life. And the result of this struggle was to enshrine in the unwritten English constitution certain principles, traceable to Magna Charta, that only Parliament itself perhaps could modify by statute. In the late 1700's, conversely, the constitutional struggle in America was between the people and government generally, involving the former's ultimately successful attempts to deny unlimited "sovereign power" to any legislature, executive official, or judge. And the result of this struggle was to enshrine in the Constitution certain principles, drawn from common law, that only the people themselves could modify by formal constitutional amendment.^{303/} But, the principle in both cases was the same: If only transcendent "sovereign power" could justify forced loans, the seizure of privately held specie and money, and the "imbas[ing]" of coin, officials who exercised no such power had no lawful privilege to do any of those things. In England, only Parliament was "sovereign" -- and, therefore, the King's authority did not extend so far, even if Parliament's perhaps did. But in America, only the people were "sovereign" -- and, therefore, the government's authority was non-existent in those areas no matter what branch attempted so to act.

It is, after all, "one of the fundamental principles of our society" that the very existence of the Constitution necessarily implies the definite and limited nature of the powers of the government of the United States.^{304/} In this

^{303/} Vieira, "Rights and the United States Constitution: The Declension from Natural Law to Legal Positivism", 13 Ga. L. Rev. 1447, 1448-63 (1979).

^{304/} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803). Accord, Kansas v. Colorado, 206 U.S. 46, 89-90 (1907); Myers v. United States, 272 U.S. 52, 230-31 (1926) (McReynolds, J., dissenting).

country the people, rather than the government, are sovereign.^{305/}

And the Constitution alone is the expression of the people's will.^{306/} Therefore, the government has no power save what

the people have granted it, in definite and limited terms, by the Constitution.^{307/} "The government of the United States

^{305/} E.g., *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967); *Fleming v. Page*, 50 U.S. (9 How.) 603, 617-18 (1850).

[T]he sovereignties in Europe * * * exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects * * *. That system contemplates him as being the fountain of honor and authority; and from his grace or grant, derives all franchises, immunities and privileges * * *. No such ideas obtain here; at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects * * * and have none to govern but themselves * * *.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471-72 (1793) (opinion of Jay, C.J.).

To the constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. * * * [T]hose who ordained and established themselves sovereign people of the United States * * *.

* * * *

[T]he term sovereign has for its correlative, subject. In this sense, the term can receive no application; for it has no object in the constitution of the United States. Under that constitution, there are citizens, but no subjects.

Id. at 454, 456 (opinion of Wilson, J.).

^{306/} E.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 381 (1821) (words of Constitution are "authoritative language of the American people").

^{307/} *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 451 (1856); *United States v. Cruikshank*, 92 U.S. 542, 551 (1876); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939).

was born of the Constitution"; it is "entirely a creature of the Constitution"; and "[i]ts powers and authority have no other source".^{308/} No branch of government -- neither Congress, nor the President, nor the courts -- possesses any extra-constitutional power.^{309/} "In this respect we differ radically from nations where all legislative power * * * is vested in a * * * body subject to no restrictions except the discretion of its members."^{310/} For this -- elementary, but basic -- reason, there can never arise in constitutional analysis any need to refer to "all the powers which usually belong to the sovereignty of a nation",^{311/} to any "implied attribute of sovereignty possessed by all nations",^{312/} to "the laws of nations" in general^{313/} or to "the laws or usages of other

^{308/} Downes v. Bidwell, 182 U.S. 244, 288 (1901), (White, J., concurring); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (opinion of Black, J.). See Field v. Clark, 143 U.S. 649, 691 (1892).

^{309/} Ex parte Quirin, 317 U.S. 1, 25 (1942); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 136-37 (1866) (opinion of Chase, C.J.).

^{310/} United States v. Butler, 297 U.S. 1, 63 (1936).

^{311/} Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1856).

In so far as the national government has anything that can be likened to "sovereignty", the latter extends no further than the powers the Constitution grants; and the "sovereignty" of each state government, such as it is, the Constitution also hedges with restrictions and limitations. E.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435-36 (1793) (opinion of Iredell, J.).

^{312/} Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

Undoubtedly, the national government possesses powers akin to the "national sovereignty" that also "belong[s] to all independent governments", such as the powers to acquire and legislate for territories. But even those powers "the general spirit of the Constitution" subjects "to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments". The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42-44 (1890).

^{313/} Fleming v. Page, 50 U.S. (9 How.) 603, 617 (1850).

nations" in particular, ^{314/} or to "decisions * * * by the courts of any other country". ^{315/} For the Constitution only is our law.

In short, if the Constitution alone enumerates the powers the sovereign people have delegated to the national government; if the enumeration of those powers explicitly delimits that government's authority; if the only power concerned with "borrow[ing]" says nothing in haec verba or by reasonable implication about forced loans; and if, at common law, the imposition of such loans could be effected (if at all) only by transcendent "sovereign power" -- then, because Congress is not and cannot be "sovereign", it has no power under Article I, § 8, cl. 2 to levy forced loans. ^{316/} (And, mutatis mutandis, no power under Article I, § 8, cl. 5 to seize bullion or coin from private persons, or to "imbase" the national coinage. ^{317/}) The power "To borrow Money", then, means simply that: the power to contract with willing creditors for the receipt of "Money", to be repaid later. ^{318/}

^{314/} Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1856). Accord, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 466 (1793) (opinion of Cushing, J.) ("point [of constitutional law] turns not * * * upon the law of any other country whatever").

^{315/} Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 851 (1824).

^{316/} Revealing in this regard is how members of Parliament condemned the "Billeting of Soldiers" as a grievance of like severity to the imposition of forced loans. Compare Petition of Right, 1627, 30 Car. I., ch. 2, § VI., with U.S. Const. amend. III.

^{317/} Ante, pp. 40-42, 49-54.

^{318/} S. Johnson, Dictionary, ante note 136, defined "borrow" as: "To take something from another upon credit", or "[t]o ask of another the use of something for a time". To like effect is the modern usage. E.g., Black's Law Dictionary,

As Article I, § 8, cl. 6 indicates, the power "To borrow" also includes the obviously necessary power to issue paper evidences of the government's debts in the form, for example, of "bonds", "notes", or other such "Securities". Whether the borrowing-power is general, or specific, with regard to its

(FOOTNOTE 318 CONT'D)

ante note 13, at 230: "To solicit and receive from another any article of property or thing of value with the intention and promise to repay or return it or its equivalent".

Judicial authorities are legion for the proposition that "borrowing" necessarily implies repayment. E.g., *Kent v. Quicksilver Mining Co.*, 78 N.Y. 159, 177-78 (1879) ("[t]o borrow is the reciprocal action with to lend"); *Rodman v. Munson*, 13 Barb. (N.Y.) 63, 75-79 (1852) (defining a loan to the government); *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103, 109-10 (18233); *Jarrolt v. City of Moberly*, 103 U.S. 580, 586 (1880); *In re Grand Union Co.*, 219 Fed. 353, 356 (2d Cir. 1914); *Bankers Mortgage Co. v. Commissioner*, 142 F.2d 130, 131 (5th Cir. 1944); *Northern Mining Corp. v. Trunz*, 124 F.2d 14, 16-17 (9th Cir. 1941); *Palmer v. Civil Serv. Comm'n*, 191 F. Supp. 495, 537 (S.D. Ill. 1961); *National Bank of Paulding v. Fidelity & Casualty Co.*, 131 F. Supp. 121, 123-24 (S.D. Ohio 1954); *First Nat'l Bank & Trust Co. of Tulsa v. Jones*, 53 F. Supp. 842, 843 & n.1 (W.D. Ok. 1943); *United States v. Investors Diversified Servs.*, 102 F. Supp. 645, 647 (D. Minn. 1951); *Omaha Nat'l Bank v. Mutual Ben. Life Ins. Co.*, 81 Fed. 935, 938-39 (D.N.J. 1897); *Lindsey v. Hamlet*, ___ Ala. ___, 179 So. 234, 235 (1938); *State v. Brown*, 102 S.W. 394, 395 (Ark. 1907); *Pratt v. R.S. Odell & Co.*, 122 P.2d 684, 689 (Cal. D.C. App. 1942); *Rogers v. Hannon-Hatch Post No. 9929*, VFW, 23 Conn. Super. 326, ___, 182 A.2d 923, 924 (1962); *Isaacson v. House*, 216 Ga. 698, ___, 119 S.E.2d 113, 116 (1961); *Bannock Cty. v. Citizens' Bank & Trust Co.*, 22 P.2d 674, 680 (Idaho 1933); *Beebe v. Kirkpatrick*, 321 Ill. 612, ___, 152 N.E. 539, 541 (1926); *Wayne Pump Co. v. Department of Treasury*, ___ Ind. ___, 110 N.E. 284, 287-88 (1953); *Coe v. First Nat'l Bank & Trust Co.*, 219 Kan. 352, ___, 548 P.2d 486, 488 (1976); *Gibbs v. Gibbs*, 254 Ky. 787, ___, 72 S.W.2d 473, 474 (1934); *Herlihy v. Coney*, ___ Me. ___, 59 Atl. 952, 952-53 (1905); *In re Beier's Estate*, ___ Minn. ___, 284 N.W. 833, 835 (1939); *Quinn v. Van Raalte*, 276 Mo. 71, ___, 205 S.W. 59, 69 (1918); *Rae v. Cameron*, 114 P.2d 1060, 1063-64 (Mont. 1941); *Cartney v. Olson*, 154 Neb. 548, ___, 48 N.W.2d 653, 655 (1951); *Kline v. Robinson*, 428 P.2d 190, 194 (Nev. 1967); *Eisenhardt v. Schmidt*, 27 N.J. Super. 76, ___, 98 A.2d 698, 700-01 (1953); *Rubenstein v. Small*, 273 App. Div. 102, ___, 75 N.Y.S.2d 483, 485-86 (1947); *State v. Douglas*, 16 N.W.2d 489, 494 (S.D. 1944); *Easter Oil Corp. v. Strauss*, 52 S.W.2d 336, 340 (Tex. Civ. App. 1932); *Rasmussen v. Western Casualty and Surety Co.*, 15 Utah 2d 333, ___, 393 P.2d 376, 378 (1964); *Embola v. Tuppela*, ___ Wash. ___, ___, 220 Pac. 789, 790 (1923).

subject, "Money", is debatable. On the one hand, the absence of any definition of the noun "Money" in Article I, § 8, cl. 2 itself supports the view that Congress may "borrow" anything that passes for or functions as "Money" in the marketplace.^{319/} On the other hand, the consistent use of that noun in connexion with the verb "coin" in Article I, § 8, cl. 5 and Article I, § 10, cl. 1 supports the view that Congress may "borrow" only what the Constitution recognizes as "Money": properly "regulate[d]" coin. The correct resolution of this question, however, is not controlling for analysis of the monetary powers.

6. Article I, § 8, cl. 6

The final monetary provision in the Constitution requires little exegesis. Self-evidently, Article I, § 8, cl. 6 relates in a derivative fashion: (i) to the power "To borrow Money" in Article I, § 8, cl. 2, out of which arise "the Securities * * * of the United States";^{320/} and (ii) to the power "To coin Money, regulate the Value thereof, and of foreign Coin" in Article I, § 8, cl. 5, out of which arises the "current Coin of the United States".^{321/}

Once again, the Framers chose painstakingly precise language -- referring specifically to "the Securities and

^{319/} See Woodruff v. Mississippi, 162 U.S. 291, 299 (1896).

^{320/} E.g., 2 J. Story, Commentaries, ante note 7, § 1123, at 61-62.

^{321/} At the time of the Federal Convention, the term "current Coin" was synonymous with the term "lawful Coin". See, e.g., Wharton v. Morris, 1 U.S. (1 Dall.) 125, 126 (Pa. 1785). The Framers added the adjective "current" apparently to bring within Article I, § 8, cl. 6 the counterfeiting of any foreign "Coin" that might be given "currency" (or made "lawful"), by its "regulat[ion]", in the United States. 1 W. Crosskey, Politics and the Constitution, ante note 202, at 476-77.

current Coin of the United States" only, while avoiding such terms as "bills of credit", "paper money", "currency", or even "money" generally. This careful distinction between "Securities" and "current Coin" strongly emphasizes once again that all "Money" of the United States is and must be coin: Article I, § 8, cl. 5 authorizes Congress "to coin Money" -- and Article I, § 8, cl. 6 empowers Congress to punish the counterfeiting of this "Money" alone. Article I, § 8, cl. 2 authorizes Congress "To borrow Money" -- and Article I, § 8, cl. 6 empowers Congress to punish the evidences of this "borrow[ing]" alone. But Article I, § 8, cl. 6 does not empower Congress to punish the counterfeiting of anything else, unequivocally implying that the Constitution recognizes only two, mutually exclusive financial instruments: "Money" itself, composed of properly "regulate[d]" domestic and foreign "Coin"; and "Securities", composed of appropriate promises to pay "borrow[ed] Money".^{322/} Or, conversely, a "Securit[y]" can never be "Money"; and the power "To borrow Money" can never function to create "Money".^{323/}

322/ Whether a mere promise to pay can qualify as a constitutional "Securit[y]" is doubtful. As late as the middle of the nineteenth century the term "security" had a restricted meaning that excluded such promises. In re Astor's Estate, 62 N.Y.S.2d 117, 118 (N.Y. City Surrogate's Ct. 1946). See Black's Law Dictionary, ante note 13, at 1522, which defines "security" as "an obligation * * * given by a debtor to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation". Blackstone, for example, drew a distinction between "bills of exchange" (which he classified as "securities") and "promissory notes". 2 W. Blackstone, Commentaries, ante note 8, at 466-70. But cf. Bank v. Supervisors, 74 U.S. (7 Wall.) 26, 31 (1868): "[United States] notes are obligations. They bind the national faith. They are, therefore, strictly securities. They secure the payment stipulated to the holders, by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume."

323/ On the other hand, as is obvious, "Money" can never be a "Securit[y]"; and the power "To coin Money" can never function to borrow "Money".

7. Summary of the monetary powers and disabilities

The Constitution thus embodies a precisely defined, tightly integrated set of monetary powers and disabilities that adopt as the basic principles of the nation's organic law the historically proven axioms of English common law, as refined through American experience.

First, the Constitution establishes a national system of "Money" that consists of silver and gold coin (with strictly subsidiary coinage of other metals). The standard of value in this system is the silver Spanish milled dollar, as it historically existed in the late 1700's.^{324/} The legally declared value of all non-subsidary silver coins must relate proportionately to the weight and fineness of the silver they contain, in comparison to the dollar. The legally declared value of all non-subsidary gold coins must relate proportionately to the weight and fineness of the gold they contain, in comparison to the dollar, at the prevailing free-market exchange-ratio between gold and silver. All silver and gold coins may be a legal tender for their intrinsic values in silver dollars. And Congress has exclusive authority "To coin Money" and "regulate" its "Value" and legal-tender character according to these principles.

Second, the Constitution outlaws the creation or use of any form of paper currency by either the States or the national government. And the States may not take any action that has the result of imposing on unwilling creditors "any Thing but gold and silver Coin" as a "Tender in Payment of Debts".

Third, the Constitution precludes Congress from levying

^{324/} Ante, pp. 85-91; post, pp. 118-26.

forced loans on the people, or from attempting to seize their money other than through proper modes of taxation.

D. Congressional and executive application
of the monetary powers and disabilities

Strictly speaking, the exegesis of the Constitution's monetary powers and disabilities is complete. Following the common-law rules of construction applicable in the late 1700's,^{325/} the foregoing analysis has considered the histori-

^{325/} 1 W. Blackstone, Commentaries, ante note 8, at 59-61:

[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. * * *

1. Words are generally to be understood in their usual and most known signification * * * their general and popular use.

2. If words happen to be still dubious, we may establish their meaning from the context * * *. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have the same affinity with the subject, or that expressly relate to the same point.

* * * *

5. But * * * the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.

See, e.g., Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838). Accord, 1 J. Story, Commentaries, ante note 7, § 400, at 305; § 402, at 306-07.

cal and legal "origin" of these constitutional provisions, and "the line of their growth".^{326/} It has placed the reader "in the position of the men who framed and adopted" the Constitution,^{327/} has read the Constitution's language "in connection with the known condition of affairs" at that time,^{328/} and has reviewed "[t]he necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption".^{329/} Using as its "first resort * * * the natural signification of the words" in the Constitution,^{330/} the analysis has consulted the antecedent common law of England,^{331/} making a "real attempt to ascertain the common law rule on the subject"^{332/}

^{326/} Gompers v. United States, 233 U.S. 604, 610 (1914).

^{327/} South Carolina v. United States, 199 U.S. 437, 450 (1905). Accord, Ex parte Bain, 121 U.S. 1, 12 (1887).

^{328/} Maxwell v. Dow, 176 U.S. 581, 601-02 (1900). Accord, Everson v. Board of Educ., 330 U.S. 1, 8 (1947); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 558 (1895).

^{329/} Knowlton v. Moore, 178 U.S. 41, 95 (1900). Accord, Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838). See, e.g., Boyd v. United States, 116 U.S. 616, 624-30 (1886); Grosjean v. American Press Co., 297 U.S. 233, 245-49 (1936).

^{330/} Lake County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).

^{331/} E.g., Moore v. United States, 91 U.S. 270, 274 (1876); Ex parte Bain, 121 U.S. 1, 12 (1887); Smith v. Alabama, 124 U.S. 465, 478-79 (1888); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 570-72 (1895); United States v. Wong Kim Ark, 169 U.S. 649, 654-55 (1898); Thompson v. Utah, 170 U.S. 343, 349-50 (1898); Schick v. United States, 195 U.S. 65, 68-70 (1904); South Carolina v. United States, 199 U.S. 437, 449-50 (1905); Kansas v. Colorado, 206 U.S. 46, 94-95 (1907); Tumey v. Ohio, 273 U.S. 510, 523-26 (1927); Patton v. United States, 281 U.S. 276, 287, 290 (1930); Dimick v. Schiedt, 293 U.S. 474, 476-82, 487 (1935); United States v. Wood, 299 U.S. 123, 133-39 (1936); Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967); Steagald v. United States, ___ U.S. ___, ___, 101 S. Ct. 1642, 1650-51 (1981).

^{332/} Dimick v. Schiedt, 293 U.S. 474, 483-84 (1935). See, e.g., United States v. Wood, 299 U.S. 123, 134-41 (1936).

by reference to recognized authorities in order to establish the apposite "principle" and "basic doctrine",^{333/} and the meaning of technical legal terms.^{334/} Moreover, the analysis has reviewed pre-constitutional colonial and state law, with which "those who framed the constitution, and the lawyers in America in that day, were familiar".^{335/} In particular, it has explained and emphasized the importance of the Articles of Confederation that preceded the Constitution as the organic law of the United States.^{336/} The analysis has considered the proceedings in the Continental Congress with which "every member of the convention which framed the constitution was familiar",^{337/} as well as the early drafts of and debate on the Constitution in the Convention itself^{338/} -- all of which are "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words" in the Constitu-

^{333/} Ingraham v. Wright, 430 U.S. 651, 661 (1977).

^{334/} E.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 396 (1798) (opinion of Patterson, J.); 2 J. Story, Commentaries, ante note 7, § 1339, at 212.

^{335/} Waring v. Clarke, 46 U.S. (5 How.) 441, 454-56 (1847).

^{336/} E.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 728 (1838); Scott v. Sandford, 60 U.S. (19 How.) 393, 418-19 (1856); McPherson v. Blacker, 146 U.S. 1, 27-28 (1892); Missouri v. Illinois, 180 U.S. 208, 219-21 (1901); Kansas v. Colorado, 206 U.S. 46, 84 (1907). See United States v. Wong Kim Ark, 169 U.S. 649, 653 (1898).

^{337/} Waring v. Clarke, 46 U.S. (5 How.) 441, 456 (1847).

^{338/} E.g., Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 562-64 (1895); Missouri v. Illinois, 180 U.S. 209, 221-24 (1901); Kansas v. Colorado, 206 U.S. 46, 84 (1907); Myers v. United States, 272 U.S. 52, 116 (1926); *id.* at 230-32 (McReynolds, J., dissenting); Cramer v. United States, 325 U.S. 1, 22-24 (1945).

tion.^{339/} And it has produced useful evidence from other contemporary documents.^{340/} No more is necessary to support the interpretations of the monetary powers and disabilities this essay presents.

The critically important nature of the issue involved here, however, warrants further investigation in order to eradicate any even colorable dispute or doubt as to the meaning of these constitutional provisions. Admittedly, the gloss governmental officials have placed on the Constitution is inconsequential in comparison to how they should have construed it according to correct legal rules of interpretation.^{341/} "[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."^{342/} Constitutional questions "must be resolved

^{339/} United States v. Wong Kim Ark, 169 U.S. 649, 699 (1898). E.g., Knowlton v. Moore, 178 U.S. 41, 96-100 (1900) (Continental Congress); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 153 (1911) (Federal Convention); Passenger Cases, 48 U.S. (7 How.) 282, 477 (1849) (Taney, C.J., dissenting) (Federal Convention).

^{340/} The Federalist -- Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418-20 (1821); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 558-59, 564 (1895); Transportation Co. v. Whelling, 99 U.S. 273, 280 (1878); Myers v. United States, 272 U.S. 52, 229, 235, 237 (1926) (McReynolds, J., dissenting). Elliot's Debates -- Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 564-68 (1895). See generally 1 J. Story, Commentaries, ante note 7, § 405, at 308. On the necessity for carefully circumspect reliance on such sources, though, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433-35 (1819) (remarks on The Federalist).

^{341/} The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458 (1851).

^{342/} Fairbank v. United States, 181 U.S. 283, 311 (1901). Accord, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819) ("[i]t will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this"); Smiley v. Holm, 285 U.S. 355, 369 (1932) ("[g]eneral acquiescence cannot justify departure from the law").

not by past uncertainties, assumptions or arguments, but by the application of the controlling principles of constitutional interpretation".^{343/} Yet, in cases of real ambiguity,^{344/} a practical legislative or executive construction "adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs" is entitled to some deference.^{345/} As the foregoing analysis has shown, of course, the nature and extent of the monetary powers and disabilities are not in any reasonable sense ambiguous or doubtful. Nevertheless, consideration of their "practical legislative [and] executive construction" in the early days of the republic is valuable -- because it systematically confirms in every particular the interpretation of those provisions heretofore outlined.

Two separate examples of this "practical construction" are noteworthy: (1) the creation of the national monetary system in the 1790's,^{346/} and the development of that system

^{343/} Wright v. United States, 302 U.S. 583, 597-98 (1938).

^{344/} E.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819); McPherson v. Blacker, 146 U.S. 1, 27 (1892); Fairbank v. United States, 181 U.S. 283, 306-12 (1901); Smiley v. Holm, 285 U.S. 355, 369-70 (1932).

^{345/} Knowlton v. Moore, 178 U.S. 41, 56 (1900). Accord, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401-02 (1819); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314-15 (1851); The Laura, 114 U.S. 411, 413-16 (1885); Myers v. United States, 272 U.S. 52, 174-75 (1926); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322-29 (1936); Ex parte Quirin, 317 U.S. 1, 41-44 (1942).

^{346/} The doctrine of "practical construction" obviously applies with particular force to actions of Congress in its first sessions following ratification of the Constitution in 1789. E.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 420 (1821); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 620-21 (1842); Ableman v. Booth, 62 U.S. (21 How.) 506, 522 (1858); Bors v. Preston, 111 U.S. 252, 256-57 (1884); Ames v. Kansas ex rel. Johnson, 111 U.S. 449, 463-64 (1884); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888); Williams v. United States, 289 U.S. 553, 573-74 (1933).

in the mid-1800's, pursuant to the power "To coin Money, [and] regulate the Value thereof" in Article I, § 8, cl. 5; and

(2) the issuance of treasury notes and other "Securities * * * of the United States" during the period 1812 to 1860, pursuant to the power "To borrow Money" in Article I, § 8, cl. 2.^{347/}

Also instructive is (3) consideration of the relationship to the national government and its monetary powers of the Bank of the United States, as incorporated in 1791 and again in 1816, pursuant to the power in Article I, § 8, cl. 18 "To make all Laws which shall be necessary and proper for carrying into Execution the * * * Powers [in Article I, § 8]".

1. The coinage-acts of the 1790's and mid-1800's

Almost immediately after ratification of the Constitution, Congress and the Executive began work on a national monetary system.

a. Alexander Hamilton's Report on the Mint

On 28 January 1791, Secretary of the Treasury Alexander Hamilton presented to Congress his Report on the Subject of a Mint.^{348/} "A plan for an establishment of this nature", he wrote, "involves a great variety of considerations -- intri-

^{347/} The year 1860 is a convenient termination-point because legislation enacted during the Civil War and thereafter is too far removed from 1789 to qualify as embodying a "contemporaneous" construction of the Constitution. E.g., *Boyd v. United States*, 116 U.S. 616, 622-23 (1886) (act of 1863). Moreover, "[m]easures * * * passed in those days of emotional stress and hostility are by no means the most reliable criteria for determining what the Constitution means". *Afroyim v. Rusk*, 387 U.S. 253, 261 n.15 (1967). Accord, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866). See also *Fairbank v. United States*, 181 U.S. 283, 311-12 (1901).

^{348/} 2 The Debates and Proceedings in the Congress of the United States (J. Gales compil., 1834), Appendix, at 2059.

cate, nice, and important."^{349/} Indeed, the erection of a mint was essential to the continued integrity of the nation's coinage:

The dollar originally contemplated in the money transactions of this country [i.e., the silver Spanish milled dollar], by successive diminutions of its weight and fineness [in the Spanish mints], 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 * * * 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, or 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.

* * * *

It was with great reason, therefore, that the attention of Congress, under the late Confederation, was repeatedly drawn to the establishment of a mint; and it is with equal reason that the subject has been resumed * * * .^{350/}

To form "a right judgment of what ought to be done", Hamilton posed two questions, "1st. What ought to be the nature of the money unit of the United States?", and "2d. What the proportion between gold and silver, if coins of both metals are to be established?"^{351/}

Recognizing that "[a] pre-requisite to determining with propriety what ought to be the money-unit of the United

^{349/} Id.

^{350/} Id. at 2060.

^{351/} Id. at 2061.

States" is "to form as accurate an idea as the nature of the case will admit, of what it actually is", Hamilton referred to the resolutions of the Continental Congress on the subject, noted that they had resulted in "no formal regulation on the point", and concluded that "usage and practice * * * indicate the dollar as best entitled to that character".^{352/} As to "what kind of dollar ought to be understood; or, * * * what precise quantity of fine silver",^{353/} he surveyed the various pieces in circulation over the years, and recommended that "[t]he actual dollar in common circulation has * * * a much better claim to be regarded as the actual money unit".^{354/}

Hamilton recognized that "[t]he suggestions and proceedings hitherto have had for object the annexing of [the title of 'money unit'] emphatically to the silver dollar". Yet, his personal view was that "a preference ought to be given to neither of the metals for the money unit" -- at least "[i]f each of them be as valid as the other in payments to any amount".^{355/} He realized, of course, that adopting equivalent, interchangeable "money units" of both silver and gold would pose practical problems "from the fluctuations in the relative [market-]value of the metals"; but he suggested that this could be overcome "if care be taken to regulate the proportion between them with an eye to their average commercial value".^{356/}

Turning to "the proportion which ought to subsist be-

^{352/} Id.

^{353/} Id. at 2061-62.

^{354/} Id. at 2062-63.

^{355/} Id. at 2064.

^{356/} Id. at 2065.

tween [gold and silver] in the coins", ^{357/} Hamilton proposed two "option[s]": namely, "[t]o approach as nearly as can be ascertained, the * * * average proportion * * * in * * * the commercial world"; or "[t]o retain that which now exists in the United States". ^{358/} The first alternative "requir[ing] better materials than are possessed, or than could be obtained without an inconvenient delay", he recommended the domestic market-ratio of "about as 1 to 15". ^{359/} "There can hardly be a better rule in any country for the legal than the market proportion," he explained, "if this can be supposed to have been produced by the free and steady course of commercial principles. The presumption in such a case is that each metal finds its true level, according to its intrinsic utility, in the general system of money operations." ^{360/}

In the course of determining the method by which the government would defray the expenses of coining silver and gold brought to the mint by private parties (the system of "free coinage"), Hamilton restated the traditional policy against monetary debasement in emphatic terms:

[R]aising the denomination of the coin [is] a measure which has been disapproved by the wisest men of the nations in which it has been practised, and condemned by the rest of the world. To declare that a less weight of gold or silver shall pass for the same sum, which before represented a greater weight, or to ordain that the same weight shall pass for a greater sum, are things substantially of one nature. The consequence of either of them * * * is to degrade the money unit; obliging creditors to receive less than their just

^{357/} Id. at 2066.

^{358/} Id. at 2068.

^{359/} Id.

^{360/} Id. at 2069.

dues, and depreciating property of every kind.

* * * *

[T]he quantity of gold and silver in the national coins, corresponding with a given sum, cannot be made less than heretofore without disturbing the balance of intrinsic value, and making every acre of land, as well as every bushel of wheat, of less actual worth than in time past. * * *

[A debasement would cause] a rise of prices proportioned to the diminution of the intrinsic value of the coins. This might be looked for in every enlightened commercial country; but, perhaps, in none with greater certainty than in this; because in none are men less liable to be the dupes of sounds; in none has authority so little resource for substituting names for things.

A general revolution in prices * * * could not fail to distract the ideas of the community, and would be apt to breed discontents as well among those who live on the income of their money as among the poorer classes of the people, to whom the necessities of life would * * * become dearer. * * *

Among the evils attendant on such an operation are these: creditors, both of the public and of individuals would lose a part of their property; public and private credits would receive a wound; the effective revenues of the Government would be diminished. 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. 361/

In sum, Hamilton recommended two equivalent statutory money-units based on weight, a gold coin of 24-3/4 grains of fine gold, and a silver coin of 371-1/4 grains of fine silver. "[N]othing better", he wrote, "can be done * * * than to pursue the track marked out by the resolution [of the Continental Congress] of the 8th of August, 1786."^{362/}

361/ Id. at 2071-73.

362/ Id. at 2082.

Hamilton's Report thus restated the traditional monetary principles of Anglo-American common law, as Blackstone recapitulated them, as the Continental Congress applied them, and as the Federal Convention embodied them in the Constitution. Congress, Hamilton urged, should adopt silver and gold as the nation's monetary substances, at an exchange-ratio representing the average proportionate value between the metals in the domestic free market. Congress should continue on "the track marked out" under the Articles of Confederation and the Constitution by employing the "dollar" as the "money-unit", or "money of account" -- a silver dollar derived directly from the Spanish milled dollar, and a new gold coin containing a silver-dollar's worth of that metal. The government should provide "free coinage" of both silver and gold for the public. And it should guarantee the preservation of the intrinsic value of the coinage.

b. The coinage acts of the 1790's

Little more than a year later, Congress began enacting these principles into law.

1) The Coinage Act of 1792^{363/}

The Coinage Act of 1792^{363/} initiated a new statutory system embodying the long-recognized common-law and constitutional principles that Hamilton had re-affirmed in his Report. First, Congress followed consistent Anglo-American common-law tradition by continuing the use of silver, gold, and copper as "Money".^{364/} Second, it reiterated the judgment of the Continental Congress and the Constitution that "the money of

^{363/} Act of 2 April 1792, ch. 16, 1 Stat. 246.

^{364/} § 9, 1 Stat. at 248.

account of the United States shall be expressed in dollars or units", ^{365/} and defined the "DOLLARS OR UNITS" in terms of weight, as "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 * * * silver". ^{366/} Perhaps recognizing that to adopt Hamilton's suggestion of a "gold dollar" would cause confusion and require constant governmental supervision to "regulate * * * Value[s]", Congress created no such coin, instead mandating the coinage of "EAGLES", "each to be of the value of ten dollars or units", ^{367/} that is, of the weight of fine gold equivalent in the marketplace to 3,712-1/2 grains of fine silver. ^{368/} Following Hamilton's suggestion, though, it 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". ^{369/} And it made "all the gold

^{365/} § 20, 1 Stat. at 250.

^{366/} § 9, 1 Stat. at 248.

^{367/} § 9, 1 Stat. at 248.

^{368/} Thus, Congress did not establish a "gold dollar", or enact a "gold standard", as the popular misconception holds. E.g., 7 Encyclopaedia Britannica, "Dollar" (1963), at 558, erroneously reports that the "dollar * * * was defined in the Coinage Act of 1792 as either 24.75 gr. (troy) of fine gold or 371.25 gr. (troy) of fine silver". The Act did no such thing. It explicitly defined the "dollar" as a fixed weight of silver, and "regulate[d] the Value" of gold coins according to this standard unit (or money of account) and the market exchange-ratio between the two metals. Nowhere did the Act refer to a "gold dollar", only to various gold coins of other names that it valued in "dollars". For the correct interpretation of the act, see, e.g., A. Hepburn, History of Coinage and Currency in the United States and the Perennial Contest for Sound Money (1903), at 22.

^{369/} Coinage Act of 1792, § 11, 1 Stat. 246, 248-49.

and silver coins * * * issued from the said mint * * * a lawful tender in all payments whatsoever, those of full weight according to the respective values [established in the act], and those of less than full weight at values proportional to their respective weights".^{370/} Congress also provided free coinage "for any person or persons",^{371/} and affixed the penalty of death for the crime of debasing the coinage.^{372/}

Thus did Congress 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 371-1/4 grains of fine silver. It coined American "dollars" as "Money", containing this intrinsic value of silver. It coined American "eagles" as "Money", containing a fixed weight of pure gold -- and "regulate[d]" their "Value" at so-many dollars by comparing their intrinsic value in (or weight of) fine gold to the market-equivalent of silver. It gave both the silver and gold coins legal-tender character for their intrinsic values in all payments. It opened the mint to free coinage of the precious metals. And it outlawed debasement of the nation's new "Money".

Self-evidently, the statesmen who drafted and approved these measures were more than merely conversant with common-law principles, the experiences of the Continental Congress, and the monetary provisions of the Constitution. And their handiwork is more than a merely coincidental embodiment of

^{370/} § 16, 1 Stat. at 250.

^{371/} § 14, 1 Stat. at 249.

^{372/} § 19, 1 Stat. at 250.

those principles, experiences, and provisions. Rather, the Coinage Act of 1792 is, taking into account the vicissitudes of the time, a perfect reflection of what the common law and the law under the Articles of Confederation had been before ratification of the Constitution, and what the constitutional law was then and remains today.^{373/} It is a definitive interpretation, elaboration, and application of the Constitution -- with, in some of its sections at least, a clearly constitutional character of its own.^{374/}

2) The Coinage Act of 1793

Almost a year later, recognizing the need to make "current" various foreign coins, Congress enacted a statute to "regulate the[ir] Value[s]", declaring that these "foreign gold and silver coins shall pass current as money within the

^{373/} Section 11 of the Coinage Act was clearly constitutional in 1792, representing as it did a reasonable means of "regulat[ing] the Value" of gold coins as against the dollar in an era in which financial data was uncertain and difficult to communicate with dispatch. Today, such a statutorily fixed exchange-ratio for the precious metals would be unreasonable, given the technical sophistication of existing financial institutions. Section 11 of a parallel modern act ought to read, perhaps, "That the proportional value of gold to silver in all coins which shall by law be current as money within the United States, on any particular day or days, shall be the proportion between pure gold and pure silver, according to quantity in weight, existing at the beginning of the business day or days in [here Congress would identify a financial market], or, if the particular day or days is or are not a business day or days, on the last preceding business day or days."

^{374/} Sections 9 (definition of the "dollar"), 14 (free coinage of silver and gold), 16 (legal-tender character for silver and gold coins), 20 (dollar identified as "money of account"), 1 Stat. at 248, 249, 250-51.

In particular, Congress' determination of the proper weight of the dollar is, for all practical purposes today, a statement of constitutional law unalterable except by amendment of the Constitution itself. For, at the remove of almost two centuries, to check the accuracy of the conclusion that 371-1/4 grains of fine silver best represents an average of the various "dollars" in circulation in the United States in 1792 is most probably impossible.

United States, and be a legal tender for the payment of all debts and demands, at [specified] rates".^{375/} In anticipation of a supply of United States coin, however, Congress provided that "at the expiration of three years next ensuing the time when the coinage * * * shall commence at the mint [created in the Coinage Act of 1792] * * * all foreign * * * coins, except Spanish milled dollars * * * shall cease to be a legal tender".^{376/} Thus, once again, Congress endorsed the Spanish milled dollar as the basic money-unit of the country.

c. The coinage-acts of the mid-1800's

The next significant congressional actions dealing with coinage occurred almost half a century after the Coinage Act of 1792.

1) The Coinage Act of 1834

Because it has been widely misinterpreted, particularly by the United States Supreme Court,^{377/} the Coinage Act of 1834^{378/} deserves detailed consideration.

The Coinage Act of 1792 had adopted a silver standard (the "dollar"), but created a bimetallic system, based equally in principle on silver and gold so long as the market exchange-ratio between the two metals remained at the then-long-customary figure of 15 to 1. Very soon afterwards, however, gold began to appreciate as against silver, leading to the virtual

^{375/} Act of 9 February 1793, ch. 5, § 1, 1 Stat. 300, 300.

^{376/} § 2, 1 Stat. 300, 301. Actually, Congress continued the "currency" of foreign coins for many years after the mint became operational. Act of 10 April 1806, ch. 22, 2 Stat. 374.

^{377/} Post, pp. 142-47.

^{378/} Act of 28 June 1834, ch. 45, 4 Stat. 699.

disappearance of gold coinage from domestic commerce.^{379/}
Meanwhile, banks proliferated -- and, with them, the issuance
(and, predictably, over-issuance) of paper currencies.^{380/} By
the early 1830's, for all practical purposes, commerce func-
tioned primarily with this unstable bank-paper.

At the same time, the Bank of the United States was the
center of a political maelstrom: President Andrew Jackson and
his supporters in the House of Representatives being committed
to its destruction.

Continuing his attacks upon the Bank[, Jackson] had, in the fall of 1833, appointed as Secretary of the Treasury, Roger B. Taney, who agreed with him that the federal government should stop depositing funds in the Bank and should pay out as rapidly as possible government funds already in the Bank. This famous episode of the "withdrawal of the deposits" precipitated a bitter controversy in the session of Congress * * * which saw the enactment of the coinage legislation of 1834. It led the Bank of the United States to curtail drastically its loans and discounts, thereby precipitating a period of credit stringency. This "pressure," as it was called, was felt throughout the country; in Congress so much discussion arose about it and its relation to the bank controversy that the session came to be known as the "Panic Session."

^{379/} See generally, e.g., J. Laughlin, History of Bimetallism in the United States (1886).

For instance, on May 1832 the Director of the Mint wrote to Congress that "[g]old at present constitutes no part of our currency; and not having, within any recent period, performed in the United States the offices of coin, it has not been the standard of value assumed in existing contracts". 10 Register of Debates in Congress (Gales & Seaton eds. 1834), Appendix, at 276.

^{380/} See generally, e.g., C. Conant, A History of Modern Banks of Issue (1902), ch. xiv. For a penetrating contemporary account, see W. Gouge, The Curse of Paper-Money and Banking; or A Short History of Banking in the United States of America, with an Account of Its Ruinous Effects on Landowners, Farmers, Traders, and on All the Industrious Classes of the Community (1833).

* * * Much of the time of both branches of Congress was taken up receiving and listening to memorials and petitions calling attention to commercial and financial distress, and placing the blame either on Jackson for ordering the withdrawal of the deposits or upon the Bank for putting on the "pressure" in retaliation. This was the political atmosphere in which the coinage legislation of 1834 was enacted. ^{381/}

The Coinage Act of 1834, then, addressed two inter-related problems: (a) restoring the proper "regulat[ion]" of gold as against the (silver) dollar; ^{382/} and (b) attempting to reform a currency-system deranged by irresponsible banking-practices.

a) The congressional debates: re-iterating the constitutional "hard-money" policy

The congressional debates on the Coinage Act of 1834 show that the "hard-money" policy the Framers had embodied in the Constitution in the late 1700's persisted among congressional leaders in the mid-1830's. Perhaps the most important influence behind the legislative reform of 1834 was the Select Committee on Coins of the House of Representatives. ^{383/} From 1831 through 1834, the Select Committee made four reports to

^{381/} O'Leary, "The Coinage Legislation of 1834", 45 J. Polit. Econ. 80, 81 (1937).

^{382/} As the Director of the Mint wrote to Congress on 25 May 1832, "[w]e may experiment on our gold coins without fear and with some resulting convenience: though a legal tender, they have never been a measure of value; and while kept from interfering with the measure in silver, there is no danger: but it is a grave question to disturb the quantity of fine metal in the silver coin". 10 Register of Debates in Congress, ante note 379, Appendix, at 280.

^{383/} "A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report * * * ." Zuber v. Allen, 396 U.S. 168, 186 (1969).

Congress, each providing detailed analyses of monetary theory and practice, against a consistent background of constitutional principles.^{384/}

On the question of what materials best function as "money", the Select Committee emphatically reported that "gold and silver is the only sound, invariable, and perfect currency that human wisdom has yet devised", "the only effective money under all contingencies and emergencies".^{385/} It was no less certain of the pre-eminent place the precious metals hold in the constitutional monetary system: "The enlightened founders of our constitution obviously contemplated that our currency should be composed of gold and silver coin."^{386/}

The constitution of the United States expressly states that "the Congress shall have power to coin money, regulate the value thereof, and of foreign coin," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * * ;" and it recites that "no State shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts."

* * * [T]he obvious intent and meaning of these special grants and restrictions was, to secure permanently to the people of the United States a gold or silver currency, and to delegate to Congress

^{384/} Reports of the House Select Committee on Coins, 22 February 1831, 17 March 1832, 30 June 1832, and 19 February 1834, in 10 Register of Debates in Congress, ante note 379, Appendix, at 257, 250, 243, 242.

^{385/} Report of 17 March 1832, in 10 id., Appendix, at 252, 257.

^{386/} Report of 19 February 1834, in 10 id., Appendix, at 243.

every necessary authority to accomplish or perpetuate that beneficial intention. 387/

Indeed, the Committee noted, "the constitutional expression is clear and distinct". 388/

On the relation between silver and gold, the Committee stressed that "the desideratum in the monetary system is a standard of uniform value", and that this standard should be silver, "the ancient currency of the United States, the metal is which the money unit is exhibited". 389/ Indeed, at one

387/ Report of 30 June 1832, in 10 id., Appendix, at 246.

The losses and deprivation inflicted by experiments with paper currency, especially during the Revolution; the knowledge that similar attempts in other countries * * * were equally delusive, unsuccessful, and injurious; had likely produced the conviction that gold and silver alone could be relied upon as safe and effective money.

Report of 17 March 1832, in 10 id., Appendix, at 251.

388/ Report of 17 March 1832, in 10 id., Appendix, at 255.

389/ Report of 17 February 1834, in 10 id., Appendix, at 245, 246.

Two of the Committee's final recommendations on this subject spell out its policy clearly:

3d. That there are inherent and incurable defects in the system which regulates the standard of value in both gold and silver: its instability as a measure of contracts, and mutability as the practical currency of a particular nation, are serious imperfections; whilst the impossibility of maintaining both metals in concurrent, simultaneous, or promiscuous circulation, appears to be clearly ascertainable.

4th. That the standard being fixed in one metal, is the nearest approach to invariableness, and precludes the necessity of further legislative interference.

10 id., Appendix, at 269.

point, the Committee even suggested the radically advanced policy that gold be "degovernmentalized" as money, and that silver alone be a legal tender, thereby achieving "the nearest practicable approach to invariableness" in the standard, and making "no alteration or interference on the part of Congress * * * ever afterwards * * * required".^{390/} However, accepting that it might "be the pleasure of the Legislature to attempt an effectual adjustment of the relative value of gold [to silver]",^{391/} the Committee described how "[t]o raise the relative value of gold so as to approximate its estimate in general commerce, and preserve silver as the practical standard".^{392/}

On the merits of supposed substitutes for silver and gold, the Committee also had definite -- and sound -- ideas. "The use of a substitute for the precious metals", it wrote, "must be mainly attributable to mistaken views as to the nature of money * * * ." ^{393/}

It being daily and universally realized, that money will procure every thing[,]
* * * the impression naturally arises,
that if its amount is numerically large,
in the like ratio must be its efficiency
in supplying those wants, and in promoting
industry and prosperity.

Minds of great acuteness have yielded
to these plausible but delusive impressions
* * * . ^{394/}

^{390/} Report of 22 February 1831, in 10 id., Appendix, at 265.

^{391/} Report of 22 February 1834, in 10 id., Appendix, at 265.

^{392/} Report of 19 February 1834, in 10 id., Appendix, at 243.

^{393/} Report of 17 March 1832, in 10 id., Appendix, at 253.

^{394/} Report of 17 March 1832, in 10 id., Appendix, at 250.

The Committee, though, was not prone to such "delus[ions]", but understood precisely why paper currencies, then epidemic in American commerce, were not only inferior to silver and gold as media of exchange, but also positively detrimental in and of themselves -- and particularly under the management of self-interested banks.

"The peculiarities in a circulating medium of coin, or of paper," the Committee explained,

are strikingly dissimilar. Gold or silver, being costly articles, which can only be procured by the transfer of an equal value of the products of industry, national interest, the most effective check imaginable, is constantly operating to prevent any unnecessary increase in their quantity; on the other hand, the cost of bank notes is trivial, and their emission yielding a large profit to the privileged issuers, the prospect of gain powerfully encourages the most active efforts for their increase * * * . 395/

Noting that, "as money is the just measure of commerce and exchange, and the standard by which contracts are fulfilled, it is of high importance that its quantity should be subject to little variation", the Committee admonished its readers to reflect on how, "in states where paper is issued, though convertible into specie, the redundancy of the circulation is confined to no ascertained limit". And it concluded that "[t]his inherent defect in convertible paper presents an objection almost insuperable to its use". 396/

For, the Committee explained, "[t]he existence of a legal right to convert bank notes into coin is specious and imposing, inviting the judgment to conclude that it must be an effective restraint upon overissues", whereas in fact it is not. "When

395/ Report of 30 June 1832, in 10 id., Appendix, at 244-45.

396/ Report of 17 March 1832, in 10 id., Appendix, at 254.

banks enjoy public confidence, and their notes are adapted to discharge every object of expenditure," the Committee made clear, "the occasions will be very rare when coin will be demanded." The "practical fac[t]" is simply that

the liability of a currency exclusively of paper to be redeemed in coin, is entirely inoperative until an unfavorable balance in foreign trade creates a demand for specie for exportation; [however,] this effect rarely occurs in less than three or four years, during which time the banks are unrestrained in their issues, unless their own ideas of prudence should be sufficiently powerful to resist the temptation of making profitable loans. 397/

The Committee, though, well knew how weak the banks' "own ideas of prudence" then were, bluntly advancing its "conviction" that the banks, during the last two years, have contributed greatly to inconsiderate overtrading * * * ; injudicious discounts and loans have inflicted serious injury upon the circumstances of the borrowers, and the facility thus given to an increase of notes has caused excessive issues, and great depreciation of the currency". 398/

Indeed, in the Committee's view, the floods of depreciated paper the banks had incautiously emitted were unjustified in economic theory, pernicious in financial practice, and subversive of the monetary system the Constitution and Congress had established. "The consequence of the present system," the Committee explained, is

that the currency of the United States is bank notes, to the exclusion of the precious metals * * * .

* * * [T]he exclusion of gold and silver coins from circulation is a serious defect, which ought not to be tolerated, and which should be speedily remedied.

397/ Report of 17 March 1832, in 10 id., Appendix, at 254.

398/ Report of 17 March 1832, in 10 id., Appendix, at 254.

There is no example on record of the successful issue of a paper currency, and our experiment has been too short and dubious to prove its suitability as a permanent regulation.

* * * *

Our present system is at variance with established principles in regard to money; with the views of the generality of the most approved writers; with the intentions of the wise founders of the constitution, and with the aim and object of the two Secretaries of the Treasury, who were the prominent, able, and influential advisers of Congress upon the subject of currency. 399/

In particular,

the present system of circulation is destructive to the uniformity of the standard of value, occasioning it to vary in a ratio with a very variable currency, causing it to fluctuate with the changeable and interested policy of the banks, instead of being regulated by the deliberate and impartial judgment of Congress; [and the Committee] think[s] that it encourages inconsiderate speculations, facilitates over-trading, interferes with the just fulfillment of contracts, and operates, according to the uncertain course of events, to the prejudice of debtors and creditors. 400/

Self-evidently, this system, "which is exclusively paper, is not the currency which was contemplated by any of the distinguished statesmen [who framed the Constitution], or such as Congress intended to establish".^{401/} "[N]one of the laws of Congress ever contemplated that the currency was to be composed, as at present, exclusively of bank notes", the Committee urged -- for "the high authority (interdicted to the States) 'to coin money and regulate the value thereof' by the standard of

399/ Report of 17 March 1832, in 10 id., Appendix, at 254.

400/ Report of 17 March 1832, in 10 id., Appendix, at 257.

401/ Report of 19 February 1834, in 10 id., Appendix, at 243.

gold and silver, is rendered nugatory and inoperative under the present system".^{402/}

And the Committee presciently warned that "gold and silver coins cannot be maintained permanently in circulation, unless the issue of bank notes of one to ten dollars be prohibited".^{403/}

Thus, the Select Committee on Coins enunciated monetary views perfectly coincidental with those of common law, of the Continental Congress (after its dolorous experiences with bills of credit), of the Framers of the Constitution, of the Constitution itself, of Secretary of the Treasury Alexander Hamilton, and of the Congress that adopted the Coinage Act of 1792. But the Committee added indictments of paper currency perhaps even more sweeping than those the Founders made, because directed at ostensibly redeemable notes that private banks, not the national or state governments, issued and that enjoyed no legal-tender character.

The debates in Congress, and particularly in the House of Representatives, reflected concordant views. Indeed, the only important dispute in the latter body was whether Congress should set the exchange-ratio between silver and gold at 15-5/8 to 1 (as the Committee originally recommended) or at 16 to 1 (as the Committee's chairman proposed on the floor). Representative Clowney, for a prime example, recalled how

[t]he particular evils, which it is the object of the bill now under consideration to remedy, are to be traced to the act of Congress passed in 1792 * * * regulating the value of coins. * * *

[In this act] we find the relative value of gold to silver * * * to be one to fifteen * * * .

^{402/} Report of 17 March 1832, in 10 id., Appendix, at 257.

^{403/} Report of 17 March 1832, in 10 id., Appendix, at 257.

The reason which induced Mr. Alexander Hamilton * * * to recommend this ratio * * * , and Congress to adopt it, was because they considered it the average value of the two metals at the time, amongst the principal commercial nations. While I admit the soundness of the principle, * * * yet does the calculation no longer hold true.

* * * *

[W]hen we come to apply the remedy, we find it an extremely nice, difficult, and complicated question to determine what proportion of gold to silver in our coinage is necessary to place the two coins upon an equal footing in commerce, and ensure their concurrent circulation, so that the one may be readily exchanged for the other by tale * * * .

There are those * * * who not only deny the expediency of regulating the standard of value in both metals, but also the practicality of so regulating it as to preserve both metals in simultaneous * * * circulation. 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 relative value of the two coins is liable to be changed by a variety of causes beyond the reach of legislative control. * * * 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 * * * .

That such were the principles that governed the committee in recommending, in the original bill * * * , the proportion * * * of 1 to 15.625, may be fairly inferred from the express language of the report * * * : "Your committee desire to raise the relative value of gold to silver, so as to approximate its estimate in general commerce, and preserve silver as the practical standard; and to authorize the assay and stamping of domestic gold * * * . 404/

404/ 10 id., pt. 4, at 4646-47.

Clowney, however, believed that a fully bimetallic system was possible, because,

[a]lthough the law which governs the supplies of gold and silver is not invariable, yet have the quantities produced borne such a uniform relative proportion in weight as to preserve for centuries in succession a degree of uniformity in their relative value, sufficient to render them together the fit measure of property. * * * From [the] history of the two metals, we have but little reason to apprehend any great change in their present commercial value * * * .

* * * *

The changes, therefore, in the relative value of the two coins being inconsiderable, * * * it would be of an immense advantage to a nation to be able to resort to both of the metals instead of one. 405/

Representative Gorham agreed that

the true ratio of gold and silver should be accurately fixed. * * * The question in this bill * * * was one purely and wholly separate from all politics. It was a question of business, which rested altogether on different grounds. It was impossible for that House, by any act of its legislation, either to take from or to add to the value of gold. That value was fixed by other things than acts of Congress. The Government might mark its own coin with what value it pleased, but it could not give it that value; and if by law they allowed money to be a lawful tender for more than its value, they immediately affected the obligation of contracts, which they were forbidden to do. Their law could no more change the value of gold than it could make gold. The real use of a mint was only to assure the people that the piece stamped was of a certain weight and fineness. If that weight could be stamped in figures, it would be all that was wanted.

* * * [T]he danger of establishing an improper standard was sufficiently obvious. * * * The ratio of 16 to 1 has never been established by the legislation

405/ Id., pt. 4, at 4647.

of any nation but Spain, and it was unquestionably above the true value. It might be asked how we were to get the true value? The answer * * * was, go into the great market of the commodity; there the average of demand and supply would be accurately fixed, and there only. 406/

Representative Jones admitted that the then-existing ratio of 1 to 15 was "too low", but pointed out that "how much it will be proper to raise it is a question difficult to determine, and on which there may honestly exist much difference of opinion". In his view, "the ratio of 1 to 16 * * * is not 1 per cent. * * * over the commercial value" -- and, "[i]n fixing upon this ratio, we shall avoid the extremes on either side". Moreover,

there is a continual increase in the value of gold, and if the increase of the legal value cause any increase in the market value, it must be evident that one to sixteen * * * will, in a short time, be only equal to the increased market value. If we stop short of this, we shall soon be compelled again to increase the value of that metal, or to struggle with the same difficulties which now prevent the circulation of our precious metals. 407/

Representative Gillet concurred in the expediency of increasing the circulation of gold coin, arguing that

the true interests of the country called for an increased circulation of the precious metals * * * . He was aware that we had, on another occasion, been told of a currency better than gold and silver, which had been furnished by a corporation. He entertained no such opinion of the productions of any corporation. He preferred a currency recognized by and resting upon the laws of the Union, the value of which should not depend upon the good or ill fortune of a corporation, or its ability to pay its debts, and which should not vibrate, contract, or expand, with the uncontrolled will of a soulless body. Our constitution had given us the

406/ Id., pt. 4, at 4650-51.

407/ Id., pt. 4, at 4654, 4656.

"power to coin money and regulate the value thereof, and to regulate the value of foreign coins." This clause of the constitution confers all the power Congress has over this subject. It had been aptly called "a hard-money power." Under this, it was our duty to * * * make such coins as the wants of our country require. * * * Congress had no power to make any other currency * * * . He hoped to see all small bills retired from circulation, and their place filled with coins. This would place in the hands of the poor and laboring classes a safe and sound currency, which would remain unaffected by the crumbling of rotten banks, and the fearful agitations of panics. Then the humble individual whose all might consist of a few dollars would not be injured or alarmed by the cry of partisans and demagogues on the subject of currency. * * * Under the paper system, banks have broken, and * * * on whom did the loss most severely fall? Upon the poor, who understood little of the condition and credit of banks. The wealthy usually foresaw the evil and protected themselves. * * * It was due to the American people that this Congress should change the order of things, and give to the people a currency which should not fluctuate in value, as a corporation might manage well or ill, or be fortunate or unfortunate. We ought to give them a currency that should be as immutable as the metals of which he proposed to make it. 408/

408/ Id., pt. 4, at 4658-59.

Representative Gillet than referred to remarks of another speaker

that it was probable, if we adopted this proposition, the [Bank of the United States] would call in its discounts in order to collect in silver, * * * and, in that way, the people would be injured and distressed. [Representative Gillet] had no fears on this ground. He, however, must thank the gentleman for the admission of the manner in which the bank created distress. * * * That it had unnecessarily called in its debts in certain points, and in that way produced * * * panic and distress, was * * * undoubtedly true * * * ; that the bank had closed its doors upon our committee, and concealed its secret

(FOOTNOTE CONT'D NEXT PAGE)

Representative Binney refrained from singling out the Bank of the United States for especial criticism, but did premonish his colleagues that "banks of all names and descriptions could, and probably would, make a profit out of a derangement in the proportional value of the gold and silver coins, and, therefore, that it was the duty of the House not to give them the opportunity".^{409/} As far as he was concerned, "[t]he whole question * * * was * * * whether the proposed ratio * * * did not overvalue the gold; and this was a simple question of fact, depending upon evidence".^{410/}

Representative Ewing agreed that the "ratio [of gold]

(FOOTNOTE 408 CONT'D)

orders and doings, was known to the world; and we had a right to infer they would not bear scrutiny. And now its ability to produce evil is held up to us as a terror against making this gold currency, which is demanded alike by the dictates of sound policy and the voice of an intelligent people.

The gentleman, no doubt, gave us his best deliberations, but his conclusions were precisely such as [Representative Gillet] should have expected from the bank, if it desired to render our efforts, in giving the country a convenient constitutional currency, entirely unavailing; so that it might present to a future Congress the failure of this attempt, as an important argument in favor of a recharter. Whether the bank did intend to defeat our efforts, the country would determine after witnessing the course of events in Congress. * * * The country imperiously called for such legislation as shall restore the use of a constitutional currency, and [Representative Gillet's] vote would be uniformly given with the view of producing that result.

Id., pt. 4, at 4662.

^{409/} Id., pt. 4, at 4662.

^{410/} Id., pt. 4, at 4666.

with silver should be founded upon an accurate estimate of its intrinsic relative value".^{411/}

And Representative Cambreleng encouraged the House to "[p]ut your gold coins in circulation" -- and then "[e]very man would see the fallacy of the supposed necessity for our small-note circulations, and of granting to corporations the power to flood the country with bank notes".^{412/} The House agreed; and the bill passed by a large majority.

In the Senate, debate was sparse, but to the same point. Answering the charge of Senator Sprague that the ratio of 1 to 16 "was more than the true relative proportion", Senator Webster "referred to the various modes of computing value, and the difficulty of coming to an accurate result".^{413/} Again, the bill passed by a large majority.

Thus, the legislative history of the Coinage Act of 1834 confirms what the act recites on its face: namely, a careful attempt by Congress to "regulate the Value" of gold coins relative to the constitutional "money of account", the (silver) dollar. First, Congress made no attempt to change the fine-silver content of the constitutional dollar at all, to create a competing statutory "gold dollar",^{414/} or in any way to question the silver-standard. Quite the contrary: the Select Committee emphasized, again and again, the pre-eminent place of silver as the standard of the nation's monetary system. Second, Congress set the "Value" of the (gold) eagle by

^{411/} Id., pt. 4, at 4668.

^{412/} Id., pt. 4, at 4672.

^{413/} Id., pt. 2, at 2121-22.

^{414/} Indeed, the Senate rejected a proposal to create a "gold dollar". Id., pt. 2, at 2121.

reference to the (silver) dollar, at the newly-accepted market exchange-ratio between gold and silver, just as it had done in 1792. Third, Congress declared that gold coins minted before the effective date of the act should be valued thereafter at their intrinsic values according to the revised exchange-ratio.^{415/} And fourth, just as it had done in 1792, Congress made the new "gold coins * * * receivable in all payments, when of full weight, according to their respective values; and when of less than full weight, at less values, proportioned to their respective actual weights"^{416/} -- exemplifying once again its understanding that "To * * * regulate the Value" of a coin means to state its intrinsic value (in weight of precious metal) as against the standard, and to make it "current" (or legal tender) for that "Value" only.

Yet, almost incredibly, various "authorities" have characterized the Coinage Act of 1834 as a "debasement" of the "gold standard", a "devaluation" of the dollar, an expropriation of creditors, an impairment of the obligation of contracts, or an exercise of some supposedly unlimited legislative power to transmute the denominations of coins without reference to their intrinsic values! For a prime example, in Knox v. Lee,^{417/} the United States Supreme Court described the act as "a new regulation of the weight and value of gold coin", in which

^{415/} Act of 28 June 1834, ch. 45, § 3, 4 Stat. 699, 700: "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".

^{416/} Compare Act of 28 June 1834, ch. 45, § 1, 4 Stat. 699, 700, with Act of 2 April 1792, ch. 16, 1 Stat. 246, 250.

^{417/} 79 U.S. (12 Wall.) 457 (1871).

about six per cent. 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 per cent. less gold than was required to pay them before.

* * * The creditor who had a thousand dollars due him on the 31st 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 gold coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars. 418/

From these supposed but erroneous "facts", and the correct observation that no creditor had judicially challenged the Coinage Act of 1834 as an unconstitutional deprivation of his property, the Court strongly implied that Congress has a constitutional power to enact "a law debasing the current coin". 419/ However, analysis of the Court's statements, in light of the actual language of the Coinage Act of 1834 and of the meaning of the phrase "To * * * regulate * * * Value", explodes this reasoning.

First, on the face of the act, nothing "was taken from the weight of each dollar". The act changed the intrinsic values (in weight and fineness) of gold coins, to be sure -- but, neither in 1834 nor at any previous time was there or had there been a "gold dollar", from which any "weight" could be "taken". 420/ The act made no change in -- indeed, said nothing about -- the (silver) dollar. Instead, the act sub silentio retained the dollar, unchanged, as Congress had

418/ Id. at 551, 552 (dictum). The Court later uncritically repeated this untruth in *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 305 (1935).

419/ 79 U.S. (12 Wall.) at 551-52 (dictum).

420/ The first "gold dollar" appeared only some fifteen years later. Act of 3 March 1849, ch. 109, 9 Stat. 397. Post, pp. 154-55.

defined it in 1792, and once again used the dollar as the standard by which to "regulate" the new gold coinage.

Second, on the face of the act, no "creditors were subjected to a corresponding loss" through any "debasement" of the gold coinage. Again, the act changed the intrinsic values (in weight and fineness) of gold coins in order properly to "regulate the Value" of those coins as against the immutable silver standard. But this was neither a "debasement" of the coinage nor an "expropriation" of creditors in any constitutional sense of those terms.

Here, concrete examples are in order. A contract executed prior to the effective date of the act, but calling for payment of a particular sum of money thereafter, could have defined that payment in six ways -- say, (i) "1,000 dollars", (ii) "100 eagles", (iii) "1,000 dollars in eagles", (iv) "1,000 dollars in gold coin of the United States", (v) "100 eagles of the present weight and fineness", or (vi) "1,000 dollars in gold coin of the United States of the present weight and fineness". Obviously, a contract stipulating payment as in definition (i) would have been unaffected by the Coinage Act of 1834. Self-evidently, the creditor would have received, not "a smaller number of silver dollars", as the Knox Court foolishly asserted, but the selfsame number. A contract stipulating payment as in (v) and (vi) would also have been unaffected by the act, at least as to the number of gold coins the creditor would have received. To be sure, after 1834 the creditor could then have exchanged those one hundred pre-1834 (gold) eagles for more (again, not less) than one thousand (silver) dollars. But the relative "Value" he received would have been the same -- because, if the payment had been made before 1834, in the market the "100

eagles" would have exchanged for more than one thousand dollars, too. Thus, where the contract explicitly specified the creditor's entitlement to "coined gold of the weight and fineness of the then existing [i.e., pre-1834] gold coinage", the creditor would have received precisely that, contrary to the Knox Court's assertion. Where the contract did not explicitly specify payment in coin "of the present weight and fineness", but spoke only in general terms, as in stipulations (ii), (iii), and (iv), however, the creditor would nevertheless have received post-1834 exactly that to which the Constitution entitled him pre-1834. After all, because the nation's monetary system rested on a silver, not a gold, standard, the "eagle" was not and could not have been a constitutionally immutable "Value". Rather, constitutionally, the "eagle" was the amount of fine gold the "Value" of which was ten (silver) dollars, at the then-existing market exchange-ratio between gold and silver. And Congress had a constitutional duty under Article I, § 8, cl. 5 whenever necessary to change the intrinsic value of the "eagle" in order as much as possible to maintain unchanged ("regulate") its "Value" in dollars. Thus, pre-1834 contracts specifying payment in "eagles" generally, without reference to "the present weight and fineness", were of legal necessity always subject to Congress' fulfillment of its constitutional duty to "regulate the Value" of gold coinage. And therefore the "regulat[ion]" embodied in the Coinage Act of 1834, far from constituting an impairment of the obligation of any contract, or an expropriation of any creditor's property, was instead a constitutional definition of that obligation establishing what the creditor's "property" properly was.

421/ Cf. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 389, 428-44 (1934).

Amazingly, the Knox Court itself recognized that "contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority";^{422/} but, apparently, its inability to comprehend the meaning of the power "To * * * regulate * * * Value" deceived it into an erroneous view both of creditors' rights prior to 1834 and of the effect of the act on those rights thereafter. Contrary to what the Court said, "the day before the act took effect", a creditor who had contracted for "1,000 dollars" or for "100 eagles" was not "entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage".^{423/} Rather, if the contract specified "1,000 dollars", the creditor was entitled, explicitly and by constitutional definition, to one thousand silver coins as described in the Coinage Act of 1792. On the other hand, if the contract specified "100 eagles", the creditor was entitled to one hundred of the gold coins the "Value" of which was ten (silver) dollars, as determined by Congress from time to time pursuant to its power "To * * * regulate * * * Value". And, in any event, as a practical matter, prior to 1834 no creditor whose contract specified payment generally in "dollars" received any gold at all (even though eagles were legal tender at their nominal dollar-values), because all debtors fulfilled such contracts with silver, at that time statutorily over-valued relative to gold.^{424/}

^{422/} 79 U.S. (12 Wall.) at 551.

^{423/} Id. at 552.

^{424/} E.g., 10 Register of Debates in Congress, ante note 379, pt. 4, at 4649 (remarks of Representative Clowney in debate on the Coinage Act of 1834).

(b) The congressional purpose: destroying
paper currency with gold

The legislative history of the Coinage Act of 1834 shows that Congress attempted in good faith properly to "regulate the Value" of gold coinage according to the market exchange-ratio between gold and silver. Establishing this ratio, however, was an inherently difficult problem, over the solution to which reasonable men could well, and did, differ.

Originally, the Select Committee on Coins recommended a ratio of 15-5/8 to 1. But on the floor of the House, the Committee's Chairman introduced an amendment to the bill calling for a ratio of 16 to 1. The traditional explanations for adoption of this ratio by Congress are three: (i) experience in other nations had shown the practical expediency of such a proportion; (ii) the difference between that ratio and other equally plausible numbers was, practically speaking, insignificant; and (iii) if (as Congress expected) gold continued to appreciate as against silver, any slight over-valuation would correct itself and obviate a need for further legislative "regulat[ion]".^{425/} But, in adopting a higher, rather than a lower, proportion between silver and gold, Congress actually had in mind a purpose even more far-reaching in its "hard-money" implications than simply fulfilling the constitutional duty properly to "regulate the Value" of gold coinage. This purpose was to strike a fatal blow at the

^{425/} See 10 id., pt. 4, at 4653-54 (Representative Jones), 4660 (Representative Gillet), 4649-50 (Representative Clowney), 4655-56 (Representative Jones).

ability of banks to sustain a circulation of small-denomination paper currencies. ^{426/}

As early as 1832, the Select Committee on Coins warned Congress of the banks' natural antipathy to "hard money". "If the profit of these institutions depends materially upon the emission of their paper," queried the Committee,

is it likely, is it reasonable, to expect that they will ever voluntarily make payments in coin? * * * Is it not obvious that their interest presents constantly a strong inducement to avoid the disbursement of specie? Have we not all experienced, or heard of the reluctance with which banks part with coin? * * *

This course of business is in accordance with the nature of the vocation; and * * * show[s], in the practical operation of our money system, the inefficacy of any measure to increase the circulation of gold or of silver, whilst bank notes retain the public confidence, and are issued of small denominations. ^{427/}

Bank-notes of small denominations, the Committee warned, were "highly objectionable in two respects": (i) "[i]n

^{426/} Congressional animosity to bank-paper is particularly important, in light of the United States Supreme Court's later erroneous dicta misinterpreting the Coinage Act of 1834, and its extension of this historical and legal blunder to the equally invalid conclusion that the legal-tender acts of the Civil War were constitutional because they effected through a paper medium the same type of "debasement", which no one "ever imagined" * * * was taking private property without compensation or without due process of law". *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 551 (1871). Of course, no one who examined it intelligently "ever imagined" that the Coinage Act of 1834 unconstitutionally deprived anyone of property, because the act had no such capability, except in the befuddled imaginations of the *Knox* majority. Yet the Court's sorry mistake in advancing that act as an argument by analogy in favor of paper currency appears even more glaringly ignorant against the background of Congress' intent to extirpate such currencies through the re-introduction of a sound gold coinage into the market.

^{427/} Report of 17 March 1832, in 10 Register of Debates in Congress, ante note 379, Appendix, at 268.

subjecting the industrious and uninformed classes to the risk of loss, from the impracticality of knowing the genuineness of the paper, or the solvency of the issuers"; and (ii) in "render[ing] the currency exclusively paper, and remov[ing] the only steady and effective limitation upon excessive issues".^{428/}

Moreover, in effect, then-current banking practices had usurped the monetary powers of Congress, too. "The legal authority to regulate the currency * * * was one of the powers granted to Congress by the constitution; but its practical efficiency is exercised exclusively by the banks", the Committee charged.^{429/} And therefore it recommended that Congress consider prohibiting the emission of paper currencies in small denominations.^{430/}

These statements reflected a crescent political, as well as economic, disillusionment with the Bank of the United States, in particular. Indeed, "[t]he real forces back of the ultimately successful effort to establish a coinage ratio of 16:1 were immediately political", "a case of animosity toward the Bank * * * with its circulation of bank notes".^{431/} At this time, President Jackson and his supporters believed that "the substitution of gold coins for bank notes would be a telling blow at the Bank, a blow which the Bank feared".^{432/} Secretary of the Treasury Taney was an especially vocal and bitter enemy of the Bank, who wished to extirpate "the currency

^{428/} Report of 30 June 1832, in 10 id., Appendix, at 246.

^{429/} Report of 17 March 1832, in 10 id., Appendix, at 268.

^{430/} Report of 17 March 1832, in 10 id., Appendix, at 269.

^{431/} O'Leary, "The Coinage Legislation of 1834", ante note 381, at 84.

^{432/} Id. at 85.

of [all] bank notes, * * * establishing in their place a currency of gold coins".^{433/} "Gold was to be the club"; and "the greater the change [in the value of gold] the surer would be the efficacy of the gold club. A ratio of 16:1 would be distinctly better than a ratio of 15.625:1".^{434/}

Of particular political significance was the unrelenting editorial campaign of the influential newspaper, the Washington Globe.

All throughout the "Panic Session" [the Globe] wrote at white heat, denouncing the Bank and its "conscienceless stipendiaries" in Congress. Time and again the Globe contained editorials[,] * * * memorials or petitions * * * . Throughout these * * * there ran the note that gold money was better than bank paper for the common man, and that it would circulate if properly valued, provided "the Bank" was destroyed and other banks were restricted in the denominations of the notes they might issue.

During the month of June, 1834, the month in which the Coinage Bill was enacted * * * , the Globe drew the alleged issue between the gold currency and the Bank sharper and sharper.

* * * *

It hammered away on the idea that the adoption of a ratio most favorable to gold would be a blow at the hated Bank.^{435/}

In Congress as well, such attitudes found expression. "It is much more safe to establish a valuation of gold too high than too low", argued Representative Cambreleng; "by

^{433/} Id. at 86.

^{434/} Id. at 87.

^{435/} Id. at 88 (footnote omitted), 89.

adopting a higher ratio, we shall be more certain of accomplishing our object, which is to secure for our own country the permanent circulation of gold coins".^{436/} "Put your gold coins in circulation," he predicted,

and the effect on public opinion, the only salutary corrective of bad legislation, * * * would be more powerful than thousands of our speeches. Every man would see the fallacy of the supposed necessity for our small-note circulations, and of granting to corporations the power to flood the country with bank notes. Those who would come here, as well as those who would be sent to our * * * Legislatures, would entertain very different opinions upon the questions of currency and banks.^{437/}

^{438/}
In these views, Cambreleng was not alone.

Whether those in Congress who supported the Coinage Act of 1834 correctly foresaw its effect on the banks is debatable, and perhaps indeterminable, but ultimately beside the point. Of unique importance is the "inescapable conclusion that the adoption of a coinage ratio of 16:1 was not due to a faulty calculation of the real relative values of [gold and silver]. It was not just a legislative accident".^{439/} Instead, it was a conscious attempt by the forces opposed to bank-paper to exert the very maximum power within Article I, § 8, cl. 5 to strike a death-blow at the antagonists of constitutional "Money".

^{436/} 10 Register of Debates in Congress, ante note 379, pt. 4, at 4671.

^{437/} Id. at 4672.

^{438/} O'Leary, "The Coinage Legislation of 1834", ante note 381, at 90-92.

^{439/} Id. at 94.

2) The Coinage Act of 1837

The next congressional legislation on coinage came in 1837, as a "supplemen[t]" to the Coinage Act of 1792.^{440/} The act provided that: (i) "the standard for both gold and silver coins of the United States shall hereafter be" nine-tenths "pure metal" and one-tenth "alloy";^{441/} (ii) "the dollar shall be of the weight of four hundred and twelve and one-half grains";^{442/} (iii) "the eagle shall be two hundred and fifty-eight grains";^{443/} and (iv) both silver and gold coins theretofore issued "shall continue to be legal tenders of payment for their nominal values, on the same terms as if they were the coinage provided for by this act".^{444/}

This last clause was hardly an innovation in monetary law, though -- for, in constitutional terms, pre-1837 silver and gold coins were precisely "on the same terms" as "the coinage provided for" in the act of 1837. The Coinage Act of 1792 authorized dollars containing 371-1/4 grains of pure silver, and eagles containing 247-1/2 grains of pure gold.^{445/} The Coinage Act of 1834 made no mention of the dollar, but "regulate[d] the Value" of the eagle to a new weight of 232 grains of pure gold.^{446/} Under the Coinage Act of 1837, the dollar contained 9/10 of 412-1/2 grains, or 371-1/4 grains, of

^{440/} Act of 18 January 1837, ch. 3, 5 Stat. 136.

^{441/} § 8, 5 Stat. at 137.

^{442/} § 9, 5 Stat. at 137.

^{443/} § 10, 5 Stat. at 138.

^{444/} § 11, 5 Stat. at 138.

^{445/} Act of 2 April 1792, ch. 16, § 9, 1 Stat. 246, 248.

^{446/} Act of 28 June 1834, ch. 95, § 1, 4 Stat. 699, 699.

pure silver -- precisely the same intrinsic value (weight and fineness) as the original constitutional dollar. And the eagle contained 9/10 of 258 grains, or 232-1/5 grains, of pure gold -- within 0.086% of its intrinsic value as constitutionally "regulate[d]" in 1834.

Thus, the Coinage Act of 1837 was a further congressional confirmation of the constitutional principles first applied in 1792.

3) The Coinage Act of 1849

The Coinage Act of 1849 created for the first time in American history statutory "gold dollars, each to be of the value of one dollar, or unit", of one-tenth the weight of an eagle as defined in the Coinage Act of 1837.^{447/}

Constitutionally, of course, there could be no objection in principle to a "gold dollar" (the amount of pure gold that exchanges in the market against 371-1/4 grains of pure silver) -- or, for that matter, to a "platinum dollar", an "irridium dollar", or any other "[metal] dollar". Economically, however, the existence of such metaphorical "dollars" could engender confusion in financial transactions when (not if) the market exchange-ratio between silver and the other metal diverged from the proportion fixed in the applicable statute "regulat[ing]" the metaphorical "dollar". Politically, as well, the existence of metaphorical "dollars" would likely arouse concern and debate as to which metal was the "real", or "better", standard -- and encourage partisans of various factions to agitate for adoption the "X", "Y", or "Z" standard

^{447/} Act of 3 March 1849, ch. 109, § 1, 9 Stat. 397, 397.

particularly favorable to the short-term interests of their clients, at the expense of the general interest of society.

The draftsmen of the Coinage Act of 1849 were careful, therefore, to refer to the "gold dollar" not as a dollar, or the dollar, but as "be[ing] of the value of one dollar" -- that is, to refer to the "gold dollar" in terms of "regulat[ing]" its "Value" as against the original (silver) standard, not in terms of defining a new, or competing, standard. None the less, the wisdom of the act, if not its strict legality, is open to question.

4. The Coinage Act of 1853

When Congress enacted the Coinage Act of 1834, setting the legal exchange-ratio between silver and gold at 16 to 1, it had expected gold to continue to appreciate as against silver. The discovery of huge gold deposits in both Australia and California soon thereafter caused the opposite to occur. When the market exchange-ratio reached about 15.7 to 1, (silver) dollars ceased to circulate. At around 15.5 to 1, money-brokers found it profitable to melt or export (silver) half-dollars, quarters, and dimes. To alleviate this situation, and provide a supply of subsidiary silver coinage, Congress enacted the Coinage Act of 1853.^{448/}

The act provided inter alia for a new half-dollar of 192 grains, nine-tenths fine.^{449/} Two of these subsidiary half-dollars, then, contained only $345\frac{3}{5}$ grains of pure silver, or but 93.1% of the amount in the constitutional dollar. But Congress limited the legal-tender character of

^{448/} Act of 21 February 1853, ch. 74, 10 Stat. 160.

^{449/} § 1, 10 Stat. at 160.

these subsidiary coins to "payment of debts * * * not exceeding five dollars".^{450/} Congress thus recognized that, once it divorced these subsidiary silver coins by weight from the dollar, it had as well to divorce them from the full legal-tender power that properly "regulate[d]" silver coins would otherwise have had. Or, in Blackstone's phrase, Congress put these subsidiary silver coins "not upon the same footing with the other"^{451/} -- just as the King at common law and Congress under the Constitution both had strictly limited the "currency"^{452/} of copper coinage for over a century and one-half theretofore.

5) The Coinage Act of 1857

The last statute enacted prior to the Civil War that dealt with silver and gold coinage was the Coinage Act of 1857.^{453/} It repealed "all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts".^{454/} Thus, for the first time since Queene Anne's Proclamation of 1704, the actual Spanish

^{450/} § 2, 10 Stat. at 160.

^{451/} 1 W. Blackstone, Commentaries, ante note 8, at 277.

^{452/} As von Mises explains,

[t]here is no such thing as an economic concept of token coinage. All that economics can distinguish is a particular sub-group within the group of claims to money that are employed as substitutes for money, the members of this sub-group being intended for use in transactions where the amounts involved are small. The fact that the issue and circulation of token coins are subjected to special legal rules is to be explained by the special nature of the purpose that they serve.

Theory of Money and Credit, ante note 1, at 56.

^{453/} Act of 21 February 1857, ch. 56, 11 Stat. 163.

^{454/} § 3, 11 Stat. at 163.

dollar ceased to be the "money of account" in this country, completely superseded by the United States (silver) dollar of 1792.

In sum, from 1792 through 1857, Congress followed a policy fully consistent with the interpretation of Article I, § 8, cl. 5 that English and pre-constitutional American law and history support. Changing economic circumstances more and more revealed the impolicy -- perhaps, impossibility -- of statutory "regulat[ion]" of gold as against silver according to a fixed exchange-ratio. But, apparently, then as now, tradition weighed heavily with lawmakers, discouraging them from simply coining gold pieces identified as to weight and fineness, but with no statutory declaration of "Value", and permitting the market to set the "Value" of those pieces from day to day.^{455/} Today, such a traditionalistic policy would be unreasonable, and therefore unconstitutional. During the early 1800's, however, it was still reasonable (if becoming increasingly unworkable), and therefore still constitutional.

In any event, nowhere in the period of over sixty years from ratification of the Constitution to the eve of the Civil War did Congress ever display the least inclination: (i) to coin any metal as "Money" other than those traditional at common law (silver, gold, and copper); (ii) to replace or deviate from the constitutional standard of value, the dollar, in terms of intrinsic value (weight and fineness) of silver; (iii) to "regulate the Value" of any nonsubsidiary coin at other than what Congress determined in good faith was its

455/ Some foresighted members of Congress apparently advocated this approach in 1834. See 10 Register of Debates in Congress, ante note 379, pt. 4, at 4646-47 (remarks of Representative Clowney, attributing this view to the Select Committee on Coins).

intrinsic value in relation to the dollar; (iv) to declare any non-subsidary coin a legal tender for more than its intrinsic value, or to permit any subsidiary coin to have unlimited legal-tender character; or (v) even to claim that it had any power whatsoever to do otherwise in any of these particulars.

This consistent "legislative construction" of Article I, § 8, cl. 5 is decisive of the meaning of that provision.

2. The issuance of treasury notes prior to the Civil War

During the first half of the nineteenth century, on numerous occasions Congress issued paper evidences of public indebtedness known as "treasury notes" under the power "To borrow Money" in Article I, § 8, cl. 2. The history of these issues establishes that, at least until 1860, Congress construed Article I, § 8, cl. 2 as disabling it from emitting "Bills of Credit", or from creating any form of paper currency with legal-tender character.

Indeed, all of Congress' actions during this period, far from asserting any such powers, faithfully reflected the common-law principles of the last Parliamentary statute on this subject before the Declaration of Independence. That statute, enacted in 1773, recognized the practical necessity

as well for the publick Advantage as in Justice to those Persons who may have Demands upon the publick Treasuries in the * * * Colonies for Services performed, that such public Creditors should be secured in the Payment of their just Debts and Demands, by Certificates, Notes, Bills, or Debentures, to be created and issued by the Authority of the General Assemblies within the said Colonies * * * ; and that such Certificates, Notes, Bills, or Debentures, should be made chargeable on the publick Treasuries of the said Colonies, and received and taken by them as a legal Tender in Discharge of

any such Duties or Taxes, or of any Debts
whatsoever, due to the publick Treasuries
of the said Colonies[.] 456/

For that reason, Parliament provided that

any Certificates, Notes, Bills, or Debentures, which shall or may be voluntarily accepted by the Creditors of the Publick within any of the Colonies in America, as a Security for the Payment of what is due and owing to the said publick Creditors, may be made and enacted by the several General Assemblies of the said Colonies respectively to be a legal Tender to the publick Treasurers in the said Colonies, for the Discharge of any Duties, Taxes, or other Debts whatsoever, due to, and payable at, or in the said publick Treasuries of the said Colonies, in virtue of Laws passed within the same, and in no other Case whatsoever * * * . 457/

Or, in the terminology soon to acquire constitutional stature, under English common law American legislatures could lawfully issue "Securit[ies]" to public creditors in the forms of "Certificates", "Notes", "Bills", or "Debentures", signifying public indebtedness to those creditors for "Services performed" -- including, presumably, the loan of money. And, if the creditors voluntarily accepted these paper evidences of debt as "Securit[ies] for the Payment of what is due and owing to [them]", the "notes" could also function as legal tender for any "Duties, Taxes, or other Debts whatsoever, due to * * * [the] publick Treasuries". Under such circumstances, the "notes" would not constitute the illegal "Paper Bills, or

456/ An Act to explain and amend an Act, made in the Fourth Year of His present Majesty, intituled, An Act to prevent Paper Bills of Credit, hereafter to be issued in any of His Majesty's Colonies or Plantations in America, from being declared to be a legal Tender in Payments of Money, and to prevent the legal Tender of such Bills as are subsisting from being prolonged beyond the Periods limited for calling in and sinking the same, 1773, 13 Geo. III., ch. 56, § 1.

457/ Id.

Bills of Credit" with legal-tender character that Parliament had categorically outlawed in 1763.^{458/}

These common-law principles presumably carried over into the power "To borrow Money" in Article I, § 8, cl. 2.^{459/} Under that power, therefore, Congress has authority to issue the "Securities" mentioned in Article I, § 8, cl. 6 to all public creditors willing to receive them as paper evidences of the indebtedness of the national government,^{460/} and to declare those "Securities" a legal tender for the discharge of all public dues to the national government on the equitable principle of set-off or counterclaim. And this is precisely what Congress did -- and all that it did -- pursuant to Article I, § 8, cl. 2 until the Civil War.

a. Treasury notes in the early 1800's,
1812 to 1815

Congress first employed treasury notes in significant amounts to finance the War of 1812. Between 1812 and 1814 it authorized four issues, each containing the same basic provisions.^{461/} First, the acts provided that the "notes shall be

^{458/} An Act to prevent Paper Bills of Credit, hereafter to be issued in any of His Majesty's Colonies or Plantations in America, from being declared to be a legal Tender in Payments of Money; and to prevent the legal Tender of such Bills as are now subsisting, from being prolonged beyond the Periods limited for calling in and sinking the same, 1763, 4 Geo. III., ch. 34. See An Act to regulate and restrain Paper Bills of Credit in his Majesty's Colonies or Plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire in America, and to prevent the same being legal Tenders in Payments of Money, 1751, 24 Geo. II., ch. 53.

^{459/} Ante note 7 & accompanying text.

^{460/} On the absence of any common-law or constitutional power to extract forced loans from the citizenry, see ante, pp. 97-108.

^{461/} Act of 30 June 1812, ch. 109, 2 Stat. 766; Act of 25 February 1813, ch. 27, 2 Stat. 801; Act of 4 March 1814, ch. 18, 3 Stat. 100; Act of 26 December 1814, ch. 17, 3 Stat. 161.

reimbursed * * * one year * * * after the day on which the same shall have been issued; from which day of issue they shall bear interest at the rate of five and two-fifths per centum a year".^{462/} Second, the statutes authorized the Executive to issue "such portion of the said treasury notes as the President may think expedient in payment of supplies, or debts due by the United States, to such public creditors, or other persons, as may choose to receive such notes in payments * * * at par", or "to borrow * * * sums * * * on the credit of such notes".^{463/} Third, the acts made the notes "transferable by delivery and assignment endorsed thereon by the person to whose order the same shall, on the face thereof, have been made payable".^{464/} And fourth, the statutes decreed "[t]hat the said treasury notes * * * shall be every where received in payment of all duties and taxes laid by the authority of the United States, and of all public lands sold by the said authority".^{465/} In sum, the treasury notes of 1812 through 1814 satisfied each of the strictures of common law for "Securit[ies]" distinguishable from the offensive "Paper Bills of Credit" that had aroused the ire of

^{462/} Act of 30 June 1812, ch. 109, § 2, 2 Stat. 766, 767; Act of 25 February 1813, ch. 27, § 3, 2 Stat. 801, 801; Act of 4 March 1814, ch. 18, § 3, 3 Stat. 100, 100; Act of 26 December 1814, ch. 17, § 3, 3 Stat. 161, 162.

^{463/} Act of 30 June 1812, ch. 109, § 4, 2 Stat. 766, 767; Act of 25 February 1813, ch. 27, § 5, 2 Stat. 801, 802; Act of 4 March 1814, § 5, 3 Stat. 100, 101; Act of 26 December 1814, ch. 17, § 3, 3 Stat. 161, 162.

^{464/} Act of 30 June 1812, ch. 109, § 5, 2 Stat. 766, 767; Act of 25 February 1813, ch. 27, § 7, 2 Stat. 801, 802; Act of 4 March 1814, ch. 18, § 7, 3 Stat. 100, 101; Act of 26 December 1814, ch. 17, § 3, 3 Stat. 161, 162.

^{465/} Act of 30 June 1812, ch. 109, § 6, 2 Stat. 766, 767; Act of 25 February 1813, ch. 27, § 8, 2 Stat. 801, 802; Act of 4 March 1814, ch. 18, § 8, 3 Stat. 100, 101; Act of 26 December 1814, ch. 17, § 3, 3 Stat. 161, 162.

Parliament, and caused the Federal Convention of 1787 to strike the power "to emit bills" from the original draft of Article I, § 8, cl. 2, and to insert the prohibition against the "emi[ssion of] Bills of Credit" in the final version of Article I, § 10, cl. 1.

This conformity to legal tradition was not merely coincidental, but in at least one important particular reflected the deliberate policy of Congress. On 12 November 1814, the House of Representatives considered a resolution "That the Treasury notes which may be issued * * * shall be a legal tender in all debts due, or which may hereafter become due, between the citizens of the United States".^{466/} Without extensive debate, the House "refused to consider" the resolution, by a vote of 95 to 42.^{467/}

In 1815, though, Congress deviated from tradition by providing in the act authorizing the issuance of treasury notes that "notes * * * of a denomination less than one hundred dollars, shall be payable to bearer and be transferable by delivery alone, and shall bear no interest", and that the Executive might give notes of larger denominations the same qualities as well.^{468/} The statute also provided 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, bearing interest at seven per centum per annum".^{469/} As the

^{466/} Debates and Proceedings in the Congress of the United States, 13th Cong., 3d Sess. (Gales & Seaton pubs. 1854), at 557.

^{467/} Id. at 558.

^{468/} Act of 24 February 1815, ch. 56, § 3, 3 Stat. 213, 213-14.

^{469/} § 4, 3 Stat. at 214.

act authorized the Executive "to cause the said treasury notes to be issued at the par value thereof, in payment of services, of supplies, or of debts, for which the United States are or may be answerable by law, to such person and persons as shall be willing to accept the same in payment", "to borrow money on the credit of the said notes", or "to sell the same, at a rate not under par";^{470/} and limited their legal-tender character by making them "every where receiv[able] in all payments to the United States" only,^{471/} it still technically complied with the applicable common-law and constitutional principles of the "borrow[ing]" power, however. The creation of notes "payable to bearer and * * * transferable by delivery alone", and accruing no interest unless exchanged for "funded stock", edged perilously close to the emission of true "Bills of Credit", though. No one challenged the constitutionality of such notes in 1815 -- but Congress would decry as unconstitutional a later issue with similar characteristics.^{472/}

b. Treasury notes in the mid-1800's,
1837 to 1847

The next significant issuance of treasury notes occurred almost a generation after the War of 1812. The first of these issues, in 1837, set the pattern for the rest.^{473/} Actually, its terms paralleled those of earlier issues, providing that the notes "be reimbursed and redeemed * * * after the expiration of one year from the dates of said notes * * * from which said dates * * * they shall bear * * * interest";^{474/} that the

^{470/} § 8, 3 Stat. at 215.

^{471/} § 6, 3 Stat. at 214.

^{472/} Post, pp. 164-72.

^{473/} Act of 12 October 1837, ch. 1, 5 Stat. 201.

^{474/} § 2, 5 Stat. at 201. See ante, note 462.

Executive have discretion to issue the notes "in payment of debts due by the United States to such public creditors or other persons as may choose to receive such notes in payment * * * at par", and "to borrow, * * * not under par, * * * sums * * * on the credit of such notes";^{475/} that the notes "be transferable by delivery and assignment endorsed thereon, by the person to whose order the same shall, on the face thereof, have been made payable";^{476/} and that the notes "be received in payment of all dues and taxes laid by the authority of the United States, of all public lands sold by the said authority, and of all debts to the United States, of any character whatsoever".^{477/} Further issues from 1838 through 1847 either adopted or followed this pattern exactly.^{478/}

The most consequential congressional action during this period with respect to legislative construction of Article I, § 8, cl. 2 occurred during the session of Congress of 1843 to 1844. In 1841, Congress had authorized a loan of \$12,000,000 to meet the needs of the Treasury and to redeem outstanding treasury notes.^{479/} In March of 1843, some \$11,000,000 in these notes were yet outstanding, of which \$8,000,000 fell due before July of that year. The Treasury resorted to the loan

^{475/} § 4, 5 Stat. at 202. See ante, note 463.

^{476/} § 5, 5 Stat. at 202. See ante, note 464.

^{477/} § 6, 5 Stat. at 202. See ante, note 465.

^{478/} Act of 21 May 1838, ch. 82, 5 Stat. 228 (adopting provisions of act of 1837); Act of 2 March 1839, ch. 37, 5 Stat. 323; Act of 31 March 1840, ch. 5, 5 Stat. 370; Act of 15 February 1841, ch. 5, 5 Stat. 411; Act of 31 January 1842, ch. 2, 5 Stat. 469; Act of 15 April 1842, ch. 26, 5 Stat. 473; Act of 31 August 1842, ch. 287, 5 Stat. 581; Act of 3 March 1843, ch. 81, 5 Stat. 614; Act of 22 July 1846, ch. 64, 9 Stat. 39; Act of 28 January 1847, ch. 5, 9 Stat. 118.

^{479/} Act of 21 July 1841, ch. 3, 5 Stat. 438.

to redeem \$7,000,000 of the notes. The remainder bore interest at six percent, which was above the then-prevailing market-rate.^{480/} In order to redeem these, the Secretary of the Treasury proposed to issue new notes bearing interest of 0.001%, redeemable after a year, but payable in coin at par on presentation. The House of Representatives soon questioned the legality of this action, referring the problem on 15 January 1844 to its Committee of Ways and Means to inquire and report "whether the notes lately issued by the Treasury Department, bearing a nominal interest, and 'convertible into coin on demand,' * * * are authorized by the existing laws and Constitution of the United States".^{481/} On 28 March 1844, the Committee reported that the notes were unconstitutional.^{482/}

The Committee did not act without consulting the Secretary of the Treasury, to discover his rationale for the notes, however. In his letter of 6 February 1844, the Secretary first outlined the statutory authority he claimed in support of his action,^{483/} and then presented his constitutional -- or, perhaps more descriptively, anti-constitutional -- analysis. "The authority given to Congress by the Constitution, 'to borrow money on the credit of the United States,'" he wrote, "is so plenary, that it must baffle ingenuity to prescribe limits to the manner or extent of its exercise. * * * It embraces time, manner, and

^{480/} See Annual Treasury Report (6 December 1843), in 13 Congressional Globe, 28th Cong., 1st Sess. (1844), Appendix, at 4.

^{481/} 13 Congressional Globe, ante note 480, at 146.

^{482/} House Committee of Ways and Means, Treasury Notes, H.R. Rep. No. 379, 28th Cong., 1st Sess. (1844).

^{483/} Id. at 12-16.

amount, without limitation or qualification."^{484/} Having in such terms already asserted the existence of a power "To borrow" that was by hypothesis beyond constitutional restraints because "plenary" and "without limitation or qualification", the Secretary at least paid lip-service to the organic law and the rules for its interpretation by recalling how "the draft of the Constitution submitted to the convention * * * contained the clause under consideration in connexion with another, thus: 'To borrow money, and emit bills * * * ;' and * * * the words 'and emit bills,' were struck out by a decisive vote".^{485/} This sequence of events, though, he considered of little import. For, "while the convention which gave to Congress the unqualified power to borrow money on the credit of the United States, struck out the specification of the particular means of exercising that power -- emitting bills; it also prohibited the use of the same means to the States * * * . The omission to insert a similar prohibition in relation to Congress, seems to furnish strong evidence of a different intention on the part of the convention".^{486/} Or, although by definition the powers to "borrow money" and to "emit bills" were and are separate and distinct, and recognized as such by everyone at that time and since, the deletion of the power to "emit bills" in the instrument enumerating the sole powers Congress might exercise did not operate, even by implication, to withhold that power. Thus, concluded the Secretary, "the inference would seem to be irresistible, that while the convention

^{484/} Id. at 16.

^{485/} Id.

^{486/} Id. at 17.

intended to deny to the States the authority to emit bills of credit for any purpose, or under any circumstances, and intended to withhold from Congress the absolute and independent power of issuing bills, they yet meant to leave that body unrestricted in the choice of means for borrowing money, if the emission of bills should at any time be deemed the most expedient means of attaining that object".^{487/} Or, although the Constitution withheld "the absolute and independent power of issuing bills [of credit]", and obviously was intended to do so in unmistakable terms, nevertheless it still contained a contingent and dependent power to perform that very act under the guise of "borrow[ing] Money".

Such reasoning did not impress the Committee. That the issuance of notes, payable on demand in coin, did not amount to creating "Securities" under the power "To borrow", the Committee had no doubt: "If the wants of the public service really require the issue of treasury notes, to supply the deficiency of means [i.e., money], then it is clearly impossible that the ability to purchase the notes should exist at the time of issue, and to make them, presently, convertible into coin. If the means to purchase are coextensive with the amount issued, * * * the wants of the public service do not require the issue. If the wants of the public service require the issues, then there must be a present inability to redeem."^{488/} Looking past form to substance, the Committee bluntly concluded "that the whole plan of issuing notes payable on demand * * * is a deliberate contrivance of [the Executive] to infuse * * *

^{487/} Id.

^{488/} Id. at 1.

into the United States a currency, or circulating medium, consisting of Government paper".^{489/} "It is an emission of paper, on the public credit, to be circulated as money, like bank notes."^{490/} And this, the Committee made clear, was not an act of "borrow[ing] Money". "[T]he issue of notes payable on demand, out of funds then on hand * * * , is totally different in principle from the issue of notes promising to pay one year after date, intended to supply a present deficit in the treasury, and to be reimbursed thereafter out of accruing revenue."^{491/}

Neither was the issuance of such notes within Article I, § 8, cl. 2. "Notes thus issued," the Committee explained,

constitute essentially a paper currency, and are identical with bills of credit, the power to issue which was intentionally * * * struck out of the plan proposed, by a vote, in convention, of nine States to two. And yet the Secretary * * * 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 * * * 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. * * * The Secretary yields the point, that the Constitution withholds from Congress the absolute and independent power of issuing bills. The committee think that they have shown that the power to issue bills with mere nominal interest, payable on demand, for the express purpose of general circulation, cannot be derived, by any fair implication, from the ordinary authority to make a

^{489/} Id. at 2.

^{490/} Id. at 3.

^{491/} Id. at 4.

loan, on time, in the form of treasury notes. 492/

The contrary view of the Secretary, the Committee held, rested on a notion of constitutional construction diammetrically opposed to the true rule. "We must * * * look," the Committee emphasized,

to the insertions in the Constitution for the extent of [Congress'] powers, and not to the omissions of prohibitions. Considering the character and structure of the Federal Government, the omission to grant a power to it, is as absolute a denial and prohibition of that power, as is an expressed prohibition of a power to the States. The omission to give the power to the Federal Government "to emit bills of credit" as completely bars that Government from the exercise of the power, as does the express prohibition to the States * * * .

* * * *

The Constitution intended to define the powers of Congress, and to restrict that body to the exercise of its enumerated powers; hence, and also because the grant of powers is in derogation of the rights of the States and the people, a rigid, rather than a latitudinous construction, should be adopted. And because the States possessed all the granted powers originally, and cannot be supposed to have parted with any but such as were deemed necessary and expressly enumerated, and because not only upon general principles, but by express stipulation [in the Tenth Amendment], they have reserved all other rights and powers, a liberal construction should be adopted in favor of State rights. The Secretary has most clearly and surprisingly reversed this obviously correct rule of construing the powers of the Federal and State Governments. 493/

Moreover, the Committee made clear, the powers to "borrow" and to "emit bills of credit" being separate and distinct by definition and historical application, the latter could not

492/ Id. at 5.

493/ Id. at 6, 7.

reasonably be implied in the former. "[T]he emission of bills of credit," the Committee wrote, recounting the view universally accepted in the late 1700's,

involved the exercise of a primary, absolute, and independent power. It cannot, therefore, be implied as belonging to any other power; it is not an incident of any other power; it is not necessary or proper to carry into effect the granted power to borrow money. It must have been so understood by the convention which framed the Constitution. The States are left, without modification or restriction, to exercise, in their own discretion, the power to borrow money. The States are unqualifiedly prohibited from emitting bills of credit. It could not have been regarded, therefore, as incident to the power of introducing a mere paper circulation, and continuing the mischiefs of the paper money system; and, being so regarded, was expressly prohibited.

In the draft of the Constitution, it was proposed to give Congress the power to borrow money, and to emit bills * * *. Here two powers * * * were proposed to be conferred on Congress. They are separate and distinct, and may be separately and independently exercised. The Secretary admits that the single and distinct power to emit bills * * *, by the form in which it was originally reported, was made separate and independent of the power to borrow money, and was regarded as sanctioning the idea of such a mere paper currency, as they, the framers of the Constitution, deprecated. Under that view, that it was a separate power, and sanctioned a mere paper currency, it was struck out by a decisive vote. And yet, in the face of this historical fact, the Secretary endeavors, by a construction more hard-strained than ingenious, to prove that being struck out, as a power distinct and independent of the power to borrow money, it reverted, thereupon, as a dependency of the latter power, and became one of its means of accomplishing its end. * * * [T]he Secretary * * * claims for Congress a power not conferred by the Constitution, but intended expressly to be withheld * * * . 494/

494/ Id. at 8-9.

Having reviewed the course of debate in the Federal Convention of 1787,^{495/} the Committee concluded that

the framers of the Constitution intended to avoid the paper money system. They intended to prevent the issue of bills of credit, which should constitute a paper currency, and circulate like bank bills, and promise to pay on demand. Especially did they intend to prevent Government paper from circulating as money, as had been practised during the Revolutionary War. The mischiefs of the various expedients that had been made were fresh in the public mind, and were said to have disgusted the respectable part of America.

* * * [T]he framers * * * designed to prevent the adoption of the paper system under any pretext or for any purpose whatsoever; and if it had not been supposed that such object was effectively secured, in all probability the rejection of the Constitution might have followed. ^{496/}

Of course, the Committee conceded, the outlawry of bills of credit did not preclude the issuance of "some species of paper * * * necessary for the purpose of effecting loans".
Rather,

[w]hen the loan obtained is for any considerable length of time, it is usual to fund the debt thereby created, by issuing certificates of stock. Where the loan obtained has only a short time to run, and it is proposed to pay it off speedily with the accruing revenue, the ordinary mode is, to authorize * * * treasury notes, payable at the expiration of a limited time, bearing such interest as may be * * * allowed * * *. Such notes are intended, bona fide, as a temporary loan, and are not designed or expected to circulate as a currency. * * *

* * * The use of public notes can be justified only as a mode of effecting a loan -- they are employed to acknowledge the existence of a debt due by the United States, and contain a promise to pay it, at some future stipulated time * * *. To issue notes for circulation, payable on demand, under cover of the authority to

^{495/} Id. at 9-10.

^{496/} Id. at 10.

borrow money in the form of treasury notes, is deemed an abuse of authority which ought to be corrected. ^{497/}

For this reason, the Committee recommended the "passage of a joint resolution", declaring the issuance of treasury notes payable in coin on demand an "abuse of authority, and violation of law and the Constitution".^{498/} The House of Representatives responded by passing a resolution declaring "[t]hat the issuance of treasury notes, made payable on their face one year after date, bearing a merely nominal rate of interest, and * * * payable at any time * * * , is without authority of law".^{499/}

Thus, over a half-century after ratification of the Constitution, lawmakers were still emphatic in the view that Article I, § 8, cl. 2 contains no power to emit bills of credit -- but, instead, operates as an explicit prohibition of any such power, disabling Congress from "adopt[ing] * * * the paper system under any pretext or for any purpose whatsoever".

c. Treasury notes immediately prior to the Civil War, 1857 to 1860

Until well into the Civil War, no more was heard of treasury notes payable in coin on demand. To the contrary: The last three peace-time issues followed the traditional common-law and constitutional pattern.^{500/} For instance, the last of these statutes, in 1860, provided (just as in every

^{497/} Id. at 10-11.

^{498/} Id. at 11.

^{499/} H.R. Res. No. 21, 28th Cong., 1st Sess. (28 March 1844), carried on 29 March 1844, 13 Congressional Globe, ante note 480, at 460.

^{500/} Act of 23 December 1857, ch. 1, 11 Stat. 257; Act of 3 March 1859, ch. 82, § 5, 11 Stat. 425, 430; Act of 17 December 1860, ch. 1, 12 Stat. 121.

major act from 1812 onwards) that the "notes shall be paid and redeemed * * * after the expiration of one year from the date of issue";^{501/} that the Executive might issue notes "in payment of warrants in favor of public creditors, or other persons lawfully entitled to payment, who may choose to receive such notes in payment at par", or "at such rate of interest as may be offered by the lowest responsible bidder";^{502/} that the notes "shall be transferable by assignment indorsed thereon * * * , accompanied together with the delivery of the note so assigned";^{503/} and that the notes "shall be received * * * in payment of all duties and taxes laid by the authority of the United States, of all public lands sold by said authority, and of all debts to the United States, of any character whatever".^{504/}

In sum, from 1812 through 1860, Congress followed a policy fully in accord with the interpretation of Article I, § 8, cl. 2 that English and pre-constitutional American law and history support. Only once in that period did the Executive purport to issue what amounted to bills of credit -- and, on that occasion, in 1844 the House of Representatives sternly rebuffed the Executive's pretensions, restating in unequivocal terms that the power "To borrow Money" includes no power to create a paper currency, even one redeemable on demand in silver or gold coin.

This consistent "legislative construction" of Article I, § 8, cl. 2 is decisive of the meaning of that provision.

^{501/} Act of 17 December 1860, ch. 1, § 2, 12 Stat. 121, 121.
See ante, notes 470, 474.

^{502/} § 4, 12 Stat. at 122. See ante, notes 463, 475.

^{503/} § 5, 12 Stat. at 122. See ante, notes 464, 476.

^{504/} § 6, 12 Stat. at 122. See ante, notes 465, 477.

3. Incorporations of the Bank of the United States in 1791 and 1816

Seemingly opposed to this conclusion are the incorporations by Congress of the Bank of the United States in 1791^{505/} and 1816.^{506/} For, in both of these instances early in the life of the republic, Congress established a bank in which the national government itself was a shareholder,^{507/} licensed that bank to issue bills and notes,^{508/} and made those bills and notes receivable in all payments to the United States.^{509/} To the casual observer, it may appear that, in these acts of incorporation, Congress claimed a power to create an agency for the emission of bills of credit -- and, thereby, necessarily claimed for itself the power to emit such bills. Casual observations, however, do not suffice to settle constitutional questions. Indeed, even those trained in the law dispute the significance of these events, some arguing that, when the Supreme Court upheld the constitutionality of the Bank in McCulloch v. Maryland,^{510/} its opinion "rested on a concept of monetary power far exceeding what the Constitution had delegated to Congress",^{511/} while others dismiss the Court's opinion as

^{505/} Act of 25 February 1791, ch. 10, 1 Stat. 191 (Act of 1791).

^{506/} Act of 10 April 1816, ch. 44, 3 Stat. 266 (Act of 1816).

^{507/} Act of 1791, § 11, 1 Stat. at 196; Act of 1816, § 1, 3 Stat. at 266.

^{508/} See Act of 1791, § 7(XIII), 1 Stat. at 195; Act of 1816, § 11(Twelfth), 3 Stat. at 272-73.

^{509/} Act of 1791, § 10, 1 Stat. at 196; Act of 1816, § 14, 3 Stat. at 274.

^{510/} 17 U.S. (4 Wheat.) 316 (1819).

^{511/} M. Holzer, Government's Money Monopoly, ante note 3, at 197.

saying "nothing whatever about the monetary authority of the United States".^{512/} For that reason, careful review of what the congressional statutes actually enacted into law, and what the Supreme Court actually held in McCulloch and other cases, is necessary.

This review establishes that, although Congress arguably had constitutional authority to incorporate the Bank, in any event the Bank's emission of bills and notes did not constitute an act of the national government -- and, therefore, incorporation of the Bank did not amount to the government's emission of bills of credit, or create a precedent for such emission thereafter.

a. The constitutionality of the Bank of the United States as an appropriate means for effectuating the powers of Congress

Not surprisingly, the acts incorporating the first and second Banks of the United States were quite similar, if not identical, as to the organizations' character, structure, and operations. Both acts, for instance, ensconced and protected the Banks as monopolies by pledging "the faith of the United States" that "no other bank shall be established by any future law * * * during the continuance of the corporation"^{513/} -- the second statute even candidly extracting from the Bank a payment of \$1.5 million "in consideration of the exclusive privileges and benefits conferred by this act".^{514/}

Both acts recited "public purposes" or imposed "public

^{512/} G. Dunne, Monetary Decisions of the Supreme Court (1960), at 32.

^{513/} Act of 1791, § 12, 1 Stat. at 196; Act of 1816, § 21, 3 Stat. at 276.

^{514/} Act of 1816, § 20, 3 Stat. at 276.

duties" as rationalizations for the Banks' existence. The first statute claimed that "the establishment of a bank * * * will be very conducive to the successful conducting of the national finances; 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 advantages to trade and industry in general".^{515/} The second statute, dispensing with rosy predictions, simply required the Bank to "give the necessary facilities for transferring the public funds from place to place, * * * and for distributing the same in payment of the public creditors, without charging commissions", and to "perform the * * * duties of the commissioners of loans for the several states";^{516/} and mandated that "the deposits of the money of the United States * * * shall be made in said bank".^{517/}

Their quasi-public attributes notwithstanding, the Banks were definitely private institutions in their predominant characters. In each case, the national government owned approximately one-fifth of the stock;^{518/} but the rest belonged to the various "person[s], co-partnership[s], or bod[ies] politic",^{519/} or "individual[s], compan[ies], corporation[s], or state[s]"^{520/} that subscribed for shares of the Banks at public offerings pursuant to the acts of incorporation. And

^{515/} Act of 1791, preamble, 1 Stat. at 191.

^{516/} Act of 1816, § 15, 3 Stat. at 274.

^{517/} Act of 1816, § 16, 3 Stat. at 274.

^{518/} Act of 1791, §§ 1-2, 11, 1 Stat. at 191-92, 196 (up to 20%); Act of 1816, § 1, 3 Stat. at 266 (21.4% fixed by statute).

^{519/} Act of 1791, § 2, 1 Stat. at 192.

^{520/} Act of 1816, §§ 1-3, 3 Stat. at 266-68.

it was these subscribers -- public and private, corporate and individual -- from whom the acts "created and made a corporation and body politic, by the name and style of The President, Directors and Company, of the Bank of the United States".^{521/} Under the first Bank, the stockholders (including the national government)^{522/} elected all of the directors. Under the second, the President of the United States, "by and with the advice and consent of the Senate", appointed one-fifth of the directors; and stockholders other than the national government elected the remaining four-fifths.^{523/} And the stockholders^{524/} and directors^{525/} exercised the privileges and powers normally associated with corporate enterprises. The corporations, moreover, were "made able and capable, in law," to acquire and dispose of property, and (under the first act) "to sue and be sued * * * in all state courts having competent jurisdiction, and in any circuit court of the United States"^{526/} or (under the second) "to sue and be sued * * * in courts of record, or any other place whatsoever".^{527/} In addition, the acts

^{521/} Act of 1791, § 3, 1 Stat. at 192; Act of 1816, § 7, 3 Stat. at 269.

^{522/} Act of 1791, § 4, 1 Stat. at 192-93.

^{523/} Act of 1816, § 8, 3 Stat. at 269-70.

^{524/} Act of 1791, § 3, 1 Stat. at 192 (corporation may "ordain, establish, and put in execution, such by-laws, ordinances and regulations, as shall seem necessary and convenient"); Act of 1816, § 7, 3 Stat. at 269 (same provision as in Act of 1791).

^{525/} Act of 1791, § 6, 1 Stat. at 193 (directors "shall have power to appoint * * * officers, clerks, and servants * * * ; and shall be capable of exercising such other powers and authorities * * * as shall be described, fixed, and determined by the laws, regulations, and ordinances of the [corporation]"); Act of 1816, § 10, 3 Stat. at 270-71 (same provision as in Act of 1791).

^{526/} Act of 1791, § 3, 1 Stat. at 192.

^{527/} Act of 1816, § 7, 3 Stat. at 269.

required that the subscribers pay for their shares no less than 25% in gold and silver, and no more than 75% in interest-bearing public debt of the United States,^{528/} and prohibited operations of the Bank until substantial subscriptions had accrued.^{529/}

Each act recognized that the Banks might issue "bills obligatory", "[bills] of credit", "bills", and "notes" -- but both were careful to provide that "bills or notes which may be issued * * * , promising the payment of any money to any person * * * , or to bearer, shall be binding and obligatory upon the [corporation], in the like manner, and with the like force and effect, as upon any private person * * * , if issued by him * * * in his * * * private or natural capacity".^{530/}

The second statute went further, directing that the Bank should issue no "obligation under its seal for the payment of a sum less than five thousand dollars";^{531/} should make payable on demand "all bills and notes * * * other than bills and notes for the payment of a sum not less than one hundred dollars, and payable to the order of some person";^{532/} and should issue "[n]o notes * * * of less amount than five dollars".^{533/} In addition, the second act decreed that the

^{528/} Act of 1791, § 2, 1 Stat. at 192; Act of 1816, § 3, 3 Stat. at 267-68.

^{529/} Act of 1791, § 5, 1 Stat. at 193 ("four hundred thousand dollars, in gold and silver"); Act of 1816, § 9, 3 Stat. at 270 ("eight millions four hundred thousand dollars in gold and silver coin, and in the public debt").

^{530/} Act of 1791, § 7(XIII), 1 Stat. at 195; Act of 1816, § 11(Twelfth), 3 Stat. at 272-73.

^{531/} Act of 1816, § 11(Twelfth), 3 Stat. at 272.

^{532/} Act of 1816, § 11(Twelfth), 3 Stat. at 273.

^{533/} Act of 1816, § 11(Seventeenth), 3 Stat. at 274.

"corporation shall not at any time suspend or refuse payment in gold and silver, of any of its notes, bills or obligations; nor of any moneys received upon deposit in said bank", and provided an interest-penalty of 12% on any unpaid "bills, notes, obligations or moneys, until the same shall be fully paid and satisfied".^{534/} Neither statute extended full legal-tender power to the Banks' paper notes or bills.

However, the first act directed that "the bills and notes of the * * * corporation originally made payable, or which shall have become payable on demand, in gold and silver coin, shall be receivable in all payments to the United States".^{535/} And the second act contained a provision semantically identical except for omission of the words "in gold and silver coin",^{536/} and, for all practical purposes, legally identical because of the subsequent section outlawing the uncompensated suspension of specie-payments.^{537/}

The Banks' many corporate privileges, though, were not unaccompanied by limitations. Besides generally exposing the Banks to suit in the national and state courts,^{538/} the acts imposed various disabilities and liabilities on the corporations and their officials. First, the statutes fixed the "total amount of debts which the * * * corporation shall at any time owe, whether by bond,

^{534/} Act of 1816, § 17, 3 Stat. at 274-75.

^{535/} Act of 1791, § 10, 1 Stat. at 196. Congress repealed this provision in 1812. Act of 19 March 1812, ch. 43, 2 Stat. 695.

^{536/} Act of 1816, § 14, 1 Stat. at 274. Congress repealed this provision in 1836. Act of 15 June 1836, ch. 97, 5 Stat. 48.

^{537/} Act of 1816, § 17, 3 Stat. at 274-75.

^{538/} Act of 1791, § 3, 1 Stat. at 192; Act of 1816, § 7, 3 Stat. at 269.

bill, note, or other contract"; declared "the directors * * * liable for the [excess] in their natural and private capacities", and subjected them to "an action of debt * * * in any court of record of the United States * * * by any creditor"; and preserved similar liability against the Banks themselves.^{539/} Second, the acts limited the amounts the Banks might lend "for the use or on account of the government of the United States, * * * of any particular state, * * * or of any foreign prince or state", and exposed "every person * * * by whose order, agreement, consent, approbation, or connivance, such unlawful * * * loan shall have been made" to a forfeiture of "treble the value or amount of the sum * * * so unlawfully advanced or lent".^{540/} And third, although the acts permitted the Banks to sell the public debts subscribed to their capital,^{541/} the statutes denied the corporations any "liberty to purchase any public debt whatsoever".^{542/}

Finally, both acts required the Banks to furnish the Treasury Department with information about their financial condition and transactions, and access to their books.^{543/} And the second statute licensed "a committee of either house of Congress * * * to inspect the books, and to examine into the proceedings of the corporation", in order to determine whether "the provisions of [its] charter have been * * * violated or not".^{544/}

^{539/} Act of 1791, § 7(IX), 1 Stat. at 194; Act of 1816, § 11(Eighth), 3 Stat. at 272.

^{540/} Act of 1791, §§ 7(XI), 9, 1 Stat. at 194, 196; Act of 1816, § 13, 3 Stat. at 274.

^{541/} Act of 1791, § 7(X), 1 Stat. at 194; Act of 1816, § 11(Ninth), 3 Stat. at 272.

^{542/} Act of 1791, § 7(X), 1 Stat. at 194; Act of 1816, § 11(Ninth), 3 Stat. at 272.

^{543/} Act of 1791, § 7(XVI), 1 Stat. at 195; Act of 1816, § 11(Fifteenth), 3 Stat. at 273-74.

^{544/} Act of 1816, § 23, 3 Stat. at 276.

In short, the Banks of the United States -- and, in particular, the second Bank, which continued operations until 1836 -- 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, corporations, or "bodies politic" other than the national government; they enjoyed the typical prerogatives of private corporations as to the promulgation of organic documents, the rights of shareholders, and the powers and duties of directors and officials; 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. Perhaps most importantly in comparison to contemporary banking-practices, though, the Banks had no power to purchase public debts -- and, therefore, no ability to "monetize" such debts by emitting bills and notes, even without legal-tender character, on the "security" of governmental promises to pay.

Notwithstanding all this, the constitutionality of the Bank of the United States was an heated issue, albeit not for the reason that its detractors considered its corporate powers in particular violation of the Constitution's monetary

provisions in Article I, § 8, cl. 5 or even Article I, § 8, cl. 2. Rather, the basic indictment of the Bank from the beginning was that Congress had no authority under any provision of the Constitution to charter such a -- or perhaps any -- corporation. Only three years after incorporation of the second Bank, the issue reached the courts. Among other States, Maryland had imposed a tax on the Bank's notes, the enforceability of which the Supreme Court considered in McCulloch v. Maryland.^{545/} In dispute was whether the Bank was a "necessary and proper" means within Article I, § 8, cl. 18 to effectuate any power the Constitution conferred on Congress. For, if it was, Maryland's tax was an unconstitutional interference with the functions of the national government in aid of which Congress incorporated the Bank. And so the Supreme Court held.

A constitutional "power being given", opined Chief Justice Marshall, "it is the interest of the nation to facilitate its execution".^{546/} Posing an example drawn directly from the Bank's charter,^{547/} he noted that "[t]hroughout this vast republic, * * * revenue is to be collected and expended * * * . The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed".^{548/} Moreover, the Constitution "does not prohibit the creation

^{545/} 17 U.S. (4 Wheat.) 316 (1819).

^{546/} Id. at 408.

^{547/} Act of 1816, § 15, 3 Stat. at 274.

^{548/} 17 U.S. (4 Wheat.) at 408.

of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers".^{549/} And "a corporation must be considered as a means not less usual, not of a higher dignity, not more requiring a particular specification than other means" the Constitution impliedly permits.^{550/} That being true in general, "no particular reason can be assigned for excluding the use of a bank, if required for [the government's] fiscal operations".^{551/} Or, although the Constitution did not grant Congress a specifically enumerated power to create corporations, where such an entity could appropriately be employed "for the purpose of carrying into execution the given powers",^{552/} it was permissible for Congress to do so pursuant to its implied powers in Article I, § 8, cl. 18.

Thus, rather than holding that Congress has power to incorporate a bank because it has power to emit bills of credit (such as bank-notes), McCulloch decided only that Congress may charter a bank if such an institution is an appropriate means to effectuate any enumerated power. Of course, Congress did permit the Bank of the United States to issue bills and notes.^{553/} But this did not imply that the Bank exercised that power as a delegate of Congress, rather than in its own right as a private corporation.

Indeed, in Osborn v. Bank of the United States,^{554/}

^{549/} Id. at 408-09.

^{550/} Id. at 421.

^{551/} Id. at 422.

^{552/} Id.

^{553/} Act of 1816, § 11(Twelfth), 3 Stat. at 272-73.

^{554/} 22 U.S. (9 Wheat.) 738 (1824).

the Supreme Court explicitly abjured the "conten[tion], that the directors, or other officers of the bank, are officers of government", ^{555/} and held that the Bank was, "undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage". ^{556/} The Court explained that the private "operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services", ^{557/} and ruled that whether "these faculties [of performing traditional banking-functions] were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created[,] * * * was certainly a question proper for the consideration of the national legislature". ^{558/} Thus, Osborn held that, although a particular activity might not in isolation be within the enumerated powers of Article I, § 8, Congress could properly permit a corporation to engage in it if Congress deemed such an activity "necessary and proper" to enable the corporation to perform other, public functions that Congress itself could undertake. ^{559/} Or, although Congress has no power to undertake the business of banking in all its ramifications, including the emission of bills of credit, it may permit a nationally chartered corporation to do so if it reasonably

^{555/} Id. at 866-67. See First Nat'l Bank of Bay City v. Fellows ex rel. Union Trust Co., 244 U.S. 416, 418 (1917).

^{556/} 22 U.S. (9 Wheat.) at 860.

^{557/} Id. at 863.

^{558/} Id. at 863-64.

^{559/} See First Nat'l Bank of Bay City v. Fellows ex rel. Union Trust Co., 244 U.S. 416, 420 (1917).

finds as a legislative fact^{560/} that that authority is necessary for the corporation to fulfill its public purposes. And the provision of such a license in no way implies that everything the bank does thereafter is equally within the power of Congress to do.

The act incorporating the second Bank of the United States reflected this constitutional doctrine in several particulars. For example, Congress permitted the Bank to issue bills and notes -- but declared them "binding and obligatory upon the [corporation], in like manner, and with like force and effect, as upon any private person * * * if issued by him * * * in his private or natural capacity".^{561/} Again, it required that the Bank "shall not at any time suspend or refuse payment in gold and silver, of any of its notes, bills or obligations".^{562/} And it gave the Bank's bills and notes no legal-tender character for private debts, or for debts the government owed.^{563/} Each of these provisions, of course, empowered the Bank to do only what, and no more (or, perhaps, even less) than private banks had long done at common law. And if its charter privileged the Bank's "bills and notes * * * [to] be receivable in all payments to the United States",^{564/} by doing so it still did not render those notes unconstitutional "Bills of Credit" as such "Bills" were understood at common law.^{565/}

^{560/} See, e.g., *Communist Party of the United States v. SACB*, 367 U.S. 1, 94-95 (1961).

^{561/} Act of 1816, § 11(Twelfth), 3 Stat. at 272-73.

^{562/} Act of 1816, § 17, 3 Stat. at 274-75.

^{563/} Act of 1816, § 14, 3 Stat. at 274.

^{564/} Act of 1816, § 14, 3 Stat. at 274.

^{565/} See *ante*, pp. 10-13.

In short, the creation of the Bank of the United States, and the declaration of its constitutionality in McCulloch, constituted no precedent adverse to the interpretation of the monetary powers presented heretofore.

b. The absence of governmental involvement with the Bank of the United States sufficient to taint its notes as unconstitutional "Bills of Credit"

In the context of the festering political crises that surrounded the operations of the Bank throughout its existence, the absence of any judicial challenge to its emission of bills and notes is revealing. Apparently, no one in those days seriously entertained the idea that the Bank was merely a surrogate for the national government, and that its bills and notes amounted to a governmental "paper money". Moreover, decisions the Supreme Court rendered after the demise of the second Bank show that such a notion had little legal merit.

In Briscoe v Bank of Kentucky,^{566/} the Supreme Court considered whether the bills of a bank that that State had chartered were unconstitutional "Bills of Credit" within Article I, § 10, cl. 1. Two questions were involved: namely, (i) whether "the Bank of the Commonwealth * * * acted as the agent of the state";^{567/} and (ii) whether its bills were "Bills of Credit", "within the meaning of the constitution".^{568/} The Court answered both questions in the negative.

First, the Court conceded that, "[i]n the preamble of the [Kentucky] act [chartering the bank], it is declared to be 'ex-

^{566/} 36 U.S. (11 Pet.) 257 (1837).

^{567/} Id. at 316.

^{568/} Id. at 318.

pedient and beneficial to the state * * * to establish a bank on the funds of the state, for the purpose of discounting paper and making loans'. Moreover, "[t]he president and directors are elected by the [Kentucky] legislature", "the capital of the bank belonged to the state", and "it received the dividends".^{569/} None the less, said the Court, this did not "change the character of the corporation", "make the bank identical with the state", conflate the "operations of the bank [with] the operations of the state", render "the bank the mere instrument of the sovereignty", or make "the state responsible for [the bank's] acts".^{570/}

"[W]hen a government becomes a partner in any trading company", explained the Court, relying on other decisions to the same effect,

it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. * * * [B]y giving to the bank the capacity to sue and be sued, [the State] voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank * * * . As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. * * * The state does not, by becoming a corporator, identify itself with the corporation. ^{571/}

Therefore, queried the Court rhetorically,

[i]f the Bank of the Commonwealth is not the state, nor the agent of the state; if it possess no more power than is given to it in the act of incorporation; and precisely the same as if the stock were owned by private individuals, how can it be contended, that the notes of the bank can be

^{569/} Id. at 319.

^{570/} Id. at 323-24.

^{571/} Id. at 324, quoting from Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907-08 (1824).

called bills of credit, in contradistinction from the notes of other banks? If, in becoming an exclusive stockholder in this bank, the state imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it; how can it be said to emit bills of credit? Is it not essential to constitute a bill of credit, within the constitution, that it should be emitted by a state? Under its charter, the bank has no power to emit bills which have the impress of sovereignty, or which contain a pledge of [the government's] faith. It is a simple corporation, acting within the sphere of its corporate powers; and can no more transcend them than any other banking institution. The state, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank, and its property of every description, are held responsible for the payment of its debts; and may be reached by legal and equitable process. In this respect, it can claim no exemption under the prerogatives of the state. 572/

In short, the Court held that, in chartering the bank and becoming its exclusive shareholder, the government of Kentucky did not constitute the bank its instrumentality for purposes of the monetary disabilities in Article I, § 10, cl. 1. Or, in the parlance of contemporary constitutional law, the bank's emission of bills and notes did not constitute "state action" sufficient to impose constitutional limitations on that emission.

Second, the Supreme Court distinguished the bank's bills and notes from unconstitutional "Bills of Credit". To constitute a "Bil[l] of Credit", said the Court, it must be issued by a state, on the faith of the state: "The individual or committee who issue the bill, must have the power to bind the state; they must act as agents and * * * not incur any personal responsibility,

572/ 36 U.S. (11 Pet.) at 326-27.

nor impart, as individuals, any credit to the paper."^{573/} Ob-
viously, however, the bank's bills did not satisfy these criteria:

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. * * *

Were they issued in 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.

* * * *

As to the funds of the Bank of the Com-
monwealth, they were, in part only, derived
from the state. The capital, it is true, was
to be paid by the state; but in making loans,
the bank was required to take good securities;
and these constituted a fund, to which the
holders of the notes could look for payment,
and which could be made legally responsible.

* * * *

Every holder of [the bank's notes] could not
only look to the funds of the bank for payment,
but he had, in his power, the means of enforc-
ing it. The bank could be sued * * * .

* * * *

If the leading properties of the notes of
the Bank of the Commonwealth were essentially
different from * * * bills of credit; if they
were not emitted by the state, nor upon its
credit, but on the credit of the funds of the
bank; if they were payable in gold and silver,
on demand, and the holder could sue the bank;
and if, to constitute a bill of credit, it must
be issued by a state, and on the credit of, the
state, and the holder could not, by legal means,
compel the payment of the bill; how can the
character of these two descriptions of paper
be considered identical? * * * [I]n name,
in form, and in substance, they differ. ^{574/}

In short, the Court held that the bank's bills were not "Bills
of Credit" because they pledged the credit of a corporation, not the

^{573/} Id. at 318-19.

^{574/} Id. at 320, 321, 322.

State, and because their holders could compel payment through regular legal procedures.

Several years later, the Court re-iterated this doctrine in Darrington v. Bank of Alabama.^{575/} Again, the issue was whether the bills of a state-chartered bank were "Bills of Credit" within Article I, § 10, cl. 1. And, once more, the Court ruled in the negative.

"By the [bank's] charter", the Court explained,

a president and fourteen directors were to be annually elected by the legislature, [and] were required to make a report to each session of the legislature * * * . The ordinary powers of a banking corporation were conferred, with a prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtedment of the bank assented to by them. Until one half of the capital stock was deposited in specie, * * * the corporation was not authorized to commence operations. The remedy for collecting debts was reciprocal for and against the bank.
* * *

The State of Alabama was the only stockholder of the bank; but it was placed under the control of directors elected by the legislature * * * .

The bills issued by the bank were made payable on presentation to it * * * .^{576/}

Thus, concluded the Court, following Briscoe, "[i]t is impossible to say that bills thus issued come within the definition of bills of credit". For the corporation's officials

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.

^{575/} 54 U.S. (13 How.) 12 (1851).

^{576/} Id. at 15.

* * * *

The promise to pay was made by the bank, and its credit gave to its bills circulation: they were in no respect, therefore, like a bill of credit. That must issue on the credit of the State. 577/

Of course, unlike the statute in Briscoe, "the credit of the State [of Alabama] was pledged for the ultimate redemption of the notes of the bank". 578/ This, however, the Court held immaterial. "Upon the face of the bills", the Court noted,

there is no promise to pay, by the State, but an express promise by the bank. * * *

The bank had not only an ample fund for the redemption of its paper, but a summary mode was provided by which the payment of its bills could be legally enforced. And the directors were personally liable, if the issues of the bank exceeded twice the amount of its capital paid in.

* * * *

No one received a bill of this bank with the expectation of its being paid by the State. 579/

Neither did the Court consider the State's possible receipt of profits from the operations of the bank consequential -- for 580/ "this is the condition of individual stockholders in all banks".

The simplest comparison establishes that, if the incorporated banks in Briscoe and Darrington were not agents of the States of Kentucky and Alabama, and if their bills and notes were not "Bills of Credit" within Article I, § 10, cl. 1, then neither was the Bank of the United States an agent of the national government, nor

577/ Id. at 15-16.

578/ Id. at 15.

579/ Id. at 16, 17.

580/ Id. at 17.

its bills and notes the "bills of credit" that the Federal Convention denied to Congress by striking those words from the original draft of Article I, § 8, cl. 2.^{581/}

First, in general, the Bank of the United States was not sufficiently imbued with "state action" to render plausible the argument that its bills and notes were invalid "bills of credit" under Article I, § 8, cl. 2. The Bank was a monopoly^{582/} -- but, even today as in the mid-1800's, monopoly-privileges, in and of themselves, are not determinative of "state action".^{583/} The national government subjected the Bank to extensive supervision and regulation^{584/} -- but, even today as in the mid-1800's, governmental regulation alone does not convert the activities of a corporation into "state action".^{585/} And the Bank performed various public functions^{586/} -- but, even today as in the mid-1800's, where a corporation's functions are not traditionally associated with sovereignty those functions do not become "state action" simply because they serve a public purpose.^{587/}

Moreover, in Briscoe and Darrington, where the Court found

^{581/} See ante, pp. 92-97. Because the same legal, historical, and policy considerations underlay the evolution of both Article I, § 8, cl. 2 and Article I, § 10, cl. 1, the term "Bills of Credit" has the same meaning with respect to the national and the state governments.

^{582/} Act of 1791, § 12, 1 Stat. at 196; Act of 1816, § 21, 3 Stat. at 276.

^{583/} Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-52 (1974).

^{584/} Act of 1791, § 7(XVI), 1 Stat. at 195; Act of 1816, §§ 11(Fifteenth), 23, 3 Stat. at 273-74, 276.

^{585/} Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974).

^{586/} Act of 1791, preamble, 1 Stat. at 191; Act of 1816, §§ 15-16, 3 Stat. at 274.

^{587/} Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974).

no significant "state action", the State was "the exclusive stockholder"^{588/} or "the only stockholder";^{589/} whereas, in the case of the Bank of the United States, the general public constituted the overwhelming majority of the stockholders, with the national government's holdings limited to about one-fifth of the equity.^{590/} Consequentially, unlike Briscoe and Darrington,^{591/} where all "[t]he capital of the bank[s] belonged to the state[s]",^{592/} and the States received all the profits,^{592/} the national government owned only its proportionate share of the capital of the Bank of the United States, and received only its proportionate share of the dividends.^{593/} Again, in both Briscoe and Darrington, the bank's "president and [all of its] directors were elected by the legislature";^{594/} whereas, in the case of the Bank of the United States, the acts provided either that the stockholders should elect all the directors,^{595/} or that the President of the United States should appoint one-fifth of the directors, with the other stockholders to elect the remaining four-fifths of the board.^{596/} In every instance, the directors were re-

^{588/} Briscoe, 36 U.S. (11 Pet.) at 323-24.

^{589/} Darrington, 54 U.S. (13 How.) at 15.

^{590/} See Act of 1791, §§ 1-3, 1 Stat. at 191-92; Act of 1816, §§ 1-3, 7, 3 Stat. 266-68, 269.

^{591/} Briscoe, 36 U.S. (11 Pet.) at 319.

^{592/} Id.; Darrington, 54 U.S. (13 How.) at 17.

^{593/} The second Bank did pay the United States a premium for its monopoly-privileges, however. Act of 1816, § 20, 3 Stat. at 276.

^{594/} Briscoe, 36 U.S. (11 Pet.) at 319; Darrington, 54 U.S. (13 How.) at 15.

^{595/} Act of 1791, § 4, 1 Stat. at 192-93.

^{596/} Act of 1816, § 8, 3 Stat. at 269-70.

quired to report to the sponsoring government.^{597/} But, otherwise, in all cases the banks "possess[ed] no more power than [was] given * * * in the act[s] of incorporation";^{598/} and their "directors * * * performed their duties under the charter[s], and, like all other directors of banks, derived their powers and incurred their responsibilities from the law[s] under which they acted".^{599/}

In short, just as in Briscoe and Darrington, the Bank of the United States was not an agent or instrumentality of the national government, or linked closely enough therewith to constitute its actions "state action" for any constitutional purpose. Therefore, that the Bank emitted bills and notes did not legally imply that it exercised this corporate authority as a surrogate for the United States, or (reciprocally) that the United States possessed a power itself to issue such paper, under Article I, § 8, cl. 2 or any other provision of the Constitution.

Second, as with the bills the banks in Briscoe and Darrington emitted, the bills of the Bank of the United States were not "Bills of Credit" within the constitutional definition of the term. In Briscoe and Darrington, the bank-bills "[u]pon their face * * * [did] not purport to be issued by the state, but by the president and directors of the bank",^{600/} and contained "no promise to pay,

^{597/} Compare Darrington, 54 U.S. (13 How.) at 15, with Act of 1791, § 7(XVI), 1 Stat. at 195, and Act of 1816, § 11(Fifteenth), 3 Stat. at 273-74.

^{598/} Briscoe, 36 U.S. (11 Pet.) at 326.

^{599/} Darrington, 54 U.S. (13 How.) at 16. See Act of 1791, § 6, 1 Stat. at 193; Act of 1816, § 10, 3 Stat. at 270-71.

^{600/} Briscoe, 36 U.S. (11 Pet.) at 320.

by the State, but an express promise by the bank".^{601/} Similarly, the acts incorporating the Bank of the United States implicitly authorized it to issue "bills, obligatory and of credit, under the seal of the corporation", and "bills or notes * * * signed by the president, and countersigned by the principal cashier or treasurer".^{602/} As the directors and officers of the Bank were not governmental officials,^{603/} their signatures, or "the seal of the corporation", bound the corporate entity only, not the United States. Again, in Briscoe and Darrington, the bank-bills were "payable in gold and silver, on demand",^{604/} or "payable on presentation" and "convertible into specie by the holder".^{605/} So, too, were the notes of the Bank of the United States.^{606/} Moreover, in both Briscoe and Darrington, the bank was subject generally to suit,^{607/} just as was the Bank of the United States;^{608/} and the state acts made each bank liable for redemption of its bills,^{609/} just as did the national statutes in the case of the

^{601/} Darrington, 54 U.S. (13 How.) at 16. "The bills * * * were signed by [the bank's] president and cashier." Id. at 15.

^{602/} Act of 1791, § 7(XIII), 1 Stat. at 195 (emphasis supplied); Act of 1816, § 11(Twelfth), 3 Stat. at 272 (same language).

^{603/} Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866-67 (1824).

^{604/} Briscoe, 36 U.S. (11 Pet.) at 322.

^{605/} Darrington, 54 U.S. (13 How.) at 15.

^{606/} Act of 1816, §§ 11(Twelfth), 17, 3 Stat. at 272-73, 274-75. The Act of 1791 did not make this explicit.

^{607/} Briscoe, 36 U.S. (11 Pet.) at 321; Darrington, 54 U.S. (13 How.) at 15.

^{608/} Act of 1791, § 3, 1 Stat. at 192; Act of 1816, § 7, 3 Stat. at 269.

^{609/} Briscoe, 36 U.S. (11 Pet.) at 321; Darrington, 54 U.S. (13 How.) at 15-16.

Bank of the United States.^{610/} Finally, the charter involved in Darrington contained a strict "prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtedness of the bank assented to by them"^{611/} -- a limitation and liability that also applied to the Bank of the United States.^{612/}

In sum, just as in Briscoe and Darrington, the bills and notes of the Bank of the United States were not properly characterizable as "Bills of Credit" within Article I, § 10, cl. 1 or the early draft of Article I, § 8, cl. 2. Therefore, that the Bank emitted bills resting, economically at least, on its own, corporate credit did not imply that Congress possesses any authority to emit "Bills" resting on the credit of the United States.

Or, overall, the incorporations of the Bank of the United States constituted no precedent for the emission of a paper currency, redeemable or not, by the national government.

II. Decisions of the United States Supreme Court on the monetary powers and disabilities

Part I. of this essay provides all that is necessary in the way of constitutional interpretation of the monetary powers and disabilities to analyze the actions of government in the monetary field from 1860 until today -- and to inform its policy in that area henceforward. Yet, consideration of leading judicial decisions on monetary matters since 1860 would not be unprofitable.

^{610/} Act of 1791, § 7(XIII), 1 Stat. at 195; Act of 1816, § 11(Twelfth), 3 Stat. at 272-73.

^{611/} Darrington, 54 U.S. (13 How.) at 15.

^{612/} Act of 1791, § 7(IX), 1 Stat. at 194; Act of 1816, § 11(Eighth), 3 Stat. at 272.

However, in consulting the opinions of the United States Supreme Court on this highly politicized subject especially, however, one should keep foremost in mind the wisdom of the English commentator Henry de Bracton, that "laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat * * * and stand amid doubts and the confusion of opinions, and frequently [are] subverted by the greater [judges] who decide cases according to their own will rather than by the authority of the laws".^{613/} Or, in the American context, that "the supreme law of the land" is the Constitution as written, not the erroneous doctrines judicial opinions may attribute to the Constitution.

No rule of law requires, or could rationally require, that "we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled".^{614/} For whether a decision consists with the Constitution depends upon whether it satisfies legal principles embodied, not in judicial "precedents", but only in the Constitution itself. Antedating any "precedents", these principles are necessarily superior to them all. Applicable to our situation, therefore, is the observation of Lord Mansfield that law "would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty".^{615/} Judicial

^{613/} 2 Bracton on the Laws and Customs of England 19 (G. Woodbine ed., S. Thorne transl., 1968) (footnotes omitted). Until the advent of Blackstone's Commentaries some five centuries later, Bracton's treatise on the laws of England was the most complete treatment of the subject available. See 2 W. Holdsworth, A History of English Law (1936), at 185-235; T. Plucknett, A Concise History of the Common Law (1929), at 180-86.

^{614/} McDowell v. Oyer, 21 Pa. 417, 423 (1853).

^{615/} Jones v. Randall, 98 Eng. Rep. 954, 955 (K.B. 1774).

decisions, that is, can never be a source of constitutional law. They are not a reservoir of fact 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 results of some courts having applied certain pre-existing legal principles, rightly or wrongly, in the adjudication of particular cases or controversies. Therefore, although they may be "highly illustrative", judicial precedents constitute not the law itself but at most only selected evidence of what the Constitution means.^{616/}

But, to divine that meaning with certainty, the best evidence is the Constitution itself, and the Anglo-American common-law principles and historical experiences that animate it and that it embodies. Too often our judicial history recounts the "tendency [of courts] to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution". The "ultimate touchstone", none the less, "is the Constitution itself and not what [the courts] have said about it".^{617/} In short, judicial decisions are not the test of the Constitution; instead, constitutional principles are the test of judicial decisions. And "[a] case

^{616/} Ex parte Milligen, 71 U.S. (4 Wall.) 2, 118-19 (1866).

^{617/} Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (footnote omitted).

that cannot be tested by principle is not law".^{618/} Non
exemplis sed rationibus adjudicandum est.^{619/}

The major decisions of the United States Supreme Court involving the monetary provisions of the Constitution exemplify the problem of attempting inductively to derive sound knowledge of constitutional law from what the courts have written about it. For both (A) the Legal Tender Cases^{620/} and (B) the Gold Clause Cases^{621/} contain complex admixtures of mature constitutional analysis with puerile blunders. Nevertheless, despite

^{618/} Ex parte Bollman, 8 U.S. (4 Cranch) 75, 104 (1807) (Johnson, J., dissenting).

^{619/} Numerous opinions of the Supreme Court itself recognize this limitation on the binding nature of judicial "precedents" in constitutional adjudication. E.g., Thomas v. Washington Gas Light Co., ___ U.S. ___, ___ n.18, 100 S. Ct. 2647, 2656 n.18 (1980); Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring) ("especially with respect to matters of constitutional interpretation * * * if the precedent or its rationale is of doubtful validity, then it should not stand"); Coleman v. Alabama, 399 U.S. 1, 22-23 (1970) (Burger, C.J., dissenting) (denying "that what the Court said lately controls over the Constitution"); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 406 (1965) (Douglas, J., dissenting) ("issues of [constitutional] magnitude are always open for re-examination"); Gideon v. Wainwright, 372 U.S. 335, 346 (1963) (opinion of Douglas, J.) ("all constitutional questions are always open"); James v. United States, 366 U.S. 213, 233 (1961) (Black, J., concurring in part and dissenting in part); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Stone, J., dissenting); Pollack v. Farmers' Loan & Trust Co., 158 U.S. 601, 622-23 (1895) (Harlan, J., dissenting) ("in a large sense, constitutional questions may not be considered as finally settled, until settled rightly"); Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314, 343-44 (1853) (Daniel, J., dissenting) (relying on precedents "must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity").

^{620/} Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871); Juilliard v. Greenman, 110 U.S. 421 (1884).

^{621/} Norman v. Baltimore & O.R.R., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).

their many glaring shortcomings, these decisions are useful evidence of the constitutional proposition that the "Money" of the United States must have intrinsic value, in silver or gold.

A. The Legal Tender Cases

Desperate for funds to prosecute the Civil War, in the early 1860's Congress for the first time under the Constitution purported to emit bills of credit with legal-tender character: the so-called "greenbacks". The initial legal-tender act, for example, authorized the Secretary of the Treasury "to issue, on the credit of the United States, * * * United States notes, not bearing interest, payable to bearer" -- and then decreed that these "such notes * * * 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 also be lawful money and a legal tender in payment of all debts, public and private, within the United States,^{622/} except duties on imports and interest as aforesaid".

Although in law "payable to bearer", the notes were in fact irredeemable at the time, because the government had suspended specie-payments.^{623/} However, "any holders of said United States notes" could exchange them for "an equal amount

^{622/} Act of 25 February 1862, ch. 33, § 1, 12 Stat. 345, 345 (emphasis supplied).

^{623/} The government later solemnly pledged, however, "to make provision at the earliest practicable period for the redemption of the United States notes in coin". Act of 18 March 1869, ch. 1, 16 Stat. 1, 1.

of bonds of the United States, * * * bearing interest * * * payable semiannually, and redeemable at the pleasure of the United States after five years, and payable twenty years from the date thereof".^{624/} As the act itself stated, moreover, the interest on these bonds was even then payable in coin, as was the principal thereafter.^{625/} And, ultimately, the notes themselves became redeemable in fact, as well as in law.^{626/}

Predictably, litigation ensued challenging the constitutionality of the "greenbacks" on several grounds. The first case to reach the Supreme Court was Bank of New York v. Board of Supervisors.^{627/} At issue was whether legal-tender United States notes were liable to state taxation, or immune therefrom under a statutory exemption for "securities of the United States". In favor of the tax, "it was insisted that [the notes] were issued as money; that their controlling quality was that of money, and that therefore they were subject to taxation in the same manner, and to the same extent, as coin".^{628/} But the Supreme Court held that "these notes are obligations [of the United States]. They bind the national faith. They are, therefore, strictly securities."^{629/}

The Court thus distinguished sharply between "money" and "securities", identifying (at least by implication) "money"

^{624/} Act of 25 February 1862, ch. 33, § 1, 12 Stat. 345, 345.

^{625/} See Eder, "A Forgotten Section of the Fourteenth Amendment", 19 Cornell L. Rev. 1, 1-9 (1933).

^{626/} Act of 14 January 1875, ch. 15, § 3, 18 Stat. 296, 296.

^{627/} 74 U.S. (7 Wall.) 26 (1869).

^{628/} Id. at 29-30.

^{629/} Id. at 31.

with "coin" alone, and United States legal-tender notes with "obligations": "Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. 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 * * * ." ^{630/} In short, far from saying that United States notes were themselves "dollars", or were a substitute for "dollars", the Court held them to be promises to pay "dollars".

Shortly thereafter, the Court decided the case of Lane County v. Oregon. ^{631/} At issue was whether the congressional act making the "greenbacks" a legal tender "in payment of all debts, public and private," applied to state taxes. The Court held that Congress did not intend the word "debts" to include such taxes, for various reasons including the meaning of the latter term at common law. ^{632/} But it rested this result on the broader ground of constitutional federalism:

[T]o the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. * * * The extent to which it shall be exercised, the subjects upon which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of this power. * * * There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. * * * If, therefore, the condition of any State, in the judgment of

^{630/} Id. at 30.

^{631/} 74 U.S. (7 Wall.) 71 (1869).

^{632/} Id. at 79-81.

its legislature, requires the collection of taxes in kind * * * , or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere * * * . 633/

Lane County thus stated the principle, affirmed appropriately once again during the Bicentennial, ^{634/} that Congress has no constitutional authority to annul or intervene in exercises of the inherent governmental powers of the States. Now, by logical extension, the same limitation on the authority of Congress to interfere with a State's privileges or powers precludes congressional interference with a State's duties or disabilities. Article I, § 10, cl. 1 imposes on the States a duty and disability with regard to "mak[ing] any Thing but gold and silver coin a Tender in Payment of Debts". And this prohibition the Constitution enunciates in absolute terms. ^{635/} Therefore, Lane County clearly implies that Congress can neither require nor license a State to force United States notes (or other congressional "obligations" or paper currency) on its own unwilling creditors, or on the creditors of other judgment-debtors who seek relief in its courts. After all, constitutional powers and constitutional disabilities are of equal dignity. If congressional authorization of legal-tender notes cannot detract from what the Constitution empowers a State to do, it cannot detract from what the Constitution commands a State not to do, either.

^{633/} Id. at 76-77. Accord, Clark v. Nevada Land & Mining Co., Ltd., 6 Nev. 203, 208-09 (1870) (States retain inherent power to determine that judgments in the courts for damages be paid in gold coin).

^{634/} National League of Cities v. Usery, 426 U.S. 833, 840-46 (1976).

^{635/} Ante, pp. 44-50.

The Supreme Court next decided the case of Bronson v. Rodes.^{636/} At issue was whether a contractual obligation of "dollars payable in gold and silver coin, lawful money of the United States" was payable in legal-tender notes. Reviewing the history of the coinage-acts from 1792 onwards, the Court noted that "[t]he design of all this minuteness and strictness in the regulation of coinage * * * 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 * * * are the only proper measure of value; [and] that these values are determined by weight and purity".^{637/} The Court then distinguished metaphorically between a "coined dollar" and a "note dollar", by explaining that "[t]he coined dollar was * * * 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". Therefore, concluded the Court, "[i]t was impossible, in the nature of things, that these two dollars should be the actual equivalents of each other".^{638/} Thus Bronson once again emphasized that a legal-tender note is not, and cannot be, a constitutional "dollar" -- but only a promise or "obligation" to pay such a "dollar".

Against this background arose direct challenges to the constitutionality of the "greenbacks" themselves. In Hepburn v. Griswold,^{639/} the Supreme Court declared the legal-tender

^{636/} 74 U.S. (7 Wall.) 229 (1869).

^{637/} Id. at 249.

^{638/} Id. at 251-52.

^{639/} 75 U.S. (8 Wall.) 603 (1870).

acts invalid under the Fifth Amendment.^{640/} Interestingly, Chief Justice Chase, the very man who as Secretary of the Treasury had lobbied for the acts and whom President Lincoln had appointed to the Court to "sustain what has been done in regard to * * * the legal tenders",^{641/} wrote the majority opinion -- apologizing therein sotto voce for his part in the legislation.^{642/}

Changes in the Court's personnel, however, soon brought re-argument of the issue in Knox v. Lee,^{643/} and a five-to-four majority for reversal of Hepburn.

The reasoning in Knox in favor of the legal-tender acts lacks credibility, so divorced is it from the basic principles

^{640/} Id. at 623-25.

^{641/} Quoted in E. Bates, The Story of the Supreme Court (1936), at 172.

^{642/} 75 U.S. at (8 Wall.) 625:

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. * * * Many who doubted yielded their doubts; many who did not doubt were silent.

^{643/} 79 U.S. (12 Wall.) 457 (1871).

of constitutional law in the monetary field.^{644/} Apparently, the Court's majority erroneously viewed the acts as singularly

644/ For example, in a passage referring to "the unit of money value", the Knox majority wrote:

It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar.

Id. at 553. Obviously, the majority had not recently re-read Article I, § 9, cl. 1 and the Seventh Amendment, or perhaps ever understood what the references to the "dollar" in those constitutional provisions mean. Ante, pp. 81-85. Neither had the majority recently consulted Blackstone's Commentaries on the connotation of the term "value" with regard to money. For, as Blackstone pointed out, "value" is emphatically not "an ideal thing", but instead a very physical one: "the weight and the fineness of the metal * * * taken into consideration together". 1 W. Blackstone, Commentaries, ante note 5, at 278. And to "regulate * * * Value" in the constitutional sense is not to attempt to manipulate purchasing-power or other "ideal" criteria, but instead to compare the weight and fineness of the "regulate[d]" coin to the standard of "Value" -- a standard which of necessity has "gravity or extension" itself. Ante, pp. 61-69.

In addition, the majority's statement that "the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it" is simply jibberish. A silver dollar is a "dollar", by historical, constitutional, and statutory definition -- not "a standard of a dollar" or "a representative of it" -- because a "dollar", by definition, is a fixed weight of fine silver. This "dollar" is the standard of the monetary system, not of itself, just as the "pound" is the standard of the system of weights (not of itself), or the "quart" the standard of the system of volumetric measures (not of itself), and so on.

Finally, the Court may have been correct, in some ultimate philosophical sense, to conjecture that "[t]here might never have been a piece of money of the denomination of a dollar" -- but, in the same vein, there might never have been a Constitution, a United States of America, or a planet called "Earth". In fact, though, all of these things, and particularly the dollar, did exist at that time; but, unfortunately, the Knox majority did not understand the significance of this. Of such confusion, apparently, are constitutional "precedents" made.

important to the Union's then-recent victory in the Civil War,
and were willing to shrink from no inconsistency^{645/} to
preserve for the government this "capability of self-preserva-
tion".^{646/}

Nevertheless, even the Knox Court did not claim that the
legal-tender notes were themselves "dollars", or that Congress
could constitutionally emit irredeemable, intrinsically
valueless paper currency as a substitute for "dollars". The
majority's opinion made this unequivocally clear when it said
that

[t]he legal tender acts do not attempt to
make paper a standard of value. We do not
rest their validity upon the assertion

^{645/} For example, in his concurring opinion, Justice Bradley
rationalized the legal-tender notes as a form of "forced
loans" under the borrowing-power. 79 U.S. (12 Wall.) at
564-65. Yet in the very same volume of the United States
Reports the whole Court claimed that the naked power to borrow
money confers no right to emit "bills * * * used as a currency
or circulating medium", with or without legal-tender character,
even if the power includes a right to issue "securities":
"The distinction [between securities and such bills] is well
understood and recognized by the whole community. A power to
execute and issue the one class cannot, without doing violence
to the language, be deemed to include power to issue the
other." Thomas v. City of Richmond, 79 U.S. (12 Wall.) 349,
353-54 (1871).

^{646/} 79 U.S. (12 Wall.) at 532-34. The Court's appeal to the
"salvation of the government" is understandable, in the historical
context. Nevertheless, "[s]uch oversimplification, so handy
in political debate, * * * lacks the precision necessary to
postulates of judicial reasoning". West Virginia Bd. of Educ.
v. Barnette, 319 U.S. 624, 636 (1943). Indeed, on the other
side, "it could well be said that a country, preserved at the
sacrifice of all the cardinal principles of liberty is not
worth the cost of preservation". Ex parte Milligan, 71 U.S.
(4 Wall.) 2, 126 (1866). In any event, "[n]othing can destroy
a government more quickly than its failure to observe its own
laws, or worse, its disregard of the charter of its own
existence". Mapp v. Ohio, 367 U.S. 643, 659 (1961). Therefore,
no argument is less apt in constitutional analysis than that
"the government created by the Constitution must now be
destroyed [through judicial relaxation of constitutional
restraints], because it is possible to suggest conditions
which, if they arise, would in future produce a like result".
South Carolina v. United States, 199 U.S. 437, 470 (1905)
(White, J., dissenting).

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. 647/

In addition, Justice Bradley's concurring opinion emphasized that the power to make United States notes legal tender

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. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed.

* * * *

No one supposes that these government certificates are never to be paid -- that the day of specie payments is never to return. * * * And their payment may not be made directly in coin, but they may be first convertible into government bonds, or other government securities. Through whatever changes they pass, their ultimate destiny is to be paid.

* * * *

So with the power of government to borrow money, * * * when exercised in the form of legal tender notes or bills of credit, it may operate for the time being to compel the creditor to receive the credit of the government in place of the gold which he expected to receive from his debtor. 648/

The Knox Court upheld the Civil-War legal-tender notes,

647/ 79 U.S. (12 Wall.) at 533.

648/ Id. at 560, 561-62, 565.

then: (i) because those notes were dependent on a fixed standard of value expressed in gold; and (ii) because those notes were ultimately redeemable, dollar for dollar, in money with intrinsic value (that is, specie). Evidently, the Knox majority would not have bothered to distinguish redeemable legal-tender notes from "attempt[s] to make paper a standard of value", from "money which has no intrinsic value", and from "an attempt to make dollars" except to emphasize by antithesis the necessary characteristics of what it thought was constitutional paper currency.

The last of the Legal Tender Cases was Juilliard v. Greenman.^{649/} Rather than asserting any new monetary principle, however, Juilliard merely applied the decision in Knox to redeemable legal-tender notes re-issued in time of peace.^{650/} Interestingly, at the time the Court decided Juilliard, the national government was already redeeming legal-tender notes "in coin".^{651/}

In sum, the effect of all the Legal Tender Cases was

^{649/} 110 U.S. 421 (1884).

^{650/} Id. at 437-38:

The single question * * * to be considered * * * is whether notes of the United States, issued in time of war * * * and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can * * * be a legal tender in payment of debts.

* * * [T]he court is * * * of opinion that [this case] cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall. 457 [i.e., Knox v. Lee] * * * .

^{651/} Act of 14 January 1875, ch. 15, § 3, 18 Stat. 296, 296.

limited to the -- unfortunately erroneous -- holding that Congress has authority to emit bills of credit and declare them a legal tender for some categories of public and private debts, if these bills are redeemable, dollar for dollar, in specie. None of the cases asserted the even more pernicious notions that Congress could change the constitutional (silver) standard of value, make paper a substitute for silver or gold without a promise of redemption, or issue irredeemable, intrinsically worthless "fiat money".

And so men of affairs at the time understood these decisions. For instance, in a speech a few years after Juilliard, Secretary of the Treasury John Sherman defined "specie payments" as

simply that paper money ought to be made equal to coin * * * .

Now the importance of this cannot be overestimated. A depreciated paper money has been treated by statesmen as one of the greatest evils that can befall a people.

* * * *

[T]here is a large class of people who believe that paper can be, and ought to be, made into money without any promise or hope of redemption; that a note should be printed: "This is a dollar," and be made a legal tender.

I regard this as a mild form of lunacy, and have no disposition to debate with men who indulge in such delusions, which have prevailed to some extent, at different times, in all countries, but whose life has been brief, and which have shared the fate of other popular delusions. * * * [T]he Supreme Court only maintained the constitutionality of the legal tender promise to pay a dollar by a divided court, and on the ground that it was issued * * * in the nature of a forced loan, to be redeemed upon the payment of a real dollar; that is, so many grains of silver or gold.

I therefore dismiss such wild theories,

and speak only to those who are willing to assume, as an axiom, that gold and silver, or coined money, have been proven by all human experience to be the best possible standards of value, and that paper money is simply a promise to pay such coined money, and should be made and kept equal to coined money, by being convertible on demand. ^{652/}

B. The Gold Clause Cases

The "delusions" of that "mild form of lunacy" that "paper can be, and ought to be, made into money without any promise or hope of redemption" found no greater support in the Supreme Court's later decisions in the Gold Clause Cases than they had earlier received the Legal Tender Cases.

Indeed, the issue of the unconstitutionality of irredeemable, legal-tender paper currency did not even arise, for two reasons: First, although Congress had terminated redemption of all paper currencies in gold, and withdrawn all gold coin from circulation, ^{653/} national paper notes were still ultimately redeemable in silver dollars of the constitutionally prescribed weight of 371-1/4 grains. ^{654/} Second, no party in any of the Gold Clause Cases challenged the purported power of Congress to terminate redemption of paper currencies in gold coin, to seize such coin from private individuals, or to decree that all private and public obligations were payable in currencies redeemable only in silver. Instead, each party

^{652/} Speech in Mansfield, Ohio, Friday, 19 August 1877, in 1 J. Sherman, Recollections of Forty Years in the House, Senate and Cabinet: An Autobiography (1968 ed.), at 589-91.

^{653/} Act of 30 January 1934, ch. 6, §§ 5-6, 48 Stat. 337, 340-41, now 31 U.S.C. §§ 315b, 408a (1976).

^{654/} Pursuant to Act of 28 February 1878, ch. 20, § 1, 20 Stat. 25, 25; and Act of 14 July 1890, ch. 708, § 1, 26 Stat. 289, 289.

actually demanded payment in paper notes ultimately redeemable in silver coin -- the only issue in the cases being the amounts of paper currency they were entitled to receive.^{655/}

Of most importance here was the decision in Perry v. United States.^{656/} In that case, a holder of a United States bond payable in gold coin challenged the authority of Congress to satisfy its obligations, dollar for dollar, with paper currencies redeemable in silver, rather than in gold. The Perry Court explicitly held that, under the Due Process Clause of the Fifth Amendment, Congress has no power to repudiate its obligations. However, to the bondholder's claim that he was entitled, not simply to the face-value of the bond in silver-backed paper currency, but rather to its face-value computed in gold and paid in a supposedly larger amount of notes, the Court responded that he "ha[d] not shown, or attempted to show, that in relation to buying power he has sustained any loss whatsoever", and had not demonstrated "any actual loss he ha[d] suffered with respect to any transaction in which his dollars may be used".^{657/} Thus, Perry stands for the proposition that, if a litigant can prove a diminution of "buying

^{655/} Norman v. Baltimore & O.R.R., 294 U.S. 240, 315 (1935) ("according to the contentions before us, * * * indebtedness on * * * 'gold bonds' must be met by an amount of currency determined by the former gold standard"); Nortz v. United States, 294 U.S. 317, 324, 330 (1935) (only question is whether "owner of gold certificates * * * who * * * had received therefor legal tender currency of equivalent face amount, [is] entitled to receive * * * a further sum"); Perry v. United States, 294 U.S. 330, 346 (1935) (sole issue is whether "claimant * * * [is] entitled to receive an amount in legal tender currency in excess of the face amount of the bond").

^{656/} 294 U.S. 330 (1935).

^{657/} Id. at 348-58.

power" or "any actual loss * * * with respect to any transaction" because Congress' exercise of its monetary powers has effectively repudiated a governmental obligation, he has a claim under the Due Process Clause.

The instructive aspect of Perry is what this due-process proposition necessarily implies about the constitutional structure of the monetary system. The effect of the national government's seizure of privately held gold and suppression of gold coinage in 1933 was to make all private and public obligations formerly denominated in gold ultimately payable thereafter only in silver. The gold-seizure thus amounted to a forced exchange of (silver) dollars, of the constitutionally prescribed weight and fineness, for gold coinage -- presumably itself of the properly "regulate[d]" weight and fineness. Yet if, as historically was the case under English common law, under the Articles of Confederation, under the explicit language of the Constitution, and under the practice of Congress for more than a century, silver and gold were always lawful "Money", always legal tender, and always exchangeable one for the other at fixed and presumably non-confiscatory rates properly "regulate[d]" according to their intrinsic "Value[s]" in the market -- then (at least in principle), the gold-seizure raised no real constitutional problem.^{658/} So

^{658/} At the time, the expressed

policy of the United States [was] 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 * * * 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 each dollar at all times in the markets and the payments of debts.

(FOOTNOTE CONT'D NEXT PAGE)

long as the complainant in Perry failed even to argue, let alone to prove, that he had received less silver for his gold than a properly "regulate[d]", non-confiscatory exchange-rate required, he had no constitutional claim at all on that score. The real, but unargued, issue in Perry was the disability of Congress or the Executive to seize the people's gold at all.^{659/} Lacking this contention in the record, the case merely restated implicitly the truism that the dollar-for-dollar exchange of a legal-tender gold coin for a legal-tender silver coin, where each presumably has the same properly "regulate[d]" intrinsic value, does not (and logically can not) deprive a person of property in violation of the Constitution.

But the significance of this truism is far from trite. For if, as the Perry Court unanimously held, Congress would have violated the Fifth Amendment by requiring the holder of a bond payable in gold coin to receive instead silver coin of less "purchasing-power", then necessarily Congress has no power to "regulate" the mutual "Value[s]" of gold and silver coins at other than their intrinsic exchange-ratios in the free market -- and, therefore, has no power to set the value

(FOOTNOTE 658 CONT'D)

Act of 1 November 1893, ch. 8, 28 Stat. 4, 4, now 31 U.S.C. § 311 (1976). To be sure, the seizure of gold eliminated coinage of that metal, but did not eliminate the statutory "gold standard", in the sense that Congress continued to define a "gold dollar" -- different from the pre-1933 "gold dollar" in terms of weight of fine gold, but a specific weight of that substance none the less. Therefore, at the time of Perry, the policy-statement in the Act of 1 November 1893 alone ensured as a matter of law, if not as a matter of the practices of the national government, that forced payment of obligations denominated in gold with paper currencies redeemable in silver had to afford the creditors "dollars" with a "parity in value" and "equal power" to the "dollars" they would otherwise have received.

^{659/} See ante, pp. 58-60.

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^{659/} See ante, pp. 58-60.

of any paper currency at other than the value of the relevant denomination of silver or gold coin in which that currency is redeemable. Or, the Fifth Amendment requires that all forms of "Money", or promises to pay "Money" with legal-tender character, ^{660/} must have the same intrinsic value: Each legal-tender instrument of whatever composition must be equivalent in "purchasing-power" to the "Value" of the constitutional (silver) dollar. Thus, if coined of silver, the dollar must contain 371-1/4 grains of fine silver. If coined of gold, the piece must have a "Value" computed on the basis of its weight in fine gold and the market exchange-ratio between that weight and the weight of the silver "money of account". And if printed as a legal-tender "certificate", "note", or other "obligation" of the government, the "Securit[y]" must be redeemable in silver, gold, or both in the constitutionally required amounts indicated by its denomination.

The implicit assumption in Perry -- that Congress has authority to emit redeemable legal-tender paper currency -- is no more correct than the explicit holding to that effect in Knox or Juilliard. But, as with those cases, Perry goes not one step further in the direction of supporting "fiat money".

III. Abuses of the monetary powers under the contemporary Federal Reserve System

Under the contemporary Federal Reserve System, the monetary structure of the United States is the veriest antithesis of what the Founders contemplated, the Constitution embodies, Congress established and maintained for nearly two centuries,

^{660/} This requirement is relevant only where paper currency with legal-tender character is concerned. For, without governmental compulsion to accept the paper, no creditor can ever suffer a loss the risk of which he did not voluntarily accept by contracting with the debtor in the first place.

and the Supreme Court sustained in the Legal Tender and Gold Clause Cases. Indeed, it is unconstitutional both: (A) in the particular -- the irredeemable, legal-tender federal-reserve notes that constitute what passes for "money" in this country; and (B) in the general -- the corporative-state Federal Reserve System that purports to exercise monetary powers of unlimited scope delegated by Congress.

A. The unconstitutionality of irredeemable, legal-tender federal-reserve notes

To appreciate the truly stark repugnance to the Constitution of contemporary irredeemable, legal-tender federal-reserve notes requires a review of the historical declension of money in this country from the unquestionably constitutional silver and gold coinage of the mid-1800's to the "fiat currency" of the last less-than-twenty years.

1. The evolution of the "bimetallic standard", 1873 to 1900

As described earlier, during the period when legislative construction of the Constitution was relevant to its interpretation, Congress enacted two important laws, the Coinage Act of 1834^{661/} and the Coinage Act of 1849.^{662/} The earlier statute "regulate[d] the Value" of gold, as against the constitutional silver dollar, at 23-1/5 grains of fine gold to the dollar of 371-1/4 grains of fine silver.^{663/} The

^{661/} Act of 28 June 1834, ch. 95, 4 Stat. 699. See ante, pp. 127-52.

^{662/} Act of 3 March 1849, ch. 109, 9 Stat. 397. See ante, pp. 154-55.

^{663/} The (gold) eagle contained 232 grains of pure gold, at a "Value" of 10 (silver) dollars. Each (silver) dollar, then, had a reciprocal "Value" of 23-1/5 grains of gold.

later statute provided for the coinage of "gold dollars, each to be of the value of one dollar, or unit", according to the standard weights established in 1834. Thus, at the end of this period, the coinage-laws had determined the weight of the constitutional standard of value, the (silver) dollar, at 371-1/4 grains of fine silver, and had created a statutory "gold dollar", the "Value" of which was appropriately "regulate[d]" at 23-1/5 grains of fine gold.

a. The Coinage Act of 1873

Soon after the Civil War, Congress embarked on a so-called "gold-standard" policy that initially deviated from its pre-war application of Article I, § 8, cl. 5, but ultimately returned to the principles of the acts of 1792, 1834, and 1849. First came the Coinage Act of 1873.^{664/} Therein, Congress continued the "gold dollar", containing 23-1/5 grains of fine gold, but declared this "dollar" "the unit of value".^{665/} Together with the provision repealing "all other acts and parts of acts pertaining to the mints * * * and coinage of the United States inconsistent with * * * this act",^{666/} the creation of a gold "unit of value" purported statutorily to supersede the constitutional silver standard. Consistently with this apparent purpose, Congress ceased minting the standard (silver) dollar^{667/} and reduced all silver coins.--

^{664/} Act of 12 February 1873, ch. 131, 17 Stat. 424. For an interesting legislative-historical analysis of this statute, see McCleary, "The Crime of 1873", Sound Currency, Vol. VII, No. 9 (September 1900), at 153.

^{665/} § 14, 17 Stat. at 426.

^{666/} § 67, 17 Stat. at 435.

^{667/} § 17, 17 Stat. at 427.

including a new "trade-dollar" of 378 grains of fine silver -- to a subsidiary status, permitting them to be "a legal tender at their nominal value [only] for any amount not exceeding five dollars in any one payment".^{668/} The gold coins, however, retained their traditional unlimited legal-tender character "in all payments at their nominal value when not below the standard weight", or otherwise, "at valuation in proportion to their actual weight".^{669/}

b. The Coinage Act of 1878

Just five years later, in the Coinage Act of 1878,^{670/} Congress resumed coinage of the standard silver dollar of 371-1/4 grains of fine silver, making it "a legal tender, at [its] nominal value, for all debts and dues public and private, except where otherwise expressly stipulated in the contract".^{671/} The act also authorized the issuance of "silver certificates": in effect, warehouse-receipts for silver coin deposited with the Treasury, payable on demand, and "receivable for customs, taxes, and all public dues".^{672/} Thus, the Coinage Act of 1878 returned the monetary system to its status in 1849 in so far as it provided for both a standard silver dollar unquestionably of the constitutional "Value" and a "gold dollar" presumably of the proper constitutional "Value", each with full

^{668/} § 15, 17 Stat. at 427.

^{669/} § 14, 17 Stat. at 426.

^{670/} Act of 28 February 1878, ch. 20, 20 Stat. 25.

^{671/} § 1, 20 Stat. at 25.

^{672/} § 3, 20 Stat. at 26.

legal-tender character for the payment of contracts the parties denominated in undefined "dollars".^{673/}

c. The Subsidiary Coinage Act of 1879

The next year, Congress clarified the position of minor silver coins as claims to "lawful money" and as legal tender in the Subsidiary Coinage Act of 1879.^{674/} First, Congress provided that, on presentation at the Treasury, "the holder of any of the silver coins of the United States of smaller denominations than one dollar may * * * receive therefor lawful money of the United States".^{675/} At this time, "lawful money" included two things: (i) In keeping with common-law tradition,^{676/} silver and gold coin were "lawful money" by both constitutional provision^{677/} and statutory declaration.^{678/} And (ii) as erroneously sustained by the Supreme Court,^{679/}

^{673/} With the re-coining of the standard (silver) dollar, the "trade dollar" became an anomaly. Congress therefore terminated its coinage in 1887, providing for "exchange for a like amount, dollar for dollar, of standard silver dollars, or of subsidiary coins of the United States". Act of 3 Mar. 1887, ch. 396, § 1, 24 Stat. 634, 635.

^{674/} Act of 9 June 1879, ch. 12, 21 Stat. 7.

^{675/} § 1, 21 Stat. at 7-8.

^{676/} E.g., 2 E. Coke, The First Part of the Institutes of the Laws of England; or, A Commentary Upon Littleton (C. Butler ed., 18th ed., 1823), § 335, at 207a-207b: "'Money, moneta, legalis moneta Angliae,' lawful money of England, either in gold or silver, is of two sorts, viz. the English money coyned by the king's authoritie, or forraine coyne by proclamation made currant within the realme." On the use of Coke's Institutes in constitutional analysis, see, e.g., Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967).

^{677/} U.S. Const. art. I, § 9, cl. 1 ("[silver] dollars"); art. I., § 10, cl. 1 ("gold and silver Coin"); amend. VII ("[silver] dollars").

^{678/} Act of 12 July 1870, ch. 252, § 5, 16 Stat. 251, 253 (defining "lawful money" for purposes of the act as "gold or silver coin of the United States").

^{679/} Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871).

legal-tender United States notes were also "lawful money",
perforce of statutory decree.^{680/} But these notes themselves
being redeemable in gold coin,^{681/} for all practical purposes
"lawful money" was synonymous with (silver) dollars and the
national gold coinage.

Second, Congress declared that subsidiary silver coinage
should be a legal tender "in full payment of all dues public
and private", but only for "all sums not exceeding ten dollars".^{682/}
This provision demonstrated Congress' great concern, as
earlier manifested in the Coinage Act of 1853,^{683/} that its
minor coinage be explicitly recognized (in Blackstone's
trenchant phrase) as "not upon the same footing with the
other" silver and gold coins issued under Article I, § 8, cl.
5. Or, once again Congress re-affirmed the common-law and
constitutional principle that a coin with full legal-tender
character must also have full intrinsic value relative to the
monetary standard. Even more interestingly, Congress obviously
desired to make doubly sure that the country's subsidiary
coinage satisfied every constitutional standard -- for, not
only did it strictly limit the legal-tender effect of that
coinage, but also it made the coins fully exchangeable for
"lawful money" with complete legal-tender character, thereby
protecting the potential recipients of that coinage in a

^{680/} E.g., Act of 25 February 1862, ch. 33, § 1, 12 Stat.
345, 345, in pertinent part now 31 U.S.C. § 452 (1976).

^{681/} Act of 14 January 1875, ch. 15, § 3, 18 Stat. 296,
296.

^{682/} Act of 9 June 1879, ch. 12, § 3, 21 Stat. 7, 8.

^{683/} See ante, pp. 155-56.

two-fold manner from any losses even arguably attributable to the monetary system alone.^{684/}

d. The Silver Purchase Act of 1890

Congress further strengthened the monetary position of silver in the Silver Purchase Act of 1890.^{685/} Therein, it directed the Secretary of the Treasury to purchase silver bullion at a price not exceeding one dollar for each 371-1/4 grains, and "to issue in payment for such purchases * * * Treasury notes of the United States".^{686/} The act made the notes "redeemable on demand, in coin," but empowered the Secretary of the Treasury to "redeem such notes in gold or silver coin, at his discretion, it being the established policy of the United States to maintain the two metals on a parity with each other".^{687/} Here, then, at a century's remove, was a restatement of the underlying policy of the Coinage Act of 1792.

e. The Policy Declaration of 1893

In 1893, Congress repealed the Silver Purchase Act of 1890.^{688/} But even more emphatically than in that act it

^{684/} Congress thus went beyond what most other governments of the "hard-money" era did to protect the recipients of minor (or "token") coinage. As von Mises points out, generally "[t]he danger that these regulations [limiting legal tender in private dealings] would prove inadequate has never seemed very great, and consequently legislative provisions for conversion of the token coins has either been entirely neglected or left incomplete by omission of a clear statement of the holder's right to change them for money". Theory of Money and Credit, ante note 1, at 57.

^{685/} Act of 14 July 1890, ch. 708, 26 Stat. 289.

^{686/} § 1, 26 Stat. at 289.

^{687/} § 2, 26 Stat. at 289.

^{688/} Act of 1 November 1893, ch. 8, 28 Stat. 4.

also re-affirmed the principles of the Coinage Act of 1792 when it declared "the policy of the United States" to be

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 payment 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. ^{689/}

In this declaration Congress encapsulated the traditions of common law, the requirements of the Constitution, and the entire legislative experience in monetary matters from 1792, through 1834 and 1849, until 1893.

f. The Coinage Act of 1900

The Coinage Act of 1900^{690/} marked a high-point in the evolution of the monetary system -- at least in comparison to what was soon to follow. Once again, Congress defined the statutory "standard unit of value" as the "dollar consisting of [23-1/5 grains of fine gold]", and ordered that "all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard".^{691/} As one manifestation of this policy, Congress decreed that

^{689/} 28 Stat. at 4.

^{690/} Act of 14 March 1900, ch. 41, 31 Stat. 45.

^{691/} § 1, 31 Stat. at 45.

treasury notes originally issued in payment for silver at the rate of one dollar for each 371-1/4 grains of fine metal "when presented to the Treasury for redemption, shall be redeemed in gold coin of the standard [of one dollar for each 23-1/5 grains of fine metal]^{692/}". Thus, Congress equated the statutory gold standard with the constitutional silver standard -- or, in principle, maintained the constitutional silver standard intact through the indirect method of fixing the statutory gold standard at "a parity of value" with it. The "gold standard" of 1873 to 1900, then, became but a reflexion of the traditional "silver standard" of the common law from Queen Anne's proclamation of 1704,^{693/} through the Constitution and the Coinage Act of 1792, to the Coinage Act of 1849. The Coinage Act of 1900 also re-affirmed the full "legal-tender quality as * * * provided by law of the silver dollar",^{694/} and provided for the issuance of silver and gold certificates,^{695/} the only "paper money" constitutionally possible under Article I, § 8, cl. 5.

At the birth of the twentieth century, therefore, the monetary system was fully on a bimetallic basis, nominally (by statute) on the "gold standard" but in effect (and by force of the Constitution) still on the "silver standard" as well. The beginning of radical change, though, was close at hand.

2. The declension of the monetary system from bimetallicism to "fiat currency", 1933 to 1978

The set of monumental political blunders that precipitated

^{692/} § 2, 31 Stat. at 45.

^{693/} In An act for ascertaining the rates of foreign coins in her Majesty's plantations in America, 1707, 6 Anne, ch. 30, § I.

^{694/} Act of 14 March 1900, ch. 41, § 3, 31 Stat. 45, 46.

^{695/} §§ 5-7, 31 Stat. at 47.

the economic catastrophe popularly known as the Great Depression needs no extensive discussion.^{696/} Suffice it to say that, although the economic collapse was the product of irresponsible bank credit-expansion engineered by the Federal Reserve System, it served as the excuse for ultimately successful attacks on the nation's "hard-money" system, and its replacement with a regime of intrinsically valueless "fiat currency".

a. The removal of gold from the monetary system

The initial phase of this process involved the seizure of all privately held gold, the abrogation of governmental obligations denominated in gold and the outlawry of private "gold clauses", the withdrawal of gold coinage from circulation, and the devaluation of the "gold dollar".

1) The Emergency Banking Act of 1933

Congress began the destruction of the constitutional monetary system with the Emergency Banking Act of 1933.^{697/} First, Congress purported to empower the President, "[d]uring time of war or during any other period of national emergency declared by the President", to "regulate or prohibit * * * export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof".^{698/} The statutory authority of the President to act "[d]uring time of war" at least assumed a prior constitutional determina-

^{696/} See, e.g., M. Rothbard, America's Great Depression (1963).

^{697/} Act of 9 March 1933, ch. 1, 48 Stat. 1.

^{698/} § 2, 48 Stat. at 1.

tion by Congress, through a declaration of war, that a real "national emergency" existed.^{699/} The further authority to act "during any other period of national emergency declared by the President" in effect purported to delegate to the Executive unlimited discretion to "regulate or prohibit * * * hoarding * * * of gold and silver coin or bullion or currency". The statute did not define "hoarding", however.

Second, Congress purported to empower the Secretary of the Treasury, "in his discretion", to "require any or all individuals * * * to pay and deliver to the Treasurer of the United States any and all gold coin, gold bullion, and gold certificates owned by such individuals". The Secretary had only to "judg[e] * * * such action * * * necessary to protect the currency system of the United States" -- but he was required to "pay [for the gold so seized] an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States".^{700/} How the Secretary should calculate what this "equivalent amount" was, the statute did not say.

On its face, the Emergency Banking Act of 1933 raised four serious constitutional issues: First, the attempted delegation by Congress to the President of the power to "prohibit * * * hoarding * * * of gold or silver coin or bullion or currency", and to the Secretary of the Treasury of the power to "require any or all individuals * * * to pay and deliver * * * any and all gold coin, gold bullion, and gold certificates", could have been constitutional only if Congress itself had had authority to seize the people's gold

^{699/} See U.S. Const. art. I, § 8, cl. 11.

^{700/} § 3, 48 Stat. at 2.

and silver coin, bullion, certificates, or "currency". That Congress never had any such power, though, English common law strongly indicates.^{701/}

Second, if Congress had had constitutional power to seize the people's silver and gold, the source of that power would have had to be the authority in Article I, § 8, cl. 5 "To coin Money, regulate the Value thereof, and of foreign Coin".^{702/} Under English common law, this coinage-power was a prerogative of the King, the English Executive. Through the grant in Article I, § 8, cl. 5, the Constitution absolutely divested the Executive of this power, and lodged it exclusively in the Legislature.^{703/} Thus, for Congress to have attempted to delegate such authority to the President (or to his subordinate, the Secretary of the Treasury) would have been to circumvent and subvert the very purpose of Article I, § 8, cl. 5 -- as unconstitutional a delegation of power as is conceivable under the American system of government. The Constitution explicitly, unequivocally, and (without constitutional amendment) irrevocably took from the Executive the authority "To coin Money, [and] regulate the Value thereof", because the Founders evidently believed that the Legislature was a more secure repository for such power. Thereby, the Constitution characterized the coinage-power as an essential legislative function, exclusively within the ken of Congress. Congress, however, "manifestly is not permitted to abdicate,

^{701/} Ante, pp. 58-60.

^{702/} See *Ling Su Fan v. United States*, 218 U.S. 302 (1910).

^{703/} Compare 1 W. Blackstone, *Commentaries*, ante note 8, at 276-78, with 1 W. Crosskey, *Politics and the Constitution*, ante note 202, at 411-14, 421.

or to transfer to others, the essential legislative functions with which it is * * * vested".^{704/}

Third, even if Congress had had constitutional authority to seize the people's silver and gold, and to delegate that power to the Executive, the question nevertheless would have remained whether the particular form of the delegation in the Emergency Banking Act of 1933 met constitutional requirements. Congress claimed to empower the President to "prohibit * * * hoarding" "during any * * * period of national emergency declared by [himself]" -- or, for all practical purposes, whenever the President wished. However, it provided no definition of the "hoarding" the President could lawfully "prohibit". In addition, Congress claimed to empower the Secretary of the Treasury to seize gold whenever, in his unfettered discretion, he judged it "necessary to protect the currency system of the United States". However, Congress failed to identify any threat to the "currency system" against which a seizure of gold was arguably appropriate "protec[tion]".^{705/} (Indeed, even to suggest that confiscation from the American people themselves of a sizeable portion of their own "currency system" amounts to, or is necessary for, "protect[ing]" that system borders on the ridiculous.) Overall, then, Congress purported to

^{704/} Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). Accord, Field v. Clark, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

^{705/} In the preamble to the act, Congress merely "declare[d] that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application". 48 Stat. at 1.

delegate sweeping monetary powers to the Executive without "declar[ing] a policy", "set[ting] up a standard for the [Executive's] action", or "requir[ing] any finding by the [Executive] in the exercise of the authority" delegated -- all of which, under traditional legal principles, rendered its action unconstitutional.^{706/}

Finally, Congress ordered the Secretary of the Treasury to "pay" for the gold he seized with "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States". On its face (and leaving aside the unconstitutionality of the seizure in the first instance), this requirement was constitutional. Still in force in 1933, the Coinage Act of 1900 declared that "all forms of money issued or coined by the United States shall be maintained at a parity of value with [the statutory gold] standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity".^{707/} In principle, then, a dollar-for-dollar exchange in 1933 of gold coin, bullion, or certificates for "any other form of coin or currency" (all of which at that time were ultimately redeemable in or convertible to standard silver dollars) would have resulted in receipt by the individual payee of a "parity of value" in silver for the gold the Treasury confiscated -- if in fact, the statutory "gold

^{706/} See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388, 414-33 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935).

^{707/} Act of March 1900, ch. 41, § 1, 31 Stat. 45, 45.

dollar" had then been properly "regulate[d]" in relation to the constitutional (silver) dollar.^{708/}

That it was "the duty of the Secretary of the Treasury to maintain such parity", the Coinage Act of 1900 enjoined upon him; but whether he had assiduously fulfilled this duty was a question only judicial investigation could have settled.^{709/} The necessary inquiry was simple enough: Given a number, G, of "gold dollars" the Secretary of the Treasury seized (say) on 1 April 1933, an "equivalent amount of * * * other coin", E, would have been G multiplied by 23-1/5 grains (the weight of pure gold in the "gold dollar"), multiplied by the market-proportion between gold and silver on that day, divided by 371-1/4 grains (the weight of pure silver in the dollar). If the Secretary has properly "maintain[ed the gold-to-silver] parity", E would have equaled G, and the seizure of gold would have amounted to no more than the dollar-for-dollar exchange of legal-tender silver coins for legal-tender gold coins of the same intrinsic value. Of course, if E had been greater than G, then any dollar-for-dollar payment of G silver dollars for G "gold dollars" would have been, not an exchange of "equivalent amount[s]", but an unconstitutional expropriation of value under the guise of an exchange. Or, conversely, if E had been less than G, any dollar-for-dollar payment would have amounted to unjust

^{708/} Such an exchange "damages the interests of neither party. It is economically neutral". L. von Mises, The Theory of Money and Credit, ante note 1, at 70. Because it is "economically neutral" (that is, because the market-value of payment in silver is equivalent to the market-value of payment in properly "regulate[d]" gold), a dollar-for-dollar exchange would be constitutional even under the strict standard applicable to "takings" of property. E.g., United States v. New River Collieries Co., 262 U.S. 341, 343-44 (1923) ("market price" of property is just compensation for its expropriation by government).

^{709/} The presumption is that governmental officials do their duty. E.g., Buttfield v. Stranahan, 192 U.S. 470, 496-97 (1904).

enrichment of the payee at the taxpayers' expense. In any event, for a seizure of G "gold dollars", the payee would have been entitled to E (silver) dollars, whether E was equal to, less than, or more than G. Only if E had been equal to G would the payment of G have been constitutional.

Presumably, Congress enacted the Emergency Banking Act of 1933 with the requirements of the Constitution and of the Coinage Act of 1900 in mind.^{710/} Therefore, when Congress used the phrase "equivalent amount of any other form of coin or currency", it presumably meant constitutionally "equivalent" in terms of the properly "regulate[d] Value" of those "other form[s] of coin or currency". And when it ordered the Secretary of the Treasury to "pay" this "equivalent amount", it presumably referred to his outstanding statutory duty to "maintai[n] * * * a parity of value" among "all forms of money issued or coined by the United States". So, in short, as written, the Emergency Banking Act of 1933 was capable of a constitutional interpretation in this particular.^{711/}

2) Executive Order No. 6102

The Executive did not apply the authority the Emergency Banking Act purported to delegate in a constitutional manner, however. In Executive Order No. 6102,^{712/} President F.D.

^{710/} E.g., Albernaz v. United States, ___ U.S. ___, ___, 101 S. Ct. 1137, 1143-44 (1981).

^{711/} In this kind of analysis, "[t]he cardinal principle of statutory construction is to save and not to destroy", to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided". NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). Accord, e.g., Crowell v. Benson, 285 U.S. 22, 62 (1932); Lynch v. Overholser, 369 U.S. 705, 710-11 (1962).

^{712/} Executive Order No. 6102, 5 April 1933, ___ Stat. ___, in 2 The Public Papers and Addresses of Franklin D. Roosevelt (1938), at 111.

Roosevelt commanded "[a]ll persons * * * to deliver * * * all gold coin, gold bullion and gold certificates" to one or another arm of the Federal Reserve System,^{713/} promising that "the Federal Reserve Bank or member bank will pay therefor an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States".^{714/} This seizure of the people's gold was, doubtlessly, unconstitutional.^{715/}

Of no minor significance in this regard was Roosevelt's definition of "hoarding", the key term Congress left undefined in that act, but identified as one alleged evil against which the seizure of gold would supposedly "protect the currency system of the United States". According to Roosevelt, "'hoarding' mean[t] the withdrawal and withholding of gold coin, gold bullion, or gold certificates from the recognized and customary channels of trade".^{716/} Or, abstracting from invidious epithets, according to Roosevelt "hoarding" meant simply holding gold -- that is, not immediately spending or depositing it in "the recognized and customary channels of trade". Now, holding money is one of the normal -- indeed, universal -- uses of money.^{717/} In effect, then, the Executive (with implicit, but unconstitutional congressional permission)

^{713/} § 2, ___ Stat. at ___, in 2 id. at 112.

^{714/} § 4, ___ Stat. at ___, in 2 id. at 113.

^{715/} Ante, pp. 58-60.

^{716/} Executive Order No. 6102, 5 April 1933, § 1, ___ Stat. ___, ___, in 2 Public Papers, ante note 712, at 112.

^{717/} E.g., L. von Mises, Human Action, ante note 1, at 402-03, 448-50. Deprecating the mere holding of money as "hoarding" obscures with scurrilous rhetoric the economic reality of the situation. E.g., M. Rothbard, Man, Economy, and State, ante note 1, at 679-93.

decreed that one of the normal, unavoidable uses of money by the people justified the seizure of that money from the people, in order to "protect the currency system" of the people supposedly based on that very money!^{718/}

3) The Emergency Farm Mortgage Act of 1933

Not satisfied with extending to the Executive an allegedly delegated power to confiscate the people's gold that Parliament had held beyond the authority of even a "sovereign" monarch,^{719/} Congress then enacted the Emergency Farm Mortgage Act of 1933,^{720/} and rationalized its action as "Exercising Power Conferred by Section 8 of Article I of the Constitution: To Coin Money and to Regulate the Value Thereof".^{721/} In its by-then-typical style of abdicating all responsibility to the Executive, Congress "authorized" the President

[b]y proclamation to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite ratio in relation to the gold dollar at such amounts as he finds necessary * * * , 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 * * * , but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum. ^{722/}

^{718/} Amazingly, Roosevelt's apologists described the gold-seizure as "a step toward the fulfillment of the Democratic National Platform of 1932 pledging 'a sound currency to be preserved at all hazards'". 2 Public Papers, ante note 712, at 115.

^{719/} Ante, pp. 58-60.

^{720/} §§ 42-46 of the Agricultural Adjustment Act of 1933, Act of 12 May 1933, ch. 25, 48 Stat. 31, 51-54.

^{721/} Preamble, 48 Stat. at 51.

^{722/} § 43(b)(2), 48 Stat. at 52-53.

Here was a complex set of constitutional violations.

First, Congress purported to transfer to the Executive the power to set "the value for which the coin is to pass current",^{723/} which under English common law was "in the breast of the king"^{723/} -- but which the Constitution had vested exclusively in the Legislature. Yet, even if Congress had had the authority to delegate to the Executive the power "To * * * regulate * * * Value", nevertheless it could not have delegated a power to fix the proportion between the gold and silver coinage "at a definite * * * ratio * * * at such amount as [the President] finds necessary" but without relation to the real intrinsic values of the precious metals in the various coins.^{724/}

Second, Congress purported to delegate with this power "To * * * regulate * * * Value" a further discretionary license to debase the value of the gold coinage by up to one-half from the statutory standard -- an authority even the King had never rightfully enjoyed under the unwritten English constitution.^{725/}

And third, Congress purported to permit the Executive, through this unlawful debasement of the purely statutory "gold dollar", to debase the constitutional (silver) dollar as well -- a power self-evidently beyond even Congress' reach without a constitutional amendment.^{726/}

In addition, Congress purported to declare that "all * * * 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",^{727/} including

^{723/} 1 W. Blackstone, Commentaries, ante note 8, at 278.

^{724/} Ante, pp. 61-69.

^{725/} Ante, pp. 70-76.

^{726/} See ante, pp. 81-85.

^{727/} § 43(b)(1), 48 Stat. at 52.

(presumably) subsidiary silver coins, copper coins, and even federal-reserve notes. Here, for the first time in American history, Congress claimed the power to make something other than silver or gold coin of the proper constitutional or statutorily "regulate[d]" standard a full legal tender. This, needless to emphasize, went beyond even what the English King had claimed at common law, besides affronting the first principles of Article I, § 8, cl. 5. ^{728/}

4) The Joint Resolution of 1933

The next step Congress took alone, in the Joint Resolution of 1933. ^{729/} First, it declared that

provisions in obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, 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, in the markets and in the payment of debts. ^{730/}

How such "provisions" could possibly "obstruct the power of Congress to regulate the value of money", Congress did not say. Neither could it have said. The power "To * * * regulate * * * Value" in Article I, § 8, cl. 5 involves comparing the weight of fine metal in a given silver coin to the weight of fine metal in the constitutional (silver) dollar, and declaring the proportion in dollar-values; or, calculating the weight of fine silver that corresponds, at the market exchange-

^{728/} Ante, pp. 70-76.

^{729/} H.J. Res. No. 192, 5 June 1933, ch. 48, 48 Stat. 112.

^{730/} Preamble, 48 Stat. at 112.

ratio, to the weight of fine metal in a given gold coin, comparing the former weight to the (silver) dollar, and declaring that proportion in dollar-values. It is a matter of determining intrinsic values, as against a standard -- not of manipulating purchasing-power according to some arbitrary political policy.^{731/} "[O]bligations which * * * require payment in gold or a particular kind of coin or currency * * * or in an amount of money * * * measured thereby" have no possible potential for "obstruct[ing]" this power. They may, to be sure, render difficult a policy of lowering the purchasing-power of "Money" by debasement; but that action is not a constitutional "regulat[ion]" of "Money" in any event.^{732/} Rather, it is an unconstitutional exercise in confiscation, against which the so-called "gold clauses" were an admirable defense, not an "obstruct[ion]", of congressional authority and duty.^{733/}

Neither did Congress explain how the "provisions" it excoriated in the Joint Resolution of 1933 were "inconsistent with the declared policy * * * to maintain at all times the equal power of every dollar * * * in the markets and in the payment of debts". Admittedly, if this "declared policy" had been one aimed at making two different "dollars", of unequal intrinsic values, exchange "with equal power", the "gold clauses" were inconsistent with it. And rightly so: For such a policy would have been the very antithesis of proper "regula-

^{731/} Ante, pp. 61-69.

^{732/} Ante, pp. 70-76.

^{733/} Cf. *Railroad Company v. Richmond*, 86 U.S. (19 Wall.) 584, 589-90 (1873) (congressional powers may not be exercised so as to interfere with "private contracts not designed at the time they were made to create impediments" to subjects and purposes of powers).

t[ion]" of "Value" under Article I, § 8, cl. 5. But speculation as to what the Congress that enacted the Joint Resolution thought the "declared policy" was is irrelevant, as that policy appears in unequivocal language in the Policy Declaration of 1893,^{734/} still as much in force today as in 1933:

[I]t 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 payment 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. ^{735/}

Thus, the "declared policy" was not to attempt to make two different "dollars", of unequal intrinsic values, exchange "with equal power" -- but, instead, so to "regulate the Value" of silver and gold coins that a "dollar" in silver should have "equal intrinsic and exchangeable value" with a "dollar" in gold. The "declared policy", then, was the traditional common-law, constitutional, and statutory policy followed from 1704 through 1900, the policy of "maintain[ing] at all times the equal power of every dollar * * * in the markets and in the payment of debts" by insuring that "every dollar" have the same intrinsic value.

Self-evidently, the "gold clauses" were not, and could

^{734/} Act of 1 November 1893, ch. 8, 28 Stat. 4.

^{735/} 28 Stat. at 4, now 31 U.S.C. § 311 (1976).

not have been, inconsistent with this policy. For, if Congress had enacted "such safeguards of legislation as will insure the maintenance of the parity in value" of "every dollar", provisions calling for "payment in gold or a particular kind of coin or currency" would have been economically irrelevant. And, if Congress had failed or refused to enact "such safeguards" -- or was planning to disregard, circumvent, or repeal "such safeguards" --, the "gold-clause" provisions would have afforded an alternative means of accomplishing the policy-goal by judicial enforcement of obligations in dollars of "equal power".

In short, the congressional rationalization for the Joint Resolution of 1933 was monetarily moronic.

The effects of the Joint Resolution, however, were pervasive. First, Congress erroneously declared "every provision * * * with respect to an obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money * * * measured thereby" to be "against public policy", and decreed that "[e]very obligation * * * 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".^{736/} Congress excluded from the term "obligation", however, "currency" of the United States, "including Federal Reserve notes".^{737/} This meant that paper notes continued to be legally redeemable in gold or silver coin, although the

^{736/} H.J. Res. No. 192, 5 June 1933, ch. 48, § 1(a), 48 Stat. 112, 113.

^{737/} § 1(b), 48 Stat. at 113.

possession by private individuals of gold coin, bullion, or certificates was illegal. In principle, then, the Joint Resolution was capable of a constitutional interpretation, just as the gold-seizure had (in principle) been capable of a constitutional interpretation, if its effect (as applied) had been to cause the payment of obligations denominated in gold with (silver) dollars of the same intrinsic value.^{738/}

Second, Congress for the first time explicitly made "Federal Reserve notes * * * legal tender for all debts, public and private, public charges, taxes, duties, and dues".^{739/}

5) Executive Order No. 6260

President F.D. Roosevelt then promulgated Executive Order 6260.^{740/} Under threat of severe criminal penalties of fine and imprisonment,^{741/} the order commanded "every person in possession of and every person owning gold coin, gold bullion, or gold certificates" to "make under oath and file * * a return * * * containing * * * the kind and amount of such coin, bullion, or certificates held and the location thereof".^{742/} It also outlawed both the acquisition of "any

^{738/} Ante, pp. 228-30. Congress repealed the Joint Resolution as to "obligations issued on or after" 28 October 1977. Act of 28 October 1977, Publ. L. 95-147, § 4(c), 91 Stat. 1227, 1229.

^{739/} H.J. Res. No. 192, 5 June 1933, ch. 48, 48 Stat. 112, 113.

^{740/} Executive Order No. 6260, 28 August 1933, ___ Stat. ___, in 2 Public Papers, ante note 712, at 345.

^{741/} § 10, ___ Stat. at ___, in 2 id. at 351 (\$10,000 fine, 10 years' imprisonment, or both for any willful violation).

^{742/} § 3, ___ Stat. at ___, in 2 id. at 346. Because Executive Order No. 6102 had already ordered "[a]ll persons" to surrender their gold under threat of criminal penalties, the reporting-provision of Executive Order No. 6260 was an obvious violation of the Fifth Amendment's prohibition against self-incrimination. E.g., Haynes v. United States, 390 U.S. 62 (1968).

gold coin, gold bullion, or gold certificates except under license" for any person "other than a Federal Reserve Bank",^{743/} and the retention of "any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States * * * except under license".^{744/}

6) The Gold Reserve Act of 1934

Five months later, Congress enacted the Gold Reserve Act of 1934.^{745/} As its name suggested, a major purpose of the act was to "pass to and * * * ves[t] in the United States" "all right, title, and interest, and every claim of the Federal Reserve Board, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all gold coin and gold bullion".^{746/} This completed the "nationalization" of the people's gold, by centralizing its custody in the Treasury. To make inescapably clear that Congress had, in a practical sense, "demonitized" gold domestically, the act further provided that "[n]o gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States"; rather, "[a]ll gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars".^{747/} Moreover, Congress decreed that, "[e]xcept to the extent permitted in regulations * * * , no currency of the United States shall be redeemed in gold".^{748/} And it empowered

^{743/} Executive Order No. 6260, 28 August 1933, § 4, ___ Stat. ___, ___, in 2 Public Papers, ante note 712, at 347.

^{744/} § 5, ___ Stat. at ___, in 2 id. at 348.

^{745/} Act of 30 January 1934, ch. 6, 48 Stat. 337.

^{746/} § 2(a), 48 Stat. at 337.

^{747/} § 5, 48 Stat. at 340.

^{748/} § 6, 48 Stat. at 340.

the Secretary of the Treasury, "with the approval of the President", to "prescribe the conditions under which gold may be acquired and held * * * for such * * * purposes as in his judgment are not inconsistent with the purposes of this Act".^{749/}

Congress also "approved, ratified, and confirmed" all of the "actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the [Emergency Banking and Emergency Farm Mortgage Acts of 1933]".^{750/}

Going further, Congress amended its earlier purported delegations of coinage-power, by providing that "the weight of the gold dollar [shall not] be fixed [by the President] * * * at more than 60 per centum of its present weight", and that "[t]he President is authorized, in addition to other powers, to reduce the weight of the standard silver dollar in the same percentage that he reduces the weight of the gold dollar".^{751/}

Finally, Congress declared that federal-reserve notes need no longer be redeemed in gold coin, but "shall be redeemed in lawful money on demand at the Treasury Department of the United States, * * * or at any Federal Reserve bank".^{752/}

The Gold Reserve Act of 1934 thus codified the series of unconstitutional statutes and actions that Congress and the Executive had enacted or taken during the previous year. First, it purported to "legalize" the gold-seizure by an ex

^{749/} § 3, 48 Stat. at 340.

^{750/} § 13, 48 Stat. at 343. See ante, pp. 224-34.

^{751/} § 12, 48 Stat. at 342, 343, amending § 43(b)(2) of the Act of 12 May 1933, ch. 25, 48 Stat. 31, 52-53.

^{752/} § 2(b)(1), 48 Stat. at 337, amending § 16 of the Act of 22 December 1913, ch. 5, 38 Stat. 251, 265.

post facto transfer to the government of the gold coin, bullion, and certificates the people had earlier surrendered under the threat of savage criminal penalties for "hoarding" their own constitutional "Money".^{753/} Second, it purported once again to delegate to the President the exclusive legislative power under Article I, § 8, cl. 5 to "regulate the Value" of coinage.^{754/} Third, it purported (through this invalid delegation) arbitrarily to debase the statutory "gold dollar" by at least forty per centum, in derogation of the requirement of Article I, § 8, cl. 5 that the intrinsic value of gold coinage be properly "regulate[d]" as against the constitutional (silver) dollar. Moreover, it also purported to debase the constitutional dollar by the same percentage, clearly in derogation of the entire law and history of the American silver standard from Queen Anne's Proclamation of 1704 onwards.^{755/} And fourth, it purported to deny redemption of any "currency" in gold, arguably confiscating property from the holders of that "currency" if payment in standard silver dollars did not provide the same intrinsic value of precious metal as payment of gold would have afforded them.^{756/}

7) The Presidential Proclamation of 31 January 1934

President Roosevelt needed but a single day to act under the unconstitutional delegation of power in the Gold Reserve Act of 1934. On 31 January 1934, he issued a Proclamation^{757/}

^{753/} Ante, pp. 224-32.

^{754/} Ante, pp. 232-33.

^{755/} See ante, pp. 70-76.

^{756/} See ante, pp. 228-30.

^{757/} Proclamation of 31 January 1934, 48 Stat. 1730.

reciting the relevant terms of the act, and "proclaim[ing], order[ing], direct[ing], declar[ing] and fix[ing] the weight of the gold dollar to be 15-5/21 grains nine tenths fine", a debasement of almost forty one per centum from the traditional standard.^{758/} However, Roosevelt also decreed that "[t]he weight of the silver dollar is not altered or affected in any manner by reason of this proclamation".^{759/}

Therefore (and perhaps amazingly), on 31 January 1934, notwithstanding all the then-recent unconstitutional enactments, orders, regulations, and other governmental actions respecting gold "Money", the United States still retained the standard, constitutional dollar of 371-1/4 grains of fine silver. Silver coinage and silver certificates still circulated. And federal-reserve notes and other paper currencies redeemable in "lawful money" still promised, directly or indirectly, to pay their bearers silver dollars on demand.

Yet the American monetary system had suffered an infusion of perverse notions about the nature of money, and about the power of the government to transmute and manipulate money, that would soon lead to destruction of the constitutional silver standard, too. As President Roosevelt wrote in a message to Congress soon after his Proclamation leaving the (silver) dollar "[un]altered", "[i]n pure theory, of course, a government could issue mere tokens to serve as money -- tokens which would be accepted at their face value if it were certain that the amount of these tokens were permanently limited".^{760/} "In

^{758/} 48 Stat. at 1731.

^{759/} 48 Stat. at 1731.

^{760/} Request for Legislation to Organize a Sound and Adequate Currency System, 15 January 1934, in 3 Public Papers, ante note 712, at 41.

pure theory, of course", Roosevelt's nominalistic conception of money manifested that "mild form of lunacy" Secretary of the Treasury Sherman had condemned sixty-seven years earlier, and was self-evidently preposterous, both as a matter of the economics of a market-society^{761/} and as a matter of constitutional law. In practice, though, it foreshadowed the future.

b. The removal of silver from the monetary system

The events of the 1930's had lain the foundations for the structure of "fiat currency" that various political and economic special-interest groups desired.^{762/} Although the constitutional silver standard remained unchanged, Congress had declared "Federal Reserve notes * * * legal tender for all debts, public and private, public charges, taxes, duties, and dues",^{763/} and had decreed that those notes "shall be redeemed in lawful money on demand".^{764/} Thus, federal-reserve notes could, and did, circulate as a fiduciary medium, supplementing or substituting for silver coinage or silver certificates in day-to-day business transactions. This circumstance was critical for the transition from a specie- and credit-based paper currency to pure "fiat currency". For government can impose "fiat currency" on a market-economy "only by taking

761/ E.g., L. von Mises, Human Action, ante note 1, at 405-08; idem, The Theory of Money and Credit, ante note 1, at 68-78.

762/ E.g., for an analysis of the role of unions in promoting inflation through "fiat currency" and central-bank credit-expansion, see Petro, "Unemployment, Unions and Inflation: Of Causation and Necessity", 26 The Freeman 387 (1976).

763/ H.J. Resolution No. 192, 5 June 1933, 48 Stat. 112, 113.

764/ Gold Reserve Act, Act of 30 January 1934, ch. 6, § 2(b)(1), 48 Stat. 337, 337.

things that are already in circulation as money-substitutes (that is, as perfectly secure and immediately convertible claims to money) and * * * depriving them of their essential characteristic of permanent convertibility. Commerce would always protect itself against any other method of introducing a government ['fiat currency']"^{765/}.

1) The Silver Purchase and Coinage Acts of 1934, 1939, and 1946

Initially, none the less, executive action and congressional enactments actually strengthened the monetary position of silver.

On the basis of the authority "to provide for the unlimited coinage of * * * silver" in the Emergency Farm Mortgage Act of 1933,^{766/} on 21 December 1933 President Roosevelt "procalim[ed] and direct[ed] that each United States coinage mint shall receive for coinage into standard silver dollars any silver which such mint * * * is satisfied has been mined * * * from natural deposits in the United States or any place subject to the jurisdiction thereof", and that "such silver" (less charges for minting) "shall be coined into standard silver dollars and the same, or an equal number of other standard silver dollars, shall be delivered to the owner or depositor of such silver".^{767/} On 9 August 1934, Roosevelt again provided for this unlimited coinage of standard silver dollars, proclaiming that "there shall be returned [for the

^{765/} L. von Mises, The Theory of Money and Credit, ante note 2, at 78.

^{766/} Act of 12 May 1933, ch. 25, Title III, § 43(b)(2), 48 Stat. 51, 52.

^{767/} Proclamation of 21 December 1933, 48 Stat. 1723, 1724.

silver deposited in the mint] in standard silver dollars, silver certificates, or any other coin or currency of the United States, the monetary value of the silver so delivered" (less mint-charges).^{768/} Similar proclamations followed in 1935,^{769/} 1937,^{770/} 1938,^{771/} and 1939.^{772/}

Congress was no less active regarding silver. Following the precedent of the gold seizure, the Silver Purchase Act of 1934^{773/} purported to empower the Executive "to investigate, regulate, or prohibit * * * the acquisition * * * of silver",^{774/} and to "require the delivery to the United States mints of any or all silver by whomever owned or possessed", for which silver the government would pay the fair market value "in standard silver dollars or any other coin or currency of the United States".^{775/} However, the statute also authorized the Secretary of the Treasury "to purchase silver, at home or abroad",^{776/} "to issue silver certificates * * * in a face amount not less than the cost of all silver [so] purchased",^{777/} and to "maintain in the Treasury as a security for all silver certificates theretofore or hereafter issued and at the time

^{768/} Proclamation of 9 August 1934, 49 Stat. 3402, 3403.

^{769/} Proclamation of 10 April 1935, 49 Stat. 3445; Proclamation of 24 April 1935, 49 Stat. 3445.

^{770/} Proclamation of 30 December 1937, 52 Stat. 1530.

^{771/} Proclamation of 31 December 1938, 53 Stat. 2517.

^{772/} Proclamation of 25 July 1939, 53 Stat. 2547.

^{773/} Act of 19 June 1934, ch. 674, 48 Stat. 1178.

^{774/} § 6, 48 Stat. at 1178.

^{775/} § 7, 48 Stat. at 1179.

^{776/} § 3, 48 Stat. at 1178.

^{777/} § 5, 48 Stat. at 1178.

outstanding an amount of silver in bullion and standard silver dollars of a monetary value equal to the face amount of such silver certificates".^{778/}

In addition, the statute declared "[a]ll silver certificates" to be "legal tender for all debts, public and private, public charges, taxes, duties, and dues", and directed their redemption "on demand at the Treasury of the United States in standard silver dollars".^{779/}

Thus, by the middle of 1934, federal-reserve notes and silver certificates were both legal tender "for all debts, public and private". Silver certificates were directly redeemable on demand for standard -- that is, constitutional -- silver dollars. And federal-reserve notes were directly redeemable on demand for "lawful money", within which category were silver certificates and silver dollars.^{780/} Or, in effect, with the removal of gold from circulation, the paper currency of the country came to rest firmly on the silver standard in so far as convertibility was concerned, with the Treasury under an explicit legal duty to maintain stocks of that metal sufficient to redeem all outstanding silver certificates dollar for dollar in their constitutional monetary value.

The Silver Coinage Act of 1939^{781/} opened the mints "for coinage into standard silver dollars [of] any silver

^{778/} § 5, 48 Stat. at 1178.

^{779/} § 5, 48 Stat. at 1178.

^{780/} The Policy Declaration of 1893 described silver as "standard money", equally with gold. Act of 1 November 1893, ch. 8, 28 Stat. 4, 4. Silver certificates, of course, were merely governmental warehouse-receipts for silver.

^{781/} Act of 6 July 1939, ch. 260, 53 Stat. 998.

which * * * has been mined * * * from natural deposits in the United States or any place subject to the jurisdiction thereof".^{782/}

The Silver Coinage Act of 1946^{783/} continued this policy of unlimited mintage of silver mined "from natural deposits in the United States".^{784/} It also authorized the Secretary of the Treasury "to sell or lease for manufacturing uses * * * any silver held or owned by the United States" -- but provided that the Treasury should nevertheless maintain "at all times the ownership and the possession or control within the United States of an amount of silver of a monetary value equal to the face amount of all outstanding silver certificates".^{785/}

Obviously, however, so long as nature limited the physical supplies of silver, and political pressure encouraged the expansion of the supply of federal-reserve notes, even the indirect and contingent backing of those notes with silver could not long continue.

2) The Silver Purchase Repeal Act of 1963

With the advent of President J.F. Kennedy's administration came the beginning of the end for silver. In late 1961, Kennedy "reached the decision that silver metal should gradually be withdrawn from our monetary reserves".^{786/} In what was, until that time, perhaps the most blatantly unconstitutional statement of any American Executive on the subject of

^{782/} § 4(a), 53 Stat. at 998.

^{783/} Act of 31 July 1946, ch. 718, 60 Stat. 750.

^{784/} 60 Stat. at 750.

^{785/} 60 Stat. at 750.

^{786/} Letter from President J.F. Kennedy to Secretary of the Treasury D. Dillon, 28 November 1961, in Public Papers of the Presidents of the United States, John F. Kennedy, 1961 (1962), at 753.

money, Kennedy described his "new policy" as "in effect provid[ing] for the eventual demonitization of silver except for its use in subsidiary coinage".^{787/} The Constitution had explicitly taken from the Executive all power over money,^{788/} and specified the (silver) dollar as the money of account^{789/} -- yet here was a President declaring his intention simply to repeal the Constitution and undo over two and one-half centuries of monetary history and precedent from Queen Anne's Proclamation of 1704, by stripping silver of its primary function as the nation's monetary unit and standard of value! In order "to provide for the gradual release of the silver now required as backing for one-dollar and two-dollar silver certificates", Kennedy "recommend[ed] that legislation be enacted to * * * authorize the Federal Reserve Banks to include these denominations in the range of notes they are permitted to issue".^{790/} The goal, then, was to "demonitize" silver by substituting for silver certificates federal-reserve notes, notes that eventually would become irredeemable in any "lawful money" itself redeemable in silver.

Congress soon complied with President Kennedy's recommendations in the Silver-Purchase Repeal Act of 1963.^{791/} First, Congress repealed the silver-purchase and -mintage acts of 1934, 1939, and 1946.^{792/} Second, although it re-iterated the

^{787/} Id.

^{788/} See 1 W. Crosskey, Politics and the Constitution, ante note 202, at 411-14, 421.

^{789/} Ante, pp. 81-91, 118-26.

^{790/} Letter from President J.F. Kennedy to Secretary of the Treasury D. Dillon, ante note 786.

^{791/} Act of 4 June 1963, Pub. L. 88-36, 77 Stat. 54.

^{792/} § 1, 77 Stat. at 54.

mandate that the Secretary of the Treasury should "maintain the ownership and the possession or control within the United States of an amount of silver of a monetary value equal to the face amount of all outstanding silver certificates", Congress licensed the Secretary to exchange silver certificates "for silver dollars or * * * for silver bullion of a monetary value equal to the face amount of the certificates".^{793/} This option to pay in either coin or bullion superseded the requirement of the act of 1934 that all silver certificates "be redeemable on demand * * * in standard silver dollars",^{794/} and moved the monetary system a further step away from the constitutional coined (silver) dollar. Third, Congress authorized the Federal Reserve System to issue notes of the denominations of one and two dollars,^{795/} thereby providing the means for replacement of the constitutional coined dollar, with an intrinsic value of 371-1/4 grains of silver, by the statutory but unconstitutional federal-reserve paper note, with an intrinsic value of nothing.

The report of the Senate Committee on Banking and Currency on this legislation is revealing.^{796/} The purpose of the statute, the Committee wrote, was to "repeal the outdated silver purchase acts" and to "authorize the issuance of \$1 and \$2 Federal Reserve notes to meet the needs of business and the

^{793/} § 2, 77 Stat. at 54.

^{794/} Act of 19 June 1934, ch. 674, § 5, 48 Stat. 1178, 1178.

^{795/} Act of 4 June 1963, Pub. L. 88-36, § 3, 77 Stat. 54, 54, amending § 3 of the Act of 26 September 1918, ch. 177, 40 Stat. 967, 970.

^{796/} S. Rep. No. 175, 88th Cong., 1st Sess. (1963), in United States Code Congressional and Administrative News, 88th Cong., 1st Sess. (1964), at 678.

public".^{797/} This, the Committee claimed, "would provide for an adequate supply of paper currency * * * , and at the same time * * * would maintain and honor the Government's pledge to exchange silver for outstanding silver certificates".^{798/}

Carefully avoiding mention of the Executive's "new policy * * * for the eventual demonitization of silver",^{799/} the Committee recounted how, "[i]n November of 1961, * * * [t]he President directed the Treasury to retire from circulation enough \$5 and \$10 silver certificates so that the silver thereby released could meet current coinage needs. The certificates retired are being replaced by \$5 and \$10 Federal Reserve notes. The President recommended that this be done also with the silver behind the \$1 silver certificates. Section 3 of the [statute] * * * make[s] this practicable by authorizing the issuance of \$1 and \$2 Federal Reserve notes to replace the silver certificates which would be retired".^{800/} Thus, the government intended to transform the paper currency in the hands of the average person from one-, two-, five-, and ten-dollar certificates redeemable in known weights of silver proportional to the constitutional dollar to similar denominations of central-bank paper notes redeemable only "in lawful money"^{801/} without any explicit guarantee of payment in

^{797/} Id.

^{798/} Id. at 679. Four years later, the country would learn what "the Government's pledge to exchange silver for outstanding silver certificates" was worth. Post, pp. 252-54.

^{799/} Letter from President J.F. Kennedy to Secretary of the Treasury D. Dillon, ante note 786.

^{800/} S. Rep. No. 175, ante note 796, at 679.

^{801/} Gold Reserve Act, Act of 30 January 1934, ch. 6, § 2(b)(1), 48 Stat. 337, 337.

silver, but with an explicit statutory repudiation of payment in gold.^{802/}

Of course, the Committee hastened to add, "[t]he substitution of * * * Federal Reserve notes for the silver certificates in circulation would have no effect on our monetary situation or our monetary policies", would be "neither inflationary nor deflationary", "is entirely unrelated to the monetary policies of the Federal Reserve Board", and "was not intended to bring about, nor would it result in, devaluation of the dollar".^{803/} The Committee did not explain, however, why the "demonitization" of silver and the replacement of silver certificates with bank-notes redeemable only "in lawful money" would have "no effect" on the nation's "monetary situation", would not necessarily be "inflationary", and would not inevitably "devalu[e]" the dollar by severing its relation with specie.

The Committee did reassure its constituents, though, that the statute "would * * * make it possible, by gradually retiring \$1 silver certificates and replacing them with Federal Reserve notes, to provide a supply of silver for subsidiary coinage",^{804/} perhaps leading those unaware of the "new policy * * * for the eventual demonitization of silver" to expect -- wrongly -- a continuation of silver coinage of

^{802/} Gold Reserve Act, Act of 30 January 1934, ch. 6, § 6, 48 Stat. 337, 340.

^{803/} S. Rep. No. 175, ante note 796, at 682.

^{804/} Id. at 683.

the constitutional standard.^{805/} And the Committee added that, in any event, "[r]etirement of silver certificates and their subsequent replacement with Federal Reserve notes will require the usual 25 percent gold reserve back of the * * * notes"^{806/} -- begging the question of what significance this had for the average citizen unable to redeem federal-reserve notes for gold,^{807/} or even to acquire and hold the metal (whatever its source) for monetary purposes.^{808/}

3) The Coinage Act of 1965

The country had to wait only until the Coinage Act of 1965^{809/} to see how the retirement of silver certificates would "provide a supply of silver for subsidiary coinage".

^{805/} The ever-pliant newsmedia, of course, broadcast a message of reassurance. E.g., "Now, a new type of dollar bill", U.S. News and World Report (9 December 1963), at 8: "Congress authorized the Treasury to start withdrawing the \$1 silver certificates so the Government's stock of silver bullion could be used for coins or other purposes. If Congress approves, silver dollars are to be coined next year * * * ." Only two years were to elapse before the country learned what fate Congress actually had in store for silver. Post, pp. 252-54.

^{806/} S. Rep. No. 175, ante note 555, at 683.

^{807/} Gold Reserve Act, Act of 30 January 1934, ch. 6, § 6, 48 Stat. 337, 340.

^{808/} Gold Reserve Act, Act of 30 January 1934, ch. 6, §§ 3-5, 48 Stat. 337, 340. Congress repealed the prohibitions against "purchasing, holding, selling, or otherwise dealing with gold" only in 1977. Act of 21 September 1977, Pub. L. 93-110, § 3(b), 87 Stat. 352, 352. See Executive Order No. 11825, 31 December 1974, 40 Fed. Reg. 1003. The reason given was 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". H. Rep. No. 93-203, 93d Cong., 1st Sess. (1973), in 2 United States Code Congressional and Administrative News, 93d Cong., 1st Sess. (1974), at 2062.

^{809/} Act of 23 July 1965, Pub. L. 89-81, 79 Stat. 254.

Indeed, rather than applying that silver to the coinage of silver dollars, half-dollars, quarter-dollars, and dimes of the constitutional standard, the act terminated outright the minting of "standard silver dollars" for the next five years,^{810/} and permitted the minting of lesser denominations from standard silver only until "adequate supplies of the coins authorized by this act are available", and in no event for more than five years.^{811/}

The "coins authorized by this Act", however, were not of standard silver -- but instead were "clad coin[s]" composed of silver and copper,^{812/} or copper and nickel,^{813/} grossly debased from the constitutional standard of value.^{814/} In the past, Congress had limited the legal-tender character of such subsidiary coinage that deviated from the constitutional standard, precisely because of that deviation.^{815/} The Coinage Act of 1965 broke with this age-old common-law and constitutional tradition to declare that "[a]ll 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

^{810/} Title I, § 101(c), 79 Stat. at 255.

^{811/} Title I, § 101(b), 79 Stat. at 254-55.

^{812/} Title I, § 101(a)(1), 79 Stat. at 254 (half-dollar).

^{813/} Title I, § 101(a)(2-3), 79 Stat. at 254 (quarter-dollar and dime).

^{814/} The "clad" half-dollar had a silver-content of "4.6 grams". Title I, § 101(a)(1)(C), 79 Stat. at 254. This amounts to approximately 71 grains of silver. A constitutional half-dollar, though, should contain 185-5/8 grains of silver. Therefore, the "clad" half-dollar was debased from the constitutional standard by nearly 62%. The "clad" quarter-dollar and dime contained no silver whatsoever. Title I, § 101(a)(2) (B-C), (3)(B-C), 79 Stat. at 254.

^{815/} See ante, pp. 155-56, 219-21.

issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues".^{816/} For the first time in Anglo-American history, an explicitly debased coinage purportedly enjoyed full statutory legal-tender power "for all debts, public and private" on a par with the constitutional standard of value itself. The unconstitutionality of this statute requires no further analysis.^{817/}

Yet, even with the Coinage Act of 1965, the national monetary system did not rest exclusively on "fiat money". Congress had terminated the issuance of standard silver dollars and subsidiary coinage, authorized the minting of debased "clad coin[s]", and extended full legal-tender power to these debased coins and to federal-reserve paper notes. None the less, the holders of "clad coin[s]" and federal-reserve paper could still exchange those things for silver certificates, redeemable on demand in standard silver dollars or silver bullion. One further step was necessary to arrive at true "fiat money".

4) The Silver Certificate Act of 1967

Two years later, Congress took that step in the Silver Certificate Act of 1967.^{818/} Repudiating its obligation to

^{816/} Title I, § 102, 79 Stat. at 255. See H.J. Res. No. 192, 5 June 1933, ch. 48, § 2, 48 Stat. 112, 113, amending § 43(1)(b) of the Act of 12 May 1933, ch. 25, 48 Stat. 51, 52.

^{817/} See ante, pp. 50-81.

^{818/} Act of 24 June 1967, Pub. L. 90-29, 81 Stat. 77.

redeem silver certificates in silver coin or bullion,^{819/}
Congress declared that "[s]ilver certificates shall be exchange-
able for silver bullion for one year following the enactment
of this Act. Thereafter 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".^{820/} Thus,
on 24 June 1968, the United States finally abandoned the

^{819/} The national obligation to redeem in silver appeared on
the certificates themselves --

\$1 Silver Certificates:

1928-1928E Series, "This certifies
that there has been deposited in the
Treasury of the United States of America
One Silver Dollar payable to the bearer on
demand."

1934-1957B Series, "This certifies
that there is on deposit in the Treasury
of the United States of America One Dollar
in silver payable to the bearer on demand."

\$5 Silver Certificates:

1934-1953C Series, "This certifies
that there is on deposit in the Treasury
of the United States of America Five
Dollars in silver payable to the bearer on
demand."

\$10 Silver Certificates:

1933 Series, "The United States of
America, Ten Dollars payable in silver
coin to bearer on demand."

1934-1953B Series, "This certifies
that there is on deposit in the Treasury
of the United States of America Ten
Dollars in silver payable to the bearer on
demand."

See, e.g., Hewitt-Donlon Catalog of United States Small Size
Paper Money (M. Hudgeons ed., 14th ed., 1979), at 38-49.

^{820/} Act of 24 June 1967, Pub. L. 90-29, § 2, 81 Stat. 77,
77, now 31 U.S.C. § 405a-3 (1976).

silver standard applicable since Queen Anne's Proclamation of 1704, and embraced a system of "fiat money" based on irredeemable legal-tender federal-reserve notes and debased legal-tender "clad" coinage.

Again, the report of the Senate Committee on Banking and Currency illuminates the legislative purpose behind the statute.^{821/} With a matter-of-fact air, the Committee explained how, after June of 1968, "[silver] certificates would continue to be legal tender, but not convertible to silver".^{822/} Apparently, the Committee did not realize (or chose not to mention) that June of 1968 would thus mark the first time in United States history that a paper currency purportedly designated a legal tender was not directly or indirectly redeemable in silver or gold coin or bullion -- including the Continental Currency and state "Bills of Credit" of the War of Independence, the "greenbacks" of the Civil War, and even federal-reserve notes prior to 1968. And apparently, the Committee did not realize (or chose not to mention) that therefore June of 1968 would also mark the first time in United States history that the purported legal-tender quality of a paper currency did not depend, at least in the minds of legislators, on that currency's convertibility into specie -- notwithstanding the Supreme Court's decision in Knox v. Lee^{823/} that the constitutionality of legal-tender character for

^{821/} S. Rep. No. 232, 90th Cong. 1st Sess. (1967), in 1 United States Code Congressional and Administrative News, 90th Cong., 1st Sess. (1968), at 1235.

^{822/} Id.

^{823/} 79 U.S. (12 Wall.) 457 (1871).

United States notes was the consequence of those notes' redeemability in gold coin.^{824/}

On the other hand, the Committee did frankly admit that the statute "is one more step in the transition from a coinage system based on silver, where the coins themselves are made of precious metals and have value in and of themselves, to a functional system of coinage, where the coins are made of base metals and have no value except as legal tender".^{825/} Here, indeed, was an acknowledgment of unconstitutional legislation as candid as it was brazen: The Constitution grants Congress the power "To coin Money, [and] regulate the Value thereof" in order to provide the country with a sound system of coinage based upon the precious metals, silver and gold.^{826/} The Constitution designates the dollar, with an intrinsic value of 371-1/4 grains of fine silver, as the standard by which the "Value" of all other "Money" is to be "regulate[d]".^{827/} And the Constitution extends full legal-tender character to "Money" only in so far as that "Money" is properly "regulate[d]" silver or gold coin itself, or is the equivalent of such coin (silver or gold certificates).^{828/} Yet, notwithstanding this, Congress decided to "demonitize" silver, and to create a "functional system of coinage" composed of base-metal coins with no value except as legal tender. Apparently, Congress forgot that, under the Constitution, the legal-tender quality of any coin is a consequence of its intrinsic value in silver

^{824/} Ante, pp. 205-09.

^{825/} S. Rep. No. 232, ante note 821, at 1236.

^{826/} Ante, pp. 27-29.

^{827/} Ante, pp. 81-91, 118-26.

^{828/} Ante, pp. 76-81.

or gold -- and no base-metal coin can acquire monetary "Value" (other than as a strictly subsidiary coin) simply by being designated a legal tender.

Interestingly, however, the Committee again re-affirmed the value of the standard (or constitutional) silver dollar, by referring to "the legal rate [of redemption of silver certificates] of 371.25 grains * * * of fine silver per dollar".^{829/} Since 1792, the constitutional dollar had not changed. And even in 1967, completing the unconstitutional "transition from a coinage system based on silver" to one based on nothing of intrinsic value, Congress refused to change the dollar. Rather, it simply pretended that the dollar was irrelevant to monetary policy, and naively imagined that a governmental decree making some worthless object "legal tender" could infuse that object with a value the market would accept in lieu of silver or gold.

The Silver Certificate Act of 1967 was unequivocally unconstitutional. In effect, after June of 1968, the statute transferred title to all silver held for payment of silver certificates from the holders of those certificates to the government, with compensation payable "in any moneys in the general fund of the Treasury". Practically speaking, the statute authorized a seizure (or at least a withholding) of silver functionally equivalent to the government's seizure of privately held gold in 1933. But there, the similarity ended.

In 1933, Congress had purported to authorize the Secretary of the Treasury to "require any or all individuals * * *

^{829/} S. Rep. No. 232, ante note 821, at 1241.

to pay and deliver to the Treasurer of the United States any or all * * * gold certificates owned by such individuals". But it also ordered the Secretary to "pay [for the gold certificates so confiscated] an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States".^{830/} And, at that time, standard silver dollars, silver certificates, and paper currencies (such as federal-reserve notes) convertible into silver certificates (and, through the certificates, into constitutional silver dollars) were the "other form[s] of coin and currency" extant. In principle, then, under a properly "regulate[d]" bimetallic system, the payment for a gold certificate, dollar for dollar, with standard silver dollars or some paper currency directly or indirectly redeemable in such dollars would have left the expropriated holder of the gold certificate in exactly the same market-position, in terms of possession of an intrinsic value of precious metal, as he would have enjoyed had he redeemed the certificate for gold coin. Pretermittting the question of whether Congress had any authority itself to seize the people's gold, or to delegate such power to the Executive, the holder of the gold certificate paid dollar for dollar in the constitutionally proper weight of silver would have had no constitutional claim against the government.^{831/}

In 1967, however, things were different. When Congress purported to repudiate its pledge to redeem silver certificates, no other form of coin or currency based on silver or gold, or properly "regulate[d]" in "Value", was extant -- except

^{830/} Emergency Banking Act, Act of 9 March 1933, ch. 1, § 3, 48 Stat. 1, 2.

^{831/} See ante, pp. 228-30.

constitutional silver dollars and fractional coinage minted prior to 1965 from standard silver. And Congress did not require the Treasury to redeem silver certificates in this silver coinage, but instead licensed it to "redeem[m] from any moneys in the general fund", including by-then-irredeemable United States and federal-reserve notes. Indeed, unlike its directive in 1933, Congress did not even require the Treasury to redeem the certificates with "an equivalent amount of any other form of coin or currency", perhaps unconsciously recognizing that the exchange it contemplated after June of 1968 would not transfer to the holders of silver certificates a market-equivalent of "Value", but would merely provide them with tokens that had value as media of exchange solely because of their legal-tender character. On its face, therefore, the Silver Certificate Act of 1967 was unconstitutional. For, even if Congress had had the constitutional authority to repudiate its obligation to redeem silver certificates (or, to seize or withhold the people's silver), it had no authority to refuse to compensate the victims of that repudiation with full market value for the silver they lost.

5) The Bank Holding Company Act of 1970

The era of American "fiat money" began in June of 1968. But the constitutional silver dollar remained unaltered for two more years, until the Bank Holding Company Act of 1970.^{832/} The Coinage Act of 1965 had terminated the minting of standard silver dollars for a five-year period, and provided for the coinage of "clad" half-dollars containing approximately 40% silver. In 1970, Congress amended the 1975 act and decreed

^{832/} Act of 31 December 1970, Pub. L. 91-607, 84 Stat. 1760.

that all coinage should contain a "cladding" of 75% copper and 25% nickel, and a "core" of pure copper.^{833/} And, for the first time in Anglo-American history, it provided for a coin denominated "[t]he dollar" containing no silver (or gold) whatsoever.^{834/} The statute permitted the continued coinage of debased silver half-dollars through 1970,^{835/} authorized the issuance of a debased silver "one-dollar piec[e]" (the so-called "Eisenhower dollar"),^{836/} empowered the Secretary of the Treasury "to offer * * * to the public" the remaining "silver dollars * * * held in the Treasury",^{837/} and repealed the section of the Coinage Act of 1878 that had provided for minting the standard silver dollar and had declared it a legal tender for all public and private debts and dues.^{838/}

Except as a market-commodity, then, the constitutional dollar was no more.

Self-evidently, the Bank Holding Company Act of 1970 was unconstitutional, with respect to both the debased and the "clad" "dollars" it purported to authorize. Indeed, if a scale of unconstitutionality applies to the monetary manipulations of Congress and the Executive from 1933 through 1970, the claim by Congress to replace the constitutional (silver) dollar with a piece of nickel-coated copper must rank at or very near the top in terms of its obvious repugnance: (i) to

^{833/} Title II, § 201, 84 Stat. at 1768.

^{834/} Title II, § 201, 84 Stat. at 1768.

^{835/} Title II, § 204, 84 Stat. at 1769.

^{836/} Title II, §§ 201-03, 84 Stat. at 1768-69.

^{837/} Title II, § 205, 85 Stat. at 1769.

^{838/} Title II, § 208, 84 Stat. at 1769, repealing § 1 of the Act of 28 February 1878, ch. 20, 20 Stat. 25, 25.

both the principles of Anglo-American common law, pre-constitu-
tional American law under the Articles of Confederation,
constitutional law from 1789 (and especially 1792) onwards, and
national statutory law throughout the nineteenth century; and
(ii) to the teaching of the entirety of Anglo-American monetary
history from Queen Anne's Proclamation of 1704. Yet, amazingly,
no judicial challenge to the purported power of Congress to
destroy the dollar ever found its way to the Supreme Court for
decision after 1970. The dollar simply died -- or, more
accurately put, was assassinated -- without either defenders
or mourners in conspicuous number.^{839/}

^{839/} Several cases did raise the unconstitutionality of the
monetary system in the lower national courts and in various
state courts, most of them prosecuted by so-called "tax-protectors"
asserting erroneous legal theories under national and
state revenue-laws. The courts uniformly rejected these
claims as "frivolous", however, without making any serious
attempt to investigate the issue.

National cases: Koll v. Wyzata State Bank, 397 F.2d
124 (8th Cir. 1968); United States v. Daly, 481 F.2d 28 (8th
Cir. 1973); Milam v. United States, 524 F.2d 629 (9th Cir.
1974); United States v. Scott, 521 F.2d 1188 (9th Cir. 1975);
Brubard v. United States Postal Service, 404 F. Supp. 691
(E.D.N.Y. 1975); 531 F.2d 953 (9th Cir. 1976); United States
v. Wangrud, 533 F.2d 495 (9th Cir. 1976); United States v.
Schmitz, 542 F.2d 782 (9th Cir. 1976); United States v.
Whitesel, 543 F.2d 1176 (6th Cir. 1976); United States v.
Hurd, 549 F.2d 118 (9th Cir. 1977); United States v. Rifen,
577 F.2d 1111 (8th Cir. 1978); Mathes v. Commissioner, 576
F.2d 70 (5th Cir. 1978); United States v. Anderson, 584 F.2d
369 (10th Cir. 1978); Nyhus v. Commissioner, 594 F.2d 1213
(8th Cir. 1979); United States v. Benson, 592 F.2d 257 (5th
Cir. 1979); United States v. Hori, 470 F. Supp. 1209 (C.D.
Cal. 1979); United States v. Moon, 616 F.2d 1083 (8th Cir.
1980); Eagle v. Kenai Peninsula Borough, 489 F. Supp. 138 (D.
Alaska 1980).

State cases: Leitch v. State Dep't of Revenue, ___ Or.
App. ___, 519 P.2d 1045 (1974); Chermack v. Bjornson, ___
Minn. ___, 223 N.W.2d 659 (1974); Radue v. Zanaty, ___ Ala.
___, 308 So.2d 242 (1975); State v. Pina, 90 N.M. 181, 561
P.2d 43 (1977); Allen v. Craig, 1 Kan. App. 2d 301, 564 P.2d
552 (1977); Trohimovich v. Director of Dep't of Labor and
Industries, 21 Wash. App. 243, 584 P.2d 467 (1978); Dorgan v.

(FOOTNOTE CONT'D NEXT PAGE)

6) The Coinage Act of 1978

Finally, Congress enacted the Coinage Act of 1978,^{840/} providing for the base-metal "Susan B. Anthony Dollar". For reasons more closely linked to aesthetics than to constitutional law, the public received this latest bogus "dollar" with monumental apathy, if not contempt. From a store of intrinsic value, Congress had finally reduced the "dollar" to an intrinsically worthless token more useful for propagandizing such faddish political causes as "feminism" than for performing the true office of constitutional "Money".

3. The unconstitutionality of a monetary system consisting of base-metal coinage and irredeemable bank-notes.

As a practical matter, then, the monetary structure of the United States today rests on two pillars: (a) base-metal coinage minted purportedly under the power "To coin Money" in Article I, § 8, cl. 5; and (b) irredeemable federal-reserve bank-notes emitted purportedly under the power "To borrow Money" in Article I, § 8, cl. 2. Any constitutional foundation for these two pillars, however, is conspicuous by its absence.

(FOOTNOTE 839 CONT'D)

Korba, ___ N.D. ___. 274 N.W.2d 167 (1978); Middlebrook v. Mississippi State Tax Comm'n, ___ Miss. ___, 387 So.2d 726 (1980); Daniels v. Arkansas Power and Light Co., ___ Ark. ___, 601 S.W.2d 845 (1980).

The main lesson these cases teach is that contemporary national and state courts will go to almost any length to avoid having to address the unconstitutionality of the present-day monetary system, and will ignore, ridicule, villify, and even punish those who press the issue on them. See especially In re Daly, ___ Minn. ___, ___, 189 N.W.2d 176, 180-82 (1971), and contrast with the cases cited ante, note 619.

^{840/} Act of 10 October 1978, Pub. L. 95-447, 92 Stat. 1072.

a. The unconstitutionality of base-metal
coinage with full legal-tender character

Little need be added to the analysis presented heretofore to expose the constitutional invalidity of the contemporary base-metal coinage that passes for the "Money" of the United States.

In principle, base-metal coins may have a place in a constitutional monetary system, but only if the government recognizes that they are "not upon the same footing with the other", constitutional coinage of silver and gold. This requires that Congress explicitly provide, as it did in the Coinage Act of 1853 and the Subsidiary Coinage Act of 1879, that the base-metal coins (or subsidiary coins of precious metal) have a strictly limited legal-tender effect, and themselves be exchangeable, dollar for dollar, for silver or gold "Money" of the full constitutional standard.^{841/}

In practice, though, today's base-metal coinage satisfies neither of these requirements. First, in the very act that initiated the creation of debased "clad" coins in 1965, Congress once again declared that "[a]ll coins * * * of the United States * * * , regardless of when coined * * * , shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues" -- without any limitation or qualification.^{842/} On its face, this legislative direction indicates that a "clad" coin containing no silver or gold whatsoever has the selfsame legal-tender value as a constitutional (silver) dollar or a properly "regulate[d]" gold coin,

^{841/} Ante, pp. 155-56, 219-21.

^{842/} Act of 23 July 1965, Pub. L. 89-81, Title I, § 102, 79 Stat. 254, 255, now 31 U.S.C. § 392 (1976).

even though the "clad" coin has no intrinsic value in precious metal, and is improperly "regulate[d]" with respect to the constitutional standard of 371-1/4 grains of fine silver.^{843/} Second, with the termination of gold coinage,^{844/} the refusal of Congress to pay out gold coin for any purpose,^{845/} and the statutory limitation on the coinage of silver,^{846/} no meaningful provision exists permitting, let alone mandating, the Treasury to exchange -- at any ratio -- "clad" coins for silver or gold coins. Or, in effect, rather than serving as mere auxiliaries to the nation's constitutional coinage, the "clad" coins have superseded it entirely.

If this be constitutional, then the entire legal history of money in England, the Colonies, the independent States, the Continental Congress, and the United States from 1704 until 1965 is, as the bard wrote, "a tale told by an idiot, full of sound and fury, signifying nothing". Can it be possible that, for more than two hundred and fifty years, English and American statesmen (including the celebrated Framers of the Constitution itself) struggled to create and maintain a monetary system based upon silver and gold purely as the result of a collective delusion that common law and the Constitution demanded it? And can it be possible that only in the last twenty years have our politicians and fonctionnaires correctly perceived that all these efforts were unnecessary, and that the men who

843/ Even if a copper (or other base-metal) coin did actually contain the amount of such metal that exchanged in the market against 371-1/4 grains of silver, it could nevertheless not have full legal-tender character. See U.S. Const. art. I, § 10, cl. 1.

844/ 31 U.S.C. § 315b (1976).

845/ 31 U.S.C. § 315b (1976).

846/ See 31 U.S.C. §§ 317, 317e, 322, 328, 391 (1976).

personally experienced English common law and wrote the Constitution had deceived themselves about the powers of the governments under which they lived, and one of which they themselves created? But, surely, such questions are merely rhetorical. For the history of these matters is neither arcane, nor meaningless, nor irrelevant. Rather, it is open to every man's view, understandable to every man's reason, and pertinent to every man's interest in a monetary system appropriate for a free and well-functioning economy. And not a jot of this history lends the least support to the notion that base-metal coinage is or can be equivalent to, or ever was intended by any American statesman worthy of that appellation to take the place of, the constitutional (silver) dollar and other properly "regulate[d]" coinage of the precious metals.

b. The unconstitutionality of irredeemable, legal-tender federal-reserve notes

If base-metal coins with full legal-tender character are unconstitutional, at least they actually are coins, and semantically within Article I, § 8, cl. 5. One cannot say the same of irredeemable, legal-tender federal-reserve notes. Their unconstitutionality, then, is perhaps even more obvious than that of contemporary "clad" coinage. None the less, closer consideration of the place of these notes in the present monetary system, and of their thoroughgoing illegality, is still profitable.

1) The monetary character of irredeemable, legal-tender federal-reserve notes

Five attributes of modern federal-reserve notes (FRNs) sufficiently define their character for purposes of constitutional analysis. First and most obviously, FRNs are not themselves coins -- of precious metal, base metal, or even any

metal. Although in their lowest denomination they display the inscription "One Dollar", they have no physical relation to the constitutional (silver) dollar, a proper statutory (gold) dollar, or even to an unconstitutional "clad" dollar.

Neither do they have any logical relation to a tangible dollar, legal or illegal. For otherwise identical pieces of paper serving as FRNs bear the inconsistent printing "One Dollar", "Five Dollars", "Ten Dollars", and so on. But every reasoning individual knows intuitively that a single thing cannot be five or ten things, and certainly cannot be one, five, or ten things simultaneously.

Second, FRNs are not redeemable, directly or indirectly, in coins of the precious metals. Indeed, on their face, they carry no promise of redemption at all. Revealing is the evolution -- or, perhaps more properly, declension -- of FRNs from the late 1920's until today. Notes of series 1928 through series 1950E carried the obligation "The United States of America will pay to the bearer on demand _____ dollars", and the inscriptions "Redeemable in gold on demand at the United States Treasury, or in gold or lawful money at any Federal Reserve Bank" (pre-1934) or "This note * * * is redeemable in lawful money at the United States Treasury, or at any Federal Reserve Bank" (post-1934). Starting with series 1963, the words "will pay to the bearer on demand" no longer appear; and each FRN simply states a particular dollar-denomination. In addition, with and after series 1963, the promise of redemption also vanished from the face of each note.^{847/}

^{847/} Hewitt-Donlon Catalog, ante note 819, at 66-153.

To be sure, national statute-law declares that FRNs "shall be redeemed in lawful money on demand at the Treasury Department of the United States * * * or at any Federal Reserve Bank"^{848/} -- indicating that FRNs themselves are not "lawful money". But for all legal and practical purposes, this mandate of "redeemability" is meaningless -- indeed, duplicitous -- as consideration of what constitutes "lawful money" under the present monetary system demonstrates.

The category "lawful money" contains four sub-categories: (i) gold and silver coin of the constitutional standard; (ii) gold and silver certificates; (iii) United States notes; and (iv) United States demand treasury notes.^{849/} According to

^{848/} 12 U.S.C. § 411 (1976).

^{849/} "Lawful money" is not a synonym for "legal tender". Historically, for instance, numerous things have been "legal tender" without being "lawful money" or even any kind of money in either the legal or the economic sense. Indeed, Article I, § 10, cl. 1 was a constitutional response to a long series of abusive practices by the States that "ma[d]e" various "Thing[s]" other than traditional money ("gold and silver Coin") a "Tender".

Statutorily, too, "lawful money" is distinguishable from "legal tender". For example, the very act first declaring United States notes "a legal tender in payment of all debts, public and private" also declared them to be "lawful money" -- an obvious redundancy unless Congress viewed the two concepts as separate. Act of 25 February 1862, ch. 33, § 1, 12 Stat. 345, 345, now 31 U.S.C. § 452 (1976).

Constitutionally, "lawful money" may be a "legal tender", as Article I, § 10, cl. 1 makes clear for "gold and silver Coin". But Congress may "coin" other metals as "Money" under Article I, § 8, cl. 5 -- metals which are "not upon the same footing with [gold and silver]" as far as their capacity for full legal-tender effect is concerned. So the distinction remains here, too.

Finally, logically, "lawful money" is not the same thing as "legal tender", at least as far as FRNs are concerned. FRNs, after all, are "legal tender" along with "[a]ll coins and currencies of the United States * * * regardless of when coined or issued". 31 U.S.C. § 392 (1976). If this also qualifies them as "lawful money", the statute mandating their redemption in "lawful money" would present the amusing spectacle of declaring that one FRN can "redeem" another -- or, because all FRNs are fungible, that an FRN can "redeem" itself!

pre-constitutional common law, "'[m]oney, moneta, legalis moneta Angliae,' lawful money of England, either in gold or silver, is of two sorts, viz. the English money coyned by the king's authoritie, or forraine coyne by proclamation made currant within the realme".^{850/} Thus, by implication, all "Money" of gold and silver that Congress "coin[s]" or properly "regulate[s]" under Article I, § 8, cl. 5 is "lawful money" of the United States -- certainly including the standard of "Value" itself, the (silver) dollar,^{851/} and the "gold and silver Coin" the Constitution permits the States to "make * * * a Tender in Payment of Debts".^{852/} Such is also the obvious implication of all the coinage acts from 1792 until 1893, at which time Congress re-affirmed "the policy of the United States to continue the use of both gold and silver as standard money",^{853/} and of other statutory statements defining "lawful money" as "gold or silver coin of the United States".^{854/}

Gold and silver certificates, of course, are merely "warehouse receipts" for gold and silver coin. If the coin itself is "lawful money", it is fairly arguable that the certificates are, too.

Congress first declared United States notes "lawful money" during the Civil War,^{855/} apparently to permit the use

^{850/} 2 E. Coke, Institutes, ante note 676, § 335, at 207a-207b.

^{851/} U.S. Const. art. I, § 9, cl. 1; amend. VII.

^{852/} U.S. Const. art. I, § 10, cl. 1.

^{853/} Act of 1 November 1893, ch. 8, 28 Stat. 4, 4, now 31 U.S.C. § 311 (1976).

^{854/} Act of 12 July 1870, ch. 252, § 5, 16 Stat. 251, 253.

^{855/} Act of 25 February 1862, ch. 33, § 1, 12 Stat. 345, 345; Act of 11 July 1862, ch. 142, § 1, 12 Stat. 532, 532; Act of 3 March 1863, ch. 73, § 2, 12 Stat. 709, 710; Act of 30 June 1864, ch. 172, § 2, 13 Stat. 218, 218.

of those notes as reserves against bank-notes.^{856/} In any event, the designation continues today by statute.^{857/}

Similarly, Congress has declared demand treasury notes issued during the Civil War^{858/} to be "lawful money".^{859/}

Yet, all this elaborate structure is nugatory in so far as redemption of FRNs is concerned. Although gold and silver coins are "lawful money", Congress has decreed that the Treasury shall coin no gold,^{860/} shall "pa[y] out or delive[r]" no gold coin,^{861/} and shall redeem no currency in gold (except for Federal Reserve Banks under certain circumstances);^{862/} and it has terminated the minting of silver, including the constitutional dollar, and replaced that coinage with bogus "clad" token-money.^{863/} Although gold and silver certificates are "lawful money", Congress has terminated their redemption in gold^{864/} or silver.^{865/} As for United States notes and

^{856/} A. Kemp, The Legal Qualities of Money (1956), at 67-71, 87-93. This is the view widely held among students of banking. E.g., F. Bradford, Money and Banking (6th ed. 1949), at 142. See, e.g. Act of 20 June 1874, ch. 343, § 3, 18 Stat. 123, 123.

^{857/} 31 U.S.C. § 452 (1976).

^{858/} Act of 17 July 1861, ch. 5, § 1, 12 Stat. 259, 259 ("treasury notes of a less denomination than fifty dollars, not bearing interest, but payable on demand"); Act of 12 February 1862, ch. 20, 12 Stat. 338; Act of 25 February 1862, ch. 33, 12 Stat. 345; Act of 17 March 1862, ch. 45, 12 Stat. 370.

^{859/} 31 U.S.C. § 453 (1976).

^{860/} 31 U.S.C. § 315b (1976).

^{861/} 31 U.S.C. § 315b (1976).

^{862/} 31 U.S.C. § 408a (1976).

^{863/} See 31 U.S.C. §§ 317, 317e, 322, 328, 391 (1976).

^{864/} 31 U.S.C. § 408a (1976).

^{865/} 31 U.S.C. § 405a-3 (1976).

demand treasury notes, these are obligations of the United States the payment of which in gold Congress has also prohibited.^{866/} A national statute provides for the "retire[ment] and cancel[lation]" of treasury notes with "standard silver dollars" -- but the same law mandates the issuance of silver certificates "against the silver dollars",^{867/} which certifies another statute declares "redeemable from any moneys in the general fund of the Treasury".^{868/} So, overall, the "redemption" of FRNs is "lawful money" leads inexorably to the exchange of one bundle of FRNs for another such bundle, differing perhaps in denominations, serial numbers, and dates of issue, but otherwise for all legal and economic purposes identical in every relevant respect. FRNs are, in short, promises to pay that are never paid because no means exist to pay them; they are endlessly circulating debt.^{869/}

^{866/} 31 U.S.C. § 463 (1976).

^{867/} 31 U.S.C. § 411 (1976).

^{868/} 31 U.S.C. § 405a-3 (1976).

^{869/} Even Congress admits as much. E.g., Subcommittee on Domestic Finance, House Committee on Banking and Currency, A Primer on Money, 88th Cong., 2d Sess. (1964), at 19, 23:

American citizens holding these [federal-reserve] notes cannot demand anything for them except (a) that they be exchanged for other Federal Reserve notes, or (b) that they be accepted in payment for taxes and all debts, public and private.

* * * *

The dollar is based on credit, and every dollar in existence represents a dollar of debt owed by an individual, a business firm, or a governmental unit.

See 18 U.S.C. § 333 (1976), referring to "any bank bill, * * * note, or other evidence of debt issued by any * * * Federal Reserve Bank, or the Federal Reserve System".

Third, FRNs have no constitutional, statutory, or economic relationship to the monetary unit of value. Congress ascertained the weight of the constitutional standard of value, the (silver) dollar, in the Coinage Act of 1792,^{870/} and never deviated from this standard thereafter. Congress first defined the "gold dollar" in the Coinage Act of 1849,^{871/} and declared it the statutory standard of value in the Coinage Act of 1873,^{872/} and again in the Coinage Act of 1900.^{873/} Only in 1933 and 1934 did Congress purport to delegate to the President the license to debase both the (silver) dollar and the "gold dollar"^{874/} -- but the President left the (silver) dollar unchanged;^{875/} and, although he did proclaim a debasement of the "gold dollar",^{876/} he made no attempt to supplant it as the statutory standard of value during the time his "emergency powers" in that regard remained in force.^{877/} Thereafter, Congress further debased the "gold dollar",^{878/} but never even

^{870/} Act of 2 April 1792, ch. 16, § 9, 1 Stat. 246, 248.

^{871/} Act of 3 March 1849, ch. 109, § 1, 9 Stat. 397, 397.

^{872/} Act of 12 February 1873, ch. 131, § 14, 17 Stat. 424, 426.

^{873/} Act of 14 March 1900, ch. 41, § 1, 31 Stat. 45, 45.

^{874/} Emergency Farm Mortgage Act of 1933, Act of 12 May 1933, ch. 25, § 43(b)(2), 48 Stat. 51, 52-53; Gold Reserve Act of 1934, Act of 30 January 1934, ch. 6, § 12, 48 Stat. 337, 342-43.

^{875/} Proclamation of 31 January 1934, 48 Stat. 1730, 1731.

^{876/} Proclamation of 31 January 1934, 48 Stat. 1730, 1731.

^{877/} See Act of 30 June 1941, ch. 265, 55 Stat. 395, extending the President's purported power to 30 June 1943.

^{878/} Par Value Modification Act, Act of 31 March 1972, Pub. L. 92-268, § 2, 86 Stat. 116, 116-17; Amendment of the Par Value Modification Act, Act of 21 September 1973, Pub. L. 93-110, § 1, 87 Stat. 352, 352; Amendment of the Bretton Woods Agreements Act, Act of 19 October 1976, Pub. L. 94-564, § 8, 90 Stat. 2660, 2661.

claimed to replace it as the statutory standard of value with the "'clad' dollar" or with the paper FRN. Indeed, national statute-law today continues to declare that "[t]he dollar of gold nine-tenths fine consisting of the weight determined under the provisions * * * of this title shall be the standard unit of value".^{879/} The FRN, in short, has no constitutional or statutory claim to be the unit of value.

Neither does it have any economic claim to that position. National law mandates that "all forms of money issued or coined by the United States shall be maintained at a parity of value with [the statutory gold] standard";^{880/} proclaims the "policy of the United States" to be "the maintenance of the parity in value of [gold and silver] coins * * * , and the equal power of every dollar at all times in the markets and in the payment of debts";^{881/} and refers repeatedly to actions necessary "to maintain the equal purchasing power of every kind of currency of the United States",^{882/} and "the parity of all forms of money issued or coined by the United States",^{883/} including "the parity of [subsidiary] coins with the standard silver dollar and with the gold dollar".^{884/} Yet, as every thinking man and woman in the United States is aware, the FRN maintains no "parity of value" with, or "equal purchasing power" to, the "standard silver dollar". Indeed, the very purpose of terminating the redemption in silver of silver certificates (and,

^{879/} 31 U.S.C. § 314 (1976).

^{880/} 31 U.S.C. § 314 (1976).

^{881/} 31 U.S.C. § 311 (1976).

^{882/} 31 U.S.C. § 408a (1976).

^{883/} 31 U.S.C. § 409 (1976).

^{884/} 31 U.S.C. § 821 (1976).

therefore, indirectly of FRNs) in 1968 was to take "one more step in the transition from a coinage system * * * where the coins themselves are made of precious metals and have a value in and of themselves, to a functional system * * * , where the coins are made of base metal and have no value except as legal tender".^{885/} And no one has ever explained how it could be possible to maintain the "parity" and "equal purchasing power" of two media of exchange, one consisting of a limited supply of precious metal with legal-tender and intrinsic value and the other consisting of an ever-expanding supply of base metal (or even worse, of paper) with legal-tender but no intrinsic value.

In sum, both the constitutional silver standard and the statutory gold standard are precisely defined, unchanging weights of precious metal. The actual purchasing-power of a "standard silver dollar" or of a "gold dollar" in the marketplace may fluctuate up or down from day to day with the varying course of economic events -- but the monetary standard never changes, because the monetary standard under common law and the Constitution is a unit of fixed intrinsic value, not of mutable exchange-value. FRNs have no intrinsic value, only a fluctuating exchange-value that exhibits a long-term trend sharply downwards. Therefore, legally, the "one-dollar" FRN cannot serve as the standard of value. And, economically, although the FRN might exhibit "parity" and "equal purchasing power" with the (silver) dollar or the "gold dollar", in fact it has not done so for many years, does not do so now, and likely never will.

^{885/} S. Rep. No. 232, ante note 821, at 1236.

Fourth, although they operate as "legal tender", FRNs are far removed from the highest, or from even a legal, form of tender recognized in constitutional law. National statutes proclaim numerous forms of "legal tender", among which are: "[a]ll coins and currencies of the United States (including Federal Reserve notes * * *), regardless of when coined or issued";^{886/} "[g]old certificates of the United States payable to bearer on demand";^{887/} "United States notes";^{888/} "[d]emand treasury notes [of 1861 and 1862]";^{889/} "[t]reasury notes [of 1863 and 1864]";^{890/} "the silver dollar";^{891/} "[t]he gold coins of the United States * * * at their nominal value when not below the standard weight * * * , and, when reduced in weight below such standard * * * at valuation in proportion to their actual weight";^{892/} "[t]he silver coins of the United States * * * of smaller denominations than \$1 * * * in all sums not exceeding \$10";^{893/} and "[t]he minor coins of the United States * * * at their nominal value for any amount not exceeding 25 cents";^{894/} but not any "foreign gold or silver

^{886/} 31 U.S.C. § 392 (1976).

^{887/} 31 U.S.C. § 451 (1976).

^{888/} 31 U.S.C. § 452 (1976) (only "within the United States").

^{889/} 31 U.S.C. § 453 (1976) ("in like manner as United States notes").

^{890/} 31 U.S.C. § 454 (1976) ("to the same extent as United States notes", but not "in payment or redemption of" any bank-notes "calculated and intended to circulate as money").

^{891/} 31 U.S.C. § 455 (1976).

^{892/} 31 U.S.C. § 457 (1976).

^{893/} 31 U.S.C. § 459 (1976).

^{894/} 31 U.S.C. § 460 (1976).

coins".^{895/} The (silver) dollar is properly -- indeed, necessarily -- a legal tender because the Constitution explicitly identifies it as the unit of value, or money of account.^{896/} Other "gold and silver Coin" is also properly -- and, again, necessarily -- a legal tender because the Constitution explicitly qualifies it as such in the "Payment of Debts".^{897/} And the "silver coins * * * of smaller denominations" and the "minor coins", too, are properly legal tender because they constitute coined "Money" and are strictly limited in their ability to pay debts, in keeping with common-law tradition.^{898/} The various paper notes the statutes declare to be legal tender, however, lack such constitutional justifications.

To the contrary: Even the erroneous theory that Congress may emit legal-tender paper currency under the power "To borrow Money" in Article I, § 8, cl. 2, does not rationalize the various irredeemable notes (including FRNs) in circulation today. For, in Knox v. Lee,^{899/} the Supreme Court upheld (albeit mistakenly) the validity of legal-tender United States notes only because those notes were ultimately redeemable in gold coin.^{900/} And, in Perry v. United States,^{901/} the Supreme Court ruled (correctly) that Congress has no power to repudiate an obligation to pay in precious metal if the

^{895/} 31 U.S.C. § 456 (1976).

^{896/} U.S. Const. art. I, § 9, cl. 1; amend. VII.

^{897/} U.S. Const. art. I, § 10, cl. 1.

^{898/} U.S. Const. art. I, § 8, cl. 5.

^{899/} 79 U.S. (12 Wall.) 457 (1871).

^{900/} Id. at 533 (opinion of the Court), 560, 561-62, 565 (Bradley, J., concurring).

^{901/} 294 U.S. 330 (1935).

currency in which it purports to pay deprives the recipient of the "buying power" he would otherwise have derived from payment in specie.^{902/} Taken together, then, Knox and Perry teach that the constitutionality of legal-tender character for a paper currency depends, at the very least, on that currency's redeemability in specie of intrinsic value equal to the denomination of the currency. But, today, none of the notes (including FRNs) that Congress purports to impose upon the country as legal tender is redeemable in any specie, let alone specie of intrinsic value equal to the denomination of the notes. Therefore, even under the broadest interpretation the Supreme Court has ever given to Article I, § 8, cl. 2, FRNs are not properly legal tender for any purpose.

Fifth and last, although a national statute solemnly decrees that FRNs "shall be obligations of the United States and shall be receivable * * * for all taxes, customs, and other public dues",^{903/} the notes constitute strange "obligations" indeed. "Among [the] elements [of an obligation,] nothing is more important than the means of enforcement. * * * The idea of right and remedy are inseparable."^{904/} Yet, nowhere in the present national scheme of monetary statutes does any means exist to enforce the "obligation" that FRNs supposedly evidence. For Congress explicitly and categorically refuses, by statute, to pay out gold or silver in satisfaction of any national debts.^{905/} And, thus, "American citizens

^{902/} Id. at 348-58.

^{903/} 12 U.S.C. § 411 (1976).

^{904/} Edwards v. Kearzey, 96 U.S. 595, 600-01 (1877) (defining "obligation" as used in Art. I, § 10, cl. 1).

^{905/} 31 U.S.C. §§ 405a-3 (no redemption of silver certificates in specie), 408a (no redemption of "currency" in gold), 463 (no payment of obligations "in gold or a particular kind of coin or currency") (1976).

* * * cannot demand anything for [FRNs] except * * * that they be exchanged for other [FRNs]".^{906/} Or, from a constitutional monetary perspective, FRNs constitute repudiated obligations in violation of the Supreme Court's decision in Perry v. United States.^{907/}

Revealingly, FRNs do not rise even to the questionable dignity of "Bills of Credit" outlawed explicitly in Article I, § 10, cl. 1, and implicitly in Article I, § 8, cl. 2.^{908/} Congressional statute makes FRNs receivable for all public dues;^{909/} but this alone does not qualify them as "Bills of Credit".^{910/} Congress apparently intends FRNs to circulate in place of "Money", and to have purported legal-tender character;^{911/} but this, although necessary, is not sufficient to constitute them "Bills of Credit" of the United States.^{912/} For FRN's are "issued at the discretion of the Board of Governors of the Federal Reserve System",^{913/} titular heads of

^{906/} A Primer on Money, ante note 869, at 19.

^{907/} 294 U.S. 330, 348-58 (1935).

^{908/} Ante, pp. 92-97.

^{909/} 12 U.S.C. § 411 (1976).

^{910/} Houston & T.C.R.R. v. Texas, 177 U.S. 66, 89 (1900); Craig v. Missouri, 29 U.S. (4 Pet.) 410, 458 (1830) (McLean, J., dissenting).

^{912/} On circulation as money as an essential attribute of "Bills of Credit", see Craig v. Missouri, 29 U.S. (4 Pet.) 410, 431-32 (opinion of the Court), 452-54 (McLean, J., dissenting) (1830); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 312-14, 318-19 (1837); Poindexter v. Greenhow, 114 U.S. 269, 284 (1885); Houston & T.C.R.R. v. Texas, 177 U.S. 66, 85-87 (1900); Bragg v. Tuffts, 49 Ark. 554, ___, 6 S.W. 158, 162 (1887).

On the non-essentiality of legal-tender character for a "Bil[1] of Credit", see Craig v. Missouri, 29 U.S. (4 Pet.) 410, 433-36 (1830); 2 J. Story, Commentaries, ante note 7, §§ 1365-67.

^{913/} 12 U.S.C. § 411 (1976).

an unconstitutional corporative-state banking-monopoly,^{914/}
and not at the constitutional discretion of the United States
government. And therefore they fail to satisfy the basic
requirement that a "Bil[1] of Credit" be issued directly by
the government itself.^{915/} Moreover, on their face, FRNs
express no promise of the United States to pay anything, as
true "Bills of Credit" always do;^{916/} and, in any event, the
government has expressly repudiated even an implied promise
to redeem the notes in silver or gold.^{917/} Finally, if FRNs
actually circulate as a medium of exchange in the American
economy, it is not on the faith and credit of the United
States, which has already repudiated the notes in no uncertain
terms.^{918/} Or, in short, contemporary FRNs represent a new
form of paper currency in Anglo-American constitutional

^{914/} Post, pp. 282-95.

^{915/} Craig v. Missouri, 29 U.S. (4 Pet.) 410, 432 (opinion of the Court), 452-54 (McLean, J., dissenting) (1830); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 312-14, 318-19 (1837); Bragg v. Tuffts, 49 Ark. 554, ___, 6 S.W. 158, 162 (1887).

The close relationship between the Federal Reserve System and the United States government does not automatically make the former's notes the latter's "Bills of Credit". See Briscoe, 36 U.S. (11 Pet.) at 316-20. Cf. ante, pp. 186-96.

^{916/} Craig v. Missouri, 29 U.S. (4 Pet.) 410, 454 (1830) (McLean, J., dissenting); Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851); Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15-17 (1851); Bragg v. Tuffts, 49 Ark. 554, ___, 6 S.W. 158, 162 (1887).

^{917/} 31 U.S.C. §§ 405a-3, 408a, 463 (1976).

^{918/} A "Bil[1] of Credit" must rest on the government's credit. Craig v. Missouri, 29 U.S. (4 Pet.) 410, 431-32 (1830) ("a state binds itself to pay money at a future day"); Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 318 (1837); Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851); Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15-17 (1851).

history -- in comparison with which the old Continental Currency appears as a species of "hard money".

2) The constitutional impossibility of irredeemable, legal-tender federal-reserve notes

Those asserting that the national government possesses a particular power have the burden of establishing where in the Constitution that power exists.^{919/} To prove that the Constitution delegates to Congress a power to generate irredeemable, legal-tender bank-notes, however, is impossible.^{920/} Only two constitutional provisions grant Congress any powers with respect to "Money": namely, Article I, § 8, cl. 5, which contains the power "To coin Money, [and] regulate the Value thereof"; and Article I, § 8, cl. 2, which contains the power "To borrow Money". But neither of these powers sustains the emission of irredeemable, legal-tender FRNs.

FRNs are not silver or gold coin of the constitutional standard, not subsidiary silver or gold coin, not subsidiary base-metal coin, not "clad" coin, not any form of coin. Furthermore, being irredeemable in "lawful money" of silver or gold, FRNs are not by any stretch of the imagination silver or gold certificates, either. Their emission, therefore, cannot possibly arise out of exercise of the power "To coin" in Article I, § 8, cl. 5. In addition, because they are irredeemable in "dollars" of the constitutional standard of 371-1/4 grains of fine silver, FRNs are not entitled to the full

^{919/} Bute v. Illinois, 333 U.S. 640, 653 (1948). See Kansas v. Colorado, 206 U.S. 46, 83-84 (1907); Downes v. Bidwell, 182 U.S. 244, 288 (1901).

^{920/} A fortiori, then, to prove that Congress may delegate such a non-existent power to a banking-monopoly organized on corporative-state lines is equally impossible. See post, pp. 282-95.

legal-tender character that pertains to properly "regulate[d]" coin of the precious metals and to valid silver and gold certificates. So their purported legal-tender effect is also not a product of any conceivable congressional exercise of the power "To coin".

The power "To borrow" in Article I, § 8, cl. 2 does not authorize Congress to issue "Bills of Credit". Therefore, if FRNs were "Bills of Credit", their very emission, not to mention their legal-tender character, could not possibly arise out of any exercise of that power. However, FRNs are not "Bills of Credit", because of their irredeemability in specie, and because of their repudiation by Congress. Therefore, under applicable decisions of the Supreme Court (some of which erroneously over-extend the reach of Article I, § 8, cl. 2), FRNs cannot be the product of any purported congressional "borrowing" of "Money".

To be sure, people often say that the steady depreciation of FRNs amounts to a "tax" Congress levies on the nation. Metaphorically, this description is not inaccurate -- but, constitutionally, it is inapposite. The emission of "Bills of Credit" does not constitute taxation, as a matter of law.^{921/} Or, conversely, the power "To lay and collect Taxes" in Article I, § 8, cl. 1 does not include a power to issue "Bills".

Which leaves as a constitutional basis for the generation of FRNs: precisely nothing. FRNs, in short, are a constitu-

^{921/} See State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174, 182 (1942) (Frankfurter, J., concurring), which points out that "[t]he taxing power of the States was limited by the Constitution and the original ten amendments in only three respects", not including the prohibition against "Bills of Credit" in Article I, § 10, cl. 1.

tional impossibility, the practical existence of which reflects only the old observation that "mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed".^{922/}

B. The unconstitutionality of the Federal Reserve System's corporative-state banking-monopoly

The present monetary arrangements of the United States would be unconstitutional even if Congress itself issued federal-reserve notes, or some similarly irredeemable, legal-tender "fiat money". The contemporary situation is peculiarly invalid, because Congress has purported to delegate to the Federal Reserve System (FRS), not only the supposed power to emit such notes, but also essentially limitless authority to manipulate the monetary affairs of the country.

1. The corporative-state structure of the Federal Reserve System

The history, structure, and general activities of the FRS are well known.^{923/} The FRS is a so-called "central bank", composed of several parts, both public and private, organized on a regional basis under governmental supervisory authority. Basically, it consists of the Board of Governors, the Federal Open Market Committee, the Federal Advisory Council, twelve regional Federal Reserve Banks, and several thousand privately owned, so-called "member banks".^{924/} The ostensible function of the FRS is to influence or control the

^{922/} Declaration of Independence (1776).

^{923/} See, e.g., E. Groseclose, America's Money Machine: The Story of the Federal Reserve (1980); Reagan, "The Political Structure of the Federal Reserve System", 55 Amer. Pol. Sci. Rev. 64 (1961).

^{924/} See generally 12 U.S.C. §§ 221-522 (1976).

money" (FRNs). Its most important tool for conducting its monetary policies is the Open Market Committee.

The Board of Governors of the FRS consists of seven members, appointed by the President of the United States by and with the advice and consent of the Senate.^{925/} Whether the Governors are "Officers of the United States",^{926/} however, is less than certain.^{927/} In any event, Congress has purported to delegate to the Board a responsibility to "maintain long run growth of the monetary and credit aggregates [of the United States] 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".^{928/} Apparently, this policy rationalizes indefinite expansion of the supplies of "fiat money" and bank-credit, so long as the economy shows a "potential to increase production". Or, Congress has charged the Board with the task of saturating the American economy with irredeemable, legal-tender paper currency and credit. And to enable the Board to pursue this goal, Congress has armed it with extraordinarily sweeping powers.

For example, in the Credit Control Act of 1969,^{929/} Congress decreed that, "[w]henver the President determines

^{925/} 12 U.S.C. § 241 (1976).

^{926/} See U.S. Const. art. II, § 2, cl. 2.

^{927/} Compare 12 U.S.C. § 241 (1976) with Act of 10 April 1816, ch. 44, § 8, 3 Stat. 266, 269-70, and with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866-67 (1824).

^{928/} 12 U.S.C. § 225a (1976).

^{929/} Act of 23 December 1969, Pub. L. 91-151, 83 Stat. 376.

that such action is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume, [he] may authorize the Board to regulate and control any or all extensions of credit".^{930/} The breadth of this authority is apparent from the statutory definition of "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment"^{931/} -- which potentially embraces everything from a corporation negotiating an intricate multi-million-dollar loan to one neighbor simply borrowing lunch-money from another. Equally apparent is the stringency of the controls the Board may impose by "regulations [prescribed] to carry out the purposes of this chapter",^{932/} which controls include "requir[ing] transactions or persons * * * to be registered or licensed", "prescrib[ing] the maximum amount of credit which may be extended", "prescrib[ing] the maximum rate of interest * * * and any other specification or limitation of the terms and conditions of any extension of credit", or "prescrib[ing] the methods of determining purchase prices or market values or other bases for computing permissible extensions of credit".^{933/} To enforce these regulations, the Board may seek injunctions in the national courts,^{934/} or "assess

^{930/} Title II, § 205(a), 83 Stat. at 377, now 12 U.S.C. § 1904 (1976).

^{931/} Title II, § 202(e), 83 Stat. at 376, now 12 U.S.C. § 1901(e) (1976).

^{932/} Title II, § 203, 83 Stat. at 376, now 12 U.S.C. § 1902 (1976).

^{933/} Title II, § 206(1, 6-8), 83 Stat. at 377, now 12 U.S.C. § 1905(1, 6-8) (1976).

^{934/} Title II, § 208, 83 Stat. at 378, now 12 U.S.C. § 1907 (1976).

upon any person * * * a civil penalty not exceeding \$1,000".^{935/}
And the government may impose criminal penalties on violators,
too.^{936/}

The boards of directors of the twelve Federal Reserve Banks consist of three classes, each composed of three members:^{937/} "Class A" consists of members "who shall be chosen by and be representative of the stockholding banks".^{938/} "Class B" consists of members "who shall represent the public * * * with due but not exclusive consideration to the interests of agriculture, commerce, industry, services, labor, and consumers". And "Class C" consists of members "designated by the Board of Governors of the Federal Reserve System".^{939/} The private member-banks in the FRS nominate and elect all "Class A" and "Class B" directors.^{940/} The task of the directors is to "perform the duties usually appertaining to the office of directors of banking associations" for each Federal Reserve Bank.^{941/}

The Federal Open Market Committee consists of the seven members of the Board of Governors and five "representatives of

^{935/} Title II, § 209, 83 Stat. at 378, now 12 U.S.C. § 1908 (1976).

^{936/} Title II, § 210, 83 Stat. at 378, now 12 U.S.C. § 1909 (1976).

^{937/} 12 U.S.C. § 302 (1976).

^{938/} The "stockholding banks" are privately owned national and state banks that have become members of the FRS by subscribing to the stock of the Federal Reserve Banks within their geographical districts. 12 U.S.C. §§ 282 (national banks), 321 (state banks) (1976).

^{939/} Each of these members must be "a person of tested banking experience". 12 U.S.C. § 305 (1976).

^{940/} 12 U.S.C. § 304 (1976).

^{941/} 12 U.S.C. § 301 (1976).

the Federal Reserve banks" selected by the boards of directors of those banks, according to a fixed formula.^{942/} The Committee is empowered to control the so-called "open-market operations" of all Federal Reserve Banks,^{943/} "with a view to accomodating commerce and business and with regard to their bearing upon the general credit of the country".^{944/} Under this authority, the Committee prescribes to the Federal Reserve Banks the manner in which they must exercise their "power to buy and sell, at home or abroad, bonds and notes of the United States, * * * bills, notes, revenue bonds, and warrants * * * issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States",^{945/} and "obligations of, or fully guaranteed as to principal and interest by, a foreign government or agency thereof".^{946/} In effect, then, Congress has purported to license the Committee to oversee, direct, and regulate the "monetization" of debt in the United States: the process by which the FRS adds to the "reserves" of its member-banks by purchasing governmental debts, including potentially limitless "obligations of * * * a foreign government or agency".

Finally, the Federal Advisory Council consists of one

^{942/} 12 U.S.C. § 263(a) (1976).

^{943/} 12 U.S.C. § 263(b) (1976).

^{944/} 12 U.S.C. § 263(c) (1976). See 12 U.S.C. §§ 353-59 (1976).

^{945/} 12 U.S.C. § 355 (1976).

^{946/} Monetary Control Act of 1980, Act of 31 March 1980, Pub. L. 96-221, Title I, § 105(b)(2), 94 Stat. 132, 140, amending 12 U.S.C. § 355 (1976).

member from each of the twelve federal-reserve districts, appointed by the boards of directors of the Federal Reserve Banks within each district.^{947/} The purpose of the Council is "to confer directly with the Board of Governors of the Federal Reserve System on general business conditions", and "to make recommendations in regard to discount rates, rediscount business, note issue, reserve conditions * * * , open-market operations * * * , and the general affairs of the reserve banking system".^{948/}

In sum, privately owned banks control the boards of directors of the Federal Reserve Banks.^{949/} The boards appoint five out of twelve members of the Federal Open Market Committee, and all of the Federal Advisory Council. In its turn, the Committee (no doubt influenced by the Council) prescribes policy for the private member-banks, and for all other "depository institutions" in the United States.^{950/} All in all, then, the FRS amounts to a national cartel of private banks, organized under a symbiotic governmental board, with a monopoly to emit irredeemable, legal-tender paper currency (FRNs), and with broad powers to control the nation's "monetary and credit aggregates". In effect, Congress has licensed this cartel, in cooperation with the Board of Governors, to exercise pervasive law-making powers -- binding not only on themselves

^{947/} 12 U.S.C. § 261 (1976).

^{948/} 12 U.S.C. § 262 (1976).

^{949/} Six out of nine members of each board are nominated and elected by the member-banks. 12 U.S.C. § 302 (1976). And the other three must be persons "of tested banking experience". 12 U.S.C. § 305 (1976). Which suggests where their sympathies lie.

^{950/} See Act of 31 March 1980, Pub. L. 96-221, Title I, §§ 102-05, 94 Stat. 132, 132-40.

and all "depository institutions", but also on every American who uses money or credit in any transaction.

Three attributes of this cartel-structure define its political-economic nature: (i) its ability to generate legal-tender paper currency, under color of purportedly delegated congressional authority; (ii) its domination by private parties; and (iii) its large measure of independence from governmental control. First, no one seriously disputes that, under the FRS, "[t]he power to create money has been delegated, or loaned, by Congress to the private banks for their free use".^{951/}

"Furthermore, [Congress] has delegated to the [FRS] the power to determine how much money shall be created and to determine also * * * what part of the total money supply shall be created by the Federal Reserve and what part by the private banks."^{952/}

Second, "[i]t is indisputable that the commercial banking community wields considerable power within the [FRS].

* * * What does this mean? It means simply that private banking interests are intimately if not decisively involved in determining the Nation's money supply and, consequently, the general level of interest rates. * * * It means that decisions absolutely crucial to the public interest are arrived at by a body riddled with private interests * * * ."^{953/}

And third, "[a]lthough a creature of Congress, the [FRS] is in practice, independent of that body in its policymaking. The same holds true with respect to the executive branch. The [FRS] neither requires nor seeks the approval of any branch of

^{951/} A Primer on Money, ante note 869, at 89.

^{952/} Id. at 21.

^{953/} Id. at 3, 4.

Government for its policies. The System itself decides what ends its policies are aimed at and then takes whatever actions it sees fit to reach those ends".^{954/} In sum, even a

slight acquaintance with American constitutional theory and practice demonstrates that, constitutionally, the [FRS] is a pretty queer duck. It exercises wide power in the area of economic policy, both in formulation and execution -- a matter which intimately affects our everyday life. It would ordinarily be assumed where such power is present that democratic control was being exercised over the central bank, at least indirectly, through the ballot box. Yet this is not the case. In fact, the combination of economic power and freedom from control by either the other branches of Government or the electorate has led some people to label the [FRS], with much truth, "a fourth branch of the Government." ^{955/}

Whether the FRS is, "constitutionally, * * * a pretty queer duck", the next sub-section of this analysis considers. From the perspective of political economy, however, the FRS is a rather typical example of the corporative-state form of economic-cum-political organization. Basically, under that system government recognizes or establishes as a specific entity a group in a particular industry, trade, or profession; endows that group with peculiar legal rights, privileges, powers, and immunities; and delegates to it the function (in cooperation with some supervisory public agency) to enact "economic laws" for that industry, trade, or profession -- and, indirectly, for all citizens who deal with the members of the group. This legally privileged entity -- or, as the Italian theorists of corporativism labelled it, the corporazione -- operates both as a private, independent group seeking its

^{954/} Id. at 2.

^{955/} Id. at 121.

own economic self-interest and that of its members, and as a quasi-public, political agency exercising delegated legislative authority supposedly in the interest of the community as a whole.

The member-banks of the FRS are private, independent associations pursuing their own economic self-interest. Through the Federal Reserve 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. They are, for all practical purposes, an American banking-corporazione.

2. The unconstitutionality of all corporative-state structures

A governmentally sponsored corporative-state structure such as the FRS is neither novel in past American political-economic experience, nor unique today.^{956/} For a prime historical example, enacted in 1933, the National Industrial Recovery Act (NIRA)^{957/} authorized private "trade or industrial associations or groups" to apply for approval by the President of the United States of "codes of fair competition for the trade or industry represented by the * * * applicants", made these "codes" the "standard[s] of fair competition for [each] trade or industry" -- that is, economic laws -- upon the President's approval,^{958/} and imposed criminal sanctions for

^{956/} See Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", Government Union Rev., Vol. 2, No. 1 (Winter 1981), at 56.

^{957/} Act of 16 June 1933, ch. 90, 48 Stat. 195.

^{958/} § 3(a-b), 48 Stat. at 196. The President could also promulgate "codes" sua sponte. § 3(b), 48 Stat. at 196.

violations thereof.^{959/} The NIRA did not last long, however.

In A.L.A. Schechter Poultry Corp. v. United States,^{960/}
the United States Supreme Court unanimously declared the NIRA
unconstitutional as an invlaid delegation of legislative power
under the Due Process Clause of the Fifth Amendment. The
Court recognized that the NIRA system of codes was

not simply one for voluntary effort. It
does not seek merely to endow voluntary
trade or industrial associations or groups
with privileges or immunities. It involves
the coercive exercise of law-making power.
The codes of fair competition * * * are
codes of law. If valid, they place all
persons within their reach under the
obligation of positive law, binding
equally those who assent and those who do
not assent. ^{961/}

To the government's argument that the codes were valid because
they "consist of rules of competition deemed fair for each
industry by representative members of that industry * * * most
vitaly concerned and most familiar with its problems", the
Court retorted:

[W]ould it be seriously contended that
Congress could delegate its legislative
authority to trade or industrial associa-
tions or groups so as to empower them to
enact the laws they deem to be wise and
beneficient for the rehabilitation and
expansion of their trade or industries?
Could trade or industrial associations or
groups be constituted legislative bodies
for that purpose because such associations
or groups are familiar with the problems
of their enterprises? * * * The answer
is obvious. Such a delegation of legisla-
tive power is unknown to our law and is
utterly inconsistent with the constitution-
al prerogatives and duties of Congress. ^{962/}

^{959/} § 3(f), 48 Stat. at 197.

^{960/} 295 U.S. 495 (1935).

^{961/} Id. at 529.

^{962/} Id. at 537.

Thus, Schechter outlawed in unequivocal terms the fundamental legal element of the corporative state: the privilege of private special-interest groups to make economic laws binding, not only themselves, but also other citizens. So passed from the American scene the first nationwide embodiment of the corporative state recognized for what it was.^{963/} To Justice Brandeis, Schechter marked "the end of this business of centralization. * * * It's come to an end."^{964/} And so it had -- but only for the moment. The NIRA "as written is rolled up", lamented its chief administrator; yet, "[t]he principles * * * remain".^{965/}

Advocates of the corporative state wasted little time in attempting to resurrect those "principles" on a limited scale in the Bituminous Coal Conservation Act (BCCA).^{966/} Following the pattern of the NIRA, the BCCA authorized the organization of private "district boards of coal producers",^{967/} empowered these boards to fix prices and regulate "the sale and distribution of coal by code members within the district[s]" subject to approval by a national commission,^{968/} and effectively

^{963/} Even the original Federal Reserve Act of 1913 had a definite corporative-state cast. See Act of 22 December 1913, ch. 5, §§ 12, 14, 38 Stat. 251, 263, 264-65. But vanishingly few people have recognized the character of this national banking-cartel.

^{964/} Quoted in A. Schlesinger, Jr., The Politics of Upheaval (1960), at 280.

^{965/} Johnson, "The Loss-Leader -- A Racket", 127 Publishers' Weekly 2110, 2110 (1935).

^{966/} Act of 30 August 1935, ch. 824, 49 Stat. 991.

^{967/} § 4, Pt. I(a), 49 Stat. at 994.

^{968/} § 4, Pt. II(a, b), 49 Stat. at 995-98.

outlawed violations of the "codes" through a complex scheme of taxes and rebates.^{969/}

In Carter v. Carter Coal Co.,^{970/} the Supreme Court once again declared the corporative-state arrangement an unconstitutional delegation of legislative power. "The power conferred", the Court explained, is "the power to regulate" -- and, under the circumstances, "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons".^{971/}

The teaching of Schechter and Carter is obvious. Under the NIRA, Congress purported to empower the President or his agents to approve, disapprove, or impose conditions on the approval of "codes" prepared by private "trade or industrial associations or groups", or to prescribe the "codes" themselves. The Schechter Court made clear, however, that neither the President acting under supposed congressional authorization, nor even Congress itself acting directly, could constitutionally license private parties to make economic laws. Under the BCCA, Congress purported to empower a national coal commission to approve, disapprove, modify, or fix outright "codes" for the production and marketing of coal. But the Carter Court held this unconstitutional, too. Together, then, Schechter and Carter disapproved corporative-state arrangements even when supervised by the highest national administrative, executive, or even legislative authorities.

^{969/} §§ 3, 4, Pt. II(e), 5(b, c), 49 Stat. at 993-94, 998-99, 1002-03.

^{970/} 298 U.S. 238 (1936).

^{971/} Id. at 311. See id. at 318 (Hughes, C.J., concurring). Six Justices joined or concurred in the holding. The remaining three reserved judgment on this issue.

As a matter of political-economic fact, there is no difference in principle between the corporative-state structures of the defunct NIRA and BCCA and that in operation under the FRS today. Under the NIRA and BCCA, private parties operating through "code authorities" or "district boards" interacted cooperatively with national executive or administrative officials to promulgate economic laws binding on their industries. Similarly, under the FRS, private member-banks operating through regional Federal Reserve Banks interact cooperatively with the Board of Governors to promulgate economic laws binding themselves, all "depository institutions", and every American who uses federal-reserve notes, credit, or any other banking-service.^{972/}

The private member-banks control the boards of directors of the Federal Reserve Banks.^{973/} In their turn, these boards select the Banks' representatives to the Federal Advisory Council^{974/} and the Federal Open Market Committee.^{975/} The Council and Committee then advise on, or establish, monetary policy in conjunction with the Board of Governors.^{976/} Or, in effect, the private member-banks cooperate with the Board to enact economic laws pursuant to authority Congress purportedly delegated to them. This, however, is precisely what Schechter

^{972/} Revealingly, the Federal Open Market Committee, the key structural element in the corporative-state banking-apparatus, was the product of New Deal legislation, just as was the NIRA and BCCA. Act of 16 June 1933, ch. 89, § 8, 48 Stat. 162, 168; Act of 23 August 1935, ch. 614, Title II, § 205, 49 Stat. 684, 705-06, now 12 U.S.C. § 263 (1976).

^{973/} See 12 U.S.C. §§ 302, 305 (1976).

^{974/} 12 U.S.C. § 261 (1976).

^{975/} 12 U.S.C. § 263(a) (1976).

^{976/} 12 U.S.C. §§ 262, 263(b) (1976).

and Carter declared unconstitutional, in no uncertain terms. If such a delegation of power to private parties was unconstitutional in the poultry industry (Schechter), and in the coal-mining industry (Carter), there appears scant reason to presume that it could be any less invalid in the banking-industry. Of course, whether the courts will choose to address this thorny political-economic problem is another ^{977/}matter.

In sum, contemporary irredeemable, legal-tender federal-reserve notes are unconstitutional because they find no sanction under Article I, § 8, cl. 5 or Article I, § 8, cl. 2. And the contemporary Federal Reserve System itself is an unconstitutional corporative-state banking-cartel, the legal-tender notes of which would be invalid even if fully redeemable in silver and gold coin.

IV. Reconstruction of a constitutional monetary system

From the perspective of constitutional law, the present monetary system of the United States is a disaster. In no important particular do the powers the national government claims today find sanction in the history, policy, language, or even proper judicial interpretation of the Constitution. To the contrary: Those powers so offend any historically consistent construction of the supreme law as to be, not simply unconstitutional, but self-evidently anti-constitutional. Any attempt to amend the nation's monetary system in the

^{977/} See Reuss v. Balles, 584 F.2d 461 (D.C. Cir.) (member of House of Representatives lacks standing to challenge composition of Federal Open Market Committee), cert. denied, 439 U.S. 997 (1978); Bryan v. Federal Open Market Committee, 235 F. Supp. 877 (D. Mont. 1964) (owner of treasury bill lacks standing to challenge delegation of congressional power to Federal Open Market Committee).

direction of constitutional ends, therefore, must ruthlessly expose, categorically repudiate, and absolutely extirpate the monetary usurpations and tyranny that Congress and the Executive have perpetrated, and the Judiciary has condoned, during the last half-century. Reconstruction can then begin, based on the unquestionably constitutional premisses that:

(A) Congress has the power and duty to provide the nation with a sound system of metallic coinage. (B) Congress has no power or privilege to emit bills of credit, or paper currency, with or without legal-tender character. And (C) Congress has the power and duty to protect commerce from irresponsible banking-practices.

A. Provision of silver, gold, and token coinage

As a practical matter, nothing is more important for the success of a metallic system of money than for the government to supply the people with silver and gold coins for use in day-to-day transactions. Three sources of this supply are open to Congress: (1) coinage in the national mints; (2) adoption of foreign coins as "current" money; and (3) encouragement of private coinage. At least initially, Congress should exploit each of these sources to its maximum extent under Article I, § 8, cl. 5.

1. United States coinage

In keeping with the explicit references in the Constitution, as construed in the Coinage Act of 1792, the standard unit of the domestic monetary system must be the (silver) dollar of 371-1/4 grains fine metal. Congress should also provide for the minting of 2-, 1/2-, 1/4-, and 1/10-dollar pieces, containing weights of fine silver in these exact

proportions to the standard dollar. To reinforce in the minds of their users that the coins represent an actual weight of silver, and not simply an abstract and arbitrary "exchange-value", the coins should display on their faces not only their denominations (such as "One Dollar", "One-half Dollar", and so on), but also their weights of fine metal (such as "371-1/4 Grains Pure Silver", "185-5/8 Grains Pure Silver", and so on).

Unlike the (silver) dollar, the basic unit of gold coinage need contain no particular weight of fine metal as a matter of constitutional requirement. Therefore, Congress may authorize the minting of whatever coins it deems appropriate for the uses of commerce. A practical family of gold coins could include a basic piece containing 1/10 ounce of fine gold (called, perhaps, the "eagle"), and companion-pieces of 1/4, 1/2, and 1 ounces (2-1/2, 5, and 10 eagles, respectively). These, too, should be marked with their actual weights in pure gold (for example, "One-Tenth Ounce Pure Gold"), as well as their denominations (for example, "One Eagle").

Congress may also permit the issuance of silver and gold certificates, denominated in dollars and eagles. The silver series might include 1-, 2-, 5-, and 10-dollar certificates; and the gold series could include 1-, 2-1/2-, 5-, 10-, and 20-eagle certificates. These certificates, of course, would represent coined silver and gold actually on deposit with the Treasury, and would be redeemable on demand.

The constitutional "Value" of any denomination in the silver coinage would be the actual weight of pure silver the coin contained, expressed in terms of dollars. Thus, a coin containing 742-1/2 grains of pure silver would have a constitutional "Value" of 2 dollars, in keeping with the denomination

stamped thereupon. But a 2-dollar piece reduced by abrasion to only $556\frac{7}{8}$ grains of fine silver would have a "Value" of $1\frac{3}{4}$ dollars only. Similarly, the constitutional "Value" of any denomination in the gold coinage would be the actual weight of pure gold the coin contained, expressed in terms of eagles. Experience having proven that a legislatively fixed exchange-ratio between gold and silver coins inevitably overvalues one metal and undervalues the other, the constitutional "Value" of any denomination in the gold coinage in terms of the silver standard would be the actual weight of pure gold the coin contained, multiplied by the market exchange-ratio between gold and silver on the relevant day (and, perhaps, at the relevant hour), and expressed in dollars. Thus, if on a particular day the market exchange-ratio between gold and silver were, say, 1 to 35, an eagle would have a "Value" of approximately $4\frac{1}{2}$ dollars.^{978/} A proper national coinage-act would contain provisions "regulat[ing] the Value" of silver and gold coins according to these principles.

Under such a system of silver and gold coinage, there would be no problem with "legal tender". Two general cases are possible: (i) where D owes money to C based upon an explicit contract stipulating the amount and the character of that money, such as "100 dollars", "10 eagles", "100 dollars in gold", or "10 eagles in silver"; and (ii) where a public or private agency for adjudicating disputes determines that D owes C some amount of damages, expressed in so many dollars or eagles. In the first case, whatever D and C have explicitly

^{978/} Value of eagle in dollars equals weight of eagle (1/10 ounce) times number of grains in an ounce (480 grains) times exchange-rate between gold and silver (35) divided by weight of silver in dollar ($371\frac{1}{4}$ grains) equals 4.5252 dollars.

contracted to use as money -- and nothing else -- would be legal tender for the debt. In the second case, the issue would turn on whether the adjudicating agency were public, such as a court; or private, such as an arbitration-panel. A private arbitration-panel could choose to calculate damages in dollars, eagles, or any other monetary unit; and the parties' submission of their dispute to such a panel, with knowledge of the monetary unit the panel employs, would amount to the parties' acceptance of that unit as the standard of value for assessing damages. Conversely, courts, being governmental agencies, would be bound to use the constitutional money-unit as their standard of value for calculating damages. All court-judgments, then, would be denominated in (silver) dollars. As Article I, § 10, cl. 1 implies, however, the States (and, probably, the national government too) may permit the "Tender" of "gold and silver Coin * * * in Payment of Debts". Therefore, a court-judgment denominated in dollars could be payable either in dollars or in the properly "regulate[d] * * * Value" of eagles as of the day judgment was entered, as Congress and the States chose. ^{979/}

979/ Substantively, legal-tender laws mean nothing in a system of silver and gold coinage that rejects the "bimetallic standard", or legislatively fixed exchange-ratios between the two metals. If C receives a judgment against D for 45,252 dollars on a day when the market exchange-ratio between silver and gold is 35 to 1, the "Value" of that judgment, in constitutional terms, is either 45,252 dollars or 10,000 eagles (presuming, of course, that Congress has provided for minting eagles containing 1/10 ounce of pure gold). Whether D pays C in silver or gold, then, is constitutionally irrelevant; for, in either case, C will have received from D fair market value for his damages -- and fair market value is the measure of "just compensation" under the Due Process Clauses of the Fifth and Fourteenth Amendments. See *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, ___ U.S. ___, ___, 101 S. Ct. 446, 450 (1980).

In addition to silver and gold coinage, Congress could also provide for subsidiary or token coinage, either of silver below the constitutional standard, or of copper, nickel, or some other base metal or alloy. For example, Congress could define the "cent" as 1/100 of a dollar, and coin cents of pure copper, or of silver so admixed with base metal that each piece would contain less than 3-7/10 grains of pure silver. To justify this subsidiary coinage constitutionally, though, Congress would have to limit its general legal-tender character in commercial markets to some reasonably small amount such as one or two dollars, to provide for its unlimited legal-tender character as against any agency of the national or state governments, and to guarantee its redemption on demand in dollars of the full constitutional weight of silver.

Procedurally, Congress should begin the reconstruction of the country's "Money" by ordering the coinage of amounts of silver and gold already in the national treasury sufficient to pay the day-to-day expenses of the government -- and, after first amassing a reserve of coin for this purpose, should actually begin to pay governmental employees, suppliers, and other creditors in the new coinage.^{980/} It also should immediately open the mints to "free coinage" of both metals, levying a charge for brassage at the absolutely minimum level necessary to fund the mints' operations.

Finally, in creating this new system of domestic silver and gold coinage, Congress should explicitly repeal all laws or regulations inconsistent therewith, particularly the obnoxious provisions that purport to authorize governmental

^{980/} This, of course, would require repricing the government's debts in terms of the "new" dollar. See post, note 984 & accompanying text.

seizure of the precious metals, the debasement of silver and gold coins (especially the constitutional dollar), and the emission of "clad" coins other than as strictly subsidiary coinage. In the amendatory legislation, Congress should also state unequivocally that all of these provisions were at the time of their passage, and are in the act repealing them recognized and declared to be, unconstitutional.

2. Foreign coinage

In the early days of the republic, Congress found it advantageous to adopt foreign silver and gold coins as part of the national monetary system. Such a policy could also be useful under contemporary conditions to supply the domestic market with coinage until the mints have struck sufficient dollars and eagles to serve the convenience of commerce.

Pursuant to its power "To * * * regulate the Value * * * of foreign Coin", Congress would simply declare which foreign coins "shall pass current as money within the United States",^{981/} and permit their "Value" in dollars to fluctuate in the market, precisely as would the "Value" of the eagle. These foreign coins could also be legal tender for their "Value[s]" if Congress or the States so chose.

3. Private coinage

The mere existence of Article I, § 8, cl. 5 implies that Congress has a duty to supply the country with an adequate coinage, at least of silver, but probably of both silver and gold. This duty precludes exclusive congressional reliance on private coinage -- but it does not disable Congress from

^{981/} As, for example, it did in the Act of 10 April 1806, ch. 22, 2 Stat. 374, 374.

permitting private parties to issue their own silver, gold, or base-metal coins, or from indirectly assisting them in doing so.

Probably the fullest extent of congressional authority over private coinage would embrace registration of the designs, inscriptions, and other identifying characteristics of such coins as "trade marks" of the private mints involved, under the power "To regulate Commerce * * * among the several States" in Article I, § 8, cl. 3. Arguably, also, Congress could prohibit any private mint from purporting to coin actual dollars or eagles, or any other coin denominated a "dollar" or and "eagle", under the power "To provide for the Punishment of counterfeiting the * * * current Coin of the United States" in Article I, § 8, cl. 6. But, under this power, Congress could not punish the counterfeiting of the private coins themselves. Perhaps it could do so under the Commerce Power. In any event, the prohibition and punishment of such counterfeiting is certainly within the power of the States.

Although Congress could provide for, and probably require, the registration of private coinage for the purpose of promoting interstate commerce in that coinage, it has no power to "regulate [the] Value" of such coinage. For Article I, § 8, cl. 5 explicitly applies that power only to the "Money" that Congress itself coins, or to "foreign Coin". Domestic coin that private parties issued, then, could not be the object of congressional regulation of "Value" -- although it would be subject to all national and state laws prohibiting and punishing fraud and misrepresentation in commerce. For example, if a private mint coined a "zlotz", containing 371-1/4 grains of fine silver, Congress would have no business enacting a law declaring the zlotz to be of the "Value" of one dollar. If,

however, the zlotz bore the inscription "371-1/4 Grains Fine Silver", or "One Dollar in Silver", but the private mint debased it to some lesser amount of precious metal, Congress or the States could intervene by law, as in any other instance of commercial fraud.

Finally, because Congress may not "regulate the Value" of private coins, it may not declare them a legal tender, either. A legal-tender law is valid if, in requiring a creditor to accept from his debtor X rather than Y, the law transfers to the creditor the same constitutional "Value" as he would have received had the debtor paid Y instead of X. Where Congress oversees the coinage of both dollars and eagles, and provides that eagles be "Value[d]" in terms of dollars only at the prevailing market exchange-rate, declaring both dollars and eagles equally legal tender satisfies this "just-compensation" (or fair-market-value) standard. Congress cannot oversee the private coinage of (for example) the zlotz, however. From time to time, for innocent or other reasons, the intrinsic value of the zlotz might change. Thus, after a while, zlotzs of identical size, design, and inscription, but with varying contents of silver, could be in wide circulation. To declare all these legal tender, Congress would have to provide a rule for "Valu[ing]" the different varieties as against the dollar. To be sure, the same rule applicable to the eagle could apply in principle to the zlotz (although in practice it would also require some tedious and costly form of assay to ascertain the amount of silver in each coin). But Congress has no power to set a "Value" on any private, domestic coins. Therefore, only the parties to a contract denominated in zlotzs could determine how many of those coins, of what purity, would suffice for payment of the contractual obliga-

tion. However, by such a contractual stipulation, the parties themselves would define the "legal tender" for that contract, leaving nothing for Congress or the courts to do in that regard (unless payment in zlotzs were somehow rendered impossible, in which case a court would simply assess damages in dollars according to the best evidence available as to the dollar-value of contractual performance). Obviously, if Congress gave legal-tender character to the zlotz, without carefully "regulat[ing its] Value", it would in effect license the private mint and its customers to expropriate their creditors by emitting and circulating debased zlotzs. But, of course, because Congress has no power itself to expropriate private property without paying "just compensation", it cannot constitutionally empower private parties to engage in such confiscatory practices.

B. Limitation of legal-tender character of federal-reserve notes

Re-institution of a constitutional monetary system depends upon congressional recognition of the national government's disability to emit bills of credit, directly or indirectly and with or without legal-tender character, under Article I, § 8, cl. 2. The most important practical step in implementing that recognition would be to "decry" federal-reserve notes, by changing, but not entirely repealing, their legal-tender status.

The national and state member-banks of the corporative-state Federal Reserve System control the Federal Reserve Banks. And federal-reserve notes (FRNs) are "issued at the discretion of the Board of Governors of the Federal Reserve System for the purpose of making advances to Federal Reserve

banks * * * and for no other purpose".^{982/} FRNs having been issued to provide "advances" to the Federal Reserve Banks the private member-banks control, those member-banks could hardly complain if Congress permitted FRNs to continue to have full legal-tender effect, for their face values, as against the very banks in whose interest the notes were originally "issued".

Congress also chose to declare FRNs "obligations of the United States * * * receivable * * * for all taxes, customs, and other public dues".^{983/} But the legal question remains whether FRNs can be valid "obligations of the United States" when they originally issued as "advances" to the corporative-state Federal Reserve System. Especially where the banking-system uses the "advances" to buy "Securities" of the national government on which the banks then collect interest, FRNs look less like governmental obligations than like instruments of a gigantic private confidence-game or swindle. Probably the most constitutionally consistent course of action, then, would be unconditionally to repudiate FRNs as "obligations" unconstitutionally assumed ab initio, thereby discouraging speculation that Congress might someday "redeem" them "dollar for dollar" in payment of "taxes, customs, and other public dues", and permitting them rapidly to sink to the appropriate level in the marketplace.

Elsewhere in society, FRNs should no longer be legal tender for any debt, public or private, unless the parties have expressly stipulated to the contrary.

Under these circumstances, public and private debts

^{982/} 12 U.S.C. § 411 (1976).

^{983/} 12 U.S.C. § 441 (1976).

(other than debts to member-banks) would fall into two classes: (i) those incurred after the effective date of the statute changing the legal-tender character of FRNs, and (ii) those incurred before that date. Presumably, the partial repeal of legal-tender status for FRNs would be entailed in comprehensive monetary legislation re-instituting the metallic coinage-system. Therefore, debts denominated in undefined "dollars" after the date of that statute would be payable in real dollars, or perhaps eagles, according to the presumed contemplation of the parties at that time. Except in special cases, however, parties who incurred debts denominated in undefined "dollars" before the passage of the statute obviously did not contemplate payment in silver dollars, or gold eagles, but only in FRNs. To require debtors in these cases to pay real dollars in satisfaction of debts originally solvable in FRNs would be patently unjust. The equitable solution would be to provide in the statute that contracts pre-dating the act which specified payment in undefined "dollars" only (as opposed to "silver dollars", "gold dollars", or some other coin) will be payable thereafter in the number of (silver) dollars that exchanged in the market at the time of the agreement against the denomination of FRNs stipulated therein. Thus, if a contract made in mid-1981 provided for payment of "\$16,000" two years later in 1983, and if in mid-1981 one so-called "junk" (silver) dollar exchanged in the market against sixteen "\$1" FRNs, then, with the passage of the statute in 1982, the "\$16,000" debt origi-

nally payable with so many "\$1" FRNs would become a debt of 1,000 real dollars, and be payable as such in 1983.^{984/}

C. Reformation of the national banking-system

With the re-institution of a monetary system based on the constitutional silver standard, the existence of governmentally sponsored banking-establishments such as the Federal Reserve System will become at best anomalous. Therefore, Congress should repeal the Federal Reserve Act of 1913, as amended, in its entirety -- or, at the very least, should immediately disassociate the national government from the Federal Reserve System by abolishing the Board of Governors and repealing all provisions of law connected therewith.^{985/}

Congress should also enact legislation to prohibit the States and their instrumentalities from erecting "little Federal Reserve Systems" or other banking-schemes that involve any level of government directly or indirectly. As Article I, § 10, cl. 1 prohibits the States from "emit[ting] Bills of Credit", and as it is therefore a "privileg[e] and immunit[y] of citizens of the United States" under § 1 of the Fourteenth Amendment to be free from state-sponsored bank-notes that amount to "Bills of Credit",^{986/} Congress undoubtedly has

^{984/} The Supreme Court long ago endorsed this solution in the analogous case of contracts payable in Confederate money. *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 11-14 (1868); *Confederate Note Case*, 86 U.S. (19 Wall.) 548, 555-58 (1873); *Wilmington & W.R.R. v. King*, 91 U.S. 3, 3-4 (1875); *Stewart v. Salamon*, 94 U.S. 434, 435-36 (1876); *Cook v. Lillo*, 103 U.S. 792, 792-93 (1880); *Rives v. Duke*, 105 U.S. 132, 140-41 (1881); *Effinger v. Kenney*, 115 U.S. 566, 571-74 (1885).

^{985/} See Act of 23 December 1913, ch. 6, § 30, 38 Stat. 251, 275, reserving "[t]he right to amend, alter, or repeal" the Federal Reserve System.

^{986/} See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79-80 (1873).

power under § 5 of that Amendment to enforce the provisions of Article I, § 10, cl. 1 so as to extirpate any state banking-establishment.

Finally, under the aegis of Article I, § 8, cl. 3, Congress should enact legislation permitting "free banking" throughout the country, but without any special privileges such as legal-tender laws, suspension of specie-payments, or the other abusive paraphernalia of governmental favoritism that have characterized banking in this country during the last century. In particular, the new legislation should outlaw "fractional-reserve banking", and instead require banks to maintain a 100% reserve against all liabilities subject to payment on demand. ^{987/}

CONCLUSION

The present crisis in this country caused by the systematic destruction of the constitutional monetary structure over the last half-century represents not merely an economic and legal dispute over what constitutes "money", or whether it can be "managed", and by whom. Rather, it reflects a profound political schism between those who believe in representative government under the rule of law, and those who would circumvent or thwart the will of the people to achieve their own selfish ends.

The simple fact is that the majority of people in the United States is not prepared to pay the exorbitant costs of the policies that influential special-interest groups have enacted into law with the aid of pliant politicians and

^{987/} See M. Rothbard, Man, Economy, and State, ante note 1, at 700-03, 708-09.

fonctionnaires at the local, state, and national levels. Resistance to increases in taxation, and even to payment of the present tax-bills, appears in everything from overt political action on behalf of tax-limitation proposals to covert expansion of the "underground economy". Under these circumstances, to continue to reward the special-interest groups that maintain them in power, the politicians and fonctionnaires must deceive the people about the costs or the incidence of the costs of the endless "welfare"-programs, "make-work" projects, "pork-barrel" legislation, and other doles and "transfer payments" that overflow from the public trough. They accomplish this task through monetary manipulations made easy in the first place by their utter disregard of, if not contempt for, the constitutional limitations of Article I, § 8, cls. 2 and 5, and made possible in the final analysis by the cowardly refusal of the Judiciary to pay any attention to what is going on.

About the nature of the problem, there can be so serious dispute. The present monetary arrangements of the country are unconstitutional, even anti-constitutional, root and branch, and augur economic catastrophe in the not-distant future. But what can be done about it in today's climate of economic and legal ignorance, and rampant political opportunism, is anyone's guess.

