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## ORIGINALISM

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## NOTE & RECENT DEVELOPMENTS

# PAPER MONEY AND THE ORIGINAL UNDERSTANDING OF THE COINAGE CLAUSE

ROBERT G. NATELSON\*

*"The Congress shall have Power . . . To coin Money, regulate the  
Value thereof, and of foreign Coin . . . ."*

– Constitution of the United States<sup>1</sup>

*"Poor? Look upon his face. What call you rich?  
Let them coin his nose, let them coin his cheeks."*

– William Shakespeare<sup>2</sup>

*Over a century ago, the Supreme Court decided the Legal Tender Cases, holding that Congress could authorize legal tender paper money in addition to metallic coin. In recent years, some commentators have argued that this holding was incorrect as a matter of original understanding or original meaning, but that any other holding would be absolutely inconsistent with modern needs. They further argue that the impracticality of functioning without paper money demonstrates that originalism is not a workable method of constitutional interpretation.*

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\* Professor of Law, The University of Montana School of Law. Researching this Article required extensive use of Founding-era legal sources not customarily consulted by American legal scholars. I am particularly grateful to many helpful and intelligent librarians. These include the staff and administration of the Bodleian Law Library, University of Oxford; Dr. Norma Aubertin-Potter, Chief Librarian of the Codrington Library at All Souls College, University of Oxford; Dr. Vanessa Hayward, Keeper of the Middle Temple Library, London, and her staff; Ms. Virginia Dunn and the Archives Research Services staff at the Library of Virginia, Richmond; and Professor Stacey Gordon, Phil Cousineau, and Bob Peck, all at the Jameson Law Library at The University of Montana.

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All translations from Latin to English in this Article are mine. A bibliographical footnote is at the end of the Article.

1. U.S. CONST. art. I, § 8, cl. 5.

2. WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 3.

*Those who rely on the Legal Tender Cases to discredit originalism are, however, in error. This Article shows that the holding, although not all the reasoning, of those cases was fully consistent with the original understanding of the Coinage Clause. This Article tells the intriguing story of Colonial America's extraordinary monetary innovations, examines contemporaneous law and language, and shows how the paper money question was addressed during the framing and ratification of the Constitution.*

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## INTRODUCTION

In the latter half of the nineteenth century, the Supreme Court decided a series of cases that upheld the power of Congress to issue paper money and to make it legal tender for all debts.<sup>3</sup> Although the last of these cases was decided in 1884,<sup>4</sup> several constituencies have kept the issues decided in those cases alive. One of these constituencies is a small, but vocal, group that has never been reconciled to the idea of American paper currency. They maintain that the Constitution did not authorize paper money and that the United States, as a matter of constitutional fidelity and sound policy, should return to a monetary regime centered on the coinage of precious metal.<sup>5</sup> More influential,

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3. When used narrowly, the expression "the *Legal Tender Cases*" refers only to *Knox v. Lee* and *Parker v. Davis*, *infra*. In this Article, however, the term refers to the entire string of connected decisions. In chronological order, they are as follows: *Veazie Bank v. Fenno*, 75 U.S. 533, 548 (1869) (sustaining the power of Congress to issue paper money, relying primarily on longstanding practice, but reserving the question whether Congress could make such paper legal tender); *Hepburn v. Griswold*, 75 U.S. 603 (1869) (The Court held, 5-3, that it was not within Congress's power to make paper money legal tender for a debt that had arisen before the legal tender law. The Court held that the legal tender law was not authorized by the Coinage Clause, not incidental to the debt and war powers because neither necessary nor appropriate to carry out those powers, violated the spirit of the Constitution, and, through a kind of substantive due process, violated the Fifth Amendment Due Process Clause. The dissent argued primarily that the measure was necessary, and dismissed the substantive due process argument on the ground that it could lead to invalidation of almost any sort of regulation.); *Knox v. Lee* and *Parker v. Davis*, 79 U.S. (12 Wall.) 457 (1871) (companion cases that together are known as the *Legal Tender Cases*) (overruling *Hepburn* and holding, 5-4, that Congress could make Civil War paper money legal tender for debts arising both before and after the legal tender enactment); *Dooley v. Smith*, 80 U.S. 604 (1871) (upholding, 6-3, a tender law covering paper money, relying on the *Legal Tender Cases*); *Railroad Co. v. Johnson*, 82 U.S. 195 (1872) (upholding a legal tender law, 6-3); *Maryland v. Railroad Co.*, 89 U.S. 105 (1874) (holding, 7-2, that to sustain a contractual requirement that a debt be paid only in gold there must be a specific term in the contract to that effect); *Juilliard v. Greenman*, 110 U.S. 421 (1884) (holding, 8-1, that Congress had authority to enact peacetime tender law covering reissued greenbacks).

Decades later, the Court decided *Norman v. Baltimore & Ohio Railroad Co.* and *United States v. Bankers Trust Co.*, collectively called the *Gold Clause Cases*, 294 U.S. 240 (1935) (upholding, 5-4, Congress's power to invalidate retroactively gold clauses in private contracts). This Article does not examine whether the holding of the *Gold Clause Cases* was consistent with the original understanding.

4. *Juilliard*, 110 U.S. at 421.

5. See, e.g., Solomon, *infra* note 344.

Consistent with the hostility felt towards paper money at the time of the Constitutional Convention, the Framers defined "Money" of the United States as coin alone. The authority in the U.S. Constitution "[t]o coin Money," lifted from the Articles of Confederation, represents the lone

perhaps, have been legal commentators who agree that the *Legal Tender Cases* were wrongly decided from an originalist point of view, but who do not advocate a return to metal coinage.<sup>6</sup> Some, such as the late Professor James Willard Hurst, employ the *Legal Tender Cases* to argue that pure originalism is not a workable method of constitutional interpretation.<sup>7</sup> They contend that courts sometimes must decide constitutional cases according to current exigencies<sup>8</sup> or current values,<sup>9</sup> rather than

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constitutional grant of power to create "Money" and limits specifically the means of generation to "coin[ing]."

While the U.S. Constitution prohibits the states from issuing paper currency by barring them from "emit[ting] bills of credit," it is silent on whether the federal government may issue such bills. Distrusting paper money, the Constitutional Convention deliberately struck a provision from the initial draft of the U.S. Constitution empowering the federal government to emit bills of credit.

*Id.* at 81 (citations omitted); see also Edwin Vieira, Jr., *The Forgotten Role of the Constitution in Monetary Law*, 2 TEX. REV. L. & POL. 77, 116–17 (1997) (implying that the Constitution authorizes only metal coinage). The claim that paper money is not constitutional is raised in litigation from time to time. See *Pai*, *infra* note 344, at 535 n.2 (listing cases).

The existence of this view among some on the right side of the political spectrum drew a response in Mark Edward DeForrest & James M. Vaché, *Truth or Consequences Part Two: More Jurisprudential Errors of the Militant Far-Right*, 35 GONZ. L. REV. 319, 333–38 (1999–2000) (arguing against the view that money must be metallic to be constitutional).

6. See, e.g., Dam, *infra* note 344, at 389 ("[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money]."); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303, 1398 n.358 (2001) ("It is uncontroversial that the Framers did not view the Constitution as giving Congress the power to issue paper money to be invested with the status of legal tender."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 475 (2006) ("There is a strong scholarly consensus that Congress was not authorized by this provision to issue paper money."). But see, e.g., C.M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?* 24 CAL. W. L. REV. 287, 302 (1988) (arguing that paper money was justified under Congress's implied powers, by analogy to the national bank).

7. HURST, *infra* note 344, at 18 ("Finally, the limitations of the developments from 1774 to 1789 point up the extent to which decision making even at a level of very competent constitutional deliberation proceeded under the immediacy of contemporary tensions. If it was to be functional to the continuing life of the country, the Constitution had to develop beyond much of its origins.").

8. Dam, *infra* note 344, at 389 (stating that the evidence that the original intent authorized only metallic coin is such that originalists need to explain "what the Court should do when it concludes that a power the Framers intended to deny has nevertheless become indispensable"); Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393 (1999) (arguing that the original understanding probably limited Congress to metallic coin, but that the natural evolution of money defied the limits of the Constitution).

according to original meaning or original understanding. Finally, a third group of commentators, such as Judge Robert H. Bork<sup>10</sup> and more recently Professors Michael J. Gerhardt<sup>11</sup> and Daniel A. Farber,<sup>12</sup> advance the related argument that the *Legal Tender Cases* are among those Supreme Court decisions that should be treated as "Super Precedents"—decisions that are now so central to the social order that the Supreme Court must follow them even if they were wrongly decided from an originalist standpoint.

Yet the conclusion that the *Legal Tender Cases* conflict with an originalist view of the Constitution rests on a fairly slender foundation.<sup>13</sup> Indeed, the same might be said for those who have argued for the contrary conclusion.<sup>14</sup> This Article is an effort to investigate the question more thoroughly.

The method of originalist analysis employed in this Article is the same that lawyers in the Founding generation would have used.<sup>15</sup> It might be called "original understanding originalism," as opposed to "original public meaning" or "original intent originalism."<sup>16</sup> Under the original understanding method, the interpreter seeks and applies the ratifiers' subjective understanding of the constitutional language, to the extent that subjective understanding is recoverable. If it is not recoverable,

9. Magliocca, *infra* note 344, at 124 ("The history [of the *Legal Tender Cases*] establishes that there is no 'correct' test for implied power under all circumstances, because every generation of Americans assigns a different value to federalism.").

10. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990) (arguing that "it is too late to overrule . . . the decision legalizing paper money" because reversing such precedents would "plunge us into chaos").

11. Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1213 (2006).

12. Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006). *But see* Randy E. Barnett, *It's a Bird, It's A Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1246–47 (2006) (stating that some distinguished economists would quarrel with the conclusion that legal tender paper money is indispensable, or even desirable, in modern society).

13. *See infra* Part I.

14. *See id.*

15. Natelson, *Founders' Hermeneutic*, *infra* note 344.

16. There is a widespread view among scholars that the Founders would have applied original public meaning analysis, a view that appears to stem from H. Jefferson Powell's article, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). This view is based on various incorrect assumptions, such as the assumption that eighteenth century courts did not examine legislative history. *See, e.g., id.* at 897 ("The modern practice of interpreting a law by reference to its legislative history was almost wholly nonexistent."). However, Professor Powell and others relied on very limited sources. The evidence is marshaled and discussed in Natelson, *Founders' Hermeneutic*, *infra* note 344.

then one applies the original public meaning of the words. Note that the subjective understanding sought is that of the ratifiers rather than that of the drafters, for it was the ratifiers who transformed the Constitution from a proposal into basic law.<sup>17</sup>

Under the Founding-era method of originalism one may proceed either by first identifying the ratifiers' subjective understanding and then using public meaning as a gap-filler, or by first identifying the public meaning and then seeking evidence that the ratifiers had a different or specialized understanding. For purposes of structure and convenience, this Article generally takes the latter approach. Under either approach, however, one should reach the same result.

This Article concludes that the holdings of the *Legal Tender Cases* were consistent with original understanding. Therefore, although it is true that some of the Supreme Court's reasoning in the *Legal Tender Cases* was superfluous, and some was wrong, the end results were clearly correct.

## I. EARLIER ARGUMENTS OVER THE QUESTION

### A. Summarizing Earlier Arguments

The originalist arguments previously made on both sides of the paper money issue are fairly straightforward. Those who contend that the text of the Constitution does not authorize paper currency read the term "coin" in the Coinage Clause<sup>18</sup> as denoting only tokens made of metal.<sup>19</sup> Hence, any power to is-

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17. See Natelson, *Founders' Hermeneutic*, *infra* note 344, at 1288–89; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C.J.):

The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification."

....

From these Conventions, the constitution derives its whole authority.

*Id.*; see also JACK N. RAKOVE, *ORIGINAL MEANINGS* 18 (1996) (stating that ratifier understanding has a better claim to be binding than drafter intent).

18. U.S. CONST. art. I, § 8, cl. 5 ("The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin . . .").

19. See *Juilliard v. Greenman*, 110 U.S. 421, 462 (1884) (Field, J., dissenting) ("The meaning of the terms 'to coin money' is not at all doubtful. It is to mould metallic substances into forms convenient for circulation and to stamp them with the impress



sue paper money must be deduced from the Necessary and Proper Clause.<sup>20</sup> However, the argument goes, the Necessary and Proper Clause's authority is limited to *incidental* powers—to means subordinate to the main powers—that would be included even in absence of that Clause.<sup>21</sup> The capacity to issue legal tender paper is not incidental to any enumerated power,<sup>22</sup> but is an independent, unconnected power.<sup>23</sup>

Those who contend that there was no federal power to emit paper money further observe that in *McCulloch v. Maryland*,<sup>24</sup> Chief Justice Marshall said that to be incidental a power must be consistent with the "spirit" of the Constitution.<sup>25</sup> But the spirit of the Constitution, the opponents of paper currency say, is hostile to paper currency. Their evidence includes (1) the instrument's ban on state emission of bills of credit and on certain related actions,<sup>26</sup> (2) the Fifth Amendment Due Process<sup>27</sup> and Takings

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of the government authority indicating their value with reference to the unit of value established by law."); see also *Legal Tender Cases*, 79 U.S. 457, 467 (1871) (argument of counsel); *id.* at 584 (Chase, C.J., dissenting); *id.* at 588 (Clifford, J., dissenting); *id.* at 649–51 (Field, J., dissenting); BANCROFT, *infra* note 344 ("In 1787 every English dictionary defined 'money' as metallic coin; and therefore as metallic coin, it must be interpreted in the clause which authorizes the legislature of the United States to borrow money."); HAMMOND, *infra* note 344, at 92 (assuming that coin cannot include paper); Dam, *infra* note 344, at 391 (describing the Supreme Court's refusal in the *Legal Tender Cases* to adopt a non-metallic definition of coin); Holmes, *infra* note 344; Solomon, *infra* note 344, at 81.

20. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be Necessary and Proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); see, e.g., *Hepburn v. Griswold*, 75 U.S. 603, 614 (1869) ("It has not been maintained in argument, nor, indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts.").

21. *Legal Tender Cases*, 79 U.S. at 641 (Field, J., dissenting).

22. *Id.* at 484–86 (argument of counsel).

23. *Id.* at 574 (Chase, C.J., dissenting).

24. 17 U.S. (4 Wheat.) 316 (1819).

25. *Id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *Legal Tender Cases*, 79 U.S. at 579–80 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 622.

26. U.S. CONST. art. 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; pass any . . . Law impairing the Obligation of Contracts . . ."); see *Legal Tender Cases*, 79 U.S. at 580–81 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 623–24.

27. U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . .").



Clauses<sup>28</sup> (both designed to prevent expropriation of the kind historically associated with paper money),<sup>29</sup> (3) the Founders' general dislike of paper money,<sup>30</sup> and (4) proceedings at the federal Convention where delegates deleted from an earlier draft of the Constitution an enumerated congressional power to emit bills of credit.<sup>31</sup> Commentators of the anti-paper money school also cite Ratification-era statements by Luther Martin of Maryland, an Antifederalist who argued that the Constitution gave Congress no power to issue paper money.<sup>32</sup>

On the other hand, those who argue that the original Constitution authorized paper currency observe that the Constitution's specific bans on bills of credit and tender laws apply only to the states, and therefore (*expressio unius est exclusio alterius*) those prohibitions do not apply to the federal government.<sup>33</sup> Additionally, some of the federal Convention delegates who voted to remove the express bill of credit power did so only because they believed that the government would still be able to issue paper money without it.<sup>34</sup> Defenders of paper currency add, further, that the Fifth Amendment is a bar only to direct takings, not to the exercise of regulatory authority that incidentally reduces property values.<sup>35</sup>

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28. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

29. *Legal Tender Cases*, 79 U.S. at 580 (Chase, C.J., dissenting); *Hepburn*, 75 U.S. at 623–24.

30. *Juilliard v. Greenman*, 110 U.S. 421, 453 (1884) (Field, J., dissenting):

It would be difficult to believe, even in the absence of the historical evidence we have on the subject, that the framers of the Constitution, profoundly impressed by the evils resulting from this kind of legislation, ever intended that the new government, ordained to establish justice, should possess the power of making its bills a legal tender, which they were unwilling should remain with the States, and which in the past had proved so dangerous to the peace of the community, so disturbing to the business of the people, and so destructive of their morality.

31. See HURST, *infra* note 344, at 14 (arguing that "there was unanimity among those who spoke in the federal convention that the intent and effect were to deny Congress authority to issue government obligations designed primarily to furnish a circulating medium for the regular operations of the economy").

32. E.g., *Legal Tender Cases*, 79 U.S. at 656 (Field, J., dissenting); HAMMOND, *infra* note 344, at 93–94.

33. E.g., *Hepburn*, 75 U.S. at 637 (Miller, J., dissenting).

34. See *infra* notes 234, 237, and accompanying text.

35. *Legal Tender Cases*, 79 U.S. at 551.

Perhaps surprisingly, paper money advocates generally concede that the Coinage Clause authorizes only metallic tokens.<sup>36</sup> They maintain, however, that the authority incidental to various express federal powers<sup>37</sup> was sufficient to permit emission of paper.<sup>38</sup> To support this argument, they adopt definitions of “incidental” that embrace all actions facilitating express powers<sup>39</sup> or linked to express powers in the aggregate.<sup>40</sup> Some paper money advocates have argued that the federal government has authority to issue legal tender paper money even in the absence of constitutional enumeration, simply because the authority to emit paper money is inherent in national sovereignty.<sup>41</sup>

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36. *Pai*, *infra* note 344, at 544 (explaining that in the 1862 congressional debates over the issue of greenbacks, “both sides agreed that no provision within Article I, Section 8 expressly granted Congress the power to issue legal tender notes”); *see also* *Juilliard v. Greenman*, 110 U.S. 421, 448 (1884) (calling the coinage power “analogous” to the power to issue paper money); *Legal Tender Cases*, 79 U.S. at 521–22 (reporting the attorney general’s argument that some find a broader meaning in the term “coin,” but neglecting it in favor of an argument under the Necessary and Proper Clause); *id.* at 547, 553 (declining to rest the Court’s opinion on the Coinage Clause); Thayer, *infra* note 344, at 83–84 (“I cannot doubt that the word *money* in the coinage clause is limited to metallic money.”). *But see* RICHARD C. MCMURTRIE, *PLEA FOR THE SUPREME COURT: OBSERVATIONS ON MR. GEORGE BANCROFT’S PLEA FOR THE CONSTITUTION* 19–22 (1886) (arguing that the Constitution uses a broader meaning of “coin”).

37. *Hepburn*, 75 U.S. at 632 (Miller, J., dissenting) (listing the powers to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money, to pay debts, and to provide for the common defense and general welfare).

38. Thus, the Necessary and Proper Clause received much attention in the 1862 congressional debates, *Pai*, *infra* note 344, at 547–48, and the Supreme Court cases on the legal tender issue, *Juilliard*, 110 U.S. at 440–41; *Legal Tender Cases*, 79 U.S. at 522–26 (argument of attorney general); *id.* at 533–43 (opinion of the Court). *See also* Dam, *infra* note 344, at 391–94; Thayer, *infra* note 344, at 91–97.

39. Thayer, *infra* note 344, at 94 (stating that incidental powers include all powers that make the express powers “do [their] usual office . . . more effectually and fully”); *see also id.* at 95 (stating that it is within congressional discretion to “give to its currency the quality of legal tender,” because “it will thus be a better instrument for borrowing purposes”). “Currency” is defined as “[a]nything that is employed as a medium of exchange, whether an article, coin, or paper money.” DODD, *infra* note 344, at 343.

40. *See Legal Tender Cases*, 79 U.S. at 539 (adopting an aggregate powers thesis).

41. *See id.* at 545; *see also id.* at 556 (Bradley, J., concurring). Although the Court’s discussion of sovereignty in *Juilliard* mentions the theory of inherent sovereign power as an alternative ground, it relies more heavily on the contention that because legal tender laws were a customary attribute of sovereign governments when the Constitution was adopted, such laws were within the range of incidental powers. *Juilliard*, 110 U.S. at 440–50; *see* Natelson, *Tempering*, *infra* note 344 (discussing the role of custom in the law of incidental powers). *But see* Dam, *infra* note 344, at 394–96 (arguing that the *Juilliard* court relied on the inherent sovereign power rationale).

### B. Assessing Prior Arguments

Most of the foregoing arguments are unsatisfying. One might have expected an inquiry into whether the phrase “to coin Money” encompassed paper, for an affirmative answer would render the implied-powers arguments of both sides unnecessary. But neither side has made such an inquiry, and both have assumed that the phrase “to coin Money” was limited to metallic tokens. They have so assumed even though the Constitution’s wording and structure should have encouraged investigation. As explained below,<sup>42</sup> ascribing a purely metallic meaning to “coin” creates serious textual difficulties. Similarly uninvestigated has been whether the phrase “to regulate the Value”<sup>43</sup> was intended to grant Congress authority to confer legal tender status.

Two doctrinal arguments raised by the advocates of paper money are seriously flawed. First, the concept of inherent sovereignty, although referenced in a few Supreme Court decisions,<sup>44</sup> is flatly precluded by the text of the Tenth Amendment,<sup>45</sup> as the

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The first case to sustain the issuance of bills of credit relied on post-constitutional practice, and did not address the original understanding. *Veazie Bank v. Fenno*, 75 U.S. 533, 548 (1869):

And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them . . . .

42. See *infra* notes 282–83 and accompanying text.

43. U.S. CONST. art. 1, § 8, cl. 5.

44. See *United States v. Lara*, 541 U.S. 193, 201 (2004) (asserting that Congress’s legislative authority to deal with Indian tribes might “rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government”); *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936) (citing inherent governmental power in foreign affairs); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (discussing inherent power to expel aliens as part of the foreign affairs power). It is not always clear, however, whether the Court means that a power is “inherent” in the sense of extra-constitutional or whether it is “inherent” in one or more enumerated powers, and therefore incidental to them. Cf. *id.* at 711–13 (listing and discussing enumerated powers over foreign affairs).

45. 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.”). See *Juilliard*, 110 U.S. at 466–67 (Field, J., dissenting) (noting that authority to establish legal tender based upon inherent sovereignty is precluded by the Tenth Amendment); BANCROFT, *infra* note 344 (pointing out that “[w]ithin the limits of the states, the government of the United States of America has no powers but those that have been delegated to it”).

Court itself has observed.<sup>46</sup> Second, paper advocates' interpretation of the doctrine of incidental powers is inconsistent with the law of the Founding Era, which limited incidental authority to that either customary or reasonably necessary for exercising a principal power.<sup>47</sup> A power did not become incidental merely because it facilitated the exercise of the principal power,<sup>48</sup> and it could never be incidental if it was independent of, or as important as, the principal.<sup>49</sup> The Framers would not have classified a power as important as the issuance of paper money as a mere incident to the issuance of metallic coinage.<sup>50</sup>

On the other hand, the opponents of paper money cite no decisive evidence that the Founders understood the Takings Clause to extend beyond direct takings.<sup>51</sup> Instead, they retroactively insert the doctrine of substantive due process into the Founding Era, even though that doctrine was not invented until *Dred Scott*<sup>52</sup> almost a century later, and was not generally applied until the late nineteenth century.<sup>53</sup> They also cite Chief

46. *Kansas v. Colorado*, 206 U.S. 46, 90 (1907).

47. This discussion follows the review of the Founding generation's doctrine of incidental powers in Natelson, *Tempering*, *infra* note 344, at 102–13.

48. See *Legal Tender Cases*, 79 U.S. 457, 543 (1870) ("It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger.").

49. JACOB, *DICTIONARY*, *infra* note 344 (defining "Incident").

50. Oliver Wendell Holmes agreed. See *Review of The Legal Tender Cases of 1871*, *infra* note 344 (stating that an express power cannot be enlarged by an incident to another express power).

51. The first Supreme Court case on the subject was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), decided well after the Founding Era. Of course, the Takings Clause did not initially apply to the states, which could explain the Court's lack of activity. Commentators have split on whether Founding-era principles justify the doctrine of *Pennsylvania Coal*. Compare John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (arguing that colonial practices do not justify compensation for ameliorative regulations), with Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999) (arguing that Founding-era precedent supported the doctrine of regulatory takings).

52. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1856) (holding that the United States, when exercising its powers under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, to determine the internal law of the territories, violates the Due Process Clause by banning a particular kind of property (slaves) therein). Some Founding-era judges and lawyers believed there were inherent limits on the scope of substantive legislation, but they did not base their arguments on the Due Process Clause.

53. The first case, other than *Dred Scott*, to rely on substantive due process as a ground to strike down a law was *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), although the Supreme Court had approved of the doctrine in dicta in several previous cases. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 611–14 (3d

Justice Marshall's reference to the "spirit" of the Constitution,<sup>54</sup> but appear to be unaware of what he meant. In Marshall's time the "spirit" of a document was a synonym for the intent of the makers.<sup>55</sup> In the constitutional context, the "spirit" was the understanding of its ratifiers.<sup>56</sup> However, opponents of paper money (like their adversaries) have investigated only the intent of the *drafters*, with inconclusive results.<sup>57</sup> They have sought almost nothing of the views of the *ratifiers*.<sup>58</sup> All this explains the need for a fresh look at the evidence.

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ed. 2006). Substantive due process should not, of course, be confused with judicial review under straightforward application of natural law principles, which some Founding-era judges advocated. *See id.* at 608–10; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring) (citing "the reason and nature of things").

54. *E.g.*, *Hepburn v. Griswold*, 75 U.S. 603, 623 (1869) ("But we think it clear that those who framed and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation . . ."); *see also* Magliocca, *infra* note 344, at 141 (interpreting the "spirit" position, following *Hepburn*, as justifying heightened judicial scrutiny when an arguably necessary and proper law impairs rights elsewhere in the text; the speculation, however, is ahistorical).

55. Natelson, *Founders' Hermeneutic*, *infra* note 344, at 1252–53.

56. *See supra* note 17 and accompanying text; *see also* *McCulloch v. Maryland*, 17 (4 Wheat.) U.S. 316, 403 (1819) ("From these [ratifying] Conventions, the constitution derives its whole authority.").

57. *See, e.g.*, *Juilliard v. Greenman*, 110 U.S. 421, 443–44 (1884); *Legal Tender Cases*, 79 U.S. 457, 496 (1871) (argument of counsel); *id.* at 585 (Chase, C.J., dissenting); *id.* at 605–07 (Clifford, J., dissenting); *id.* at 653–55 (Field, J., dissenting); BANCROFT, *infra* note 344; Dam, *infra* note 344, at 384–88; HAMMOND, *infra* note 344, at 92–93; Holmes, *infra* note 344, at 147; Thayer, *infra* note 344, at 73–78, 80; *see also* Pai, *infra* note 344, at 572–77 (summarizing the 1862 congressional debate on the subject).

58. In his 1884 pamphlet on the issue, even the distinguished historian George Bancroft failed to give significant attention to the ratification debates. BANCROFT, *infra* note 344; *see also* *Legal Tender Cases*, 79 U.S. at 498 (setting forth the argument of counsel that, "[n]o framer of the Constitution, no judge, no commentator, is found prior to this law who claimed any such power for Congress," but not discussing ratification at any length); *id.* at 656 (Field, J., dissenting) (arguing that there was a unanimity of opinion against paper money at the ratifying conventions, also without significant discussion).

Professor Hurst cited one Ratification-era quotation in his text, HURST, *infra* note 344, at 15, and one such quotation in one of his footnotes, *id.* at 25–26, n.57. Unfortunately, Professor Hurst dismissed them without recognizing that they were heavily corroborated in other parts of the ratification record. *See infra* Part IV. Similarly, Bray Hammond cited an important Ratification-era comment from David Ramsey and a corroborative remark by Alexander Hamilton, but failed to explore further. *See* HAMMOND, *infra* note 344, at 94.

Although records from the Ratification Era formerly were less readily available than they now are (thanks to the Internet and publication of DOCUMENTARY HISTORY, *infra* note 344), this is not a sufficient excuse for the neglect. Transcripts from the state ratifying conventions have been publicly available at least since 1836, when ELLIOT'S DEBATES, *infra* note 344, was published. The ratification debates reproduced in that work include many important remarks on the subject. *See infra* Part IV.

## II. THE HISTORICAL CONTEXT OF THE COINAGE CLAUSE

A. *English Law and Practice*

In eighteenth century Anglo-American law and practice, when the term “commerce” was used in an economic sense, it encompassed the buying and selling of goods and several associated activities, such as navigation, marine insurance, commercial paper, and banking.<sup>59</sup> The Framers all had lived the first part of their lives under law that identified the Crown as “the arbiter of commerce”<sup>60</sup> within Great Britain. The royal prerogative was the primary source of commercial regulation, although in practice Parliament enjoyed a significant role as well.<sup>61</sup> In the words of William Blackstone:

WITH us in England, the king’s prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

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59. See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789 (2006); Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003).

60. 1 WILLIAM BLACKSTONE, COMMENTARIES \*263.

61. See *id.* at \*268 (stating that the King’s power to debase or enhance the currency may be limited and that the consent of Parliament was necessary to regulate foreign coin by a standard other than that used for British money); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1117 (1833) (pointing out that from the time of Magna Carta until his own time there were over twenty acts of Parliament on the subject of weights and measures); DODD, *infra* note 344, at 80 (stating that during William and Mary’s reign the coinage power was conceded to Parliament). This state of affairs, however, was clearly temporary.

Sir Edward Coke seems to have argued that the King’s monetary power was restricted in various ways, 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 576–78 (E. & R. Brooke 1797) (1628), but this argument was widely rejected, 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, A NEW EDITION 193–94 (1778) (correcting Coke); 4 COMYNS, *infra* note 344, at 255 (“So, by the Common Law, the Power to make or coin Money within his Dominions belongs only to the King.”); *id.* at 256 (“And if the King by Proclamation makes a mixt or base Money Current, it shall be so.”); 4 BACON, *infra* note 344, at 162 (stating of the King, “That at the first Institution of any Coin within this Kingdom, the King and he alone sets the Weight, the Alloy, the denominated Value of all Coin . . . He may by his Proclamation legitimate foreign Coin, and make it Current Money of this Kingdom according to the Value imposed by such Proclamation . . . He may inhance the external Denomination of any Coin already established, by his Proclamation”). The power to regulate money was still seen as a branch of the power to regulate commerce, notwithstanding this dispute.

FIRST, the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging . . . .

SECONDLY, the regulation of weights and measures . . . .

THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current [that is, to declare it to be legal tender].<sup>62</sup>

. . . .

The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current.<sup>63</sup>

Blackstone's summation was supported by the leading judicial decision on the subject:<sup>64</sup> the *Case of Mixed Money*.<sup>65</sup>

James I was on the throne when the Privy Council decided the *Case of Mixed Money*, but the controversy had begun during the reign of Queen Elizabeth. In April 1601, an Irish merchant, Brett of Drogheda, purchased some goods from a London merchant named Gilbert, for which Brett promised to pay £200, half of which was to be remitted at a certain locale in Dublin shortly thereafter, payable in "sterling, current and lawful money of England."<sup>66</sup> On May 24, 1601, however—before Brett was to tender the first £100—Elizabeth issued for Ireland, then under English control, a coinage made of an alloy of silver and base metal. The Queen ordered that this "mixed money" was to replace the more nearly silver "sterling" coins that before had

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62. That this principle includes the power to declare money legal tender is clear from the context. Blackstone says the King has power to "legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments." Nevertheless, "[t]here is at present no such legitimated money; Portugal coin being only current by private consent." 1 WILLIAM BLACKSTONE, COMMENTARIES \*268.

63. *Id.* at \*264–68; see also CHAMBERS, CYCLOPEDIA, *infra* note 344 (defining "Money") ("And as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority, or make it current.").

64. The decision is heavily featured in popular contemporaneous secondary sources. See, e.g., 4 BACON, *infra* note 344, at 5–6 (citing to various pages of "Dav." in which the case was reported); 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, A NEW EDITION 188, 192–94 (1778) (summarizing and discussing the case).

65. P.C. 1604, Dav. 48, 80 Eng. Rep. 507. This case seems to have been overlooked by modern writers on the Coinage Clause, perhaps because it is composed almost entirely in Law-French and Latin.

66. Dav. at 18, 80 Eng. Rep. at 507 ("sterling, currant & loyall money; Dengleterre").



circulated in Ireland. She further ordered that the new coinage was to be legal tender, for she

expressly commanded that this money should be so used, accepted and reputed by all her subjects and others, using any traffick, or commerce within this kingdom; and that if any person or persons should refuse to receive this *mixed money* according to the denomination or valuation thereof, viz. shillings for shillings, sixpenny pieces for sixpenny pieces, &c. being tendered for any payment of any wages, fees, stipends, debts, &c. they should be punished . . .<sup>67</sup>

At the appropriate time and place, therefore, Brett offered Gilbert £100 in the new, less valuable currency, which, of course, Gilbert did not want to accept. The question before the Privy Council was whether Brett had made a good tender.

The Council decided that he had. First, it declared that every country needed a common standard of money for purposes of exchange. Citing civil law scholar Jean Bodin, the Council characterized money as a “public measure,”<sup>68</sup> for “[m]oney is the proper medium and measure of the exchange of things.”<sup>69</sup> Implicit in this characterization was the idea that the power over money was closely related to the weights and measures power: a relationship acknowledged as uncontroversial fact in eighteenth-century American writings.<sup>70</sup>

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67. Dav. at 18, 80 Eng. Rep. at 507:

[E]xpressement command que ceux moneyes serront issint use, accept & repute, per tous ses subjects, & auters usant ascun traffique ou commerce deins cest realm: & que si ascun person ou persons refuseront de recevoir ceux mixt moneyes, solonque le denomination ou valuation d'ceux, viz. shillings per shillings, & les pieces de 6d. per 6d. & sic de cæteris, esteant tend' per paymentt des ascuns wages, fees, stipends, ou debts, &c. ils serront punish . . .

The translation from Law-French is found in ANONYMOUS, A REPORT OF CASES AND MATTERS IN LAW, RESOLVED AND ADJUDGED IN THE KING'S COURTS IN IRELAND, COLLECTED AND DIGESTED BY SIR JOHN DAVIES [sic] 48 (1762). The same translation from Law-French is used throughout. This version retains large segments of Latin, however, which I have translated.

68. Dav. at 19, 80 Eng. Rep. at 507 (“*mensura publica*”).

69. Dav. at 18, 80 Eng. Rep. at 507 (“*Moneta est justum medium & mensura rerum commutabilium*”).

70. E.g., Samuel Mather, NEW-ENG. WKLY. J., Feb. 4, 1734, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 21 (setting forth a view of the relationship between the “regulation” of weights and measures and that of money); *Extract of a Letter: “To a Gentleman in a Neighbouring Government Concerning the New Notes of Hand”* (1734), in BANKING AND CURRENCY, *infra* note 344, at 37 (calling currency “the Measures and Balances by which Men dealt one with another” and criticizing “Divers Weights and a false Balance”); Pelatiah Webster, *Strictures on Tender-Acts*, Dec. 13, 1780, in BANKING AND CURRENCY, *infra* note 344, at 125–26:

Next, the Council ruled that it was the Crown's exclusive prerogative to make or coin money<sup>71</sup> and that "it appertaineth to the King only to put a value upon coin, and make the price of the quantity, and to put a print to it; which being done the coin is current."<sup>72</sup> The Council asserted that "[t]here should be one faith, weight, measure, money."<sup>73</sup> It was custom for the Crown to exercise this power by royal proclamation, although, the Council added, Parliament sometimes adopted acts in aid of royal authority.<sup>74</sup>

Thirdly, the Privy Council ruled "that as the King by his prerogative may make money of what matter and form he pleaseth, and establish the standard of it, so may he change his money in substance and impression, and enhance or debase the value of it, or entirely decry and annul it"<sup>75</sup> and that he could "set the value of money" at his own discretion, without the consent of others.<sup>76</sup> In the Council's view, the power to strike coin and to regulate its value went together as a matter of law: "*Monetae aestimationem dat qui cudendi potestatem habet.*"<sup>77</sup> In other words, the Crown had full right to claim *seigniorage*, the profit generated from pegging the currency at a legal tender

The nature of a Tender-Act is not more or less than establishing by law the standard value of money, and has the same use with respect to the currency, that the legal standard pound, bushel, yard, or gallon has to these goods, the quantities of which are usually ascertained by those weights and measures . . . .

71. Thus: "*Jus cudendae monetae ad solum principem, hoc est, imperatorem, de jure pertinet*"—that is, "By law, the right of striking money extends only to the prince, that is, the emperor" (referring to Roman practice). Dav. at 20, 80 Eng. Rep. at 509.

72. Dav. at 19, 80 Eng. Rep. at 508 ("*appertient al Roy solement de metter value al coine, & faire le price del quantitie, & de metter print a ceo; le quel esteant fait, le coine est currant*").

73. Dav. at 19, 80 Eng. Rep. at 508 ("*Una fides, pondus, mensura, moneta sit una*").

74. Dav. at 20–21, 80 Eng. Rep. at 509 ("*Et semble que ceux changes de moneyes en Angleterre fueront fait per le authoritie del Roy sans Parliament, coment que plusors Acts de Parliament ont estre fait pur ordering del eschange, & a prohibiter le exportation des moneyes faits & ordeines per le Roy, & le importation & utterance de forreine & faux moneyes, sur certeine paines & penalties, dont ascuns fueront capitall, & ascuns pecuniary*").

75. Dav. at 20, 80 Eng. Rep. at 509 ("*que sicome le Roy per son prerogative poet faire moneyes de quel matter & forme luy plerra, & establisher le standard de ceo, issint poet il changer son money en substance & impression, & enhaunser ou abaser le value de ceo, ou tout ousterment decrier & adnuller ceo*").

76. Dav. at 22, 80 Eng. Rep. at 510 ("*princeps ad arbitrium suum, irrequisitio assensu subditorum, valorem monetæ constituere potest*")—that is, "the prince may set the value of money at his own discretion, without the consent of his subjects").

77. Dav. at 20, 80 Eng. Rep. at 509 (meaning, "He gives the value to money who has the power of striking it").

value greater than the sum of the minting and material costs.<sup>78</sup> The Council added that the power of the sovereign to alter the form of money *included the power to use any material he or she chose*. The sovereign could even fabricate money out of leather if he or she so pleased.<sup>79</sup> (Indeed, later in the century, the deposed James II, then in possession of Ireland, actually did coin leather money.<sup>80</sup>)

Finally, the Privy Council ruled that the King's prerogative extended to Ireland as well as to England.<sup>81</sup> Notwithstanding the difference in intrinsic value between the older and newer Irish coinage, therefore, Gilbert was bound to accept Brett's tender.

The holding of the *Case of Mixed Money* was reinforced by other circumstances. Just three years previously, *Wade's Case*<sup>82</sup> had held that the Crown could proclaim what foreign coin was legal tender and the exchange rate at which one was compelled to accept it.<sup>83</sup> In later years, English sovereigns actively employed the powers recognized in the *Case of Mixed Money* and in *Wade's Case*. For instance, in 1672, Charles II coined copper farthings and half-pence as subsidiary coins,<sup>84</sup> and proclaimed them legal tender for payments under the value of sixpence.<sup>85</sup>

78. DODD, *infra* note 344, at 344 (defining "seigniorage" [also spelled "seignorage"] as "[a] charge made by the sovereign on the issue of coin over and above the expenses of coinage and the value of the metal").

79. Dav. at 22, 80 Eng. Rep. at 511 ("*etiam ut ex corio fieri possit*" — that is, "it could even be made out of leather").

80. Thomas Hutchinson, *Comments on Massachusetts Banking and Bills of Credit* (1769), in *BANKING AND CURRENCY*, *infra* note 344, at 72, 73. Moreover, during the reign of Henry VIII, the King's minister, Thomas Cromwell, had discussed in Parliament the possibility of leather currency. BRAUDEL, *infra* note 344, at 353.

81. Dav. at 21, 80 Eng. Rep. at 510 ("*Et sicome le Roy ad tous foits use de faire & chaunger les moneyes de Engleterre, il ad auxy use mesme le prerogative en Ireland*").

82. *Wade's Case* (C.P. 1601) 5 Co. Rep. 114a, 77 Eng. Rep. 232.

83. *Id.* at 232 (holding that the King had the power to declare foreign money "current" — that is, legal tender that a citizen must accept); HUGH VANCE, *AN INQUIRY INTO THE NATURE AND USES OF MONEY*, reprinted in 3 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 365, 409 ("It is the undoubted Prerogative of the civil Magistrate, to appoint all the common Measures of Quantity and Value, and to change them as just Occasions may require, and more especially to order what shall be adjudged Money in the Law . . . They have (and it is their undoubted Right) said, that the Bills shall be a *lawful Tender* where Money is promised . . .") (italics in original); see also 4 BACON, *infra* note 344, at 162.

84. "Subsidiary coins" are "coins which are issued by public authority but are not full legal tender." DODD, *infra* note 344, at 344.

85. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*277–78 ("[S]ir 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-

His successors, James II (1685–1689) and William and Mary (1689–1702), coined half-pence and farthings in tin.<sup>86</sup> In 1704, Queen Anne extended her prerogative beyond the British Isles by fixing the legal rates for various foreign coins circulating in the colonies.<sup>87</sup>

The sovereign was always free to set the legal tender value well above intrinsic value, as Queen Elizabeth had done for Ireland. Queen Anne's proclamation for the colonies mandated legal tender values higher than intrinsic values for all coins listed.<sup>88</sup> In Britain, gold passed by weight, but the legal tender value of silver or copper coin was set at its "tale," or face amount,<sup>89</sup> which was generally above intrinsic value.<sup>90</sup>

To summarize: The royal prerogative included authority to regulate British domestic commerce, and regulation by prerogative sometimes was extended to the colonies. As the Framers recognized, this commercial authority included governance of weights and measures, of which the medium of payment was considered one branch.<sup>91</sup> The royal power over the medium of payment included authority to strike "coin" of any denomination and from any material, and to regulate the value of that coin and of foreign money. Regulating the value of money encompassed designating what items were legal tender and at

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pence were coined by king Charles the second, and ordered by proclamation to be current in all payments, under the value of sixpence, and not otherwise."); *see also* CHAMBERS, CYCLOPEDIA, *infra* note 344 (defining "Money").

That some English money was legal tender, and some was not, supports Professor Thayer's argument that money need not be legal tender. *See* Thayer, *infra* note 344, at 85–88.

86. DODD, *infra* note 344, at 81.

87. 1 BANKING AND CURRENCY, *infra* note 344, at 17 (reprinting original document).

88. For example, the intrinsic value of a "Seville ps. of Eight old plate" was listed as four shillings, sixpence, but its legal tender value was declared to be six shillings. *Id.* at 17.

89. DODD *infra* note 344, at 132. "Payment by tale" is defined as "Payment by reckoning coins at their nominal value, instead of at their intrinsic value as bullion." *Id.* at 344.

90. Franklin, *infra* note 344, at 214 (stating that the intrinsic value of silver coin could be as little as one-half its legal-tender value).

91. E.g., THE FEDERALIST NO. 69, at 361 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[The King] is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coin."); JOHN ADAMS, NOVANGLUS, OR A HISTORY OF THE DISPUTE WITH AMERICA, reprinted in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 256, 282 (C. Bradley Thompson, ed. 2000) (stating that "coin [is] . . . of absolute prerogative to the king without parliament").

what rates (and for what debts) they had to be accepted. The Crown took any profit derived from setting legal tender value higher than minting costs.

## B. *Law and Practice in the Colonies*

### 1. *Before the Currency Act of 1764*

#### a. *Origins to Mid-Century*

In England, metal had been the only serious money over a continuous history of nearly two thousand years.<sup>92</sup> When the first bank notes<sup>93</sup> and Exchequer bills<sup>94</sup> appeared in the seventeenth century, they were not legal tender,<sup>95</sup> nor, apparently, were they thought of as money, containing inherent value.<sup>96</sup> Contemporary British lay dictionaries,<sup>97</sup> legal dictionaries,<sup>98</sup> and digests<sup>99</sup> usually referred to both “coin” and “money” in terms of metal.

In Britain’s American colonies, however, conditions were very different. Throughout the seventeenth and eighteenth cen-

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92. See DODD, *infra* note 344, at 1–2.

93. “A ‘bank note’ is ‘a promissory note, made by a banker, payable to bearer on demand and intended to circulate as money.’” *Id.* at 177.

94. These were short-term debt instruments that paid interest. First issued in 1696, they eventually circulated as currency. *See id.* at 91.

95. *Id.* at 125. Bank of England bank notes became legal tender in 1833. *Id.* at 149.

96. Bank notes were, however, used extensively in Britain for larger transactions. FRANKLIN, *infra* note 344, at 213.

97. JOHNSON, *DICTIONARY, infra* note 344 (defining “to coin” as “1. To mint or stamp metals for money. . . . 3. To make or forge any thing, in an ill sense,” and defining “money” as “Metal coined for the purposes of commerce”); CHAMBERS, *CYCLOPEDIA, infra* note 344 (defining “money” as “a piece of metal marked for coin, with the arms of a prince, or state, who make it circulate or pass, at a fixed rate, for things of different value”).

98. JOHN COWELL [or “COWEL”], *A LAW DICTIONARY OR THE INTERPRETER OF WORDS AND TERMS, USED EITHER IN THE COMMON OR STATUTE LAWS OF GREAT BRITAIN, AND IN TENURES AND JOCULAR CUSTOMS* (1727) (defining “Money” as “that Metal, be it Gold or Silver, that receives an Authority by the Prince’s *Impressa* to be current: For as Wax is not a Seal without Print, so Metal is not *Money* without *Impression*”); 1 TIMOTHY CUNNINGHAM, *A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW* (3d ed. 1783) (defining “Coinage” as “the stamping and making of *money* by the King’s authority,” and “Money” as “that metal, be it gold or silver, that receives an authority by the Prince’s *impress* to be current”); JACOB, *DICTIONARY, infra* note 344 (defining “Money” in much the same way); *STUDENT’S LAW DICTIONARY, infra* note 344 (defining “Money” as “denot[ing] Gold, Silver, Copper, or other Kind of Metal, that receives Authority by the King’s *Impression* to be current”).

99. 4 COMYNS, *infra* note 344, at 354 (assuming that current money must be coin).

turies, British America enjoyed what was probably the fastest-growing economy in the world.<sup>100</sup> A surging rate of economic exchange required a circulating medium that would keep pace. Yet British America had no gold or silver mines, and the authorities in London decided against flooding their colonies with specie. With one temporary exception, the authorities also forestalled efforts to establish mints in America.<sup>101</sup>

Most of the limited specie available was Dutch, Portuguese, or Spanish,<sup>102</sup> with the most common coin being the Spanish dollar, or "piece of eight."<sup>103</sup> The British accepted these foreign tokens as the primary colonial circulating medium, and set their values by royal proclamation.<sup>104</sup> But even with foreign issues available, the quantity of specie proved woefully inadequate for American needs.<sup>105</sup> Americans also resorted to sophisticated forms of barter, which proved to be clumsy and therefore unsatisfactory.<sup>106</sup>

It was in this context that the colonists embarked upon an extraordinary voyage of financial creativity. "One would be hard pressed," observed Professor Richard Sylla, "to find a place and time in which there was more monetary innovation than in the British North American colonies in the century and a half before the American Revolution."<sup>107</sup>

During the seventeenth century, New Englanders made wampum their principal measure of ordinary retail trade.<sup>108</sup>

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100. Sylla, *infra* note 344, at 23.

101. The documents creating the mint are set forth in *Coinage: The Establishment of a Mint in Massachusetts* (1652), reprinted in BANKING AND CURRENCY, *infra* note 344, at 14–15. See also MYERS, *infra* note 344, at 5 (stating that the Pine Tree Shilling was the only coin minted in the colonies during the colonial period). The Massachusetts mint was established in 1652 and coined Pine Tree Shillings for about 30 years. MARKHAM, *infra* note 344, at 47. An edict closing the mint is reproduced at *Royal Edict Repealing the "Law on a Mint House"* (1665), reprinted in BANKING AND CURRENCY, *infra* note 344, at 16. One William Wood briefly had a right to make copper coins for America, but soon sold it to the Crown. MARKHAM, *infra* note 344, at 47.

102. MYERS, *infra* note 344, at 4–5.

103. MARKHAM, *infra* note 344, at 48; DODD, *infra* note 344, at 231.

104. MARKHAM, *infra* note 344, at 48.

105. The reasons and the extent of the shortage are disputed. See, e.g., Sylla, *infra* note 344, at 23 (listing some possible explanations, but emphasizing rapid economic growth); Weiss, *infra* note 344, at 773–75, 783–84.

106. For example, Americans frequently used "bookkeeping barter," a system whereby "goods were traded for other goods, and excess credits were carried on account." MARKHAM, *infra* note 344, at 46.

107. Sylla, *infra* note 344, at 23.

108. *Id.*

Virginians and Marylanders paid their bills in tobacco.<sup>109</sup> South Carolinians remitted quit rents and public charges with skins, cheese, tar, whale oil, butter, tallow, corn, wheat, tobacco, pork, and beeswax.<sup>110</sup> At various places and times other colonists resorted to sugar, rum, molasses, beads, bullets, rice, indigo, and other products as currency.<sup>111</sup>

Such practices encouraged colonial governments to bestow legal-tender quality upon different media at different times, without waiting for royal permission to do so. In 1637, the government of Massachusetts declared white wampum legal tender for debts under twelve pence at the rate of four white beads per penny, and in 1640 it declared "blueu" wampum legal tender at 2 beads per penny.<sup>112</sup> Wampum retained this legal tender status for another twenty-one years.<sup>113</sup> Massachusetts also designated musket balls legal tender at four per penny.<sup>114</sup> Wool became legal tender for some purposes in Rhode Island, as did rice in South Carolina.<sup>115</sup>

Not surprisingly, this experimentation gave Americans expansive ideas about the materials proper for money. One Boston essayist writing in 1740 defined "Money" as "*any Matter, whether Metal, Wood, Leather, Glass, Horn, Paper, Fruits, Shells, Kernels &c. which hath Course as a Medium of Commerce*"<sup>116</sup>—a formulation in sharp contrast to the metal-oriented definitions current in Britain.<sup>117</sup> It was during the course of this experimentation that the British colonists created "the first fiat paper moneys in the western world."<sup>118</sup>

109. MARKHAM, *infra* note 344, at 44–45; DODD, *infra* note 344, at 227.

110. MARKHAM, *infra* note 344, at 46, 57.

111. DODD, *infra* note 344, at 229; MARKHAM, *infra* note 344, at 43; MYERS, *infra* note 344, at 4; see also William Douglass, *An Essay, concerning Silver and Paper Currencies*, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 218, 226 (listing as preferred media of exchange tobacco in Virginia, rice in South Carolina, and produce in North Carolina).

112. BANKING AND CURRENCY, *infra* note 344, at 11 (reprinting original document).

113. *Id.* at 13.

114. MARKHAM, *infra* note 344, at 46.

115. DODD, *infra* note 344, at 229.

116. HUGH VANCE, AN INQUIRY INTO THE NATURE AND USES OF MONEY, in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 365, 396 (italics in original); see also Anonymous, *A Letter from a Gentleman in Boston to his Friend in Connecticut*, in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 217, 229.

117. See *supra* notes 96–99 and accompanying text.

118. Sylla, *infra* note 344, at 23. On the priority of the colonies in using fiat money, see MYERS, *infra* note 344, at 6. The Chinese were said to have invented paper money centuries earlier. *Id.*



The colonists were familiar with bills of exchange in foreign transactions, promissory notes in domestic transactions, and letters of credit.<sup>119</sup> These instruments may have planted the idea of using paper as material for currency. Whatever the inspiration, some kind of informal paper medium—its exact nature is uncertain—was circulating in New England well before 1684.<sup>120</sup> In 1690, Massachusetts issued the first government-sponsored American paper money in the form of £7000 in bills of credit.<sup>121</sup> That colony emitted another £33,000 the following year, of which £10,000 was eventually redeemed and burned.<sup>122</sup> More Massachusetts paper appeared in 1702 and later.<sup>123</sup> The colony of South Carolina issued paper money in 1703; New Hampshire, New York, and Connecticut did so in 1709; Rhode Island in 1710; North Carolina in 1712; Pennsylvania in 1723; and Maryland in 1733.<sup>124</sup> By 1760, every colony had followed suit.<sup>125</sup>

Much has been said of the depreciation of American paper money during the eighteenth century. Power over the currency is, of course, a standing temptation for the government to cheat the public, and—human nature being what it is—sometimes the government yields to the temptation. Even in Britain, which for centuries prided itself on a sound system grounded in precious metals, there were recurrent instances of devaluation and, occasionally, of outright theft.<sup>126</sup> When currency is fabricated from base material, it is fairly easy for those in power to

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119. MARKHAM, *infra* note 344, at 45–49; see also NEWMAN, *infra* note 344, at 11 (listing other antecedents to colonial issues).

120. See, e.g., *Bills of Credit: A Contemporary Observation of the Evolution of Money in New England* (1684), reprinted in BANKING AND CURRENCY, *infra* note 344, at 18 (reprinting original document stating that “for some years Paper-Bills passed for payment of Debts”).

121. See MYERS, *infra* note 344, at 8; see also BANKING AND CURRENCY, *infra* note 344, at 19 (reprinting the inscription on a five shilling bill). This issue was said to be inspired by British Exchequer bills. MARKHAM, *infra* note 344, at 50.

122. MYERS, *infra* note 344, at 8.

123. *Id.*

124. Sylla, *infra* note 344, at 25.

125. MARKHAM, *infra* note 344, at 51; see also WILLIAM DOUGLASS, A DISCOURSE CONCERNING THE CURRENCIES OF THE BRITISH PLANTATIONS IN AMERICA (1740), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 307, 314–27 (detailing the situation colony-by-colony as of 1740).

126. See DODD, *infra* note 344, at 42–43 (debasement under Henry VIII); *id.* at 49–50 (dishonest coin exchange under Elizabeth I); *id.* at 72–73 (outright theft of deposits by Charles I); *id.* at 76–77 (partial governmental default under Charles II); *id.* at 138 (successive debasements under various reigns from the middle ages to the early nineteenth century).

"pay" the government's bills by issuing money faster than the economy produces goods and services.

During the first half of the eighteenth century, the currencies in all four New England colonies performed as poorly as a pessimist might expect.<sup>127</sup> The value of paper bills was stable for a few years after the 1690 Massachusetts emission,<sup>128</sup> but then began to dwindle. In 1736, Thomas Hutchinson—a leading political figure who later became the colony's last civilian royal governor—reported that Massachusetts notes initially worth twenty-seven shillings were then worth only eight.<sup>129</sup> In 1702, £100 sterling could be had for £133 in Massachusetts currency; by 1749 one needed £1100 in Massachusetts bills to purchase the same amount in the relatively stable<sup>130</sup> British medium.<sup>131</sup> Over a fifteen year period, from 1744 to 1759, Rhode Island notes lost more than eighty percent of their value.<sup>132</sup> Over a much wider stretch of time, from 1720 until 1765—the year after Parliament's Currency Act<sup>133</sup> became effective—Massachusetts currency inflated against sterling more than fourfold (all before 1750), and Rhode Island currency more than twelvefold.<sup>134</sup> Gresham's Law holds that "bad money drives out good,"<sup>135</sup> and Gresham's Law was sovereign in New England: specie essentially disappeared from daily trade.<sup>136</sup>

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127. See MYERS, *infra* note 344, at 9.

128. See DODD, *infra* note 344, at 233 (claiming 30 years of stability). But see WRIGHT, *infra* note 344, at v (showing an inflation in Massachusetts currency between 1702 and 1722 of over one hundred percent).

129. THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES, ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152.

130. The stability of the pound sterling for a period of over three hundred years was "little short of a miracle," for "the pound sterling, having been stabilized in 1560–61 by Elizabeth I, never thereafter varied, maintaining its intrinsic value until 1920 or indeed 1931." BRAUDEL, *infra* note 344, at 356.

131. WRIGHT, *infra* note 344, at v.

132. *Id.* (showing that Rhode Island currency was worth £450 per £100 sterling in 1744, but had dropped to £2300 by 1759).

133. See *infra* Part II.B.2.

134. Weiss, *infra* note 344, at 778 tbl.2.

135. MARKHAM, *infra* note 344, at 85.

136. In 1740, a Boston writer called bills of credit "the only Money passing among us." A LETTER RELATING TO A MEDIUM OF TRADE, IN THE PROVINCE OF THE MASSACHUSETTS-BAY (1740), reprinted in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 3, 4; see also AN ENQUIRY INTO THE STATE OF THE BILLS OF CREDIT OF THE PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND: IN A LETTER FROM A GENTLEMEN IN BOSTON TO A MERCHANT IN LONDON (1743), reprinted in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 149, 150 (saying of paper currency in

On the other hand, a pessimist might be pleasantly surprised by the more mixed record in the other colonies. Maryland and the Carolinas experienced significant inflation, but Virginia did not.<sup>137</sup> Nor did New York, New Jersey, or Pennsylvania. For example, over the forty-five year period from 1720 to 1765, Pennsylvania currency rose only twenty-nine percent against the pound sterling.<sup>138</sup> By comparison, the United States consumer price index rose 586 percent in the forty-five year period leading up to 2007.<sup>139</sup>

Professors Paul Studenski and Herman E. Krooss have summed up the colonial experience with paper money in this way:

The depreciation of colonial paper money has usually been exaggerated. Where the bills were used in moderation and not as substitutes for taxes to pay current expenses, and where the bank notes were issued cautiously and subject to rigid redemption, they did not have a bad history. Indeed, in seven colonies the experience was favorable while in the six others it was unfavorable.<sup>140</sup>

Amid this mixed record, one unmixed fact stands out: paper money was popular.<sup>141</sup> People were willing to accept the risks

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New England, that "for several Years past [it] has been the only *general Medium* of it's [sic] Trade"); *A Few Remarks on the Present Situation of Affairs Respecting Silver and Paper Money*, WKLY. REHEARSAL, Apr. 1, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 129, 130–31 (stating that paper money was the dominant medium in all four New England states); THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152 (calling bills of credit "the only current Money of the Province [Massachusetts]").

137. See MYERS, *infra* note 344, at 10–11.

138. Weiss, *infra* note 344, at 778. Virginia's currency rose forty-one percent, and New York's fifteen percent, against sterling. *Id.*

139. That is, the consumer price index rose from a base of 1.00 in 1962 to 6.86 in 2007. See Federal Reserve Bank of Minneapolis, Consumer Price Index Calculator, <http://www.minneapolisfed.org/Research/data/us/calcul/> (last visited May. 24, 2008). Yet the American dollar is still considered one of the world's most stable paper currencies.

140. STUDENSKI & KROOSS, *infra* note 344, at 16–17; see also Wicker, *infra* note 344, at 869 (concluding that during the French and Indian War, which lasted from 1755 to 1763, the paper currencies of New York, Pennsylvania, and South Carolina fared about as well as the specie-based standard of Massachusetts).

141. See, e.g., HUTCHINSON, *infra* note 344, at 392, 395, 437 (referring to the popularity of paper money); STUDENSKI & KROOSS, *infra* note 344, at 17 ("[T]he overwhelming majority of the colonists favored paper money and inflationary policies in general, regarding them as economically beneficial."); GOVERNOR THOMAS HUTCHINSON COMMENTS ON MASSACHUSETTS BANKING AND BILLS OF CREDIT (1769), reprinted in BANKING AND CURRENCY, *infra* note 344, at 72, 82.

of inflation and the inconveniences of the lack of monetary uniformity<sup>142</sup> over the economic consequences of deflation.<sup>143</sup> As historian Mary M. Schweitzer observed of Pennsylvania, "paper money was virtually an 'apple pie and motherhood' issue throughout the colonial period."<sup>144</sup>

Nor were the advocates of paper money all—or even mostly—radical redistributionists and demagogues. Many responsible Americans believed that paper money, when properly secured, was a sensible approach to the colonies' need for liquidity. They believed that the colonies needed paper money to prevent the deflation that results when the supply of circulating media does not keep pace with a quickening economy.<sup>145</sup>

One paper money advocate was Benjamin Franklin, who while still a young man wrote *A Modest Enquiry in the Nature and Necessity of a Paper Currency*, in which he urged Pennsylvania to adopt a land-bank or loan-office system.<sup>146</sup> Franklin argued that, to a greater extent than in Europe, American assets consisted primarily of illiquid real estate, and to put those assets to work in the daily business of commerce they could be used to collateralize a circulating medium. Franklin continued to support paper emissions throughout his life, so long as such emissions were secured by valuable assets<sup>147</sup> and remained free of tender laws binding those from outside the issuing jurisdiction.<sup>148</sup> While serving in London as Pennsylvania's colonial agent, Franklin published a pamphlet urging repeal of the 1764 Currency Act, which had imposed strict restraints on colonial paper.<sup>149</sup> Franklin's views were shared by many others of great respectability,

142. Sometimes there were multiple currencies even within a single colony. MARKHAM, *infra* note 344, at 53.

143. See Sylla, *infra* note 344, at 22 (noting that the colonial experience supports the hypothesis of an inflationary bias in history).

144. Schweitzer, *infra* note 344, at 314.

145. *Id.* at 312.

146. BENJAMIN FRANKLIN, *A MODEST ENQUIRY INTO THE NATURE AND NECESSITY OF A PAPER CURRENCY* (1729), reprinted in 2 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 335. The pamphlet is also reproduced in BANKING AND CURRENCY, *infra* note 344, at 24–36. See *infra* notes 186–88 and accompanying text for a discussion of the land-bank or loan-office system.

147. FRANKLIN, *infra* note 344, at 220 (stating that paper money should be secured by tax revenue or land). Franklin opposed the issues of the Continental Congress because they did not bear interest. MARKHAM, *infra* note 344, at 60.

148. Letter from Benjamin Franklin to Louis-Guillaume Le Veillard (Feb. 17, 1788), in 16 DOCUMENTARY HISTORY, *infra* note 344, at 135, 136.

149. FRANKLIN, *infra* note 344; see also *infra* Part II.B.2 (discussing the Currency Act).

including Daniel Dulany, a distinguished essayist and lawyer,<sup>150</sup> and several of the King's colonial governors.<sup>151</sup>

*b. Mid-Century Reforms in New England*

British imperial authorities and their American allies were unsympathetic to colonial paper currency,<sup>152</sup> and made various efforts to control it.<sup>153</sup> For example, in 1749, when the British government shipped £183,000 in specie to Massachusetts to reimburse the colony for war expenses, Thomas Hutchinson, the conservative Speaker of the colony's House of Representatives, convinced the legislature to dedicate the specie to retire outstanding bills of credit.<sup>154</sup> In 1751, Parliament prohibited the colonies from issuing any further "Paper Bills or Bills of Credit, of any Kind or Denomination whatsoever" other than short-term tax anticipation notes and funding for emergencies.<sup>155</sup> Parliament also provided that no paper money in New England should be legal tender.<sup>156</sup>

Although three New England colonies somehow managed to issue paper after 1751, it was better secured and carried no legal tender status. Massachusetts and Connecticut labeled their new issues "treasury notes" rather than "bills of credit." In Massachusetts, they bore interest and were convertible into specie on

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150. Greene & Jellison, *infra* note 344, at 490; see also Edward C. Papenfuse, *Daniel Dulany (1722–1797): Politician in America*, 17 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 172 (2004).

151. Greene & Jellison, *infra* note 344, at 491 (referencing Governor Fauquier of Virginia); *id.* at 493 (referencing Governor Sharpe of Maryland); *id.* at 494 (referencing Governor Moore of New York).

152. See *id.* at 486.

153. See NEWMAN, *infra* note 344, at 11–12 (describing British efforts to curb paper money in the first half of the century and the struggle between colonial assemblies and royal governors); Greene & Jellison, *infra* note 344, at 486 (discussing a circular instruction to royal governors in 1720 and a parliamentary statute of 1741); see also BANKING AND CURRENCY, *infra* note 344, at 20–23 (reprinting documents describing the struggle over the size of a paper money emission between the Pennsylvania House of Representatives and the Royal Governor, a struggle the Governor lost).

154. See HUTCHINSON, *infra* note 344, at 435–40, for a discussion of the process by one of the participants. See also Governor Thomas Hutchinson *Comments on Massachusetts Banking and Bills of Credit*, (1769), reprinted in BANKING AND CURRENCY, *infra* note 344, at 72, 81–84 (providing another account).

155. STAT. AT LARGE, 24 Geo. ii, c. 53 (1751).

156. *Id.* § vii.

demand.<sup>157</sup> In Connecticut, they also bore interest.<sup>158</sup> Rhode Island continued to emit "bills," but they were convertible into specie within two years of issue.<sup>159</sup>

## 2. *The Currency Act of 1764 and Aftermath*

In 1764, Parliament adopted an act addressing the colonies' paper bills of credit, now known as the Currency Act of 1764.<sup>160</sup> This measure extended the ban on issuance of legal tender paper currency from New England to all American colonies.<sup>161</sup> The immediate effect was significant deflation<sup>162</sup> that eventually fostered considerable colonial resentment.<sup>163</sup> Feelings had been deteriorating for some time, and continued to erode as older currencies were retired and the British rejected several substitutes for maintaining liquidity.<sup>164</sup> Moreover, the colonists were frustrated by the British government's fragmentation of responsibility for American policy among Parliament, the Privy Council, the Secretary of State for the Southern Department, and the sixteen Lords Commissioners of Trade and Plantations

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157. Smith, *infra* note 344, at 6 (outlining the Massachusetts reforms). These treasury notes were a form of tax anticipation note, payable with interest and in specie after two or three years. Wicker, *infra* note 344, at 872.

158. NEWMAN, *infra* note 344, at 68 (reproducing a 1770 Connecticut interest-bearing "treasury note").

159. *Id.* at 288 (reproducing a 1767 Rhode Island bill convertible into specie within two years).

160. STAT. AT LARGE, 4 Geo. iii, c. 34 (1763). Parliament later allowed colonies to issue bills for taxes and debts due to the colonies themselves, but the bills were not to be used for private debts. MARKHAM, *infra* note 344, at 56.

161. DODD, *infra* note 344, at 236.

162. Based on a factor of 100 for the year 1720, the Philadelphia exchange rate with the pound sterling dropped from 129 in 1765 to 115 in 1770, but then rose to 127 in 1774. The comparable figures for Virginia were 141, 104, and 113. Weiss, *infra* note 344, at 778.

163. See MARKHAM, *infra* note 344, at 56.

164. See, e.g., Greene & Jellison, *infra* note 344, at 502-03 (discussing the retirement of old currency in New York and the British refusal to allow new currency to take its place); see also BANKING AND CURRENCY, *infra* note 344, at 87 (stating that the colonists "objected bitterly to the Crown's refusal to permit an expanded money supply"); DODD, *infra* note 344, at 237-38 (stating that the British intervention throughout the first half of the eighteenth century fed American resentment against the British authorities); MYERS, *infra* note 344, at 11 (referring to anger at British-imposed restrictions on the use of paper money); STUDENSKI & KROOSS, *infra* note 344, at 17 (contending that "Franklin was correct in listing the British anti-inflation policy among the five factors which lessened the colonial respect for Parliament and led to the Revolution").

("Board of Trade").<sup>165</sup> One effect of this fragmentation was that the imperial government had difficulty defining the boundaries of the Currency Act.<sup>166</sup>

Most of the colonies attempted to cobble together ways of supporting their currencies without legal tender laws. Pennsylvania, for example, issued non-legal tender notes secured by previously-issued legal tender notes.<sup>167</sup> But none of these expedients proved wholly satisfactory.<sup>168</sup> Finally, in 1773, Parliament granted to all the colonies a concession it earlier had granted only to New York. It permitted the colonies to issue tax-anticipation bills that constituted legal tender only for public obligations, including payments to governmental land-banks.<sup>169</sup> The same year, the British further sought to ease the colonial specie shortage by striking a copper half-penny for Virginia.<sup>170</sup> By that time, however, it probably was too late to rescue the trans-Atlantic relationship.

### 3. *Kinds of American Paper Money*

Legal writers—as opposed to economic historians—seem almost universally to have made the error of assuming that the constitutional phrase "Bills of Credit"<sup>171</sup> was a mere synonym

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165. For a discussion of these institutions, see MARKHAM, *infra* note 344, at 34, and ESMOND WRIGHT, *FABRIC OF FREEDOM: 1763–1800*, at 27 (rev. ed. 1978). For an example of colonial frustration, see MARKHAM, *infra* note 344, at 57 (referring to the struggle between the Board of Trade and South Carolina over the use of paper and commodities as money). See also Greene & Jellison, *infra* note 344 (describing the British-American tug-of-war over the currency).

Although the Board of Trade was influenced heavily by mercantile interests, it could only advise the other responsible parties, a system that became even more confused with the creation of the post of Secretary of State for American Affairs in 1768. WRIGHT, *supra*, at 27–31. British colonial decision making among these and other agencies was uncoordinated, thereby adding to American frustration. See *id.*

166. See Greene & Jellison, *infra* note 344, at 505; see also *supra* note 164 (discussing the lack of coordination among British agencies). Instructions to royal governors regarding permissible currency sometimes were subject to different interpretations. In Massachusetts, for example, governors had instructions not to approve a "depreciating" currency, but could interpret this to approve or disapprove various kinds of paper emissions. See, e.g., HUTCHINSON, *infra* note 344, at 402–03.

167. See NEWMAN, *infra* note 344, at 249 (reproducing two such bills of credit, issued in 1769).

168. Greene & Jellison, *infra* note 344, at 504–14.

169. *Id.* at 514–17; see NEWMAN, *infra* note 344, at 253 (reproducing a Pennsylvania land-office bill issued in 1773).

170. See The Virginia Half Penny of 1773: Introduction, <http://www.coins.nd.edu/ColCoin/ColCoinIntros/VA-halfd.intro.html> (last visited May 25, 2008).

171. U.S. CONST. art. I, § 10, cl. 1.



for paper money.<sup>172</sup> In fact, bills of credit constituted only the most important of several categories of American paper currency. The name of this kind of currency probably was inspired by private bills of credit, which were instruments executed by an issuer to a potential creditor, informing the potential creditor that if he (i) extended credit to an identified potential debtor (often the issuer's agent), and (ii) delivered to the issuer the debtor's written acknowledgment of the debt, then the issuer would hold the potential creditor harmless.<sup>173</sup> A paper-money bill of credit was analogous to its private counterpart in that the issuing government gave the instrument to one of its creditors to assure the creditor that if he extended credit to his fellow citizens (potential debtors), then he (the creditor) would be held harmless. The government promised to discharge this obligation by future payment or by accepting the bill in lieu of future taxes or other fees.<sup>174</sup> The paper-money bill of credit, however, differed from its private-party analogue in that the public bill was intended to circulate as currency,<sup>175</sup> and the bearer presented the same document, rather than a separate document executed by the debtor, when seeking payment.

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172. Compare Harlow, *infra* note 344, at 63 ("Then there were all the varieties of state paper: bills of credit, treasurer's notes, and almost no end of certificates."), with Kemmerer, *infra* note 344, at 867 (distinguishing loan-office bills from bills of credit). See also *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830) (holding, per Marshall, C.J., over the dissents of three Justices, that loan office certificates were bills of credit for constitutional purposes); FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO*, 1776-1876, at 128 (2000) (noting that the holding was "technically questionable, because loan office certificates were historically quite different from bills of credit").

173. 4 COMYNS, *infra* note 344, at 239 ("A Bill of Credit is, when a Merchant sends a Letter by a Servant, or Agent to another Merchant, within the Realm, or in foreign Parts, whereby he desires him to give Credit to the Bearer for Goods or Money, to such a Value."). Many form-books provided the eighteenth-century lawyer or businessman with forms for bills of credit. See, e.g., 1 ANONYMOUS, *THE ATTORNEY'S COMPLEAT POCKET-BOOK* 113 (5th ed. 1764); 1 NICHOLAS COVERT, *THE SCRIVENER'S GUIDE* 305-06 (4th ed. 1724); H. CURSON, *ARCANA CLERICALIA; OR, THE MYSTERIES OF CLERKSHIP EXPLAINED* 450-51 (1705).

174. This promise is why the bill-of-credit powers in the initial drafts of both the Articles of Confederation and the Constitution were associated with the borrowing power. See *infra* note 231 (reproducing the clause in the Committee of Detail's original draft of the Constitution).

175. HUGH VANCE, *AN INQUIRY INTO THE NATURE AND USES OF MONEY*, in 3 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 365, 432 (1740) (arguing that the name "Bill of Credit" is not appropriate, because after the first emission, the bills were issued intending them to be money).

How a colony labeled its currency did not necessarily control whether that currency was actually a bill of credit. The "treasury notes" issued by Connecticut and Massachusetts after mid-century<sup>176</sup> were not legal tender, but they were bills of credit in all but name.<sup>177</sup> Some forms of paper money, on the other hand, were clearly not bills of credit. The Virginia and Maryland "tobacco notes," although generally serving as legal tender, were classic warehouse receipts.<sup>178</sup> In contrast, the "bills" issued by a land-bank—an institution discussed below<sup>179</sup>—were not actually bills of credit: bills of credit represented the government's indebtedness to citizens; land-bank bills represented citizens' indebtedness to the government.<sup>180</sup>

Both bills of credit and other forms of paper money could be secured or unsecured. For instance, Maryland's "indented bills" of 1733 were collateralized by stock in the Bank of England.<sup>181</sup> Other instruments were backed by commodities such as lum-

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176. See *supra* notes 157–58 and accompanying text.

177. Harlow, *infra* note 344, at 49 (stating that "there was little valid difference" between treasury notes and bills of credit during the Revolutionary War). Currency that appears on its face to be pure legal tender fiat money rather than a governmental debt was sometimes labeled a "bill of credit." See, e.g., NEWMAN, *infra* note 344, at 239 (reproducing a 1744 Pennsylvania fiat note apparently called a "bill of credit"). Many or most of those "bills of credit," were actually redeemable under the terms of their issue, and therefore did represent a governmental debt. See, e.g., *id.* at 206–07 (reproducing redeemable New York bills of credit); *id.* at 324 (reproducing a redeemable Vermont bill of credit). Moreover, even a non-redeemable legal tender bill represented a government obligation insofar as it could be used to pay taxes and other government charges.

178. See MARKHAM, *infra* note 344, at 45 (stating that tobacco notes were a kind of warehouse receipt, that they were legal tender in Virginia before 1717 and again after 1730, and that similar receipts were also "passed as money" in Maryland); DODD, *infra* note 344, at 235 (describing the tobacco warehouse receipt system); MYERS, *infra* note 344, at 4 (same); NEWMAN, *infra* note 344, at 13 (same). A Virginia tobacco note currently in the Library of Virginia is clearly a receipt, with indications of the quantity and quality of tobacco deposited, although it also represents that the issuer will deliver, on demand, the tobacco to the depositor or to his order. A warehouse receipt tobacco note should not be confused with other notes, also issued by Virginia, promising to pay soldiers in tobacco upon their discharge. See, e.g., NEWMAN, *infra* note 344, at 343.

In Maryland, official certificates of tobacco inspection were also intended to and did pass as money. MARKHAM, *infra* note 344, at 45; Mary McKinney Schweitzer, *Economic Regulation and the Colonial Economy: The Maryland Tobacco Inspection Act of 1747*, 40 J. ECON. HIST. 551, 555–57, 563–64 (1980).

179. See *infra* notes 186–88 and accompanying text.

180. See Kemmerer, *infra* note 344, at 867 (distinguishing land-bank bills from bills of credit). These bills should not be confused with those bills of credit in which the government used part of the proceeds of emission to make real estate loans. See, e.g., NEWMAN, *infra* note 344, at 253 (reproducing such bills of credit).

181. See NEWMAN, *infra* note 344, at 111.

ber.<sup>182</sup> A less tangible form of security—if it was security at all—backed the first Massachusetts bills of credit. Those bills entitled the bearer to remit them for payments due at the colonial treasury, most likely for tax payments.<sup>183</sup> Each bill specified its denomination and proclaimed that it “shall be in value equal to money & shall be accordingly accepted by the Treasurer . . . in all publick payments and for any Stock at any time in the Treasury.”<sup>184</sup> Most other early colonial issues, especially those in New England, followed the same general formula.<sup>185</sup> If the issue were legal tender, the phrase “and all others” might be inserted on the bill after the word “Treasurer.”<sup>186</sup>

Most colonies also experimented with the “land-bank” or “loan-office” system, in which a landowner granted the government a real estate mortgage as collateral and in exchange received a loan of government paper currency.<sup>187</sup> Thus, the loan office turned illiquid real-estate assets into, as Benjamin Franklin wrote, “Coined Land.”<sup>188</sup> Land-banks sometimes issued currency in exchange for inadequate or improper collateral, thereby contributing to inflation of paper money.<sup>189</sup>

The terms of repayment of paper money also varied. An emission might promise payment in specie or some other asset on demand, or it might provide for remittance after a date, fixed<sup>190</sup> or variable,<sup>191</sup> or tied to future tax receipts.<sup>192</sup> Some cur-

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182. MARKHAM, *infra* note 344, at 49 (describing a failed effort).

183. NEWMAN, *infra* note 344, at 7 (describing the first Massachusetts emission).

184. *Id.* at 124.

185. *See, e.g., id.* at 51, 158, 197 (reproducing bills from Connecticut, New Hampshire, and New York).

186. *See, e.g., id.* at 88 (reproducing a Georgia bill).

187. *See, e.g.,* Kemmerer, *infra* note 344, at 874 (discussing the land-bank in New Jersey); Theodore Thayer, *The Land-Bank System in the American Colonies*, 13 J. ECON. HIST. 145, 145 (1953) (“Land banks were established in most of the American colonies during the first half of the eighteenth century.”). The quality of the collateral was sometimes open to debate. *Compare A Letter from a Gentleman in Rhode-Island to his Friend in Boston*, WKLY. REHEARSAL, Feb. 18, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 35, 37 (asserting that Rhode Island paper was effectively secured by land), with *To the Author of the Weekly Rehearsal*, WKLY. REHEARSAL, Mar. 4, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 61, 62–63 (disputing that assertion).

188. FRANKLIN, *supra* note 146, at 349.

189. HUTCHINSON, *infra* note 344, at 392–96 (discussing the land-bank experience in Massachusetts).

190. *See, e.g.,* NEWMAN, *infra* note 344, at 224–25 (reproducing three North Carolina bills with fixed payment dates); *id.* at 295 (reproducing a 1780 Rhode Island bill of credit redeemable in Spanish milled dollars on Dec. 31, 1786).

rency bore interest, and some did not.<sup>193</sup> Currency, whether or not in the form of bills of credit, might or might not be legal tender.<sup>194</sup> Some was pure fiat money, like the modern Federal Reserve note, promising nothing but stating on its face merely that it was "Lawful Money"<sup>195</sup> or "shall pass current" at a denominated amount.<sup>196</sup>

### C. Revolutionary War Emissions

Armed revolution erupted in the spring of 1775. The Continental Congress decided to issue bills of credit worth two million Spanish-milled dollars to finance the cause.<sup>197</sup> There were several reasons for this decision. First, Congress had the power to issue bills of credit but no authority to raise money through taxation.<sup>198</sup> Second, the states did not pay the full amount of congressional requisitions but rather competed

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191. See, e.g., *id.* at 95 (reproducing two 1775 Georgia bills "to be called in and provided for within three Years after a Reconciliation between Great Britain and America shall take place").

192. See, e.g., *id.* at 309 (reproducing a 1774 South Carolina bill).

193. See, e.g., *id.* at 217 (reproducing a 1780 New York bill). Professor Kenneth W. Dam argued that bills of credit were distinguished from "notes" in that bills of credit paid no interest and notes did, and that Madison understood the distinction in this way. Dam, *infra* note 344, at 387-88. This argument is incorrect: Both "bills of credit" and "notes" came in interest-bearing and interest-free varieties. See, e.g., NEWMAN, *infra* note 344, at 152, 217, 264 (reproducing a 1780 Massachusetts bill of credit that paid five percent interest, a 1780 New York bill of credit that paid five percent interest, and a 1783 Pennsylvania note, redeemable in specie, but paying no interest). Madison's own state of Virginia issued both interest-bearing and non-interest-bearing treasury notes. *Id.* at 432-33 (referencing four Virginia treasury notes with interest and reproducing three Virginia treasury notes without interest).

194. Compare *id.* at 239 (reproducing 1744 and 1746 Pennsylvania bills of credit that were legal tender), with *id.* at 249 (reproducing 1769 Pennsylvania bills of credit that were not legal tender), and *id.* at 341 (reproducing 1779 Virginia "Treasury Bills," redeemable in gold, that were issued without legal tender status but were later given that status).

195. See, e.g., *id.* at 302 (reproducing a 1731 South Carolina bill).

196. See, e.g., *id.* at 179-94 (surveying New Jersey money, most of which provided that it "shall pass current"); *id.* at 205 (setting forth New York samples issued in 1734 and 1737); *id.* at 223 (reproducing a sample of 1748 North Carolina "Proclamation Money").

197. See *id.* at 30-42 (reproducing facsimiles of continental currency issued under each congressional resolution).

198. See DODD, *infra* note 344, at 239-40 (referring to Congress's difficulties with instituting taxes).

with Congress for European loans.<sup>199</sup> Third, as noted above, paper money was popular.<sup>200</sup>

Congress soon issued more bills of credit. By 1778, continental issues had grown to \$30 million; by 1779 to \$150 million; and by 1780 to \$240 million.<sup>201</sup> This was in addition to about \$200 million in paper emitted by the states.<sup>202</sup> In 1776, Congress asked the states to make congressional bills legal tender, that is, to force people to take them at face value.<sup>203</sup> Most states complied.<sup>204</sup>

Beginning in 1777, despite the state tender laws, continental currency depreciated precipitously.<sup>205</sup> So Congress resorted to general price controls, which enjoyed the same level of success such measures always do—little or none.<sup>206</sup> Finally in March 1780, with continentals good for about two and one-half cents on the dollar, Congress gave up “the pretence that notes were on par with coin.”<sup>207</sup> Congress stopped issuing paper money<sup>208</sup> and issued an announcement euphemistically declaring almost

199. *See id.* at 246.

200. *See supra* notes 141–51 and accompanying text.

201. MARKHAM, *infra* note 344, at 61; *see also* BANKING AND CURRENCY, *infra* note 344, at 89 (editor’s commentary) (giving another account of congressional paper money emissions).

202. MYERS, *infra* note 344, at 28. States gradually stopped issuing paper at the request of Congress. *Id.*

203. MARKHAM, *infra* note 344, at 67–68; *see also* BANKING AND CURRENCY, *infra* note 344, at 105–06 (setting forth proposed resolution in committee report).

204. DODD, *infra* note 344, at 242.

205. BANKING AND CURRENCY, *infra* note 344, at 153–54 (setting forth “Scales of Depreciation of Continental Money”); *see also* Harlow, *infra* note 344, at 54–57 (describing various methods, some quite draconian, through which the states and Congress tried to halt depreciation and counterfeiting).

206. Commentators agreed on the ineffectiveness of this measure, even though price controls were occasionally enforced through vigilante action. *See* MARKHAM, *infra* note 344, at 67; MYERS, *infra* note 344, at 29; STUDENSKI & KROOSS, *infra* note 344, at 28. Interestingly, the colonies had suffered poor experiences with such controls, so perhaps they should have known better. *See* MARKHAM, *infra* note 344, at 35 (referring to the maximum price on rum in the Carolinas in 1673).

Congress abandoned price controls in 1780. In November of that year, however, Congress urged the states to impose a six-million dollar goods tax, a levy payable in-kind, with even worse results. DODD, *infra* note 344, at 246. Congress also tried, unsuccessfully, to raise money through a lottery, MARKHAM, *infra* note 344, at 61; and drew bills of exchange on its cashless representatives in France, *id.* at 61–62.

207. *See* DODD, *infra* note 344, at 245; MARKHAM, *infra* note 344, at 66–68.

208. *See* 13 DOCUMENTARY HISTORY, *infra* note 344, at 12 (editor’s note).

total default.<sup>209</sup> Fortunately, by May 1781, specie was again in circulation courtesy of French monetary imports.<sup>210</sup>

It is easy to condemn the Continental Congress's venture into hyperinflation, but difficult to see how Congress could have financed the Revolution otherwise. At the time, many people did not see the episode as a failure at all. The liquidity was received favorably (at least at first), and the depreciation was seen as an informal tax for financing the war.<sup>211</sup> And, of course, the war had been won.

#### D. The Confederation Era

Congress approved the Articles of Confederation in 1777, although they did not become effective until the thirteenth state (Maryland) ratified them in 1781.<sup>212</sup> The Articles gave Congress "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 [and] fixing the standards of weights and measures throughout the United States."<sup>213</sup> Congress also received authority to "emit bills on the credit of the United States."<sup>214</sup>

The Confederation Congress declined to exercise this power, but during the period the Articles were in effect (from March 1, 1781 to June 21, 1788) ten of the states did, in fact, emit paper money.<sup>215</sup> The experience in some of the states was good. South

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209. See DODD, *infra* note 344, at 247-48.

210. MYERS, *infra* note 344, at 28. Continental paper no longer circulated as currency after May 31, 1781. BANKING AND CURRENCY, *infra* note 344, at 154.

211. STUDENSKI & KROOSS, *infra* note 344, at 28; BANKING AND CURRENCY, *infra* note 344, at 88 (editor's commentary).

212. 19 J. CONT. CONG. 213-23 (Mar. 1-2, 1781).

213. ARTS. CONFED. art. IX.

214. *Id.*

215. For example, Georgia issued new sets of bills in 1782 and 1786, NEWMAN, *infra* note 344, at 107; Maryland in 1781, *id.* at 141; Massachusetts in 1781, *id.* at 157 (in addition to Massachusetts bank issues); New Jersey in 1781, 1784, and 1786, *id.* at 221; New York in 1781, 1786, and 1788, *id.* at 243; North Carolina in 1781, 1783, 1785, *id.* at 287; Pennsylvania in 1781, 1783, and 1785, *id.* at 325; Rhode Island in 1786, *id.* at 365; and South Carolina in 1786, 1787, and 1788, *id.* at 399. Avoiding issues during this period were Connecticut, *id.* at 65; Delaware, *id.* at 95; and New Hampshire, *id.* at 197.

State constitutions did not explicitly grant states the power to issue paper money, but some of them contained clauses assuming that the states had, or would continue to exercise, that power. See, e.g., N.J. CONST. arts. III & IV (1776), (referring to "proclamation money," paper currency with legal tender status).

Carolina notes were not legal tender,<sup>216</sup> yet they were well-backed and traded at a premium.<sup>217</sup> Depreciation was mild in New York.<sup>218</sup> In other states, such as North Carolina and, most notoriously, Rhode Island, inflation was severe.<sup>219</sup>

During this period many people became concerned that state-level paper money emissions might trigger interstate trade wars. In 1786, Rhode Island issued paper money at least partly to relieve resident debtors pressed by out-of-state creditors. This money depreciated quickly. Two years later, debtors could escape for as little as ten cents on the dollar.<sup>220</sup> To ensure that creditors accepted this currency, the legislature passed a law declaring that anyone who refused to do so could be fined without benefit of trial by jury.<sup>221</sup>

Debtors from other states owing money to Rhode Island creditors decided they could play the same game. When sued in Rhode Island courts, out-of-state debtors tendered Rhode Island paper money. The outraged Rhode Island legislature responded by ordering state judges to refuse to recognize any such tender from a debtor who was not a Rhode Island resident. Connecticut lawmakers thereupon provided that Rhode Islanders could not collect debts in Connecticut until its neighbor repealed the discriminatory statutes against non-residents.<sup>222</sup> Such struggles between states later became fodder for the ratification debates.<sup>223</sup>

### E. *The Constitutional Convention*

#### 1. *Why a Coinage Clause Was Necessary*

Extant comments by James Wilson and James Madison suggest that they believed the states were incompetent to handle the coinage power and that it should be lodged in the federal

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216. See, e.g., S.C. Pub. L. No. 1258 (1782), THE PUBLIC LAWS OF SOUTH CAROLINA (1790) (stating that no paper money should be legal tender).

217. MYERS, *infra* note 344, at 40.

218. Rolnick et al., *infra* note 344, at 4.

219. *Id.*

220. *Id.*

221. JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN 58–59 (1787), (setting forth statute denying jury trial when accused of refusing tender).

222. 9 DOCUMENTARY HISTORY, *infra* note 344, at 1005–06 (editor's note 19).

223. See *infra* notes 306, 329, 330, and accompanying text.



government.<sup>224</sup> Assuming that delegates to the Constitutional Convention generally held this belief, one might ask why convention delegates enumerated a specific coinage power when by common understanding congressional authority over commerce<sup>225</sup> would include authority over measures and money as well.<sup>226</sup> The Articles of Confederation included express powers over measures and money but only because the Articles granted Congress no general power over commerce.

One possibility is that the delegates chose to include a specific coinage power because the congressional commerce power did not extend to some commerce. Excluded was commerce that was neither foreign, nor interstate, nor with the Indian tribes, nor "necessary and proper" to regulate in pursuit of an enumerated power. Moreover, some activities benefiting from standard measurements, such as manufacturing and agriculture, were not "commerce" at all in the contemporaneous sense of the word.<sup>227</sup> Including a separate power "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures"<sup>228</sup> enabled Congress to set measurement standards for all transactions within the United States.<sup>229</sup>

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224. See 1 FARRAND, *infra* note 344, at 331 (reporting the notes of Rufus King, who recorded Wilson as saying: "Coinage. P. Office &c [the States] are wholly incompetent to the exercise of any of the Gt. & distinguishing acts of Sovereignty"); *id.* at 413 (reporting the notes of Robert Yates, who recorded Wilson as saying, "We have unanimously agreed to establish a general government – That the powers of peace, war, treaties, coinage and regulating of *commerce*, ought to reside in that government. And if we reason in this manner, we shall soon see the impropriety of admitting the interference of state governments into the general government"); *id.* at 446 (reporting the notes of Madison, who recorded himself as arguing that foreign governments would not take seriously a mere league of states, "each with authority and discretion, to raise money, levy troops, determine the value of coin &c").

225. U.S. CONST. art. I, § 8, cl. 3.

226. See *supra* notes 61, 67–69, and accompanying text.

227. See *supra* note 58 and accompanying text. One could, of course, argue that the King's general commerce power enabled him to control the measurements used in non-commercial transactions, so Congress's limited commerce power should enable it to reach non-commercial transactions with interstate implications. If the Framers thought of this argument at all, they no doubt wished to forestall such quibbles.

228. U.S. CONST. art. I, § 8, cl. 5.

229. Cf. THE FEDERALIST NO. 42, *infra* note 344, at 271–72 (James Madison):

All that need be remarked on the power to coin money, regulate the value thereof, and of foreign coin, is, that by providing for this last case, the Constitution has supplied a material omission in the articles of Confederation. The authority of the existing Congress is restrained to the regulation of coin *struck* by their own authority, or that of the respective

## 2. *What the Convention Records Have To Say About Paper Money*

It is probable that most of the delegates at the federal Convention were hostile to paper money. They were particularly hostile to state emissions of paper money, which accounts for their adopting an express ban on state bills of credit and tender laws.<sup>230</sup> This does not, however, answer the question whether most of them intended to deprive the new federal government of the power to emit paper money.

The Convention first laid down a series of resolutions governing the content of the Constitution, and then delegated the job of producing the first draft to a Committee of Detail. That committee consisted of five members. They included Nathaniel Gorham of Massachusetts, a merchant and former President of Congress, and four distinguished lawyers: Edmund Randolph of Virginia, John Rutledge of South Carolina, James Wilson of Pennsylvania, and Oliver Ellsworth of Connecticut.<sup>231</sup> On August 6, 1787, the committee presented its draft to the whole Convention, which debated, supplemented, and amended it over the next few weeks. Those seeking the original meaning of the Constitution regarding paper money have focused much attention on the notes taken by James Madison on August 16, one of the days on which the delegates were picking apart the committee's draft.<sup>232</sup>

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States. It must be seen at once that the proposed uniformity in the *value* of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States. . . . The regulation of weights and measures is transferred from the articles of Confederation, and is founded on like considerations with the preceding power of regulating coin.

230. U.S. CONST. art. I, § 10, cl. 1; see 2 FARRAND, *infra* note 344, at 439 (reporting Madison's notes on the Convention debate over the denial of monetary powers to the states).

231. See Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 269–71 (2004) (discussing the selection and careers of the committee's members).

232. See 2 FARRAND, *infra* note 344, at 308–10. Madison's record is as follows:

Mr. Govr Morris moved to strike out "and emit bills on the credit of the U. States"—If the United States had credit such bills would be unnecessary: if they had not unjust & useless.

Mr Butler, 2ds. the motion.

Mr. Madison, will it not be sufficient to prohibit the making them a tender? This will remove the temptation to emit them with unjust views. And promissory notes in that shape may in some emergencies be best.

Mr. Govr. Morris. striking out the words will leave room still for notes of a *responsible* minister which will do all the good without the mischief.

That draft included a congressional power "[t]o borrow money, and emit bills on the credit of the United States."<sup>233</sup> The

The Monied interest will oppose the plan of Government, if paper emissions be not prohibited.

Mr. Ghorum was for striking out, without inserting any prohibition. if the words stand they may suggest and lead to the measure.

Col Mason had doubts on the subject. Congs. he thought would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet as he could not foresee all emergencies, he was unwilling to tie the hands of the Legislature. He observed that the late war could not have been carried on, had such a prohibition existed.

Mr Ghorum—The power as far as it will be necessary or safe, is involved in that of borrowing.

Mr Mercer was a friend to paper money, though in the present state & temper of America, he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the Government to deny it a discretion on this point. It was impolitic also to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of Citizens

Mr. Elsworth thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made, were now fresh in the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new Governmt. more friends of influence would be gained to it than by almost any thing else—Paper money can in no case be necessary—Give the Government credit, and other resources will offer—The power may do harm, never good.

Mr. Randolph, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.

Mr Wilson. It will have a most salutary influence on the credit of the U. States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered. And as long as it can be resorted to, it will be a bar to other resources.

Mr. Butler. Remarked that paper was a legal tender in no Country in Europe. He was urgent for disarming the Government of such a power.

Mr Mason was still averse to tying the hands of the Legislature *altogether*. If there was no example in Europe as just remarked it might be observed on the other side, that there was none in which the Government was restrained on this head.

Mr. Read, thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.

Mr. Langdon had rather reject the whole plan than retain the three words "(and emit bills)".

On the motion for striking out

N. H. ay- Mas. ay. Ct. ay. N-J. no. Pa. ay. Del. ay. Md. no. Va. ay. N. C. ay. S. C. ay. Geo. ay. [Ayes—9; noes—2.]

*Id.* (footnotes omitted).

233. *Id.* at 182.

discussion on paper money began when Gouverneur Morris moved to strike the language: "emit bills on the credit of the United States." His reason, apparently, was that this phrase would wave a red flag before some of the Constitution's potential supporters, and it would do so needlessly, for officials in the future government could find ways to borrow money without resorting to bills of credit.<sup>234</sup>

Eleven delegates spoke in the debate on the Morris proposal.<sup>235</sup> In the ensuing state-by-state vote, nine states voted for the motion to remove the bill of credit language, and two states voted against it.<sup>236</sup> This vote is sometimes cited as showing intent to deny the federal government the power to issue paper money. The records of the debate, however, demonstrate that the delegates who voted for the motion did so for varying reasons. Some probably believed that they were banning paper currency; others thought that the federal government would be able to issue such currency without the bill-of-credit language, but wanted to remove it to avoid offending potential ratifiers or encouraging Congress to emit paper money needlessly.<sup>237</sup> Taking the discussion as a whole into consideration, one can infer no more than the following:

- All of those voting to retain the language explicitly authorizing federal bills of credit did so because they believed (i) the federal government should have the power to issue bills of credit; and (ii) deleting the language would delete the power.<sup>238</sup>
- Some voting to delete the language believed (i) the federal government should *not* have the power to issue bills of

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234. *Id.* at 308–09.

235. *Id.* at 310.

236. *Id.*

237. *See, e.g., id.* at 309 (reporting Gouverneur Morris as saying: "The Monied interest will oppose the plan of Government, if paper emissions be not prohibited."); *id.* ("Mr. Ghorum was for striking out, without inserting any prohibition. if the words stand they may suggest and lead to the measure."); *id.* at 310 ("Mr. Read, thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.").

238. This would, of course, be the principal reason to vote against deletion. The identity of exactly who voted which way within their state delegations is not fully known, and only eleven of fifty-five delegates spoke to the issue. Mercer and Randolph, however, were probably among this first group.

credit; and (ii) deleting the language would delete that power.<sup>239</sup>

- Others voting to delete the language believed (i) the federal government should have the power to issue bills of credit; but (ii) deleting the language would *not* delete that power. This final group voted to delete because they saw the committee's language as superfluous and imprudent.<sup>240</sup>

James Madison seems to have been in his own category. He thought (i) the federal government ought to have the power to issue paper money, but only if it were not legal tender; and (ii) deleting the language would achieve this result.<sup>241</sup> Madison voted for the motion because, he said,

[he] became satisfied that striking out the words would not disable the Govt from the use of public notes as far as they could be safe & proper; & would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or private debts.<sup>242</sup>

Madison's interpretation is not fully accurate, however, because "notes" could and did serve as "paper currency," and whether or not an item was a "bill of credit" was not determinative of its legal tender status.<sup>243</sup> It is possible that the "notes" Madison was thinking of were Massachusetts treasury notes, which were not legal tender, but which bore interest and were convertible on demand into specie.<sup>244</sup> Those notes, however, certainly served as paper currency.<sup>245</sup>

In addition to the variation in delegates' views, another reason the import of the Convention discussion is unclear is because we do not know how many delegates thought a ban on "bills of credit" would be equivalent to a ban on all paper money. As noted earlier, the phrase "bill of credit" was, techni-

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239. Wilson and Butler were probably in this group.

240. Ghorum was probably among this category of delegates. Morris, Mercer, and Read all mentioned considerations of public acceptability, and Read may or may not have been in this group.

241. 2 FARRAND, *infra* note 344, at 310.

242. *Id.*

243. See *supra* note 194 and accompanying text.

244. See *supra* note 157 and accompanying text.

245. See Smith, *infra* note 344, at 4-5.

cally, only one kind of paper money—a circulating instrument representing a government debt.<sup>246</sup>

The proceedings of the Committee of Detail are relevant to this issue. At the outset of the committee's work, Randolph was assigned to write an initial draft, which Rutledge then revised. With Rutledge's additions italicized and anonymous deletions struck through, the coinage power looked like this:

To ~~regulate~~ *The exclusive right of coining money* ~~Paper prohibit~~  
no State to be *perd.* in future to emit *Paper Bills of Credit* witht.  
the App: of the Natl. Legisle nor to make any ~~Article~~ Thing but  
*Specie a Tender in paymt of debts*<sup>247</sup>

Thus, Randolph initially provided for a congressional power "To regulate coining," but Rutledge changed this to "coining money" and added the words "Paper prohibit." Rutledge also added the conditional ban on state "Paper Bills of Credit." The difference in the phrases "Paper prohibit" and "Bills of Credit" suggests that the Committee might not have considered the two to be synonymous. Certainly, the Committee's coupling of the proposed federal bill of credit power with the borrowing power<sup>248</sup> suggests that it understood the specialized debt-representation aspect of bills of credit, as opposed to other forms of paper currency.<sup>249</sup>

Moreover, Rutledge's placement of "Paper prohibit" suggests that he thought of this phrase as a qualification on the coining power, which in turn suggests that one could coin paper. Interestingly, the Committee decided to delete Rutledge's proposed prohibition of federal paper money.<sup>250</sup> Even though the Convention later dropped the Committee's federal bill of credit language, it never restored Rutledge's proposed prohibition. Thus, to the argument that the Convention's deletion of the bill of credit power implied a loss of that power, one can counter that deletion of the ban on federal paper money implied a removal of that ban.

246. See *supra* notes 171–86 and accompanying text.

247. Committee of Detail Proceedings, in 2 FARRAND, *infra* note 344, at 144.

248. See *supra* notes 233–34 and accompanying text.

249. See 2 FARRAND, *infra* note 344, at 182 (reporting the bill of credit provision as "To borrow money, and emit bills on the credit of the United States"); see also *supra* text accompanying note 233–34.

250. We know that at least one other member of the Committee—Edmund Randolph—favored, albeit reluctantly, giving Congress the power to emit paper. See 2 FARRAND, *infra* note 344, at 310.

Fundamentally, however, the Committee's transactions are ambiguous, because one can construct a plausible "metallist" interpretation of them. Perhaps the Committee deleted the ban on paper money because it thought that "coining" had a purely metallic meaning, such that the Coinage Clause would not have given power to issue paper currency anyway. Perhaps the Committee's addition of a separate power to issue bills of credit was the reason the ban was omitted; if so, the Convention's deletion of that power may have implied the reinstitution of the ban.

Another excerpt from the Convention records—overlooked by previous commentators—can be read to support the view that the Framers were using "bill of credit" as a synonym for all paper money.<sup>251</sup> As we shall see, however, this excerpt is also ambiguous. The Committee of Detail's final draft provided that "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."<sup>252</sup> Wilson and Roger Sherman proposed moving state bill of credit emissions and tender laws from the list of powers that states could exercise conditionally on consent of Congress to the list of powers that states could not exercise at all. According to Madison's August 28th report:

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 ~~making the measures allowable~~ (as in the XIII art:) *with the consent of the Legislature of the U. S.*

Mr. Ghorum thought the purpose would be as well secured by the provision of art: XIII which makes the consent of the Genl. Legislature necessary, and that in that mode, no opposition would be excited; whereas 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.

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251. See *id.* at 439.

252. See *id.* at 187.

The question being divided: on the 1st. part—"nor emit bills of credit"

N. H. ay. Mas. ay. Ct. ay. Pa. ay— Del. ay. Md divid. Va. no. N— C— ay— S— C. ay. Geo. ay. [Ayes—8; noes—1; divided—1.]

The remaining part of Mr. Wilson's & Sherman's motion, was agreed to nem: con.<sup>253</sup>

The suggestion that prohibiting state bills of credit would constitute an "absolute prohibition of paper money" implies that the speakers were imprecisely using the terms "bills of credit" and "paper money" interchangeably. Yet the resolution also included a rule against making "any thing but gold & silver coin a tender in payment of debts." So, some delegates might have thought that to completely "crush[] paper money," it was necessary to include *both* a prohibition of bills of credit and the tender provision, the latter to proscribe legal tender paper money other than bills of credit.

In sum, the proceedings at the federal Convention leave us doubtful that the drafters had any prevailing intent to grant or deny the central government a paper-money power. Even if the proceedings had been clearer, this would not have helped the ratifying public understand the Convention's intent, because the proceedings were closed from public view. The resulting Constitution that the public *did* see failed to communicate fully whatever intent the Framers had formed on monetary matters. It banned state "bills of credit," but it was unclear about whether the phrase meant "a government debt instrument that serves as a circulating medium" or "all paper money." The Constitution was also silent on whether the federal government could issue "bills of credit" (however defined) or paper money in general. Finally, as explained below, the Constitution's use of the words "coin" and "to coin" were subject to two plausible, but very different, interpretations.<sup>254</sup>

253. 2 FARRAND, *infra* note 344, at 439 (second and third emphases added).

254. See discussion *infra* Part III.C.



### III. THE ORIGINAL PUBLIC MEANING OF THE COINAGE CLAUSE

#### A. Initial Considerations

Those who have tried to wring an interpretation of the Coinage Clause from the records of the federal Convention may have been squeezing the wrong fruit. Founding generation lawyers, like most originalists today, understood that in seeking a document's meaning, the relevant inquiry is into "the intent of the makers," and that the ratifiers, not the drafters, were the Constitution's makers. It was the ratifiers who converted a mere proposal into a legal reality.<sup>255</sup> Therefore, the real value of the debates at the federal Convention lies in the light they cast on the meaning to the ratifiers.<sup>256</sup> This Part examines the prevailing meaning of the expressions "to regulate the Value" and "to coin Money" at the time those phrases would have been presented to the ratifying public.

#### B. The Clear Original Meaning and Understanding of "Regulate the Value"

The historical record leaves little doubt about the public meaning of the phrase "regulate the Value." That phrase was coupled with the words "to coin Money" in accordance with the common law rule that one who strikes money also has the power to set its value.<sup>257</sup> As discussed above,<sup>258</sup> setting the value of money encompassed determinations of which domestic and foreign currency would be legal tender and to what extent it would be legal tender; the government was entitled to any seigniorage. Pelatiah Webster of Philadelphia reflected common understanding when, in 1780, he wrote:

The nature of a Tender-Act is no more or less than establishing by law the standard value of money, and has the same use with respect to the currency, that the legal standard pound, bushel, yard, or gallon has to these goods, the quan-

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255. See discussion *supra* Part I.

256. See generally Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1148-64 (2003).

257. See *supra* note 76 and accompanying text.

258. See *supra* text accompanying notes 71-90.

ties of which are usually ascertained by those weights and measures . . . .<sup>259</sup>

Not only is this understanding clear, but it makes sense as a textual matter, for only by deciding issues of legal tender could Congress fully “regulate the Value” of money. If Congress were denied the power to determine questions of legal tender, then it would be missing an important tool that governments traditionally employed for monetary regulation.<sup>260</sup>

The historical record does not seem to contain anything that suggests the ratifiers’ understanding of the phrase “regulate the Value [of Money]” differed from the public meaning at the time. Therefore, a determination of the original intent of the Coinage Clause may proceed to more difficult matters.<sup>261</sup>

### C. *The Ambiguous Original Public Meaning of “Coin”*

The more common meaning of “coin” in the eighteenth century, as now, referred to metallic tokens.<sup>262</sup> Madison used the word this way in *The Federalist*, when he wrote that “the same reasons which shew the necessity of denying to the states the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin.”<sup>263</sup> Nonetheless, other possible definitions of “coin”—recognized even in monetarist Britain—were “Payment of any kind”<sup>264</sup> and “all Manner of the several Stamps and Species in any Nation.”<sup>265</sup> The verb “to coin” could mean “to make or forge any thing”<sup>266</sup> (represented today by the common

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259. Pelatiah Webster, *Strictures on Tender-Acts* (1780), in *BANKING AND CURRENCY*, *infra* note 344, at 125–26.

260. Some have argued that the power to declare money legal tender is merely implied, but this conclusion is based on little or no historical evidence. *See, e.g.*, Thayer, *infra* note 344, at 84; *see also* HURST, *infra* note 344, at 13 (“[T]here is no evidence that the framers thought of legal tender as a dimension of *value* . . .”). Professor Hurst seems to have overlooked contemporary British and American regulatory practices.

261. *See supra* notes 16–17 and accompanying text (explaining the methodology for determining original understanding).

262. JOHNSON, *DICTIONARY*, *infra* note 344 (giving as the first definition of “to coin,” “To mint or stamp metals for money”).

263. THE *FEDERALIST* NO. 44, *infra* note 344, at 244 (James Madison).

264. JOHNSON, *DICTIONARY*, *infra* note 344 (giving second definition of “coin”).

265. *STUDENT’S LAW-DICTIONARY*, *infra* note 344 (defining “coin”).

266. FRANCIS ALLEN, *A COMPLETE ENGLISH DICTIONARY* (1765) (defining “to coin”).

expression, "to coin a phrase"); so, pursuant to this usage, paper money could be "coined."

To the modern speaker of English, the metallic meaning seems the more natural one,<sup>267</sup> but this was less so in the eighteenth century. When speaking of matters other than the financial practices of the British government, eighteenth-century English speakers, like Shakespeare's Falstaff before them,<sup>268</sup> often used both the noun and verb form of "coin" in broader ways. This was true not only of rogues like Falstaff, but of quite respectable people. For example, in his celebrated *Cyclopaedia*, Ephraim Chambers wrote, "The Hollanders, we know, *coined* great quantities of pasteboard in the year 1574."<sup>269</sup> This formulation was later adopted almost word-for-word by the *Encyclopedia Britannica*.<sup>270</sup>

What could be said of pasteboard and the Dutch could also be said of paper. In 1700, the anonymous author of a pamphlet on trade reflected on how other nations might compete with the English woolen trade by "Coining Paper Money."<sup>271</sup> In 1720, economist John Law proposed "Coining Notes of one Pound"<sup>272</sup> and otherwise "coining" paper money.<sup>273</sup> A few

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267. This may explain why even the most eminent authority has adopted this meaning without further investigation. See, e.g., HURST, *infra* note 344, at 16 ("[T]he only explicit authorization on making money was 'to coin' it; in the contemporary setting coinage meant mainly gold or silver. . . ."). Professor Hurst followed this statement with a footnote, but that footnote offered no substantiation for his textual assertion. *Id.* See also Pai, *infra* note 344, at 555 ("But the Framers' use of 'coin' counsels against this expansive reading. 'Coin,' as opposed to 'raise' or 'produce,' has a narrow, literal meaning. Its use suggests metal, and for a reason: metal's inherent worth gives it stability. As such, the Coinage Clause provides tenuous support for Congress's power to create legal tender.").

268. See *supra* note 2 and accompanying text. Shakespeare used "coin" in the broader sense quite frequently. See, e.g., WILLIAM SHAKESPEARE, CORIOLANUS act 3, sc. 1, in THE COMPLETE WORKS (Stanley Wells & Gary Taylor, eds. 2d ed. 2005) ("[S]o shall my lungs Coin words"); WILLIAM SHAKESPEARE, CYMBELINE act 2, sc. 1, in THE COMPLETE WORKS, *supra* ("A mother hourly coining plots"); *id.* at act 5, sc. 5 ("Tis not so dear, yet 'tis a life; you coined it."); WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4, in THE COMPLETE WORKS, *supra* ("This is the very coinage of your brain.").

269. CHAMBERS, CYCLOPEDIA, *infra* note 344 (discussing "money") (emphasis added).

270. 7 ENCYCLOPEDIA BRITANNICA 5159 (2d ed. 1781) ("[T]he Hollanders, we know, coined great quantities of pasteboard in the year 1574.").

271. SOME OBSERVATION'S ON OUR TRADE, AND THE USE OF A STANDARD 101 (n.d.) ("[I]f they find that our advantage arises by the use of Notes, they may easily counterplot us by Coining Paper Money also . . .").

272. JOHN LAW, MONEY AND TRADE CONSIDER'D 32 (2d ed., London 1720).

273. See *id.* at 71 ("[n]otes be coin'd"); *id.* at 80 ("[t]he Proprietor to coin pieces of Paper"); *id.* 95 ("[i]f [paper money] is coin'd for 15 Years Purchase").

years later, Daniel Defoe related how tradesmen "coined bills payable from one to another."<sup>274</sup> When the American colonies declared their independence, John Shebbeare attacked them for "coining paper money."<sup>275</sup> The debates in the Irish Parliament of 1784 include a reference to "coining paper into money."<sup>276</sup> Thomas Paine argued that "[o]f all the various sorts of base coin, paper-money is the basest."<sup>277</sup> When Benjamin Franklin urged issuance of Pennsylvania paper money secured by land, he characterized it as "Coined Land."<sup>278</sup> In the 1742 case of *Charitable Corporation v. Sutton*,<sup>279</sup> Chancellor Hardwicke referred to "notes coined"<sup>280</sup> by private parties, and to "coining notes."<sup>281</sup> These are not isolated examples.<sup>282</sup> And although not everyone

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274. 2 DANIEL DEFOE, *THE COMPLETE ENGLISH TRADESMAN* 19 (5th ed., London 1745); see also *id.* at 20 ("As those bills were coined . . . they coined.").

275. JOHN SHEBBEARE, *AN ESSAY ON THE ORIGIN, PROGRESS AND ESTABLISHMENT OF NATIONAL SOCIETY* 141 (London 1776).

276. 1 *THE PARLIAMENTARY REGISTER* 302 (2d ed., Dublin 1784) (quoting Member Flood as saying: "It is proposed that we should give a certain number of men a power of coining paper into money.").

277. THOMAS PAINE, *DISSERTATIONS ON GOVERNMENT, THE AFFAIRS OF THE BANK, AND PAPER-MONEY* 46 (Philadelphia 1786).

278. FRANKLIN, *supra* note 146, at 349 (Philadelphia 1729).

279. (1742) 9 Mod. 349, 88 Eng. Rep. 500 (Ch.).

280. *Id.* at 352, 88 Eng. Rep. at 501.

281. *Id.* at 353, 354, 88 Eng. Rep. at 502. For other examples of the broader meaning of the verb "coin" in eighteenth-century cases, see *Anonymus* (1727) Fitzg. 2, 3, 94 Eng. Rep. 627, 627 (K.B.) (Raymond, C.J.) ("[W]here no proper [Latin] word is to be found [for a pleading], he is allow'd to coin and explain his word by an Anglice . . ." [an English translation]); *Dorvill v. Aynesworth* (1727) 1 Barn. K.B. 28, 29, 94 Eng. Rep. 19, 20 (K.B.) ("But Judge Reynolds said, that the utensils among the Romans were not the same as amongst us, and therefore the Court would allow greater latitude, and let you coin words in such cases.").

282. Seventeen additional references follow in chronological order (and more could have been provided): JAMES MILNER, *THREE LETTERS RELATING TO THE SOUTH-SEA COMPANY AND THE BANK* 22 (London 1720) (repeating the argument that a country can "coin Paper"); *Letter from Humphrey Morice to Bishop Atterbury* (May 8, 1728), in 5 *THE MISCELLANEOUS WORKS OF BISHOP ATTERBURY* 105, 106 (John Nichols ed., London 1796) ("paying off several public debts, by coining paper instead of money"); DR. MOWBRAY, *THE REPORT OF THE GENTLEMEN APPOINTED BY THE GENERAL COURT OF THE CHARITABLE CORPORATION* 4 (London 1732) (referring to the issuance of notes as "to coin Notes"); *A Modest Apology for Paper Money*, WKLY. REHEARSAL, Mar. 18, 1734, at 92 (referring to paper money secured by land as "coined Land"); *A Letter Relating to a Medium of Trade, In the Province of the Massachusetts-Bay*, in 4 *COLONIAL CURRENCY REPRINTS*, *infra* note 344, at 3, 5 (Boston 1740) (complaining of "the Clippers of our Coin (i.e., our Bills of Credit)"); WILLIAM ALLEN, *THE LANDLORD'S COMPANION* 5 (London 1742) (referring to the possibility of bringing certain countries "to a Paper-Coin only"); ERASMUS PHILIPS, *MISCELLANEOUS [sic] WORKS CONSISTING OF ESSAYS POLITICAL AND MORAL* 67 (London 1751) ("this large and regular Interest has made a Paper-

approved of applying the word "coin" to non-metallic media, the existence of a recorded protest testifies that the usage was common enough.<sup>283</sup>

A potential ratifier examining the proposed Constitution would have been encouraged by the context to read the document's use of "coin" in this broader manner. In perusing the Coinage Clause, the reader would have seen the words, "To coin Money, regulate the Value thereof, and of foreign Coin."<sup>284</sup> Applying the metallic definition to "coin" would result in Congress having power to issue metal tokens but no other kind of money, and to regulate the value of foreign metal tokens but not any other foreign currency. It seems unlikely, however, that the Founding generation would have wished to deny Congress

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coin current among us"); AN ESSAY ON PAPER CIRCULATION, AND A SCHEME PROPOSED FOR SUPPLYING THE GOVERNMENT WITH TWENTY MILLIONS, WITHOUT ANY LOAN OR NEW TAX 36 (London 1764) (calling paper money a kind of "coin"); MICHAEL COMBRUNE, AN ENQUIRY INTO THE PRICES OF WHEAT, MALT, AND OCCASIONALLY OF OTHER PROVISIONS 11 (T. Longman, London 1768) (stating that at a given point of history, "paper coin was then unknown"); 1 THE ORIGINAL WORKS OF WILLIAM KING, LL.D. 199 (London 1776) (stating that the King of France "had established a paper credit (or, if you please to call it, coin) of bills issued out of the Exchequer"); *Remarks on the Circulation of Commodities, Goods, Money, &c. and their Uncertainty*, FARM'S MAG., Jan. 1779, at 13, 13 (contemplating "if the Bank of England itself should coin paper"); NATHANIEL SMITH, ON THE DEBT OF THE NATION COMPARED WITH ITS REVENUE 131 (London 1781) ("for it would be only coining more paper"); MINUTES OF SEVERAL CONVERSATIONS BETWEEN THE REV. MR. JOHN AND CHARLES WESLEY, AND OTHERS 15 (J. Paramore, London n.d.) ("that base practice, of raising Money by *coining Notes*, (commonly called the *Bill-trade*)"); STEPHEN WESTON, LETTERS FROM PARIS, DURING THE SUMMER OF 1792 WITH REFLECTIONS, 51 (London 1793) ("You see the government, notwithstanding its facility in coining paper-money, is under the necessity of buying gold and silver . . ."); A COLLECTION OF FACTS, RELATIVE TO THE COURSE OF EXCHANGE, BETWEEN ENGLAND AND HOLLAND 11 (Thomas Pearson, Birmingham 1793) (referring to bills of exchange as "nominal coin"); GEORGE CHALMERS, STRICTURES ON A PAMPHLET WRITTEN BY THOMAS PAINE, ON THE ENGLISH SYSTEM OF FINANCE 19 (2d ed., London 1796) ("they are always paid in Bank notes coined for the purpose"); JOHN SINCLAIR, LETTERS WRITTEN TO THE GOVERNOR AND DIRECTORS OF THE BANK OF ENGLAND, IN SEPTEMBER, 1796, at 26, 33 (W. Bulmer & Co., London 1797) (referring to "the coining of paper money" and "coining paper"); THOMAS FRY, A NEW SYSTEM OF FINANCE 94, 119 (London 1797) (referring several times to "coining paper" and to "paper coinage"). These examples were culled from the Thomson Gale database, *Eighteenth Century Collections Online*.

283. See *A Letter from a Gentleman in Boston, to his Friend in Connecticut* (Boston 1743), in 4 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 217, 229 (1743) ("But I apprehend the Gentlemen are much mistaken, and that Coinage and Currencies are non synonymous [sic] and convertable [sic] Terms; Coinage being only applicable to Metals: Hence Coin differs from Money.").

284. U.S. CONST. art. I, § 8, cl. 5.

the power to regulate foreign paper.<sup>285</sup> Buttredding this inference is analogous language in the Articles of Confederation, granting Congress "the sole and exclusive right and power of regulating the alloy and value of coin struck by [authority] . . . of the respective States."<sup>286</sup> Because, at the time the Articles were adopted, the states had issued primarily paper money rather than metallic tokens, such language would not have been of much consequence unless the term "coin" was read to include paper money.<sup>287</sup>

The word "Coin" also appears in another clause of Article I, Section 8, giving Congress authority "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States."<sup>288</sup> The provision does not seem to suggest a particular meaning of "Coin," because whether or not paper money is included in the meaning, the United States was certainly likely to issue "Securities," such as bonds, distinct from money. Therefore, there are no relevant inferences to be drawn from the presence of "Coin" in this provision.

There is, however, yet another use of "coin" in the Constitution's text. Article I, Section 10 provides: "No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts."<sup>289</sup> One could argue that the separate listing of "coin Money" and "emit Bills of Credit" suggests that "coin Money" refers to metal while "Bills of Credit" refers to paper. But bills of credit were only one kind of paper money,<sup>290</sup> and in any event, the items on this list of prohibitions overlap each other significantly. The printing of legal tender bills of credit, for example, would have violated at least three, and perhaps four, separate proscriptions in the list.<sup>291</sup>

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285. Of course, one could argue that if the narrower definition were applied, Congress still could regulate foreign non-metallic money under its power to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, but this would render the entire Foreign Coinage Clause superfluous.

286. ARTS. CONFED. art. IX.

287. I am indebted for this insight to Kathleen Pirozzolo, Class of 2007, Georgetown University Law Center.

288. U.S. CONST. art. I, § 8, cl. 6.

289. U.S. CONST. art. I, § 10, cl. 1.

290. See *supra* notes 178–80 and accompanying text.

291. They are (1) emitting bills of credit, (2) making them a tender, (3) impairing the obligation of contracts, and perhaps (4) passing an ex post facto law. See *gener-*

A Ratification-era reader might well have noted that this use of "coin" was modified by the adjectives "gold and silver," while the word was used without modification in the Coinage Clause. As Chief Justice Marshall pointed out in an analogous situation, the absence of modifiers suggests a wider meaning.<sup>292</sup> "[C]oin" in the Coinage Clause should, therefore, include coins made of substances other than gold and silver. It is unreasonable to contend that coins could be made only of base metals but not of other kinds of material (such as paper), because determined politicians can debase money by using cheap metal almost as well as by using anything else. Consider the possibility of one-thousand-dollar tin coins.<sup>293</sup>

The word "coin" does not appear further in the Constitution, but the word "Money" does. A purely metallist reading of "Money" has implications for federal financial operations that the Founders certainly could not have intended. As Attorney General Akerman argued in the *Legal Tender Cases*:<sup>294</sup>

"No appropriation of money" [to the use of raising and supporting armies] "shall be for a longer term than two years." This provision would certainly be violated by an appropriation of treasury notes to the support of the army for three years. "No money shall be drawn from the treasury but in consequence of appropriations made by law." Treasury notes could not be drawn from the treasury without such

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ally Natelson, *Retroactivity*, *infra* note 344 (discussing the interrelationship between these provisions and the contemporaneous belief that ex post facto laws could be civil as well as criminal statutes).

292. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 387–88 (1819) (Marshall, C.J.) (drawing implications about the meaning of the unqualified adjective "necessary" from that adjective's qualified usage elsewhere in the Constitution).

293. The United States Attorney General Amos Akerman made this point in a particularly colorful way in the *Legal Tender Cases*:

Some men appear to consider that there is a peculiar constitutional virtue in metal, whether gold, silver, nickel, or copper. According to them, what is a crime against the Constitution, if done in paper, may be innocently done in metal. The obligation of contracts may be impaired, in metal. The dictates of justice may be disobeyed, in metal. A man may be lawfully compelled to take, in metal, a fraction in value of what he contracted for. The scope for the discretion of Congress is unlimited within the metallic field. That sensitive being, always invoked in such discussions, whom they denominate "the spirit of the Constitution," though enraged by the rustle of paper, is lulled to repose by the clink of metal, however base.

*Legal Tender Cases*, 79 U.S. 457, 520 (1870). See also Akhil Reed Amar, 1999 *Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 73 n.156 (2000) (making a similar argument).

294. 79 U.S. 457 (1870).

appropriation. [Yet] [t]he regular statement "of the receipts and expenditures of all public money," which the same section requires to be published from time to time, would be incomplete if treasury notes were left out.<sup>295</sup>

Akerman might have added that, in such a world, when the federal government exercised its power to "borrow Money,"<sup>296</sup> it could receive from lenders only metal.

As previously shown, one cannot prove that the drafters of the Constitution specifically intended "coin" to have a broader meaning, because their intents appear to have varied, and not all of their views are recoverable.<sup>297</sup> Yet the *ratifiers* could easily have understood the word in a broad way. The ratification records should now be evaluated to determine the direct evidence of their understanding.

#### IV. THE RATIFIERS CHOOSE A MEANING FOR "COIN"

The ratification records contain substantial discussion of the question whether the Constitution would permit the federal government to emit paper currency. Just as the ratifiers had to select a meaning for the uncertain constitutional phrase "ex post facto Law,"<sup>298</sup> so too did they have to determine a meaning for "coin." The evidence suggests that the meaning the ratifiers chose was broad enough to include the power to "coin paper."

The ratification record includes many general comments that the Constitution would put an end to paper money.<sup>299</sup> These

295. *Id.* at 521.

296. U.S. CONST. art. I, § 8, cl. 2.

297. See *supra* Part II.E.2.

298. U.S. CONST. art. I, § 9, cl. 3; see generally Natelson, *Retroactivity*, *infra* note 344, at 517–22 (discussing the debate over the meaning of the disputed term, and finding that the ratifiers limited it to criminal statutes).

299. See, e.g., 3 ELLIOT'S DEBATES, *infra* note 344, at 566 (reporting Antifederalist William Grayson as stating at the Virginia ratification convention, "There is one clause in the Constitution which prevents the issuing of paper money. If this clause should pass, (and it is unanimously wished by every one that it should not be objected to,) I apprehend an execution in Rhode Island would be as good and effective as in any state in the Union."); 2 DOCUMENTARY HISTORY, *infra* note 344, at 78 (reporting Daniel Clymer as stating at the Pennsylvania ratifying convention that when the Constitution is adopted, America will "no longer [be] subject to the fluctuation of faithless paper money and party laws"); Commentary, *A Freeholder*, VA. INDEP. CHRON. (Richmond), April 23, 1788, reprinted in 9 DOCUMENTARY HISTORY, *infra* note 344, at 753, 754 (stating that under the Constitution, debtors "can no longer hope for paper money"); Commentary, *The Protest of the Minority, Who Objected to Calling a Convention, for the Purpose of Adopting the Foederal Constitution*, PA. GAZETTE



comments should be taken, however, as reflecting the Constitution's ban on state emissions only, not any putative federal ban. One general reason for this is that the prior history of paper money had been almost exclusively a history of emissions by *colonies and states*. Colonies and states had been emitting paper currency almost continuously for nearly a century, and during the ratification debates most of the states had returned to their traditional practices.<sup>300</sup> Congressional emissions from 1775 to 1780 represented the only exception, and by the time of the ratification debates, Congress had terminated all of its issues and had no plans to resume them. Thus, from the standpoint of the participants in the ratification debates, a Constitution that banned state emissions would likely stop all emissions for the foreseeable future.

When debate participants spoke less generally and focused specifically on the Constitution's provisions pertaining to paper money, almost everyone emphasized that the prohibition on bills of credit applied to the *states*.<sup>301</sup> Federalists cited prior

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(Philadelphia), Oct. 3, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 155, 156 (claiming (satirically) that Antifederalist objections to the Constitution arose because it "puts an end to all future emissions of paper money"); PA. PACKET (Philadelphia), Dec. 3, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 457, 457 (reporting a statement by Dr. Benjamin Rush at the Pennsylvania ratifying convention that through the Constitution, "an eternal veto will be stamped on paper emissions"); PA. HERALD (Philadelphia), Dec. 26, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *infra* note 344, at 415, 418 (quoting Thomas McKean as stating at the Pennsylvania ratifying convention that by adoption of the Constitution, "some security will be offered for the discharge of honest contracts and an end put to the pernicious speculation upon paper emissions."). The *Pennsylvania Herald's* accounts of the debates were written by its editor, Alexander J. Dallas, who was eventually fired over allegations of bias and inaccuracies in his accounts. 2 DOCUMENTARY HISTORY, *infra* note 344, at 40; *see also* *Legal Tender Cases*, 79 U.S. at 497 (reporting the argument of counsel that "[i]t was declared in every State whose debates on adopting the Constitution are reported, that paper money was to be put an end to").

300. Schweitzer, *infra* note 344, at 315 ("The movement to print more money was not a continuation of the wartime issues, but rather the return to prewar practices regarding paper money.").

301. The number of recorded statements is copious. *See, e.g.*, Chief Justice Henry Osborne, Charge to the Chatham County [Georgia] Grand Jury (Mar. 4, 1789) ("The Federal Constitution has wisely taken away from each of the states the power of emitting a paper money; therefore no further emission (happily for us) can ever be made by the state."); A NATIVE OF VIRGINIA, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT (1788), *reprinted in* 9 DOCUMENTARY HISTORY, *infra* note 344, at 655, 676-77 (referring to ban on paper money as a prohibition on the states); AN ORATION (David Ramsay), PREPARED FOR DELIVERY BEFORE THE INHABITANTS OF CHARLESTON, ASSEMBLED ON THE 27TH MAY, 1788, TO CELEBRATE THE ADOPTION OF THE NEW CONSTITUTION BY SOUTH CAROLINA (1788), *reprinted in* 18 DOCUMENTARY HISTORY, *infra* note 344, at 158, 162 (referring

state actions that justified the ban.<sup>302</sup> When they mentioned con-

to the ban on bills of credit as operating at the state level); THE FEDERALIST NO. 80, *infra* note 344, at 508 (Alexander Hamilton) ("The States, by the plan of the convention, are prohibited from doing a variety of things . . . . The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind."); Commentary, *A Friend to Honesty*, INDEP. CHRON. (Boston), Jan. 10, 1788, *reprinted* in 5 DOCUMENTARY HISTORY, *infra* note 344, at 687, 689 ("Does it then offend you, to find that this new constitution will deprive State assemblies of the power of relieving fraudulent debtors, with that precious facility called *paper-money*?"); Brutus, Commentary, *To the Citizens of the State of New-York*, N.Y. J., Oct. 18, 1787, *reprinted* in 13 DOCUMENTARY HISTORY, *infra* note 344, at 411, 415 ("No state can emit paper money . . ."); Cassius, Commentary, *To the Inhabitants of this State* (pt. 2), MASS. GAZETTE (Boston), Dec. 18, 1787, *reprinted* in 5 DOCUMENTARY HISTORY, *infra* note 344, at 479, 482 ("The last section of this article provides, that no state shall enter into any treaty, alliance, &c. coin money, emit bills of credit . . . . The absolute necessity of power of this nature being vested in a federal head is indisputable."); Commentary, *To the Good People of Virginia, on the New Federal Constitution, by an Old State Soldier, in Answer to the Objections*, VA. INDEP. CHRON. (Richmond), April 2, 1788, *reprinted* in 9 DOCUMENTARY HISTORY, *infra* note 344, at 647, 652 (referring to the ban on paper money as a prohibition on the states); PA. HERALD (Philadelphia), Jan. 5, 1787, *reprinted* in 2 DOCUMENTARY HISTORY, *infra* note 344, at 436, 438 (reporting Jasper Yeates as referring to the ban on paper money as one of "the restrictions on the several states"); Jasper Yeates, *Notes of Speech Delivered in Convention* Novr. 30, 1787 (Nov. 30, 1787), in 2 DOCUMENTARY HISTORY, *infra* note 344, at 434, 436 (reporting himself as saying at the Pennsylvania ratifying convention, "It is confessed the 10th section . . . abridges some of the powers of the state legislature, as in preventing them from coining money, [and] emitting bills of credit . . . . If state governments are prevented from exercising these powers, it will produce respectability, and credit will immediately take place. . . . Congress alone with the powers given them by this system, or similar powers, can effect these purposes.");

See also 4 ELLIOT'S DEBATES, *infra* note 344, at 156, which reports William David as having said at the North Carolina ratifying convention:

There are certain prohibitory provisions in this Constitution, the wisdom and propriety of which must strike every reflecting mind, and certainly meet with the warmest approbation of every citizen of this state. It provides, "that no state . . . shall emit bills of credit, [or] make any thing but gold and silver coin a tender in payment of debts." These restrictions ought to supersede the laws of particular states.

302. Again, the record is copious. See, e.g., 2 ELLIOT'S DEBATES, *infra* note 344, at 144 (quoting Reverend Thatcher as contending at the Massachusetts ratifying convention: "In South Carolina, creditors, by law, were obliged to receive barren and useless land for contracts made in silver and gold. I pass over the instance of Rhode Island: their conduct was notorious."); 3 ELLIOT'S DEBATES, *infra* note 344, at 207 (quoting Edmund Randolph as asserting at the Virginia ratifying convention: "Does not the prohibition of paper money merit our approbation? I approve of it because it prohibits tender-laws, secures the widows and orphans, and prevents the states from impairing contracts. I admire that part which forces Virginia to pay her debts." (emphasis added)); 3 ELLIOT'S DEBATES, *infra* note 344, at 549 (quoting Edmund Pendleton as arguing at the same convention that a federal judiciary will be necessary to strike down "[p]aper money and tender laws . . . passed in other states, in opposition to the federal principle, and restriction of this Constitution"); 4 ELLIOT'S DEBATES, *infra* note 344, at 159 (reporting William Davie as saying at the North Carolina ratifying convention, "It is essential

tinental money at all, they tended to be much more tolerant, ascribing congressional difficulties to the exigencies of the Revolution<sup>303</sup> or otherwise justifying congressional conduct.<sup>304</sup> State issues of legal tender paper, on the other hand, were attacked both as immoral efforts to redistribute wealth from some constituencies to others<sup>305</sup> and as a source of bad interna-

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to the interest of agriculture and commerce that *the hands of the states* should be bound from making paper money, instalment [sic] laws, or *pine-barren acts*. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims." (first emphasis added)); THE FEDERALIST NO. 44, *infra* note 344, at 285 (James Madison) (complaining of "[t]he loss which America has sustained since the peace, from the pestilent effects of [state] paper money" (emphasis added)).

303. See, e.g., 3 ELLIOT'S DEBATES, *infra* note 344, at 290 (quoting William Grayson at the Virginia ratifying convention as stating, "Paper money has been introduced. What did [Congress] do a few years ago? Struck off many millions . . . . However unjust or unreasonable this might be, I suppose it was warranted by the inevitable laws of necessity."); see also 4 ELLIOT'S DEBATES, *infra* note 344, at 169 (reporting Matthew Locke, a defender of paper money, as stating at the North Carolina ratifying convention: "Necessity compelled them to pass the law, in order to save vast numbers of people from ruin. I hope to be excused in observing that it would have been hard for our late Continental army to lay down their arms, with which they had valiantly and successfully fought for their country, without receiving or being promised and assured of some compensation for their past services."); 4 ELLIOT'S DEBATES, *infra* note 344, at 294 (reporting Robert Barnwell as saying at the South Carolina legislative session that called the state's ratifying convention that "it was not the state, but the Continental money, that brought about the favorable termination of the war").

304. See, e.g., 3 ELLIOT'S DEBATES, *infra* note 344, at 258, which reports James Madison as saying at the Virginia ratifying convention:

At one period of the congressional history, they had the power to trample on the states. When they had that fund of paper money in their hands, and could carry on all their measures without any dependence on the states, was there any disposition to debase the state governments? All that municipal authority which was necessary to carry on the administration of the government, they still retained unimpaired. There was no attempt to diminish it.

305. See, e.g., A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (referring to the ban on paper money as a prohibition on the states, and giving as a reason that an issue of paper money by one state "might defraud not only its own citizens, but the citizens of other States"); *To the Freemen of Pennsylvania*, PA. GAZETTE (Philadelphia), Oct. 10, 1787, reprinted in 13 DOCUMENTARY HISTORY, *infra* note 344, at 362, 365 ("See, in Rhode-Island, the bonds of society and the obligations of morality dissolved by paper money and tender laws.").

The colonists had long recognized that depreciating currency enriched some social groups at the expense of others. See, e.g., WILLIAM DOUGLASS, A DISCOURSE CONCERNING THE CURRENCIES OF THE BRITISH PLANTATIONS IN AMERICA (1740), reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 307, 328-31 (listing various classes as disadvantaged by paper money); HUTCHINSON, *infra* note 344, at 435 (noting the poor moral effects of depreciating paper money); THOMAS HUTCHINSON, A LETTER TO A MEMBER OF THE HONOURABLE HOUSE OF REPRESENTATIVES, ON THE PRESENT STATE OF THE BILLS OF CREDIT (1736), reprinted in 3 COLO-

tional and interstate relationships.<sup>306</sup> Participants took particular offense to the actions of Rhode Island, which, among other measures, had structured the tender provisions of its paper money act to benefit in-state debtors at the expense of out-of-state creditors.<sup>307</sup>

Antifederalist objections to the Constitution's provisions on paper money focused almost entirely on the effect of those provisions *on the states*. At the North Carolina ratifying convention, Antifederalists argued that the ban could cause hardship because it might be construed to invalidate North Carolina bills of credit that were already in circulation.<sup>308</sup> In Virginia, Antifederalists argued that, in conjunction with the prohibition on state *ex post facto* laws,<sup>309</sup> the proscription of state bills of credit might require Virginia taxpayers to repay the Old Dominion's Revolutionary War debt "shilling for shilling,"<sup>310</sup> instead of allowing the state government to issue paper to "scale" (discount) it.<sup>311</sup>

Much of the ratification debate was devoted to arguments over what particular constitutional clauses would mean in practice. Only one significant figure argued specifically that the

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NIAL CURRENCY REPRINTS, *infra* note 344, at 151, 152–53 (listing widows, orphans, clergy, and "[s]alary [m]en" among the losers); Samuel Mather, Letter to the Editor, NEW-ENG. WKLY. J., Feb. 4, 1734, *reprinted in* 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 21 (arguing that winners from paper money included tenants and debtors, while losers included widows, orphans, day laborers, public officials, and country ministers on fixed incomes).

306. See Schweitzer, *infra* note 344, at 322 ("It was the damage of legal tender laws to interstate relations . . . that resulted in the Constitutional prohibition of state paper money."). Paper money damaged interjurisdictional relationships even during the colonial era. See HUTCHINSON, *infra* note 344, at 380–81 (discussing such an aggravation of relations between the New England colonies in 1733).

307. See *supra* notes 220–22 and accompanying text.

308. See generally 4 ELLIOT'S DEBATES, *infra* note 344, at 173–86. The convention issued the following resolution:

*Resolved, unanimously*, That it be recommended to the General Assembly to take effectual measures for the redemption of the paper currency, as speedily as may be, consistent with the situation and circumstances of the people of this state.

*Id.* at 252.

309. See U.S. CONST. art. I, § 10.

310. 3 ELLIOT'S DEBATES, *infra* note 344, at 319 (quoting Patrick Henry, an Antifederalist, as saying: "Pass this government, and you will be carried to the federal court, . . . and you will be compelled to pay shilling for shilling.").

311. This argument was made repeatedly at the Virginia ratifying convention by the leaders of the Antifederalists, Patrick Henry, see *id.* at 318–19, 322, and George Mason, see *id.* at 472–73. But see *id.* at 473 (Madison's response).

Constitution's monetary provisions would prohibit the federal government from emitting paper money.<sup>312</sup> That person was Luther Martin, the Maryland Attorney General and Antifederalist, who at the Philadelphia Convention had been on the losing side of the vote to remove the express reference to federal bills of credit.<sup>313</sup> Martin had been, in other words, one of the minority at the Convention who believed both that the federal government should have the power to issue bills of credit and that deleting the language would delete the power.<sup>314</sup>

Few seem to have accepted his argument. Even a satirist pretending to be Martin could not bring himself to repeat Martin's assertion that the federal government was barred from issuing bills of credit. Instead, the satirist recharacterized Martin's argument as stating that, "The framers of [the Constitution] have inserted a clause prohibiting paper-money emissions, and legal tenders, *in any of the states*."<sup>315</sup>

All of Martin's Antifederalist allies who addressed the issue interpreted the Constitution as permitting the central government to issue paper money. At the Pennsylvania ratifying convention, William Finley, responding to Federalist attacks on bills of credit, pointed out that the Constitution contained "no guard against Congress making paper money."<sup>316</sup> Other Anti-

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312. See Luther Martin, *Information to the House of Assembly* (pts. 6 & 8), BALTIMORE MD. GAZETTE, Jan. 15, 1788, reprinted in 15 DOCUMENTARY HISTORY, *infra* note 344, at 374, 378-79; BALTIMORE MD. GAZETTE, Jan. 22, 1788, reprinted in 15 DOCUMENTARY HISTORY, *infra* note 344, at 433 (asserting that the federal government would have no power to issue paper money or pass installment laws).

In addition to the one "significant figure," there was one *insignificant* figure as well. A local (Queens County, New York) writer misread Article I, Section 10 as applying to the federal government, quoting the language "nothing but gold and silver Coin shall be a Tender in Payment of Debts" as applying to Congress. Even that writer, though, did not deny that the federal government might issue paper money, but claimed only that it could not be legal tender. This contention appeared in a broadside, not in a published article, and apparently had only local impact. Broadside, Flat-Bush, *To the Inhabitants of King's County* (April 21, 1788), in 21 DOCUMENTARY HISTORY, *infra* note 344, at 1472; see also 21 DOCUMENTARY HISTORY, *infra* note 344, at 1475 nn.1-2 (editor's notes).

313. See *supra* note 236 and accompanying text.

314. See Martin (pt. 6), *supra* note 312, at 378-79 (arguing that the elimination of the words "to emit bills of credit" in the Committee of Detail draft resulted in Congress not having the power); see also *supra* note 235 and accompanying text.

315. Luther Martin, *Commentary, Number V: To the Citizens of Maryland*, PHILA. FED. GAZETTE, April 10, 1788, reprinted in 17 DOCUMENTARY HISTORY, *infra* note 344, at 69, 71 (emphasis added).

316. 2 DOCUMENTARY HISTORY, *infra* note 344, at 505-06 (setting forth James Wilson's notes of Finley's remarks).

federalists used the purported congressional power to issue bills of credit as a reason to oppose the Constitution. The pseudonymous "Deliberator" wrote:

Though I believe it is not generally so understood, yet certain it is, that Congress may emit paper money, and even make it a legal tender throughout the United States; and, what is still worse, may, after it shall have depreciated in the hands of the people, call it in by taxes, at any rate of depreciation (compared with gold and silver) which they may think proper. For though no state can emit bills of credit, or pass any law impairing the obligation of contracts, yet the Congress themselves are under no constitutional restraints on these points.<sup>317</sup>

Other Antifederalists taking the same tack included John Winthrop of Massachusetts,<sup>318</sup> DeWitt Clinton of New York,<sup>319</sup> and an anonymous "Farmer" in Pennsylvania.<sup>320</sup>

The Federalists who addressed the issue also said that Congress would enjoy the power to issue paper money, however ill-advised some thought the exercise of that power might be. At the Pennsylvania ratifying convention, Federalist Jaspar Yeates essentially conceded Finley's point, agreeing that "Congress alone" would be able to exercise powers such as emitting

317. Deliberator, Commentary, *THE N.-AM. INTELLIGENCER* (Philadelphia), Feb. 20, 1788, available at <http://www.thisnation.com/library/antifederalist/44.html>.

318. See Agrippa, Commentary, *To the Massachusetts Convention* (pt. 2), *MASS. GAZETTE* (Boston), Jan. 15, 1788, reprinted in 5 DOCUMENTARY HISTORY, *infra* note 344, at 720, 722 ("There is no bill of rights, and consequently a continental law may controul [sic] any of those principles . . . . Tender acts and the coinage of money stand on the same footing of a consolidation of power. It is a mere fallacy, invented by the deceptive powers of mr. [sic] Wilson, that what rights are not given are reserved."). "Agrippa" is believed to be Winthrop. 4 DOCUMENTARY HISTORY, *infra* note 344, at 303.

319. See A Countryman, Commentary (pt. 5), *N.Y. J.*, Jan. 17, 1788, reprinted in 20 DOCUMENTARY HISTORY, *infra* note 344, at 623, 624 ("By this new constitution, there are several things, which it is declared the state governments shall not do, such as emitting bills of credit, [and] making any thing but gold or silver coin a tender in payment of debts, . . . but I do not find, that this new government are [sic] hindered from doing these things."). "A Countryman" was Clinton. 20 DOCUMENTARY HISTORY, *infra* note 344, at 623.

320. See Commentary, *The Fallacies of the Freeman Detected by A Farmer* (pt. 1), *FREEMAN'S J.* (Philadelphia), Apr. 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST at 181, 187 (stating that under the Constitution, "[t]he exclusive power of emitting [sic] bills of credit is also reserved to Congress"). The "Farmer" essay was written in response to Tench Coxe, writing as "A Freeman." 3 THE COMPLETE ANTI-FEDERALIST 181 (Herbert J. Storing ed., 1981).

bills of credit.<sup>321</sup> "A Native of Virginia" argued that the ban on state emissions was justified because, "An exercise of these rights would materially interfere with the exercise of the like by Congress."<sup>322</sup> In South Carolina, Federalists repeatedly represented that Congress would have power to issue paper money. One such Federalist was the distinguished physician, historian, and some-time politician David Ramsay, writing as *Civis*.<sup>323</sup> According to Ramsay, under the Constitution, "the states cannot emit money; this is not intended to prevent the emission of paper money, but only of state paper money. Is not this an advantage? To have thirteen paper currencies in thirteen states is embarrassing to commerce, and eminently so to travellers."<sup>324</sup> In the session of the South Carolina legislature that called the state ratifying convention, Robert Barnwell responded to a defense of state emissions<sup>325</sup> by averring that "it was not the state, but the Continental money, that brought about the favorable termination of the war. If to strike off a paper medium becomes necessary, Congress, by the Constitution, still have that right, and may exercise it when they think proper."<sup>326</sup> At the South Carolina ratifying convention, Charles Pinckney, who had been a prominent delegate to the federal Convention, observed, "Be-

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321. See 2 DOCUMENTARY HISTORY, *infra* note 344, at 436 (reporting Jasper Yeates as saying at the Pennsylvania ratifying convention: "It is confessed the 10th section abridges some of the powers of the state legislature, as in preventing them from coining money, [and] emitting bills of credit . . . . If state governments are prevented from exercising these powers, it will produce respectability, and credit will immediately take place. . . . Congress alone with the powers given them by this system, or similar powers, can effect these purposes." (emphasis added)).

322. A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (emphasis added).

323. *Civis* is the Latin word for "citizen."

324. CIVIS, AN ADDRESS TO THE FREEMEN OF SOUTH CAROLINA, ON THE SUBJECT OF THE FOEDERAL CONSTITUTION, PROPOSED BY THE CONVENTION, WHICH MET IN PHILADELPHIA (1787), reprinted in 16 DOCUMENTARY HISTORY, *infra* note 344, at 21, 23.

325. Rawlins Lowndes had argued as follows:

Paper money, too, was another article of restraint, and a popular point with many; but what evils had we ever experienced by issuing a little paper money to relieve ourselves from any exigency that pressed us? We had now a circulating medium which every body took. We used formerly to issue paper bills every year, and recall them every five, with great convenience and advantage. Had not paper money carried us triumphantly through the war, extricated us from difficulties generally supposed to be insurmountable, and fully established us in our independence? and [sic] now every thing is so changed that an entire stop must be put to any more paper emissions, however great our distress may be.

4 ELLIOT'S DEBATES, *infra* note 344, at 289-90.

326. *Id.* at 294.

sides, if paper should become necessary, the general government still possess the power of emitting it, and Continental paper, well funded, must ever answer the purpose better than state paper."<sup>327</sup>

Participants in the ratification debates cited four reasons why the Constitution should allow federal paper money but prohibit state emissions. First, the Articles of Confederation had granted Congress exclusive authority over foreign relations,<sup>328</sup> but state issues of paper money had impeded Congress's exercise of that authority.<sup>329</sup> Second, removing the power of issuing paper

327. *Id.* at 335.

328. *See* ARTS. CONFED. art. VI (giving broad authority over foreign relations only to Congress).

329. *See* Letter from Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), in *NEW HAVEN GAZETTE*, Oct. 25, 1787, reprinted in 13 DOCUMENTARY HISTORY, *infra* note 344, at 471:

The restraint on the legislatures of the several states respecting emitting bills of credit, making any thing but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interest of foreigners as well as the citizens of different states may be affected.

*See also* ARISTIDES, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, ADDRESSED TO THE CITIZENS OF THE UNITED STATES OF AMERICA AND PARTICULARLY TO THE PEOPLE OF MARYLAND (1788), reprinted in 15 DOCUMENTARY HISTORY, *infra* note 344, at 517, 538 (arguing that a ban on states issuing paper money is necessary to restore America's credit abroad); 2 ELLIOT'S DEBATES, *infra* note 344, at 492–93 (reporting James Wilson's remarks at the Pennsylvania ratifying convention explaining how the constitutional scheme would restore credit with foreign nations); 3 ELLIOT'S DEBATES, *infra* note 344, at 28 (reporting Edmund Randolph at the Virginia ratifying convention as admonishing: "Rhode Island—in rebellion against integrity—Rhode Island plundered all the world by her paper money."); Publicola, Commentary, *To the Freemen of the State of North Carolina*, *ST. GAZETTE OF N.C.*, Mar. 20, 1788, reprinted in 16 DOCUMENTARY HISTORY, *infra* note 344, at 435, 439 (stating that paper money has resulted in the unwillingness of foreigners and citizens of sister states to loan to North Carolinians); *see also* THE FEDERALIST NO. 44, *infra* note 344, at 231–32 (James Madison):

[T]he same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money, than to coin gold or silver. The power to make any thing but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of issuing a paper currency.



money from the state governments, particularly from Rhode Island's government,<sup>330</sup> would remove a source of discord and incipient trade wars between the various states.<sup>331</sup> Historian Mary

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Aristides was Alexander Contee Hanson. 15 DOCUMENTARY HISTORY, *infra* note 344, at 517. Publicola was Archibald Maclaine. 16 DOCUMENTARY HISTORY, *infra* note 344, at 435.

330. See, e.g., *To the Freemen of Pennsylvania*, *supra* note 305, at 365 ("See, in Rhode-Island, the bonds of society and the obligations of morality dissolved by paper money and tender laws."); see also PA. HERALD (Philadelphia), June 9, 1787, reprinted in 13 DOCUMENTARY HISTORY, *infra* note 344, at 132 (reporting incorrectly that the Constitutional Convention had "resolved that Rhode-Island should be considered as having virtually withdrawn herself from the union . . . [S]he shall be compelled to be responsible . . .").

One effect of Rhode Island's excessive issuance of paper money was alleged to be the depreciation of paper money in other states. Anonymous, *A Letter from a Gentleman to His Friend*, NEW ENG. WKLY. J., Feb. 18, 1734, reprinted in 3 COLONIAL CURRENCY REPRINTS, *infra* note 344, at 29, 30.

331. See A NATIVE OF VIRGINIA, *supra* note 301, at 676-77 (referring to ban on paper money as a state ban, and arguing that an issue of paper money by one state "might defraud not only its own citizens, but the citizens of other States"); 2 ELLIOT'S DEBATES, *infra* note 344, at 171 (reporting Charles Turner, at the Massachusetts ratifying convention, referring to "the tendency of depreciating paper, and tender acts, to destroy mutual confidence, faith, and credit, to prevent the circulation of specie, and to overspread the land with an inundation, a chaos of multiform injustice, oppression, and knavery"); 2 DOCUMENTARY HISTORY, *infra* note 344, at 519 (reporting James Wilson as saying at the Pennsylvania ratifying convention: "I would ask, how a merchant must feel to have his property lay at the mercy of the laws of Rhode Island? I ask further, how will a creditor feel, who has his debts at the mercy of tender laws in other states?"); Publicola, *infra* note 344, at 439 (stating that paper money has resulted in the unwillingness of foreigners and citizens of sister states to loan to North Carolinians); see also Franklin, *infra* note 344, at 211 (complaining of "the prudent reserve of one colony in its emissions, being rendered useless by excess in another"); cf. 4 ELLIOT'S DEBATES, *infra* note 344, at 157 (reporting William Davie, at the North Carolina ratifying convention, emphasizing the importance of federal judicial control of state paper money and other actions that might lead to discrimination against other states).

Governor Edmund Randolph was particularly eloquent at the Virginia ratifying convention:

Are we not borderers on states that will be separated from us? Call to mind the history of every part of the world, where nations bordered on one another, and consider the consequences of our separation from the Union. Peruse those histories, and you find such countries to have ever been almost a perpetual scene of bloodshed and slaughter—the inhabitants of one escaping from punishment into the other—protection given them—consequent pursuit—robbery, cruelty, and murder. A numerous standing army, that dangerous expedient, would be necessary, but not sufficient, for the defence of such borders. Every gentleman will amplify the scene in his own mind.

. . . I have before hinted at some other causes of quarrel between the other states and us; particularly the hatred that would be generated by commercial competitions. . . . Paper money may also be an additional source of disputes. Rhode Island has been in one continued train of

M. Schweitzer has concluded that this was the most important factor leading to the constitutional ban on state issues.<sup>332</sup> Third, interstate monetary uniformity<sup>333</sup> offered solid advantages for travel,<sup>334</sup> credit,<sup>335</sup> and commerce.<sup>336</sup> Before the Constitution, each state had issued its own currency, and the nominal values of these currencies varied sharply from state to state.<sup>337</sup> David Ramsay looked forward to the day when this would change:

How extremely useful and advantageous must this restraint be to those states which mean to be honest, and not to defraud their neighbors! Henceforth, the citizens of the states

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opposition to national duties and integrity; they have defrauded their creditors by their paper money. Other states have also had emissions of paper money, to the ruin of credit and commerce. May not Virginia, at a future day, also recur to the same expedient? Has Virginia no affection for paper money, or disposition to violate contracts? I fear she is as fond of these measures as most other states in the Union. The inhabitants of the adjacent states would be affected by the depreciation of paper money, which would assuredly produce a dispute with those states. This danger is taken away by the present Constitution, as it provides "that no state shall emit bills of credit."

3 ELLIOT'S DEBATES, *infra* note 344, at 75–76; *see also id.* at 82 (reporting Randolph as stating, "Rhode Island and Connecticut have been on the point of war, on the subject of their paper money").

332. Schweitzer, *infra* note 344, at 322.

333. *See* HURST, *infra* note 344, at 10–13 (stressing the need for standardization).

334. *See* CIVIS, *supra* note 324, at 23.

335. *See* Letter from Nathaniel Peaslee Sargeant to Joseph Badger (1788), in 1 NEW ENG. HIST. & GENEALOGICAL REG. 237 (1847), *reprinted in* 5 DOCUMENTARY HISTORY, *infra* note 344, at 563, 565 ("The old Confederation without Power or Energy destroyed ye Credit of ye United States. The scarcity of Cash, and ye embarrassments of ye Government, for want of some fixed System of finance has destroyed ye credit of ye individual States—different Tender acts in different States, different sorts of paper money in different States, (for almost all ye States have either paper money or tender acts,) have destroyed private Credit . . .").

336. *See* Benjamin Rush, Commentary, AMERICAN MUSEUM, Jan. 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *infra* note 344, at 45, 46 ("I wish [the Convention] may add to their recommendations to each state, to surrender up to congress their power of emitting money. In this way, a uniform currency will be produced, that will facilitate trade, and help to bind the states together."); *see also* THE FEDERALIST NO. 42, *infra* note 344, at 220 (James Madison) (defending congressional regulation of foreign coin on grounds of uniformity); Harrington, Commentary, PA. GAZETTE (Philadelphia), May 30, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *infra* note 344, at 116, 118–19 (calling on the states to give up their financial powers to create a unified system, giving up "their unjust tender and commutation laws—their paper money—their oppressive taxes upon land—and their partial systems of finance").

337. *See* WRIGHT, *infra* note 344, at vi (showing, as of 1761, variations among colonial currencies per £100 sterling from par (Georgia) to £700 (South Carolina)); *see generally* Rolnick et al., *infra* note 344 (emphasizing exchange rate variability as a reason for the prohibition of state currencies).

may trade with each other without fear of tender-laws or laws impairing the nature of contracts. The citizen of South Carolina will then be able to trade with those of Rhode Island, North Carolina, and Georgia, and be sure of receiving the value of his commodities.<sup>338</sup>

Fourth, many believed that the wider scope of the federal government would reduce the possibility that paper money would be issued needlessly or for improper purposes.<sup>339</sup>

A later anecdote suggests how even strident opponents of paper money accepted the federal power to issue it. In 1819, John Adams wrote to Thomas Jefferson on the subject of recent American issues of paper money,<sup>340</sup> quoting Charles François Dupui:

[Debasing the coinage] is to steal. A theft of greater magnitude and still more ruinous is the making of paper. It is greater because in this money there is absolutely no real value. It is more ruinous because by its gradual depreciation during all the time of its existence it produces the effect which would be produced by an infinity of successive deteriorations of the coin.<sup>341</sup>

Adams added, "That is to say, an infinity of successive felonious larcenies. If this is true, as I believe it is, we Americans are the most thievish people that ever existed: we have been stealing from each other for an hundred and fifty years."<sup>342</sup> Jefferson

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338. 4 ELLIOT'S DEBATES, *infra* note 344, at 335.

339. See, e.g., THE FEDERALIST NO. 10 (James Madison), *infra* note 344, at 48:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

See also 4 ELLIOT'S DEBATES, *infra* note 344, at 86 (quoting Whitmill Hill as saying at the North Carolina ratifying convention, "We can borrow money with ease, and on advantageous terms, when it shall be known that Congress will have that power which all governments ought to have. Congress will not pay their debts in paper money. I am willing to trust this article to Congress, because I have no reason to think that our government will be better than it has been.").

340. Several emissions were made as part of the war effort in the War of 1812. See Legal Tender Cases, 79 U.S. 457, 636 n.1 (1870) (Field, J., dissenting).

341. Letter from John Adams to Thomas Jefferson (Feb. 24, 1819), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 535 (Lester J. Cappon ed., 1959).

342. *Id.*

responded, "The paper bubble is then burst. This is what you and I, and every reasoning man, seduced by no obliquity of mind or interest, have long foreseen. Yet it's [sic] disastrous effects are not the less for having been foreseen."<sup>343</sup>

However vehement they were on the iniquity of paper money, though, these old Founders refrained entirely from questioning its constitutionality.

## CONCLUSION

According to the original understanding, the Constitution's Coinage Clause granted to Congress the express power to coin money and bestow legal tender quality upon that money. A similar power of lesser, but still broad, scope was also created by the Commerce Clause, for part of the eighteenth-century definition of "regulating commerce" was the issuance and regulation of the media of exchange.

In addition, the money thus "coined" did not need to be metallic. Paper or any other material that Congress selected would suffice. Because the power to coin paper was express, it requires no justification by the incidental powers doctrine of the Necessary and Proper Clause.

The Supreme Court's opinions in the *Legal Tender Cases* did rely on the Necessary and Proper Clause, and to that extent their reasoning was at odds with the original understanding. However, the outcome of those cases—that Congress had authority to issue legal tender paper money—was correct as a matter of original understanding. Originalists or others propounding interpretive theories, therefore, need not make any special accommodation for the holdings of the *Legal Tender Cases*.<sup>344</sup>

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343. Letter from Thomas Jefferson to John Adams (Nov. 7, 1819) in 2 THE ADAMS-JEFFERSON LETTERS, *supra* note 341, at 546.

344. *Bibliographical Note*: This footnote collects alphabetically the secondary sources cited more than once in this Article. The sources and short form citations used are as follows:

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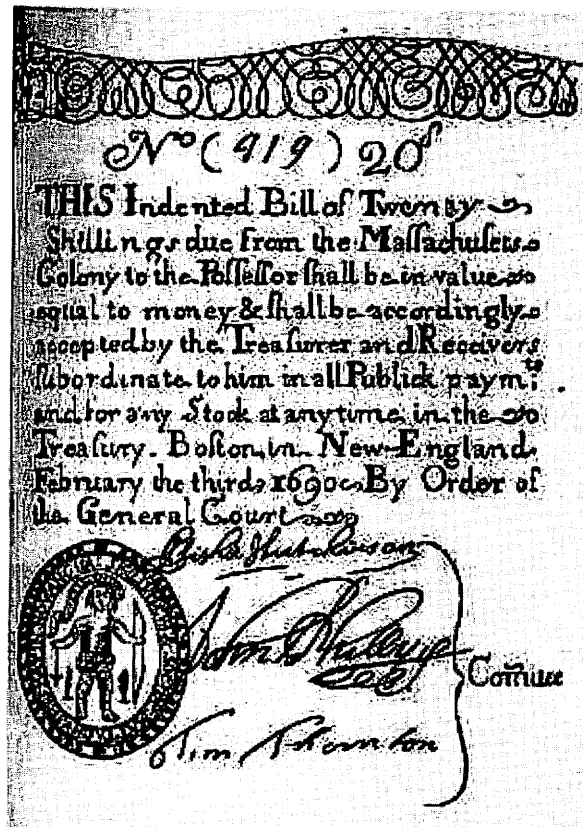
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