Money as Simulacrum: The Legal Nature and Reality of Money

John J. Chung
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What is money? This question seems so elementary and self-evident. Money is, after all, the green pieces of paper issued by the government that we have in our pockets. But is that it? Even if one were to accept that as a satisfactory answer, what exactly are those pieces of paper? Are they themselves the “money” or do they represent something else that is the “money?” And where do those pieces of paper come from, and why are those pieces of paper considered money as opposed to anything else? We all want money, and devote our lives to getting it. Yet, many spend little time thinking about what it is. Given the role money plays in our lives, it is surprising that few questions are asked about it.

In terms of legal significance, few things are as important. There was a time when the leading law reviews published articles containing statements such as: “Money is a fundamental concept of the law. There are perhaps few other juridical notions of greater importance.”1

The legal significance of money was further underscored by Professor Nussbaum’s observation that “[t]he word ‘money’ is perhaps more important and more often used in legal relations than any other. It appears everywhere—in constitutions, codes, statutes, judgments, administrative regulations, contracts, wills and other legal documents.” NUSBAUM, MONEY IN THE LAW supra note 1, at 19.

As for the categorization or placement of the subject of money within the law, one prominent commentator places it within the area concerning the police power. “Because the functional meaning and workability of the money system both derive from and materially affect the general context of

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1. One of the leading treatises on the legal aspects of money begins with the following observation: “In the social sciences it is a familiar experience that a phenomenon commonly considered as plain and distinct, on closer analysis turns out to be utterly problematical. This observation applies preeminently to the notion of money.” ARTHUR NUSBAUM, MONEY IN THE LAW 1-2 (1950).

the first volume of the *Harvard Law Review* addressed the issue "whether Congress has the power to make paper a good tender in payment of debts."\(^3\) There was also a time when the Supreme Court’s rulings on the constitutionality of government-issued money were considered to be among the most important decisions of the Court.\(^4\) Yet in today’s law school, in which classes do students learn about the legal nature of money? The likely reason such questions are not asked is because the answers seem so well-settled, and money carries with it the appearance (or illusion) of stability.

One of the penalties paid for the blessings of stability of the currency is that the law finds itself unprepared for unexpected and revolutionary changes in the monetary system. Money constitutes the most vital part of the substructure of the entire legal system, but when its stability is taken for granted, monetary questions rarely come before the courts and no analysis of underlying legal theories becomes necessary.\(^5\)

We all know what money is (or think we do), and there seems to be little need to ask questions about it. To the extent that this is the popular view, this article submits that the meaning and nature of money is more elusive than commonly thought. Moreover, the fundamental nature of money has materially changed every other generation or so since colonial times in America, and we may have reached a state of events where such a change may occur again. Money today is different from money as it was envisioned by the Framers of the Constitution. Money today has taken on a nature that was predicted by several Supreme Court Justices in the nineteenth century in their warnings in the Legal Tender cases. Strangely enough, the dissenters’ views of money foreshadowed, and were echoed by, the theories of the French post-modernist theorists, Jean Baudrillard and Jean-Joseph Goux, in the 1970s and 1980s. The strangest turn of events is that in this decade (as this article contends), money has taken on the nature of its own hyper-reality as predicted by Baudrillard.

The purpose of this paper is to explain and support these (perhaps cryptic) statements. To that end, this paper explores the origins, development, and legal history of money. Its purpose is also to suggest one version of where the future may lead, if we do in fact live in a world where money is its own hyper-reality.

Part I begins by discussing the standard definition and understanding

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social relations, legal control of money is established within that legitimate concern of law with the good order of social relations, which has commonly been called the police power." JAMES WILLARD HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, 109 n.58 (1973).


of money. Part II presents a brief and general history of the origin of money. It traces the development of money from a thing of independent value to facilitate exchange to a symbol of such things, and includes a discussion of the gold standard. Part II closes with the final transformation of money from symbol to its own self-referential reality. Part III presents a brief history of money in the United States from the colonial era to the situation today. It explains how major historical events (including the adoption of the U.S. Constitution, the Civil War, World War I, the Great Depression, and World War II) affected and changed the fundamental nature of money in America. Part IV examines money as it exists now. In doing so, it explores the writings of Jean Baudrillard and Jean-Joseph Goux from the 1970s and 1980s. Their work deserves attention because they foresaw what money would become today. They predicted that the development of money into its own self-referential reality would create what Baudrillard called the “hyper-real.” Part V contends that hyper-reality is an accurate way to describe the nature of the monetary world today, and touches upon certain facts of contemporary life that may be indications of the hyper-reality. Part VI then examines two historical eras when money lost all traditional meaning, and thereby created a new reality. The two eras are from Weimar Germany after World War I when catastrophic hyperinflation took hold, and France in the early 1700s when money took on its own reality with disastrous consequences. Part VII offers some thoughts on the future of money, and asks whether we may be at a turn in the cycle when the world will demand again some tangible backing for money. Part VIII concludes this paper.

I. THE STANDARD DEFINITION OF MONEY

Money is a term that is used constantly. Perhaps because the term is so prevalent and central to human activity, few pause to ask what it really is. "[M]oney is whatever is generally accepted in exchange for goods and services—accepted not as an object to be consumed but as an object that represents a temporary abode of purchasing power to be used for buying still other goods and services." A leading treatise on the legal history of money broadly describes it as follows:

Money is an instrument for helping men create and manage some of their relationships. Money has no substantial meaning unless men will use it. That a design of money units is available for communication facilitates use. But a system of symbols, by itself arbitrary and abstract, offers only the minimum

6. MILTON FRIEDMAN, MONEY MISCHIEF 16 (1992). Professor Friedman was awarded the Nobel Prize in Economics in 1976.
inducement of convenience to energize will and persuade individuals to commit themselves to action. To make a system of money have working effect, men must be willing to accept the money tokens and have confidence that others will accept them in effecting immediate exchanges, or as conferring future command over other assets, or as dependably measuring some deferred performance. So a central concern of public policy was how law could promote the practical acceptability of a given system of money.\footnote{Hurst, \textit{supra} note 2, at 34-35.}

Thus, one way to think of money is that it is what we use to acquire the things we want. However, this is only one aspect of money. The essential characteristics of money include its role as "(1) a common denominator of value; (2) a medium of exchange; (3) a standard of deferred payments."\footnote{Nussbaum, \textit{Basic Monetary Conceptions in Law}, \textit{supra} note 2, at 867; see also Nussbaum, \textit{Money in the Law}, \textit{supra} note 1, at 11.} A leading textbook on monetary theory confirms the economists' view that the three essential features of money are: (1) its use as a medium of exchange; (2) its use as a unit of account; and (3) its function as a store of value.\footnote{FREDERIC S. Mishkin, \textit{The Economics of Money, Banking and Financial Markets} 49-51 (6th ed. 2001). Professor Mishkin was on the Board of Governors of the Federal Reserve until August 2008. He is the Alfred Lerner Professor of Banking and Financial Institutions at the Graduate School of Business, Columbia University.} A dollar bill satisfies all three functions. It is what is exchanged to acquire something. It is a unit of account because it is the measure of value of goods and services (just as distance is measured in terms of miles).\footnote{Id. at 50.} It is a store of value because "it is a repository of purchasing power over time."\footnote{Id. at 51. Money's function as a unit of measurement gave rise to more abstract developments. Originally, 'talent,' 'as,' 'pound,' 'mark,' and other money terms were names of weights. However, as soon as people, though using the weight name, assume the habit of giving and receiving the coined metal piece not by weight, but in reliance on the stamp [on the piece of metal], an independent money value detaches itself from the value of the weighed quantity. ... Thus the value of the monetary unit seems to be somewhat disconnected from reality, or at least from materiality. Nevertheless, in the consciousness of the social community, its significance is sufficiently distinctive.... The existence of a monetary unit apparently is a group-psychological phenomenon.}
In addition to being a tangible thing, money is also a concept. Obviously, money is distinct from all other fungible things, such as wheat, coal, Ford automobiles. Money may be a gold piece, a silver piece, a copper piece, a paper bill or what-not. Its composition is legally irrelevant. It is only the relationship of the money piece to a certain ideal unit (dollar, pound sterling, franc, mark, etc.) which has jural relevancy, inasmuch as the thing is treated as money and not just as a mere piece of metal or a scrap of paper. Money, as a concrete phenomenon, then, is a thing which, irrespective of its composition, is by common usage treated as a fraction, integer or multiple of an ideal unit.\textsuperscript{2}

The nature of money as a tangible thing of value or as an abstraction has been a source of tension and crisis throughout history. The exploration of this tension is a recurring them of this paper.

A. THE RELATED CONCEPTS OF FIAT MONEY AND LEGAL TENDER

A one Euro coin also satisfies all three functions of money, as does a one Swiss Franc coin. This is obviously so because they are money in the jurisdictions in which they are issued. However, a resident of Rhode Island will be frustrated if she tries to purchase gasoline at the corner station with Euros. The reason is because Euros (or anything other than U.S. currency, for that matter) are not legal tender in America. "Legal tender is money which, if tendered by a debtor in payment of his debt, must not be refused by the creditor."\textsuperscript{3} In other words, the local merchant is freely within his rights to refuse Euros as payment. However, he is required by law to accept other things. "The core idea of legal tender stood the same through the legal history of money in the United States: that certain law-designated tokens should, so far as the law was concerned, fully satisfy money claims recognized as legally enforceable."\textsuperscript{4} Thus, it is a violation of federal law for that same merchant to refuse to accept a $20 bill as payment.

Where an obligation merely specifies a certain number of 'United States Dollars' or employs the symbol '$', and repayment is to be made in the United States, there is no doubt that the creditor, suing in the country of payment, can obtain a judgment only for the sum stipulated in the contract, in legal tender. The medium of repayment of debts contracted in terms of currency is thus whatever the law has impressed with the character of legal tender. Legal tender may be defined as money

\textsuperscript{12} Nussbaum, Basic Monetary Conceptions in Law, supra note 2, at 870.
\textsuperscript{13} Id. at 893; see also NUSBAUM, MONEY IN THE LAW, supra note 1, at 45-46.
\textsuperscript{14} HURST, supra note 2, at 40.
which cannot be lawfully be refused by a creditor.\textsuperscript{15}

Thus, the ability of money to satisfy claims, debts and obligations depends on the law’s designation of it as legal tender. The full force and significance of the law in this regard is seen with respect to fiat money. The term might seem pejorative to anyone unfamiliar with it, but it is a term used by our own government in describing our money and by economists in their discussions of money. Fiat paper money is “paper currency that has value because the government has decreed that it is a ‘legal tender’ for making tax payments and often for discharging other debts and payments as well. Fiat money does not represent a claim on some other form of money or commodity such as gold and silver.”\textsuperscript{16} Fiat money is money solely because the government requires it to be money. People accept pieces of fiat paper money “because they are confident that others will. The pieces of green paper have value because everybody thinks they have value. Everybody thinks they have value because in everybody’s experience they have had value….”\textsuperscript{17} Our money is fiat money, and this paper will examine the development of money and how it arrived at this point.

The concepts of legal tender and fiat money underscore the law’s role in money. A thing may become money because a sovereign authority orders it. A thing may become the medium of exchange because people are required by law to accept it as payment. Ideally, a thing will become money because people want to use it as such, independent of any legal requirement, because of the intrinsic desirability of the thing (and if the law happens to require it to be used as money, then so much the better). However, it is also possible that a thing may be money solely because of government fiat and not because anyone wants it as money.

II. A BRIEF, GENERAL HISTORY OF MONEY

Before money was invented, societies relied on barter exchanges. A villager in need of wheat might have some pottery to trade for wheat. The villager would, however, need to find a farmer with a need for pottery, or else no exchange would occur. Even if a nearby farmer needed pottery, the two would need to agree upon the number of pots that would induce the farmer to part with a certain quantity of wheat. But what if the farmer had no need for pottery, but craved venison? Perhaps, the villager’s neighbor had more venison than he could consume. If the neighbors were able to agree upon a rate of exchange for pottery and venison, the villager would

\textsuperscript{15} George Nebolsine, The Gold Clause in Private Contracts, 42 Yale L.J. 1051, 1052-53 (1933).
\textsuperscript{17} FRIEDMAN, supra note 6, at 10.
be able to obtain venison which he could then use to obtain wheat from the farmer. These were the original forms of transaction costs. In the presence of such costs, it is a wonder that anyone had time to make pots, cure venison, or grow wheat.

Humans responded to the problems of barter by inventing money. It was agreed that one thing or some things had utility as (1) a medium of exchange, and (2) a common measure of value. The thing could be used to exchange for any other thing (whether it was for pots, venison, or wheat), and the thing was the standard against which the value of all other things could be measured. The thing came to be known and accepted as money.

A. MONEY'S ORIGIN AS THINGS OF INDEPENDENT VALUE TO FACILITATE EXCHANGE

The earliest forms of money included animal skins, livestock, slaves, beads, shells, corn, olive oil, tobacco, straw mats, and salt. These things had exchange value because they had an independent and universally desired value and function. The accepted view of the origins of money, as expressed by nineteenth century scholars, was that anything used as money must have an independent utility and value, and that "it is impossible that a substance which has no direct value should be introduced as money, however suitable it may be in other respects for this use." Over time, the

18. In general, barter raises three barriers to exchange: (1) Two people with mutually satisfiable needs must locate each other; (2) The bartering parties must agree upon a rate of exchange for the exchanged goods; (3) The goods to be exchanged may need to be divisible, and not all goods are. W. STANLEY JEVONS, MONEY AND THE MECHANISM OF EXCHANGE 3-6 (1875). To illustrate the third point, an exchange of corn for wheat presents few problems because different amounts of each can be measured out to satisfy the agreed upon rate of exchange. Suppose, however, the trade is corn for a jacket, and suppose that the tailor only wants a small amount of corn that is less than the value of a jacket. The parties cannot exchange half a jacket.

19. Id. at 13-15.

20. Id. at 19-29. For something to function as money, it must be (1) easily standardized, (2) widely accepted, (3) must be divisible, (4) easily portable, and (5) resistant to deterioration. MISHKIN, supra note 9, at 50.

21. JEVONS, supra note 18, at 33. Jevons added:

Since money has to be exchanged for valuable goods, it should itself possess value, and it must therefore have utility as the basis of value. Money, when once in full currency, is only received in order to be passed on, so that if all people could be induced to take worthless bits of material at a fixed rate of valuation, it might seem that money does not really require to have substantial value. Something like this does frequently happen in the history of currencies, and apparently valueless shell, bits of leather, or scraps of paper, are actually received in exchange for costly commodities. This strange phenomenon is, however, in most cases capable of easy explanation, and if we were acquainted with the history of every kind of money the like explanation would no doubt be possible in other cases. The essential point is that people should be
societies that used money narrowed the form of money to precious metals, especially gold and silver. This form of money is called "specie," which is "any monetary gold or silver, whether in the form of bullion (bars) or coins." For centuries, gold and silver were the major mediums of exchange around the world, and economists regarded only specie as money. William Blackstone explained the desirability of gold and silver

induced to receive money, and pass it on freely at steady ratios of exchange for other objects; but there must always be some sufficient reason first inducing people to accept the money. The force of habit, convention, or legal enactment may do much to maintain money in circulation when once it is afloat, but it is doubtful whether the most powerful government could oblige its subjects to accept and circulate as money a worthless substance which they had no other motive for receiving.

Id. at 32. Contemporary circumstances cast doubt on Jevons' last point.

23. FRIEDMAN, supra note 6, at 16. The Supreme Court echoed these sentiments in the nineteenth century:

It recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are the only proper measures of value; that these values are determined by weight and purity; and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which gives them.

Bronson v. Rodes, 74 U.S. 229, 249 (1868) (holding that contracts specifically calling for payment in gold coin could not be satisfied by paper money in the form of United States notes). Similar statements were made in the Chief Justice's dissenting opinion in Knox v. Lee:

The selection, therefore, by the common consent of all nations, of gold and silver as the standard of value was natural, or, more correctly speaking, inevitable. For whatever definitions of value political economists may have given, they all agree that gold and silver have more value in proportion to weight and size, and are less subject to loss by wear or abrasion than any other material capable of easy subdivision and impress, and that their value changes less and by slower degrees, through considerable periods of time, than that of any other substance which could be used for the same purpose. And these are qualities indispensable to the convenient use of the standard required. In the construction of the constitutional grant of power to establish a standard of value every presumption, is, therefore, against that which would authorize the adoption of any other materials than those sanctioned by universal consent.


Money is not only a medium of exchange, but it is a standard of value. Nothing can be such standard which has not intrinsic value, or which is subject to frequent changes in value. From the earliest period in the history of civilized nations we find pieces of gold and silver used as money. These metals are scattered over the world in small quantities; they are susceptible of division, capable of easy impression, have more value in proportion to weight and size, and are less subject to loss by wear and abrasion than any other material possessing these qualities. It requires labor to obtain them; they are not dependent upon legislation or the caprices of the multitude; they cannot be manufactured or decreed into existence; and they do not perish by lapse of time. They have, therefore, naturally, if not necessarily, become throughout the world a standard of value. In exchange for pieces of them, products requiring an equal amount of labor are readily given. When the product and the piece of metal represent the same labor, or an approximation to it, they are freely exchanged. There can be no adequate substitute for these metals.

Juilliard, 110 U.S. at 462-463.
as money as follows:

Money is an universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained: . . . a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only. The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.24

The prevalence of gold and silver as money was reflected in language. The French word for money, "argent", is the same as the word for silver. However, it was gold that would take primacy in the development of an international monetary order.

1. The Gold Standard

Eventually, societies around the world settled upon gold as money. Its unique qualities include its resistance to oxidation, its density, and its malleability.25 Gold coinage first made its appearance in Asia Minor over 3500 years ago.26 The large-scale issuance of gold coin first began under King Croesus, who ruled from 560 to 546 B.C. in ancient Lydia, which is now western Turkey.27

The primitive notions supporting the gold standard traced their origins back to the prestige and international acceptability of Croesus's staters, when gold first started to perform as money in a systematic fashion. From this root, the religion of the international gold standard had just one absolute commandment: gold, and gold alone, is the ultimate form of money, the standard. A country on the gold standard defined its money—

25. PETER L. BERNSTEIN, THE POWER OF GOLD 4. Among other things, gold is imperishable, unlike some other metals which rust away, and it is easily shaped into objects such as coins. Id. at 2.
26. Id. at 15.
pound, franc, lira, dollar—in terms of a specified and immutable quantity of gold. Its own citizens, and the world around them, expected the authorities to maintain full and free convertibility of its banknotes and bank deposits... into gold at that fixed ratio, come what may.28

The use of gold as money led to the adoption of what is known as the "gold standard", which began with developments in Great Britain in the early nineteenth century.29 Under the gold standard, the currency of a country operating under that standard was directly convertible into gold.30 This meant that the currency of each country under the standard had a fixed exchange rate against all the other currencies under the standard, which rate was fixed by the reference and convertibility into gold.31 By the 1870s, most of the major economies of the world had adopted the gold standard, and it governed international monetary relationships until the economic crises resulting from World War I forced the abandonment of the standard.32 This period from the 1870s to World War I represented the classical age of the gold standard.

A major argument for the gold standard was that adherence to a gold standard prevented a country from engaging in uncontrolled paper money creation. The gold standard forced a country to limit paper money creation to an amount supported by reserves of physical gold. Thus, money could not be created for reasons of political expediency or popular demand. "That a gold base was trusted by its proponents because the physical and market limitations on its supply meant a nonpolitical check on the

29. Id. at 203.
Full cash payments in gold were restored and a new coin was issued, the sovereign, equal to twenty shillings and 20/21 of the amount of gold in a guinea; in preparation for this moment, the Mint produced a total of 35 million sovereigns in 1821. The gold standard was now an acknowledged reality, enshrined in official legislation. The British arrangements became the model for the rest of the world to follow for nearly one hundred years.

Id. at 217-218.
30. MISHKIN, supra note 9, at 487.
31. MISHKIN, supra note 9, at 487.
American dollar bills, for example, could be turned in to the U.S. Treasury and exchanged for approximately 1/20 ounce of gold. Likewise, the British Treasury would exchange ¼ ounce of gold for [one pound sterling]. Because an American could convert $20 into 1 ounce of gold, which could be used to buy [four pounds sterling], the exchange rate between the pound and the dollar was effectively fixed at $5 to the pound.

Id.
expansion of the money stock." Thus, under a gold standard, a country had no control over its own monetary policy because its money supply was determined by gold flows between countries, and (to a lesser extent) the production and discovery of gold. The consequences of failing to control or check money supply are discussed later in this paper.

B. THE TRANSITION OF MONEY FROM THINGS OF INDEPENDENT VALUE TO SYMBOL

At this point in the paper, it is necessary to return to the time before the gold standard. As explained, gold attained universal recognition as money throughout the world because of its unique qualities. However, one of its unique qualities was also a drawback to its use. Gold is heavy due to its density. Thus, transporting gold in order to conduct an economic exchange presented challenges. An owner of gold must also secure and protect the gold. In response to these problems, goldsmiths offered the service of safekeeping of gold. The owners of gold "would deposit them with a goldsmith for safekeeping, accepting in exchange a receipt for the gold that could then be used as a means of payment because it was redeemable in gold on demand." This began the practice of circulating paper receipts that represented physical gold. Because this paper represented gold (the actual money), the paper came to be accepted as money because it was the symbol of the real thing.

The various forms of private paper—bills of exchange, goldsmiths' receipts, and banknotes issued by commercial banks throughout the country—could always be exchanged for the notes of the Bank of England, and Bank notes could always be exchanged for gold, or specie as it was often called in those days. For example, before February 26, 1797, anyone with 210 [GBP] in notes could go to the Bank at any time and receive two hundred golden guineas in exchange.

By the time of the adoption of the gold standard, the acceptance of paper money was widespread and unquestioned. "Once the gold standard was in place, paper notes and bank deposits as well as holdings of foreign exchange were considered as little more than convenient substitutes for the 'real thing,' assets that enjoyed acceptability purely by virtue of being convertible into gold."

33. HURST, supra note 2, at 288 n.233.
34. MISHKIN, supra note 9, at 488.
35. BERNSTEIN, supra note 25, at 203, 204.
36. Id. at 204.
37. Id. at 241.
The acceptance of paper symbolizing gold marked the development of money as symbol. Transactions no longer required the actual thing of value (gold) to be exchanged. The exchange of the symbol satisfied the parties. So long as the symbol was genuine as a symbol, it served all the functions of the signified thing. The symbol thus became as good as money.  

C. THE DEVELOPMENT OF MONEY INTO PURE SIMULACRUM WITH ITS OWN SELF-REFERENTIAL REALITY AND MEANING UNTETHERED FROM ANY UNDERLYING OR ORIGINAL REALITY

The acceptance of the symbol (paper) as money, to the point where paper became as good as money, led to the actual break of the symbol (paper) from the underlying thing of value (gold). Throughout most of history, money was either a thing of value in and of itself, or it was a symbol of the thing of value. Today, however, money is neither. No longer is paper money a symbol; it is the money, by itself. This may not seem to be a particularly noteworthy point because Americans and the citizens of many countries live with money that is neither a thing of independent tangible value nor a symbol of such. However, this has been the situation only since the early 1970s.

For present purposes, we can simplify our attempt to demystify money by concentrating on the monetary arrangement that, while historically a very special case, is currently the general rule: a pure paper money that has practically no value as a commodity in itself. Such an arrangement has been the general rule only since President Richard M. Nixon ‘closed the gold window’ on August 15, 1971—that is, terminated the obligation that the United States had assumed at Bretton Woods to convert dollars held by foreign monetary authorities into gold at the fixed price of $35 an ounce. Before 1971, every major currency from time immemorial had been linked directly or indirectly to a commodity.  

Since 1971, “every major country has adopted an inconvertible paper or fiat standard, not as a temporary emergency measure but as a system intended to be permanent. Such a worldwide fiat monetary system has no

38. "[F]rom primitive periods until the present day men have been accustomed to connect the idea of money with definite symbols, whether they were animals, commodities, quantities of metal, or coins and bank notes, as we find today them in all civilized countries." F.A. MANN, THE LEGAL ASPECT OF MONEY 8 (5th ed. 1992).

39. FRIEDMAN, supra note 6, at 15.
historical precedent." Thus, the monetary order under which we live has only been in existence for a little over a generation. This development was the catalyst for the analyses of Baudrillard and Goux, because they recognized that this development would take the world into a new reality.

III. A BRIEF HISTORY OF MONEY IN THE UNITED STATES

The green pieces of paper issued by the government have been what we consider money during the lifetimes of almost everyone alive today. This has created a false sense of stability regarding the nation’s money. However, the history of money in America has been anything but stable, and has undergone radical and repeated transformations since the colonial era. Although perhaps similar in form, today’s money bears little resemblance in substance to money from 100 years ago (much less the early years of the country), and there is no reason to think that money today will be the same as money in the future.

A. THE COLONIAL PERIOD

The most widely circulated currency of the English colonies in America was not the money of England. During much of the seventeenth and eighteenth centuries, the Spanish Dollar coin was the unofficial currency of the American colonies. Some of the individual colonies experimented with paper money. However, it was the colonies’ issuance

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40. Id. at 129.
41. 1995 Annual Report: A Brief History of Our Nation’s Paper Money, available at http://www.frbsf.org/publications/federalreserve/annual/1995/history.html, which is the website of the Federal Reserve Bank of San Francisco. “To make change the dollar was actually cut into eight pieces or ‘bits.’ Thus came the terms ‘pieces of eight’ from these early times and ‘two bits’ from our time.” Id.
42. Massachusetts issued the first paper money in the colonies in 1690. See Karen Flamme, 1995 Annual Report: A Brief History of Our Nation’s Paper Money, available at http://www.frbsf.org/publications/federalreserve/annual/1995/history.html. The Supreme Court also described some of the colonial experience with paper money. See Craig v. Missouri, 29 U.S. 410 (1830) (holding that certificates issued by Missouri were constitutionally prohibited bills of credit). Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776, an additional emission was made, and the bills were declared to be tender. The bills of 1775 and 1776 circulated together; were equally bills of credit; and were
of the paper Continental notes as it fought for independence that influenced the development of American money into the nineteenth century. This experience with the Continentals was particularly disastrous.

To finance the Revolutionary War, the Continental Congress in 1775 authorized the limited issuance of paper currency. These notes, called Continentals, were denominated in dollars and backed by the ‘anticipation’ of future tax revenues, with no backing in silver or gold. They could be redeemed only upon the independence of the colonies . . . Without solid backing and with rising inflation, the Continentals soon became worthless, thus the expression ‘not worth a Continental.’

There was such a widespread reluctance to accept Continentals as payment that the Continental Congress attempted to support the value of the currency by declaring that any person convicted of refusing Continentals at face value was an enemy of the country.

The remnant of this experience was a deep distrust of paper money which was not issued again by the federal authorities until the Civil War when the Federal government first issued paper money. The Continental was significant, however, in that it marked the first time that the worth of U.S. currency lay in its productive of the same consequences.

Craig, 29 U.S. at 435.

43. Flamme, supra note 42. Benjamin Franklin, however, expressed a contrary and favorable view of the Continentals. Justice Bradley’s concurring opinion in Knox v. Lee quoted Franklin’s letters from France:

‘The only consolation under the evil is, that the public debt is proportionately diminished by the depreciation; and this by a kind of imperceptible tax, every one having paid a part of it in the fall of value that took place between the receiving and paying such sums as passed through his hands.’ . . . ‘This effect of paper currency is not understood this side the water. And indeed the whole is a mystery even to the politicians, how we have been able to continue a war four years without money, and how we could pay with paper, that had no previously fixed fund appropriated specially to redeem it. This currency, as we manage it, is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides victuals and ammunition.’ In a subsequent letter, of 9 October, 1780, he says: ‘[Congress] issued an immense quantity of paper bills, to pay, clothe, arm, and feed their troops, and fit out ships; and with this paper, without taxes for the first three years, they fought and battled one of the most powerful nations of Europe.’


Throughout his life, Franklin was a strong proponent of paper money, and was influential in the development of paper money in Pennsylvania during the colonial period. See Farley Grubb, Benjamin Franklin and the Birth of a Paper Money Economy, available at http://www.philadelphiafed.org/education/teachers/resources/ben-franklin-and-paper-money-economy.pdf. At the time he wrote his essay, Professor Grubb was a professor at the University of Delaware; he holds a Ph.D. in economics from the University of Chicago.

purchasing power and not in its intrinsic value.\textsuperscript{45}

The experience with the Continentals raised questions and themes that would be repeated throughout the history of the United States (and this paper). One question was whether paper money should be money. Another question concerned the power of the government to force acceptance of paper money. In addition, a recurring theme would be the eruption of monetary crises with war (whether Revolutionary War, Civil War, World War I, World War II, or Vietnam), and their effect on the legal nature of money.

\section*{B. \textsc{The Framers' View of Money}}

Even after America won its independence, foreign currency was still in wide circulation in the new country, and the Spanish Dollar coin was still regarded as a monetary standard.

At the time of adoption of the Constitution, Spanish, French, English, and Portuguese coins were in wide circulation and constituted the money supply of the United States.\ldots \textsuperscript{46} Although some gold was current, silver coins alone were legally recognized in colonial times. Of all foreign coins, the Spanish milled silver dollar was, and for decades had been, the money of American markets.\ldots \textsuperscript{47} The Act of 1792, which established the United States Mint, further clarified the Constitution by defining dollar as a unit of account in value and weight similar to the Spanish milled dollar.

The new country needed a national money, and the Framers directly addressed this need. To the Framers, money meant gold and silver coin. When Alexander Hamilton addressed the subject of national wealth and money in The Federalist Papers, he described money in this specific way: "By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate the channels of industry, and to make them flow with greater activity and copiousness."

To any reader of this passage in November 1787 (when it was published), the reference to precious metals had one, and only one, obvious meaning—gold and silver coins, not paper money. The disastrous experience with the Continental was still fresh in the minds of the newly

\textsuperscript{45} Flamme, \textit{supra} note 42.

\textsuperscript{46} Ali Khan, \textit{The Evolution of Money: A Story of Constitutional Nullification}, 67 U. Cin. L. Rev. 393, 403 n.52 (1999). According to Professor Dam: "It was not until 1857 that the legal tender quality of all foreign coins was withdrawn." Dam, \textit{supra} note 4, at 376.

\textsuperscript{47} \textsc{The Federalist} No. 12 (Alexander Hamilton).
independent Americans, and this was Hamilton's acknowledgement that the money under the new Constitution would be hard money in the form of gold and silver, not pieces of paper. This view prevailed at the Constitutional Convention.

At the Constitutional Convention, whether the government would have the authority to issue a paper currency was explicitly debated, and several of the Framers expressed strong views against having a paper currency at all. Their overwhelming, expressed sentiment was one of "antipathy to paper money" because "it was plain that almost all the speakers feared that if the government held broad power to issue paper money, it could not be trusted to avoid disastrous inflation or legislative disturbance of vested money claims." In his look back at the Convention, Professor Thayer believed that "the majority of the speakers thought that they were prohibiting bills of credit and paper money." This view was also shared by other commentators: "The Constitutional Convention conceived of American currency as being essentially a commodity currency, composed solely of precious metals having, what was termed, intrinsic value. In the view of the framers of the Constitution, money was nothing more than so many pieces of precious metal of certified weight and fineness."

Less than 100 years after the Convention, several of the Supreme Court Justices surveyed the history of the Convention when they were required to address constitutional issues of money, and also held the view that money under the Constitution meant metallic coin.

48. Thayer, supra note 3, at 76-77.
49. Hurst, supra note 2, at 14. According to Justice Clifford's dissent in Knox v. Lee: "Paper money, as legal tender, had few or no advocates in the Convention, and it never had more than one open advocate throughout the period the Constitution was under discussion, either in the Convention which framed it, or in the conventions of the States where it was ratified." 79 U.S. 457, 606 (1870). Oliver Ellsworth of Connecticut said he wanted "to shut and bar the door against paper money." Id.

Justice Field's dissent added:

[F]or on the subject now under consideration there was everywhere, in the several State conventions and in the discussions before the people, an entire uniformity of opinion, so far as we have any record of its expression, and that concurred with the intention of the Convention, as disclosed by its debates, that the Constitution withheld from Congress all power to issue bills to circulate as money, meaning by that bills made receivable in compulsory payment, or, in other words, having the quality of legal tender. Every one appears to have understood that the power of making paper issues a legal tender, by Congress or by the States, was absolutely and forever prohibited.

Id. at 656.
50. Thayer, supra note 3, at 79.
52. Justice Clifford's dissent in Knox v. Lee discussed the Framers' view of money: Paper emissions have, at one time or another, been authorized and employed as currency by most commercial nations, and by no government, past or present, more extensively than by the United States, and yet it is safe to affirm that all experience in its use as a circulating medium has demonstrated the proposition that it cannot by any legislation, however stringent, be made a standard of value or the just equivalent of
In the end, the Framers drafted Article I, Section 8 of the Constitution to provide that Congress shall have power "to coin money, regulate the value thereof, and of foreign coin . . ." Article I, Section 10 provides in pertinent part: "No state shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts." Thus, the gold and silver. Attempts of the kind have always failed, and no body of men, whether in public or private stations, ever had more instructive teachings of the truth of that remark than the patriotic men who framed the Federal Constitution, as they had seen the power to emit bills of credit freely exercised during the war of the Revolution, not only by the Confederation, but also by the States, and knew from bitter experience its calamitous effects and the utter worthlessness of such a circulating medium as a standard of value. Such men so instructed could not have done otherwise than they did do, which was to provide an irrepealable standard of value, to be coined from gold and silver, leaving as little upon the subject to the discretion of Congress as was consistent with a wise forecast and an invincible determination that the essential principles of the Constitution should be perpetual as the means to secure the blessings of liberty to themselves and their posterity. 

Knox, 79 U.S. at 588-89.

Justice Clifford added:
Goods and chattels were directly bartered, one for another, when the division of labor was first introduced, but gold and silver were adopted to serve the purpose of exchange by the tacit concurrence of all nations at a very early period in the history of commercial transactions. Commodities of various kinds were used as money at different periods in different countries, but experience soon showed the commercial nations that gold and silver embodied the qualities desirable in money in a much greater degree than any other known commodity or substance. Daily experience shows the truth of that proposition, and supersedes the necessity of any remarks to enforce it, as all admit that a commodity to serve as a standard of value and a medium of exchange must be easily divisible into small portions; that it must admit of being kept for an indefinite period without deteriorating; that it must possess great value in small bulk, and be capable of being easily transported from place to place; that a given denomination of money should always be equal in weight and quality, or fineness to other pieces of money of the same denomination, and that its value should be the same or as little subject to variation as possible. Such qualities, all agree, are united in a much greater degree in gold and silver than in any other known commodity, which was as well known to the members of the Convention who framed the Constitution as to any body of men since assembled, and intrusted [sic] to any extent with the public affairs. They not only knew that the money of the commercial world was gold and silver, but they also knew, from bitter experience, that paper promises, whether issued by the States or the United States, were utterly worthless as a standard of value for any practical purpose.

Id. at 604-05.


The meaning of "emit bills of credit" was discussed in Craig v. Missouri, 29 U.S. 410, 431-32 (1830):

What is a bill of credit? What did the constitution mean to forbid? In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. . . To 'emit bills of credit,' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood. . . . The term has acquired an appropriate meaning; and 'bills of credit' signify a paper medium, intended to circulate between individuals, and
Constitution expressly addresses the subject of money.\textsuperscript{55}

What is noteworthy, however, and what would generate numerous constitutional cases throughout American history is the fact that this quoted language contains the entirety of the Constitutional provisions regarding the federal government’s issuance of money. It is what is not stated that would repeatedly raise constitutional issues concerning the nature of money. In summary, the Constitution addresses money in the following manner:

[F]irst, both the Union and the States could borrow money; second, the States could not coin money, and they could not give the quality of ‘a tender in payment of debts; to anything but gold and silver coin; third, the Union could ‘coin money, regulate the value thereof, and of foreign coin.’ It was not restricted as to the metal it should coin. It was not given any express power to give or to withhold from its own coin or any other, the quality of a legal tender in payment of debts; and it was not denied any usual or naturally implied power of this sort; fourth, the States could not emit bills, and, of course, they could not borrow by the aid of such bills; fifth, as to the power of Congress to emit bills, to supply a paper currency, or to make it a legal tender, the

between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all; the people declared in their constitution, that no state should emit bills of credit. If the prohibition means any thing, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation. One of the dissenters in the case provided additional historical background regarding bills of credit.

During that most eventful period of our history, bills of credit formed the currency of the country; and every thing of greater value was excluded from circulation. These bills were so multiplied by the different states and by congress, that their value was greatly impaired. This loss was attempted to be covered, and the growing wants of the government supplied, by increased emissions. These caused a still more rapid depreciation, until the credit of the bills sunk so low as not to be current at any price. Various statutes were passed to force their circulation, and sustain their value; but they proved ineffectual. For a time, creditors were compelled to receive these bills under the penalty of forfeiting their debt; losing the interest; being denounced as enemies to the country, or some other penalty. These laws destroyed all just relations between creditor and debtor; and so debased a currency produced the most serious evils in almost all the relations of society.

Craig, 29 U.S. at 453 (M'Lean, J. dissenting).

55. From this language, one prominent commentator concluded the following: “Paper money is fully under the control of the Federal government. The Constitution, Art. 1, sec. 10, par. 1, expressly forbids the States to issue ‘bills of credit,’ that is, notes of a monetary character.” NUSSBAUM, MONEY IN THE LAW, supra note 1, at 89-90.
Constitution was silent.\textsuperscript{56}

The silence of the Constitution would lead many to raise pressing questions about money. For example, in 1836, Daniel Webster had this to say about money in a Senate speech:

What is meant by the 'constitutional currency' about which so much is said? What species or forms of currency does the Constitution allow, and what does it forbid? It is plain enough that this depends on what we understand by currency. Currency, in a large, and, perhaps, in a just sense, includes not only gold, and silver, and bank notes, but bills of exchange also. . . . But if we understand by currency the legal money of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender, in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance.\textsuperscript{57}

Thus, the Constitution left open three major questions concerning Congressional authority regarding money. Did Congress have the power "(1) to issue paper money, (2) to define legal tender, and (3) to charter national banks."\textsuperscript{58} The first two, in particular, would require repeated attention.\textsuperscript{59}

\textsuperscript{56} Thayer, supra note 3, at 75.

\textsuperscript{57} Daniel Webster, Senator (Mass.), Specie Circular, Speech Delivered in the Senate of the United States (Dec. 21, 1836) (transcript available in the University of California, Berkeley General Library).

\textsuperscript{58} Hurst, supra note 2, at 13. In the past ten years, there have been a few law review articles raising constitutional issues about modern currency. See, e.g., Khan, supra note 46; Michael Strong, Rethinking the Federal Reserve System: A Monetarist Plan for a More Constitutional System of Central Banking, 34 IND. L. REV. 371 (2001); Edwin Vieira, Jr., The Forgotten Role of the Constitution in Monetary Law, 2 TEX. REV. L. & POL. 77 (1998).

\textsuperscript{59} The coining of money began with enactment of the Coinage Act of 1792. The history of coinage by the government was summarized in Bronson v. Rodes, 74 U.S. 229, 247-48 (1869).

The act of 1792 established a mint for the purpose of a national coinage . . . . It provided that the gold of coinage, or standard gold, should consist of eleven parts fine and one part alloy, which alloy was to be of silver and copper in convenient proportions, not exceeding one-half silver, and that the silver of coinage should consist of fourteen hundred and eighty-five parts fine, and one hundred and seventy-nine parts of an alloy wholly of copper.

The same act established the dollar as the money unit, and required that it should contain four hundred and sixteen grains of standard silver. It provided further for the coinage of half-dollars, quarter-dollars, dimes, and half-dimes, also of standard silver, and weighing respectively a half, a quarter, a tenth, and a twentieth of the weight of the dollar. Provision was also made for a gold coinage, consisting of eagles, half-eagles, and quarter-eagles, containing, respectively, two hundred and ninety, one
C. THE FREE BANKING ERA

From the time of the Continentals until the Civil War, the federal government did not issue a paper currency. Paper money did exist, however. It was issued by privately owned banks. This paper money was redeemable upon demand at the issuing bank for a specified quantity of specie. The new nation also did not have a central bank in its early years. Because there was no central bank to act as a financial back-stop and no government insurance, the only and ultimate guarantee of the value of bank-issued paper was the value of the issuing bank’s assets.

There was an institution resembling a central bank in the early years of independence. Shortly after the adoption of the Constitution, Congress authorized a privately owned bank to issue paper money and act like a central bank.

In 1791 the Bank of the United States received a charter to operate until 1811, followed by the Second Bank of the United States from 1816 to 1836. These two banks, chartered by Congress rather than a state, performed several central bank functions. Although privately owned, they were authorized to issue paper bank notes and serve as the fiscal agent of the government. Both banks, however, were unpopular with those wanting easy credit—primarily the western, agrarian interests—and in 1832 Andrew Jackson vetoed the recharter of the Second Bank.

Thereafter, from 1837 to 1865, paper currencies were issued by numerous privately owned banks in different states with no oversight by
the federal government, and circulated as money. This was known as the "Free Banking Era." Thus followed the "Free Banking Era"—a quarter century in which American banking was a hodgepodge of state-chartered banks with no federal regulation or uniformity in operating laws. State Bank notes of various sizes, shapes, and designs were in circulation. Some of them were relatively safe and exchanged for par value and others were relatively worthless as speculators and counterfeiters flourished. By 1860, an estimated 8,000 different state banks were circulating "wildcat" or "broken" bank notes in denominations from ½ cent to $20,000. The nickname "wildcat" referred to banks in mountainous and other remote regions that were said to be more accessible to wildcats than customers, making it difficult for people to redeem these notes. The "broken" bank notes took their name from the frequency with which some of the banks failed, or went broke.

In *Veazie Bank v. Fenno*, the Supreme Court described the situation during the Free Banking Era:

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no National currency except coin; there was no general regulation of any other by National legislation; and no National taxation was imposed in any form on the State bank circulation.

During this era, there were wild fluctuations in the amount of notes issued by banks, and the quality of the notes ranged from valuable and reliable, on the one hand, to worthless. Whether one had good money or

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63. Dwyer, *supra* note 60, at 1.

64. *Id.* It was called "free banking" because there was free entry to the creation of a bank under the terms of a general law of incorporation, as opposed to creation through a specific legislative act. Alan Greenspan, Chairman, Fed. Reserve Board, Remarks before the Annual Meeting and Conferences of the Conference of State Bank Supervisors, (May 2, 1998), (transcript available at http://www.federalreserve.gov/BoardDocs/Speeches/1998/19980502.htm).

65. Flamme, *supra* note 42.


67. ROGER T. JOHNSON, HISTORICAL BEGINNINGS . . . THE FEDERAL RESERVE 10, (Dec. 1999),
not depended on whether one held notes issued by a prudent bank or a reckless one. This system was weakened by inadequate bank capital, problem loans, and insufficient reserves to support issued notes. The "Free Banking Era" effectively ended with the passage of the National Banking Act of 1863. This legislation provided for the creation of nationally chartered banks with the ability to issue notes backed by federal government securities. More importantly (with respect to the end of free banking), an amendment to the act imposed a tax on state banknotes, which effectively taxed them out of existence, and the era ended in 1865.

D. THE CIVIL WAR AND THE LEGAL TENDER CASES

The cost of fighting the Civil War generated unprecedented financing needs for the federal government. In response to these needs, the

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available at http://www.bosfed.org/about/pubs/begin.pdf. "The notes of many state banks traded at a discount from face value, particularly outside the community in which they were issued. Some notes were fraudulent, the supposed issuers not existing at all." Dam, supra note 4, at 375.

68. JOHNSON, supra note 67, at 10.

69. Flamme, supra note 42. Until 1863, all commercial banks in the United States were chartered by the states. MISHKIN, supra note 9, at 250.

70. Dwyer, supra note 60, at 2. Congress passed the National Banking Act in 1863 which established a national banking system and a uniform national currency to be issued by the new "national banks." Flamme, supra note 42. The banks were required to purchase U.S. government securities as backing for their National Bank Notes. Id. In 1865 a 10 percent tax was levied on State Bank notes eliminating the profit in issuing them and basically taxing them out of existence. Id.

71. Dam, supra note 4, at 370. The financial needs of the government during the Civil War were described as follows:

Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the
government issued demand notes to pay debts generated by the war.\textsuperscript{72} However, there were two new and distinctive features about these demand notes (which became known as "greenbacks"). First, they were not redeemable in specie but in 6 percent twenty-year bonds, and, second, they were deemed to be "lawful money and a legal tender in payment of all debts, public and private within the United States."\textsuperscript{73} This second feature generated the constitutional issues. Did Congress have the authority to declare the paper money to be legal tender?

Due to the high inflation rate of the Civil War years, the greenbacks...
fell in value against gold. Thus, the following questions were raised:

Was a debt denominated in a stated number of dollars dischargeable in an equal amount of greenbacks? Or could the creditor demand coin, or failing that, an amount in greenbacks equivalent to the gold value of the debt? If the premium on gold (which reached a high of 185 percent in July 1864) was, say, 100 percent, could the creditor on a ‘$100 debt’ require payment of $200 in greenbacks?\textsuperscript{74}

These issues generated three cases before the Supreme Court, which came to be known as the Legal Tender cases.\textsuperscript{75}

The first of the Legal Tender cases, \textit{Hepburn v. Griswold}, involved an action on a two-year promissory note in the amount of $11,250 due on February 20, 1862 (which was five days before the enactment of the legal tender legislation). The issue in \textit{Hepburn} was “whether Congress has [the] power to make notes issued under its authority a legal tender in payment of debts which, when contracted, were payable by law in gold and silver coin.”\textsuperscript{76} In February 1870, the Supreme Court ruled by a 5-3 vote that the maker of the note could not discharge the debt by the payment of 11,250 greenback dollars but was required to pay the greenback value of 11,250 gold dollars. In other words, the Court ruled that Congress lacked the authority to make greenback dollars legal tender for pre-existing debts.

In May 1871, just a little over a year after \textit{Hepburn}, the Court decided \textit{Knox v. Lee}. In \textit{Knox}, the Court addressed the question “can Congress

\textsuperscript{74} Id. at 374.
\textsuperscript{75} Id. at 367 n.1. In \textit{Juilliard}, the Court upheld the constitutionality of an act authorizing the issuance of legal tender notes in peacetime. \textit{Juilliard v. Greenman}, 110 U.S. 421 (1884). The Legal Tender cases arose because there is no express power to issue legal tender notes under the Constitution. Nebolsine, \textit{supra} note 15, at 1055 n.13. These cases upheld the right of Congress to issue such notes and make them legal tender under the Necessary and Proper Clause. \textit{Id}. Aside from their significance for monetary history, Professor Dam made the following observation regarding their significance for constitutional history:

\textbf{Is it possible, for example that the notion of a government of enumerated powers deprives the Congress of some powers essential to the nation’s survival? Assuming that the Court takes the intention of the Framers seriously, what should it do if the Framers intended to withhold a power that the Court believes indispensable to meet a crisis? More generally, does the idea of a written constitution necessarily include a force majeure principle that permits its rules to bend in the face of overwhelming events, such as a civil or foreign war? In short, is there a necessity principle that operates, either through the Necessary and Proper Clause or by inherent power, to grant the Congress whatever power is needed?}

The Legal Tender cases do not resolve these issues. Indeed, the various opinions do not confront them directly. They were, in fact, more directly treated in the congressional debates on the legal tender legislation. Nevertheless, the facts of the Legal Tender cases come as close, as any cases, with the possible exception of war power decisions, to probing these outer limits of constitutionalism.

\textbf{Dam, \textit{supra} note 4, at 370.}

\textbf{76. Hepburn v. Griswold, 75 U.S. 603, 610 (1869).}
constitutionally give to treasury notes [paper money] the character and qualities of money?" The Court overruled Hepburn and held that the legal tender legislation was constitutional as to pre-existing and subsequent obligations.78

These cases sharply divided the Court and were hugely controversial. The dispute over the constitutionality of paper money resurrected the Framers' debates on the matter.

The fact remains, that in 1787 and in 1862 policy makers expressed their sharpest fear of government paper money when the law made it legal tender. The main object of fear was not the effect which money had peculiarly from legal-tender status. True, there was concern when given tokens were made legal tender retroactively, upsetting prior expectations. But retroactivity posed transitional problems; one way or another men would work through their older deals, and bargainers could adjust future transactions to legal-tender money. The more deeply disturbing aspects of legal-tender status were in what it symbolized and in the working effects it might have to make the symbol real. In the most irreconcilable fashion it symbolized the assertion that legal process should prevail over market process in determining what should be effective money, in practice as well as in law.79

The acceptance of paper money as legal tender was strongly opposed, and the individual opinions of the Justices expressed the opposition. The Chief Justice's dissent in Knox stated:

But the terms of the only express grant in the Constitution of power to establish such a standard leave little room for presumptions. The power conferred is the power to coin money, and these words must be understood as they were used at the time the Constitution was adopted. And we have been referred to no authority which at that time defined coining otherwise than as minting or stamping metals for money; or money otherwise than as metal coined for the purposes of commerce.80

Justice Field added his own dissent:

The power 'to coin money' is, in my judgment, inconsistent with and repugnant to the existence of a power to make anything but coin a legal tender. To coin money is to mould metallic substances having intrinsic value into certain forms convenient

78. Dam, supra note 4, at 377. This time the vote was 5-4. In the time between Hepburn and Knox, the composition of the Court was changed and the number of Justices increased to nine.
79. Hurst, supra note 2, at 184.
80. Knox, 79 U.S. at 583-84.
for commerce, and to impress them with the stamp of the
government indicating their value. Coins are pieces of metal, of
definite weight and value, thus stamped by national authority.\textsuperscript{81}

In addition to expressing their views on the intended and expressed
meaning of the Constitution, these Justices also foreshadowed the concerns
over paper money that would be raised again in the 20th century. These
warnings have been largely forgotten today, but there may come a time
when they are resurrected for contemporary consideration.

E. THE ESTABLISHMENT OF THE FEDERAL RESERVE

At the end of the Civil War and throughout the remainder of the
nineteenth century, there was no central bank in the United States.
Banking remained a local function with no overarching, national
mechanism to regulate the flow of money and credit.\textsuperscript{82} The need for the
creation of a central bank began to be widely acknowledged as a result of
the Panic of 1907.\textsuperscript{83} Without a central bank, the federal government had no
ability to expand or contract money supply on a national, coordinated level
in response to economic needs, and this situation tended to aggravate
booms and busts.\textsuperscript{84} When the Panic of 1907 erupted, the government had
no monetary tools to combat it, and this realization concentrated minds on

\textsuperscript{81} Id. at 649.
\textsuperscript{82} JOHNSON, supra note 67. The post-Civil War state of national currency was as follows:
Although United States Notes were still widely accepted as a medium of exchange,
most paper currency circulating between the Civil War and World War I consisted of
National Bank Notes. They were issued from 1863 through 1932. From 1863 to 1877
National Bank Notes were printed by private bank note companies under contract to
the Federal government. The Federal government took over printing them in 1877.
The economy was in turmoil in the late nineteenth century. The government, in a
move to increase its reserve of precious metals, offered certificates in exchange for
deposits of silver and gold. Gold certificates, colorful and vivid, were first issued in
1863 and put into general circulation in 1882. They are among the most attractive of
all currency issues, with the reverse a brilliant golden orange, symbolic of the gold
coin they represent. In 1933, when the country faced a severe depression and a
banking crisis, the public began to demand gold. Silver certificates were first issued in
exchange for silver dollars in 1878.... For many years silver certificates were the
major type of currency in circulation. However, in the early 1960s when the price of
silver jumped to over $1.29 an ounce it was evident that further increases would make
it profitable for holders of silver coins to sell them in the open market. To avert this
crisis, Congress eliminated silver certificates in 1963, and empowered the Federal
Reserve to issue $1 and $2 Federal Reserve Notes for the first time.

Flamme, supra note 42.

\textsuperscript{83} BORN OF A PANIC: FORMING THE FEDERAL RESERVE SYSTEM, AUGUST 1988, at
\textsuperscript{84} JOHNSON, supra note 67.
the need for a central bank.\textsuperscript{85}

As a result of the lesson of 1907, Congress established the Federal Reserve System (the "Fed") in 1913 to serve as the nation's central bank.\textsuperscript{86} Its most important role was to serve as a "lender of last resort" to the banking system, in order to prevent system-wide bank failures and to provide reserves to banks when no one else would.\textsuperscript{87} The Fed oversees the country's monetary policy, which has two basic goals: to promote "maximum" sustainable output and employment and to promote "stable" prices.\textsuperscript{88} The Federal Open Market Committee ("FOMC") has primary responsibility for conducting monetary policy.\textsuperscript{89}

The Federal Reserve creates money through its open market operations.\textsuperscript{90} These operations, which are conducted by the Federal Reserve Bank of New York, include the buying and selling of previously issued U.S. government securities.\textsuperscript{91} To create money, the New York Fed buys securities on behalf of the Federal Reserve from an approved group of

\textsuperscript{85} The Panic of 1907 was the result of an attempt to corner the stock of United Copper Company. \textit{See} \textit{Panic of 1907, Federal Reserve Bank of Boston,} available at http://www.bos.frb.org/about/pubs/panicof1.pdf. On October 14, 1907, shares in the company sold for more than $62 a share, but two days later they closed at $15 a share. \textit{Id.} F. Augustus Heinze, the man behind the attempt to corner the stock faced ruin. \textit{Id.} The markets quickly lost confidence in the financial institutions associated with Heinze. \textit{Id.} One such institution was Knickerbocker Trust Company, whose president was a business associate of Heinze. \textit{Id.} Knickerbocker's depositors were desperate to withdraw their funds, and began a "run on the bank" on October 22. \textit{Id.} This panic spread throughout the city, and other institutions were hit by demands for immediate withdrawal of money. \textit{Lessons from Wall Street's Panic of 1907, National Public Radio,} (Aug. 28, 2007), available at http://www.npr.org/templates/story/story.php?storyid=14004846. On October 24, the panic had reached the stage where the New York Stock Exchange's president wanted to close the exchange early. \textit{Id.} (quoting \textit{ROBERT F. BRUNER AND SEAN D. CARR, THE PANIC OF 1907} (2007)). Fifty stock exchange houses were on the verge of collapse, because liquidity evaporated. \textit{Id.} The exchange needed a cash infusion to restore liquidity. \textit{Id.} The immediate crisis was averted on that day through the practically single-handed effort of J.P. Morgan who organized the city's banks to raise cash to backstop the exchange. \textit{Id.} Morgan was, in effect, America's de facto central banker.

\textsuperscript{86} See http://www.frbsf.org/publications/federalreserve/monetary/structure.html. The Fed was established under President Wilson with his support, and one of Wilson's key advisors on this matter was Louis Brandeis. \textit{JOHNSON, supra} note 67. The Fed consists of twelve Federal Reserve District Banks, and includes the Board of Governors and the Federal Open Market Committee ("FOMC"). \textit{MISHKIN, supra} note 9, at 369. The current chairman of the Fed is Ben S. Bernanke.

\textsuperscript{87} \textit{MISHKIN, supra} note 9, at 444. Viewed this way, the Fed is the formal institution with the legal duty to act in the manner that J.P. Morgan did to stem the Panic of 1907.

\textsuperscript{88} See http://www.frbsf.org/publications/federalreserve/monetary/structure.html.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} See http://www.federalreserveeducation.org/fed101/policy/money.htm. The Fed also exercises control over the money supply through the discount rate and through bank reserve requirements. \textit{See} \textit{MISHKIN, supra} note 9, at 410. Discount loans are loans the Fed makes to banks. \textit{Id.} at 392. The money supply increases when the level of discount loans increase. \textit{Id.} at 421. Required reserves are the amounts that a bank must hold in reserve in a specified ratio to the amount of its deposits and loans. \textit{Id.} at 214. Such reserves are required by law, and the Fed sets the reserve requirement. \textit{Id.} An increase in the reserve requirement by the Fed results in a contraction of the money supply. \textit{Id.} at 449.

securities dealers.\textsuperscript{92} It pays for the securities by crediting the accounts that the dealers’ banks have at the New York Fed.\textsuperscript{93} These newly credited amounts may be used by banks to support new loans to borrowers.\textsuperscript{94} When the banks make new loans, the money supply is increased.\textsuperscript{95}

The Fed began issuing paper currency, called Federal Reserve notes, shortly after it was established. Federal Reserve notes became legal tender in 1933.\textsuperscript{96} The pieces of paper in our wallets and purses today are Federal Reserve notes. However, the Federal Reserve notes of today are not the same in substance as the Federal Reserve notes when they were originally issued.

In 1913 a major change in paper currency occurred with the passage of the Federal Reserve Act aimed at resolving some long-standing money and banking problems which had led to bank failures, business bankruptcies, and general economic contractions. The Act created the Federal Reserve System as the nation’s central bank to regulate the flow of money and credit for economic stability and growth. In 1914, Federal Reserve Notes, which comprise more than 99 percent of today’s paper money, were issued by Federal Reserve Banks as direct obligations of the Federal Reserve System. They replaced National Bank Notes as the dominant form of paper money.\textsuperscript{97}

When Federal Reserve notes were first created, “they were promissory notes bearer in form, negotiable by delivery alone, and convertible in gold on demand.”\textsuperscript{98} The Federal Reserve notes in our possession are not convertible into gold or anything else.\textsuperscript{99}

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\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. New loans are made possible because the banks’ reserves have been increased.

Banks and other depository institutions (for convenience, we’ll refer to all of these as ‘banks’) keep a certain amount of funds in reserve to meet unexpected outflows. Banks can keep these reserves as cash in their vaults or as deposits with the Fed. In fact, banks are \textit{required} to hold a certain amount in reserves. . . . The major tool the Fed uses to affect the supply of reserves in the banking system is open market operations—that is, the Fed buys and sells government securities on the open market. These operations are conducted by the Federal Reserve Bank of New York.

Suppose the Fed wants the funds rate to fall. To do this, it buys government securities from a bank. The Fed then pays for the securities by increasing that bank’s reserves. As a result, the bank now has more reserves than it wants. So the bank can lend these unwanted reserves to another bank in the federal funds market. Thus, the Fed’s open market purchase increases the supply of reserves to the banking system, and the federal funds rate falls.

See \url{http://www.frbsf.org/publications/federalreserve/monetary/tools.html}.

\textsuperscript{95} Id.
\textsuperscript{96} NUSSBAUM, \textit{MONEY IN THE LAW}, \textit{supra} note 1, at 47.
\textsuperscript{97} Flamme, \textit{supra} note 42.
\textsuperscript{98} Khan, \textit{supra} note 46, at 436.
\textsuperscript{99} Professor Khan posed the following questions about the nature of our Federal Reserve notes:
F. THE EFFECT OF THE GREAT DEPRESSION ON MONEY

The Great Depression was the most catastrophic event in American economic history. Real output in the United States fell almost 30 percent between 1929 and 1933, and the unemployment rate rose from about 3 percent to 25 percent in those years.\(^{100}\) The economy suffered from deflation, with prices falling at a rate of almost 10 percent a year in the early 1930s.\(^{101}\) This economic contraction was accompanied by (not surprisingly) a plummeting stock market, bank failures, and bankruptcies.\(^{102}\)

During this period, the money supply dropped by more than 25 percent.\(^{103}\) According to Professor Mishkin, this drop "is thought by many economists, particularly monetarists, to have been the major contributing factor the severity of the depression, never equaled before or since."\(^{104}\) The decline in money supply was the largest ever experienced in the United States.\(^{105}\)

The consensus view among economists is that adherence to the gold standard aggravated the Great Depression because the government attempted to defend the gold standard by raising interest rates.\(^{106}\) Thus, at a time when the economy was contracting, the government raised interest rates; hindsight suggests that the better course of action would have been to lower interest rates to spur economic activity. Fed Chairman Bernanke described the situation in the following way:

Central banks as well as private investors converted a substantial quantity of dollar assets to gold in September and October of 1931, reducing the Federal Reserve’s gold reserves. The

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\(^{101}\) *Id.*

\(^{102}\) Deflation cripples economic activity. If a consumer knows that prices are falling, she will refrain from making non-essential purchases today because prices will be lower in the future. If consumers are not consuming, there is no need to produce.

\(^{103}\) *Id.*

\(^{104}\) *Mishkin*, supra note 9, at 466.

\(^{105}\) *Id.*

speculative attack on the dollar also helped to create a panic in the U.S. banking system. Fearing imminent devaluation of the dollar, many foreign and domestic depositors withdrew their funds from U.S. banks in order to convert them into gold or other assets. The worsening economic situation also made depositors increasingly distrustful of banks as a place to keep their savings. During this period, deposit insurance was virtually nonexistent, so that the failure of a bank might cause depositors to lose all or most of their savings. Thus, depositors who feared that a bank might fail rushed to withdraw their funds. Banking panics, if severe enough, could become self-confirming prophecies. During the 1930s, thousands of U.S. banks experienced runs by depositors and subsequently failed.

Long-established central banking practice required that the Fed respond both to the speculative attack on the dollar and to the domestic banking panics. However, the Fed decided to ignore the plight of the banking system and to focus only on stopping the loss of gold reserves to protect the dollar. To stabilize the dollar, the Fed once again raised interest rates sharply, on the view that currency speculators would be less willing to liquidate dollar assets if they could earn a higher rate of return on them. The Fed’s strategy worked, in that the attack on the dollar subsided and the U.S. commitment to the gold standard was successfully defended, at least for the moment. However, once again the Fed had chosen to tighten monetary policy despite the fact that macroeconomic conditions—including an accelerating decline in output, prices, and the money supply—seemed to demand policy ease.1

Thus, it is widely accepted that the gold standard aggravated macroeconomic problems during the Great Depression. Gold also aggravated economic problems at the level of the individual. Among other things, the fragility of the banking system led to runs on banks with depositors demanding gold in satisfaction of their accounts. In order to prevent further runs and to protect the government’s own gold supply, the federal government in 1933 and 1934 outlawed private holdings or dealings in gold, and barred enforcement of private contracts requiring payment in gold or gold-backed paper. President Roosevelt acted first, and was soon followed by Congress.108 The Supreme Court upheld the constitutionality

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107. Bernanke, supra note 100.
108. HURST, supra note 2, at 42. On April 5, 1933, President Roosevelt issued Executive Order 6102, which banned the private ownership of gold by U.S. citizens (except for certain specified exceptions) and required all citizens to turn over their gold to the government. Exec. Order No. 6102, reprinted in 12 U.S.C. § 248; see also Nebolsine, supra note 15, at 1083-84. The reasons for this order included the need to prevent bank runs and to preserve the government’s gold holdings.

Runs [by the public demanding gold in exchange for notes] developed on both Federal
of these measures in *Norman v. Baltimore & O.R. Co.* 109 The Court upheld the prohibition of gold clauses on the ground that Congress had the constitutional authority to regulate the currency and establish the monetary system of the country, and that no private contract would be permitted to interfere with that authority.

The crises generated by the Great Depression again brought about a fundamental change in the nature of money in America. "In 1913, notes Reserve Banks (which had been established under the Federal Reserve Act in 1913) and commercial banks. In order to deal with this crisis, only Federal Reserve Banks were permitted to hold gold. In 1934, Federal Reserve Banks were required to turn over all gold coin, bullion, and certificates to the U.S. Treasury in return for a new type of gold certificate. These were never put into circulation and the last ones were printed in January 1935. In 1964, private citizens could once again hold gold certificates issued before January 30, 1934, but they could no longer be redeemed in gold. This changed in 1974, and private U.S. citizens could once again hold gold legally.

Flamme, *supra* note 42.

Roosevelt's order was followed by a Joint Resolution of Congress, on June 5, 1933, which declared that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy" and therefore prohibited. The resolution also provided that "Every obligation, hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." H.J. Res. 192, 73d Cong. (1933), 48 Stat. 112.

109. *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935). The *Norman* case raised the issue of the enforceability of a contractual clause specifying payment of an obligation in gold coin. The defendant railroad company argued that it was legally unable to pay an obligation in gold coin as a result of the Congressional resolution. Plaintiff Norman challenged the constitutionality of the resolution. In deciding the case, the Court distinguished *Bronson v. Rodes*, 74 U.S. 229 (1868), by noting that at the time of the Bronson decision, gold coin was still in lawful circulation and Congress had not passed any legislation prohibiting the enforcement of gold clauses in contracts. *Norman*, 294 U.S. at 300. The Court also took note of the following language from Congress:

The Committee on Banking and Currency of the House of Representatives stated in its report recommending favorable action upon the Joint Resolution (citation omitted):

The occasion for the declaration in the resolution that the gold clauses are contrary to public policy arises out of the experiences of the present emergency. These gold clauses render ineffective the power of the government to create a currency and determine the value thereof. If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a particular form of the circulating medium, particularly when it is the medium upon which the entire credit and currency structure rests.

*Norman*, 294 U.S. at 311-312. This language is noteworthy because it demonstrates the broad authority of Congress when it comes to monetary matters.
were redeemable in gold and were not legal tender. By 1934, they could not be converted into gold and were declared legal tender for all debts, public and private. By forbidding private dealings in gold coin or gold, Congress in 1934 finally freed the money system from the chances of the precious-metals commodity market, released money from a rigid control which had no functional relation to general transactions, and removed the basic factor which had fostered superior and inferior grades among the components of the money system. In 1945 Congress relaxed statutory limitations which had restricted issue of federal reserve notes by the system’s gold reserve and its holding of limited kinds of commercial paper, and thus armed the system to buy such securities as the Treasury might float to support operation of the Federal Deposit Insurance Corporation.

The economic crisis drove the policy responses of the entire government. The actions of all three branches weakened the link between gold and money, and set the stage for the final break.

G. THE BRETTON WOODS AGREEMENT

In July of 1944, the Allied powers were able to foresee with confidence the eventual defeat of Germany and Japan, and realized the need to prepare for a post-war monetary order. Undoubtedly influenced by the disastrous state of affairs after World War I, the soon-to-be victorious powers wanted to establish a new global framework for monetary stability. The allied powers saw the need for a new standard to govern foreign exchange. In the first three weeks of July 1944, delegates from 44 nations gathered in New Hampshire at the United Nations Monetary and Financial Conference to pursue these goals. The resulting agreement has come to be known by the location of the conference, the Bretton Woods Agreement.

The delegates at Bretton Woods reached an agreement known as the Bretton Woods Agreement to establish a postwar international monetary system of convertible currencies, fixed exchange rates and free trade. To facilitate these objectives, the agreement created two international institutions: the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank). The

110. Khan, supra note 46, at 438.
111. HURST, supra note 2, at 60.
112. MISHKIN, supra note 9, at 488.
intention was to provide economic aid for reconstruction of postwar Europe.

The Bretton Woods Agreement was also aimed at preventing currency competition and promoting monetary co-operation among nations. Under the Bretton Woods system, the IMF member countries agreed to a system of exchange rates that could be adjusted within defined parities with the U.S. dollar or, with the agreement of the IMF, changed to correct fundamental disequilibria in the balance of payments.\textsuperscript{113}

This new system of fixed exchange rates was based on the convertibility of U.S. dollars into gold at the $35 per ounce, and the dollar was used as the standard by which other countries denominated the assets that they held as international reserves.\textsuperscript{114} Under this modified gold standard, countries settled their international balances in U.S. dollars, and the U.S. in turn stood ready to exchange other central banks' holdings of dollars for gold at the fixed rate of $35 per ounce.\textsuperscript{115} By this use of the

\begin{itemize}
\item \textsuperscript{113} Id.
\item \textsuperscript{114} MISHKIN, supra note 9, at 488. However, the ability to convert dollars into gold was limited to foreign governments and central banks only; individuals did not have the right to such a conversion. Id.
\item \textsuperscript{115} Michael D. Bordo, \textit{Gold Standard}, THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2008), available at http://www.econlib.org/LIBRARY/Enc/GoldStandard.html. One prominent economist explained that this monetary regime was more accurately called "the gold-exchange standard," which replaced the gold standard after World War I. JACQUES RUEFF, THE MONETARY SIN OF THE WEST, 15, 22 (Roger Glemat trans. 1972). Rueff expressed the strong view that the gold-exchange standard posed grave threats to international monetary order. Rueff's views are important because he was one of the leading economists of his time, and was one of Charles de Gaulle's chief economic advisors.
\item The gold-exchange standard is characterized by the fact that it enables the bank of issue to enter in its monetary reserves not only gold and paper in the national currency, but also claims denominated in foreign currencies, payable in gold (which necessarily meant dollars and sterling after World War I) and deposited in the country of origin. In other words, the central bank of a country that applies the gold-exchange standard can issue currency not only against gold and claims denominated in the national currency, but also claims in dollars or sterling.
\item Rueff warned of the dangerous consequences of this situation. He observed that deficits in the U.S. balance of payments produced a duplication of the world's credit base. Id. at 25-26. He warned: Indeed, the foreign exchange transferred for the settlement of the deficit is bought, against the creation of money, by the banking system of the creditor country. The cash holdings thus generated are handed over to the creditors of the debtor country. But at the same time, these amounts in foreign currency against which the creditor country has created money are reinvested in the market of the debtor country. Thus everything happens as if these amounts had never left the debtor country. Thus these foreign-exchange movements representing balance-of-payments deficit flow into the credit system of the creditor country, while at the same time remaining in the debtor country, thereby giving rise to a straightforward duplication phenomenon.
\item One result, according to Rueff, was that it enabled the U.S. to incur deficits "without tears" because the recycling of the deficit flow meant that the U.S. never suffered adverse consequences from running a deficit, in contrast to a situation under the traditional gold standard where such deficits would require economic contraction by the debtor country. Id. at 23. This mechanism "becomes a powerful instrument of worldwide inflation." Id. Rueff's analysis became the basis of the following statement.
\end{itemize}
dollar, it became the international "reserve currency." This use of the dollar as the reserve currency was one of the most important features of the Bretton Woods Agreement. The Bretton Woods system lasted from 1945 to 1971.

H. THE FINAL BREAK FROM GOLD AND THE CURRENT SITUATION

The 1960s saw significant events leading up to the final break from gold. In 1963, "federal reserve notes ceased to carry the promise of redemption in lawful money of the United States and stood simply declared as legal tender for all public and private debts." In 1965 and 1968, Congress "eliminated the requirement that federal reserve banks hold gold issued by de Gaulle in 1965:

The fact that many countries as a matter of principle accept dollars as well as gold to offset the U.S. balance-of-payments deficits leads to a situation wherein the United States is heavily in debt without having to pay. Indeed, what the United States owes to foreign countries it pays—at least in part—with dollars that it can simply issue it chooses to. . . This unilateral facility that is available to the United States contributes to the gradual disappearance of the idea that the dollar is an impartial and international trade medium, whereas it is in fact a credit instrument reserved for one state only.

Id. at 72.

Rueff predicted "the growing insolvency of the dollar resulting from the unending accumulation of foreign 'dollar balances' . . . and by the ensuing widespread inflation." Id. at 160. He asked, "Can one imagine that holders of fantastic masses of dollar or Eurodollar balances, henceforth without any fixed value in terms of gold or indeed in terms of any non-American currency, will indefinitely abstain from demanding in the exchange market the counterpart in a third currency of their holdings?" Id. at 205. Rueff died in 1978. One wonders what he would think about the situation today.

With the United States running a current account deficit at 6 percent of national income, foreign nationals have been accumulating U.S. assets at a spectacular rate. Taking into account recent stock market gains, foreigners now hold well over $14 trillion of U.S. assets, more than a 100 percent of U.S. gross domestic product. Foreigners, mainly foreign central banks and government investment funds, hold more than $2.5 trillion in U.S. Treasury securities alone. Incredibly, the United States absorbs roughly 70 percent of all net saving produced by the world's current account surplus countries, including China, Japan, Germany and the oil exporting countries. Borrowing on this scale by any large country, much less the world's pre-eminent economy is unprecedented in modern world history.

Many observers are asking whether U.S. indebtedness to foreigners might pose any subtle hidden threats to the U.S. economy or even to U.S. national security. With China alone holding $1.2 trillion in reserve assets and foreigners collectively holding more than twice that in U.S. Treasury securities, is there any risk that the United States might be subject to economic blackmail?


116. MISHKIN, supra note 9, at 489.
117. Id. at 488.
118. HURST, supra note 2, at 47.
reserves against deposits or federal reserve notes." America's final break from the gold standard occurred in August 1971 when President Nixon effectively ended the Bretton Woods Agreement.

By the late 1960s, the inflationary excesses of the Great Society and the Vietnam War exerted tremendous stress on the gold exchange standard of Bretton Woods. Foreign central banks, awash with dollars, saw gold at $35 an ounce as an irresistible bargain and began to exchange dollars for gold. The United States could either watch its gold reserves flee the country or close the gold window. On 15 August 1971, President Richard Nixon closed the gold window, effectively uncoupling the dollar from gold and ending the Bretton Woods regime. Today, each of the 182 member countries of the IMF can choose the method it uses to determine its exchange rate: a free float, a managed float, a pegged exchange arrangement, or a fixed exchange arrangement.

The present system of floating currencies has been the general rule only since Nixon "closed the gold window" on August 15, 1971—that is, terminated the United States' obligation to convert dollars held by foreign monetary authorities into gold. American money thus lost any ties to the Framers' original views.

Nevertheless, from the time when the framers wrote into the Constitution their stringent bans on state bills of credit and on state laws making anything but gold or silver legal tender, until Congress removed gold from the domestic money supply in 1934, public policy resorted to a specie standard as the ultimate means to show distrust of money-supply decisions made by legal processes. . . To the extent that law tied the money stock to a specie base, it linked control to factors not determined by public officers.

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119. HURST, supra note 2, at 93. "The requirement of a gold reserve for deposits was abolished by 79 Stat. 5 (1965), sec. 1; that for Federal Reserve notes by 82 Stat. 50 (1968), sec. 3." HURST, supra note 2, at 313 n.337. These moves eliminated the Federal Reserve Act's original requirements of a gold reserve.

The Federal Reserve Act in 1913 revived the idea of a substantial reserve against circulating paper, stipulating the federal reserve banks hold 40 percent of gold against their outstanding federal reserve notes. Congress eliminated the gold reserve requirement in 1968, in tardy recognition that it had lost meaning since Congress in 1934 forbade private monetary dealing in gold.

HURST, supra note 2, at 53.


121. FRIEDMAN, supra note 6, at 15.

122. HURST, supra note 2, at 67. To support this point, Hurst quoted the following statement by Alexander Hamilton:
As of today, the Department of Treasury describes our money in the following way:

Federal Reserve notes are not redeemable in gold, silver or any other commodity, and receive no backing by anything. This has been the case since 1933. The notes have no value for themselves, but for what they will buy. In another sense, because they are legal tender, Federal Reserve notes are 'backed' by all the goods and services in the economy.123

Professor Mishkin, who was on the Fed's Board of Governors until August 2008, describes our money in this way in his textbook:

Federal Reserve notes are IOUs from the Fed to the bearer and are also liabilities, but unlike most liabilities, they promise to pay back the bearer solely with Federal Reserve notes; that is, they pay off IOUs with other IOUs. Accordingly, if you bring a $100 bill to the Federal Reserve and demand payment, you receive two $50s, five $20s, ten $10s, or one hundred $1 bills.124

Federal reserve notes have value and are accepted as payment because the law requires us to accept them as payment. Each paper note bears the

Though paper emissions, under a general authority, might have some advantages not applicable, and be free from some disadvantages which are applicable, to the like emissions by the States separately, yet they are of a nature so liable to abuse—and, it may even be affirmed, so certain of being abused—that the wisdom of the government will be shown in never trusting itself with the use of so seducing and dangerous an expedient. In times of tranquility it might have no ill consequences—it might even perhaps be managed in a way to be productive of good; but in great and trying emergencies, there is almost a moral certainty of its becoming mischievous. The stamping of paper is an operation so much easier than laying of taxes, that a government in the practice of paper emissions would rarely fail, in any such emergency, to indulge itself too far in the employment of that resource, to avoid, as much as possible, one less auspicious to present popularity.


123. U.S. Dept. of the Treasury, http://www.ustreas.gov/education/faq/currency/legal-tender. shtml#q2 (last visited Oct. 5, 2008). The current twenty-dollar bill makes clear that it is a "Federal Reserve Note" above the image of Andrew Jackson. By contrast, the federal reserve notes issued from 1928 to 1950 carried the words:

THE UNITED STATES OF AMERICA WILL PAY TO THE BEARER ON DEMAND [some number of] DOLLARS," and the inscriptions "REDEEMABLE IN GOLD ON DEMAND AT THE UNITED STATES TREASURY, OR IN GOLD OR LAWFUL MONEY AT ANY FEDERAL RESERVE BANK" (pre-1934); or "THIS NOTE ... IS REDEEMABLE IN LAWFUL MONEY AT THE UNITED STATES TREASURY, OR AT ANY FEDERAL RESERVE BANK" (post-1934). Starting with Series 1963, the words "WILL PAY TO THE BEARER ON DEMAND" no longer appeared, and each federal reserve note simply stated a particular denomination in dollars. With and after Series 1963, the promise of redemption also vanished from the face of each note.

Vieira, supra note 58, at 81.

124. MISCHIN, supra note 9, at 393.
words: “This note is legal tender for all debts, public and private.” It is pure fiat money. The current nature of money in the United States was powerfully described by in a now famous (or infamous) speech by Ben Bernanke in 2002 that grabbed the attention of the financial world.

Like gold, U.S. dollars have value only to the extent that they are strictly limited in supply. But the U.S. government has a technology, called a printing press (or, today, its electronic equivalent), that allows it to produce as many U.S. dollars as it wishes at essentially no cost. By increasing the number of U.S. dollars in circulation, or even by credibly threatening to do so, the U.S. government can also reduce the value of a dollar in terms of goods and services, which is equivalent to raising the prices in dollars of those goods and services. We conclude that, under a paper-money system, a determined government can always generate higher spending and hence positive inflation.

Bernanke gave this speech when the prospect of deflation was causing concern, and he made these remarks to reassure the audience that the Fed could always counter deflation by creating inflation. Nonetheless, it was a disturbingly candid confirmation of the fact that money is now a pure abstraction that can be created endlessly because it is completely decoupled from a tangible restraint.

IV. MONEY AS PURE SIMULACRUM

Money in its earliest form was a thing of value in and of itself that others were willing to accept as part of an exchange because the money had intrinsic value. Live cattle, animal skins, and finally gold constituted money. After gold became the predominant form of money, people realized that transactions became easier if pieces of paper representing gold were exchanged instead of the actual gold. After all, gold is heavy and difficult to transport for large transactions. Thus, people came to accept paper as the symbol for gold, and the symbol became money. The core fact, however, was that the paper signified something of value; it had value only insofar as it served as the symbol of the underlying thing of value. This was the state of world for hundreds of years until the 1970s, when the last major currencies of the world abandoned the gold standard. From that point forward, the pieces of paper we call money ceased to be signifiers of 

125. On a twenty-dollar bill, these words are found to the left of Andrew Jackson’s image, below the seal of the Fed, and above the signature of the Treasurer of the United States.

a signified thing of value. The symbol ceased being a symbol and became the thing of value in and of itself.

Explained in these terms, it seems many would agree that this was one of the great turning points in history. One would expect that such a momentous event would be the subject of popular discussion. But when is it ever discussed? Is the event even known in popular circles? In what class or course in high school, college, or law school is the event studied? It seems accurate to say that the final abandonment of the gold standard passed without much public notice. There was one obscure circle, though, where it was noticed. Strangely enough, at least two French post-modernist literary theorists recognized the significance, and recorded their observations which have turned out to be surprisingly prescient.

A. JEAN BAUDRILLARD

Jean Baudrillard analyzed money in post-modernist terms. Before turning to his specific discussions of money, it is helpful to examine his more general analysis of symbols in Simulacra and Simulation, in which he discussed the relationship between signifiers and the signified. He wrote:

All Western faith and good faith became engaged in this wager on representation: that a sign could refer to the depth of meaning, that a sign could be exchanged for meaning and that something could guarantee this exchange—God of course. But what if God himself can be simulated, that is to say can be reduced to the signs that constitute faith? Then the whole system becomes weightless, it is no longer itself anything but a gigantic simulacrum—not unreal, but a simulacrum, that is to say never exchanged for the real, but exchanged for itself, in an uninterrupted circuit without reference or circumference.128

With these thoughts, he drew the distinction between the symbol and the signified thing, and set the stage for the examination of the possibility that the symbol can take on meaning and value of its own, independent of and without reference to the original signified thing.

His analysis took him to the subject of money. With an obvious understanding of the origins of money as gold, and then the development of the gold standard, he wrote:

127. The author of this paper majored in economics in the late 1970s and early 1980s in a department whose faculty included President Reagan's chief economic advisor in addition to a future member of the Board of Governors of the Fed. The author does not recall any discussion of the gold standard or its abandonment.

Money is the first ‘commodity’ to assume the status of a sign and to escape use-value. Henceforth, it intensifies the system of exchange-value, turning it into a visible sign, and in this way makes the transparency of the market (and therefore of rarity too) visible. Today, however, money sanctions a further step: it also escapes exchange-value. Freed from the market itself, it becomes an autonomous simulacrum, relieved of every message and every signification of exchange, becoming a message itself and exchanging amongst itself. Money is then no longer a commodity since it no longer contains any use-value or exchange-value, nor is it any longer a general equivalent, that is, it is no longer a mediating abstraction of the market. Money circulates at a greater rate than everything else, and has no common measure with anything else.129

This observation tracks the rupture of money from gold. It is undoubtedly no coincidence that he wrote these words in the same general timeframe as when Nixon forced the end of the convertibility of money into gold.130 What is so interesting about this observation is that it echoes the thoughts of some members of the Supreme Court in the Legal Tender cases. The majority opinion in Knox addressed the issue of the intrinsic nature of money in the following way:

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government’s promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is


130. It is also probably not a coincidence that the two French literary theorists were contemporaries of Jacques Rueff. It seems highly likely that the two were familiar with Rueff’s writings, because articles about Rueff’s monetary theories were published in the popular, quality media, and Rueff was certainly one of the most prominent French economists of his time.
hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII, almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.131

Indeed, how can anything "be made a uniform standard of value which has itself no value?" This was precisely the question explored by Baudrillard. Two observers separated by a century, culture, and undoubtedly on different ends of the political spectrum recognized the urgency of the same issue.

Baudrillard summarized the status of money with the following observation, which seems to squarely applicable: "[T]he era of simulation is inaugurated by a liquidation of all referential . . . [i]t is a question of substituting the signs of the real for the real . . . "132 The "liquidation of all referential" would mean the break of paper money from gold, which has historically been the monetary referential. Paper money, formerly the sign of the real (gold), has become the real. Baudrillard continued his analysis:

Saussure located two dimensions to the exchange of terms of the langue, which he assimilated to money. A given coin must be exchangeable against a real good of some value, while on the other hand it must be possible to relate it to all the other terms in the monetary system. More and more, Saussure reserves the term value for this second aspect of the system: every term can be related to every other, their relativity, internal to the system and constituted by binary oppositions. This definition is opposed to the other possible definition of value: the relation of every term to what it designates, of each signifier to its signified, like the relation of every coin with what it can be exchanged against. The first aspect corresponds to the structural dimension of language, the second to its functional dimension. Each dimension is separate but linked, which is to say that they mesh and cohere. This coherence is characteristic of the 'classical' configuration of the linguistic sign, under the rule of the commodity law of value, where designation always appears as

132. BAUDRILLARD, SIMULACRA AND SIMULATION, supra note 129, at 2.
the finality of the structural operation of the langue. The parallel between this 'classical' stage of signification and the mechanics of value in material production is absolute, as in Marx's analysis: use-value plays the role of the horizon and finality of the system of exchange-values. The first qualifies the concrete operation of the commodity in consumption (a moment parallel to designation in the sign), the second relates to the exchangeability of any commodity for any other under the law of equivalence (a moment parallel to the structural organisation of the sign). Both are dialectically linked throughout Marx's analyses and define a rational configuration of production, governed by political economy."

These observations track the development of money as things of value in and of themselves (such as animal skins and gold) and converted into a medium for universal exchange. Baudrillard goes on to observe:

A revolution has put an end to this 'classical' economics of value, a revolution of value itself, which carries value beyond its commodity form into its radical form. This revolution consists in the dislocation of the two aspects of the law of value, which were thought to be coherent and eternally bound as if by a natural law. Referential value is annihilated, giving the structural play of value the upper hand. The structural dimension becomes autonomous by excluding the referential dimension, and is instituted upon the death of reference. The systems of reference for production, signification, the affect, substance and history, all this equivalence to a 'real' content, loading the sign with the burden of 'utility', with gravity—its form of representative equivalence—all this is over with. Now the other stage of value has the upper hand, a total relativity, general commutation, combination and simulation—simulation, in the sense that, from now on, signs are exchanged against each other rather than against the real (it is not that they just happen to be exchanged against each other, they do so on condition that they are no longer exchanged against the real). The emancipation of the sign: remove this 'archaic' obligation to designate something and it finally becomes free, indifferent and totally indeterminate, in the structural or combinatory play which succeeds the previous rule of determinate equivalence."

These observations reflect the nature of money today. Money is now a pure abstraction with its own self-referential value and reality, whose creation is no longer constrained by a reference to anything else. Money is no longer a symbol; it is its own reality.

133. BAUDRILLARD, SYMBOLIC EXCHANGE AND DEATH, supra note 130, at 6 (emphasis omitted).
134. Id. at 6-7 (emphasis omitted).
B. JEAN-JOSEPH GOUX

The second French post-modernist to include money in his observations was Jean-Joseph Goux. He wrote that the development of money “is a process in which thought leaves aside what is fortuitous about the thing, the immediate phenomenon, and separates the inessential from the essential, making it into an abstraction.”  

Thus—and this is fundamental—the history of the money function is marked by a progression toward abstraction and convention. In place of products with material value, increasingly abstract monetary signs are gradually substituted. In monetary evolution, we can see an exemplary shift from the instrument to the fetish, from the fetish to the symbol, and from the symbol to the simple sign: a movement toward idealization, a shift from material prop to relation. No longer a material value, money becomes a sign of gold, and then a simple sign of value, the sign or representative of a hypostatized abstraction.

This observation traces the development of money from things like animal skins to the pure abstraction that it is today—the development from a coarse thing to a pure abstraction. Furthermore, Goux contended that “[t]he increasingly arbitrary medium of exchange, whether economic or signifying, tends to make matter indifferent. The logic of exchange ends with the indifferentiation of matter.” Matter has become indifferent because there is no gold or anything else tangible underlying money. He also observed: “[w]hen money has assumed the social role of a simple, ‘arbitrary’ symbol, the abstraction that is market ‘value’ is at its height. Ultimately, value is detached from any material incarnation or any concrete labor.” When money can be created endlessly and effortlessly through the running of the printing press, it is completely detached from any labor or material input. Goux then aptly summarized the nature of money:

The analysis of economic exchanges shows that the notion of the pure symbol, in the sense of a disaffected substitute that can be perfectly arbitrary, conventional, and unmotivated, emerges of its own accord from circulation and thus from the intensification of social exchanges. It appears at a precise turning point in the development of the extended exchange form. Indeed, in its function as a simple medium of circulation and exchange, gold or silver currency can be replaced by any sign or symbol.

136. Id. at 49.
137. Id. at 50 (emphasis omitted).
138. Id. at 62.
whatsoever that represents a certain quantity of the standard unit. As Marx writes, clearly distinguishing the registers of the symbolic and the real, "symbolic money can replace the real, because material money as mere medium of exchange is itself symbolic." What circulates is no longer a certain quantity of precious metal, whose investment with sacred value is all the greater since the cause of its value is not understood, but rather a substitute without any value of its own. This substitute highlights the symbolic function per se. But in order for this legal substitution to take place, the exchanges must be unified by a common monetary measure and must no longer be subject to the accidents of multiple contingent evaluations.139

V. MONEY AS ITS OWN HYPER-REALITY

So, do these post-modernist visions describe the world today? Is the following statement by Baudrillard accurate: "[s]imulation is no longer that of a territory, a referential being, or a substance. It is the generation by models of a real without origin or reality: a hyperreal."140 If one is open to the possibility that we live in a state of hyper-reality as envisioned by Baudrillard, what does it look like? Perhaps it might look like this. In 2007, the average amount of annual compensation for the top 25 highest paid hedge fund managers was $892-million.141 The compensation for the highest paid manager was $3.7-billion.142 The following observation in the Wall Street Journal is also illuminating:

[Professor] Rauh [of the University of Chicago] said “it’s hard to escape the notion” that the rising share of income going to the very richest is, in part, “a Wall Street, financial industry-based story.” The study shows that the highest-earning hedge-fund manager earned double in 2005 what the top earner made in 2003, and top 25 hedge-fund managers earned more in 2004 than the chief executives of all the companies in the Standard & Poor’s 500-stock index, combined.143

139. Id. at 127 (emphasis omitted) (quoting KARL MARX, GRUNDRISSE: FOUNDATIONS OF THE CRITIQUE OF POLITICAL ECONOMY 212, (Martin Nicolaus trans., Random House, 1973)).
140. BAUDRILLARD, SIMULACRA AND SIMULATION, supra note 129, at 1.
142. Id. Hedge fund managers are not paid on an hourly basis, of course, but the following breakdown provides a telling comparison. Suppose a year consists of 2000 working hours (50 weeks x 40 hours per week). The hourly compensation of someone who makes $3.7-billion in one year is $1,850,000.00 per hour. As of July 24, 2008, the federal minimum wage is $6.55 per hour. See http://www.dol.gov/compliance/topics/wages-minimum-wage.htm.
Earlier this decade, the price of some paintings broke the $100-million mark.\textsuperscript{144} Single family homes also have broken the $100-million mark this decade.\textsuperscript{145} To the ordinary person, such amounts are beyond comprehension.\textsuperscript{146} Such numbers are the product of a different world, a different reality that bears no resemblance to the reality of most people.

VI. HISTORIC CONSEQUENCES OF MONEY AS ITS OWN HYPER-REALITY

If the consequences of hyper-reality were merely fodder for gossip columns about the wealth of others, whether or not we live in the hyper-real would be an equally frivolous matter. However, such a situation has potentially real and catastrophic consequences in the form of hyperinflation or financial manias, which unavoidably lead to massive social upheaval and suffering. These economic phenomena are real, and their creation results directly from out-of-control money creation. The relationship between money creation and hyperinflation is as follows:

"Inflation in the range to which we have become accustomed, let alone in the hyperinflationary range, became feasible only after paper money came into wide use. The nominal quantity of paper money can be multiplied indefinitely at a negligible cost; it is necessary only to print higher numbers on the same pieces of paper."\textsuperscript{147}

Similarly, out-of-control money creation may lead to financial manias. "Speculative manias gather speed through expansion of money and credit or perhaps, in some cases, get started because of an initial expansion of money and credit."\textsuperscript{148} Two infamous periods from history illustrate the phenomena.

\begin{itemize}
\item \textsuperscript{146} Hyper-reality may also be a world where lawyers making $1-million a year view themselves as struggling underachievers, barely able to stay above the middle class. Bar Talk, \textit{Rich lawyer, Poor lawyer}, \textit{LegalWeek.com}, Dec. 12, 2007, http://www.legalweekblogs.com/legalvillage/2007/12/rich_lawyer_poor_lawyer.html.
\item \textsuperscript{147} FRIEDMAN, supra note 6, at 190.
\item \textsuperscript{148} CHARLES P. KINDLEBERGER, \textit{Mania, Panics, and Crashes: A History of Financial Crises} 52 (1978). "The word 'mania' ... connotes a loss of touch with reality or rationality, even something close to mass hysteria or insanity." \textit{Id}. at 25.
\end{itemize}
A. LESSONS FROM THE WEIMAR REPUBLIC

One of the most amazing and painful experiences with hyperinflation occurred during the Weimar Republic of post-World War I Germany.\textsuperscript{149} This experience left indelible images of people trying to buy groceries with a wheelbarrow full of money, and people burning stacks of paper money for winter heat because the money was cheaper than heating fuel.\textsuperscript{150} The seeds of the hyperinflation were sown by Germany’s abandonment of the gold backing of its currency in 1914, the costs of waging war, and its defeat.\textsuperscript{151} The generally accepted explanation for the cause of the hyperinflation is that Germany’s money supply increased uncontrollably due to the heavy burden of war reparations imposed by the World War I victors.\textsuperscript{152} Professor Mishkin described the causes as follows:

In 1921, the need to make reparations and reconstruct the economy after World War I caused the German government’s expenditures to greatly exceed revenues. The government could have obtained revenues to cover these increased expenditures by raising taxes, but that solution was, as always, politically unpopular and would have taken much time to implement. The government could also have financed the expenditure by borrowing from the public, but the amount needed was far in excess of its capacity to borrow. There was only one route left: the printing press. The government could pay for its expenditures simply by printing more currency (increasing the money supply) and using it to make payments to the individuals and companies that were providing it with goods and services. \ldots [T]his is exactly what the German government did; in late 1921, the money supply began to increase rapidly, and so did the price level.\textsuperscript{153}

The wheels set in motion by war and defeat started to accelerate at an alarming pace in the post-war years. During the German hyperinflation after World War I, prices increased at the average rate of more than 300 percent a month for more than a year.\textsuperscript{154} “[T]he prices that had doubled from 1914 to 1919 doubled again during just five months in 1922,” but this

\begin{footnotesize}
\begin{enumerate}
\item The commonly accepted definition of hyperinflation is a rate of price increase exceeding 50 percent per month. Theo Balderston, Economics and Politics in the Weimar Republic 104 (2002).
\item Adam Smith, Paper Money 57-62 (Summit Books 1981).
\item Constantino Bresciani-Turroni, The Economics of Inflation 51-68 (first pub. 1931, later trans. Millicent E. Savers 1937); Balderston, supra note 149, at 1-33.
\item Mishkin, supra note 9, at 666.
\item Friedman, supra note 6, at 194.
\end{enumerate}
\end{footnotesize}
was nothing compared to what would follow.\textsuperscript{155} 

In June, 1918, the dollar (parity 4.21 marks) had reached a level of 5.31 and by November, 1918, 7.43. In December 1919, the dollar was quoted at 46.77; in December, 1920, at 73; in December, 1921, at 191; in July 1922, at 493; in October, 1922, at 3180; in December, 1922, at 7589. . . . [D]ollar quotations in January, 1923, averaged 17,972; in February, 27,918; in March, 21,190; in April, 24,457; in May, 47,670; in June, 109,996; in July 353,412. Then the dollar quotations soared to astronomical heights: 4.6 millions in August; 150 millions on September 18; 1.2 billion on October 9; 12 billions on October 19; the trillion limit was attained on November 14.\textsuperscript{156} 

In five years, the exchange rate between the U.S. dollar and the mark went from $1 = 4.21 marks to $1 = one trillion marks. It is not even clear if 1 trillion is within ordinary human comprehension.

On pay day, workers spent their pay as quickly as possible before the money could depreciate even more. Those unable to take time from work to spend the pay arranged for relatives to meet them at the workplace so that the money could be spent within minutes of receipt.\textsuperscript{157} “When the 1,000-billion mark note came out, few bothered to collect the change when they spent it. By November 1923, with one dollar equal to one trillion

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} Id.
\item \textsuperscript{156} See NUSSBAUM, MONEY IN THE LAW, supra note 1, at 200. The political consequences from the hyperinflation are now well-known. “The fledging Nazi party, whose attempted coup had failed in 1923, won 32 seats legally in the next election. The right-wing Nationalist party won 106 seats, having promised 100 percent compensation to the victims of inflation and vengeance on the conspirators who had brought it.” See http://www.pbs.org/wgbh/commandingheights/shared/minitext/ess_german_hyperinflation.html. Professor Friedman observed: “The hyperinflations in Russia and Germany after World War I prepared the ground for communism in the one country and nazism in the other.” FRIEDMAN, supra note 6, at 191-92.
\item \textsuperscript{157} SMITH, supra note 151, at 59-60.
\end{itemize}
\end{footnotesize}
marks, the breakdown was complete. The currency had lost meaning.”

As evidenced by the historical records, the hyperinflation destroyed German society. Yet, it was not universally destructive. “But it is most astonishing that huge private fortunes and imposing concentrations of capital were amassed in the years 1919-23: years which were not, on the whole, a time of general economic prosperity.” Fortunes were created “while the poverty of many classes of society increased and the total income of the German people remained below the pre-war income.”

But the new men of the post-war period were not generally creators of new industries or new forms of economic organization . . . . The new men were for the most part very clever speculators, combining their knowledge of business with the strategy of the Bourse and of high finance. And, above all, their successes were intimately connected with the inflation.

Is there any resemblance between this description and the world today? Is money beginning to lose meaning when an annual income of more than $1-billion is possible for those who live in a hyper-reality?

So how did the hyperinflation end? The end was brought about by the so-called “miracle of the Rentenmark.”

On 15 November 1923 a new, temporary, internal currency, called the rentenmark, was officially introduced, initially with a floating exchange rate against the papermark. It was theoretically redeemable into bond liabilities secured on ‘mortgages’ imposed by decree on German real estate.

Prices continued to stabilize, as Germany restored the gold standard in 1924.

Obviously, though the [old] currency was worthless, Germany was still a rich country—with mines, farms, factories, forests. The backing for the Rentenmark was mortgages on the land and bonds on the factories, but that backing was a fiction; the factories and land couldn’t be turned into cash or used abroad. The Germans wanted desperately to believe in the Rentenmark, and so they did. . . .

Whether it was the Rentenmark, by itself, or a variety of factors, the

158. Id. at 60-61.
159. BRESCHI-TURRONI, supra note 152, at 289.
160. Id.
161. Id. at 291.
162. SMITH, supra note 151, at 59-60.
163. BALDERSTON, supra note 149, at 58.
164. Id. at 61-62.
165. SMITH, supra note 151, at 59-60.
nightmare of the hyperinflation ended. It remains one of the most frightening examples of the consequences when money loses all meaning.

B. LESSONS FROM JOHN LAW AND EIGHTEENTH CENTURY FRANCE

One of the greatest financial manias and collapses in history was caused by John Law, a Scotsman, in early eighteenth century France. Extraordinary times present extraordinary opportunities for extraordinary men, and perhaps John Law and France in the early 1700s were made for each other. After the death of Louis XIV in 1715, the financial state of France was in collapse. In the midst of this chaos, Law appeared on the scene. By this time, Law had developed a reputation for his expertise in banking and credit matters. Law presented his view that a great, commercial country like France needed a paper money in addition to metallic money to promote and support commerce, and he proposed that he should be permitted to establish a bank with the authority to issue paper money supported by the royal revenues and land. The French regent hired John Law to solve France’s currency problems, and gave Law the authority to establish a bank with the authority to issue paper money.

At first, Law’s notes were payable at sight and in coinage in effect at the time they were issued. As a result, the new notes quickly gained acceptance, and in fact increased in value because of the wide acceptance. “The regent appears to have been utterly astonished at his success, and gradually to have conceived the idea that paper, which could so aid a metallic currency, could entirely supersede it.” The issuance of Law’s paper money did, in fact, improve the French economy, and this initial success paved the way for the next phase of Law’s plans.

Law followed up on this success by proposing, and obtaining the Regent’s approval of, the establishment of a company with the exclusive

166. CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS 11 (1852). John Law was born in 1671 in Edinburgh, the son of a rich goldsmith and banker. Id. at 2. As a teenager, he learned the business of banking at his father’s counting house, but set off for London for more colorful adventures. At the age of twenty-six, he was sentenced to death (but had the sentenced reduced to manslaughter) for killing a man in a duel arising out of a love triangle. Id. at 2-5. He escaped to the Continent, where he spent more than a decade roaming from city to city, supporting himself through gambling. Id.
167. Id. at 5. “The national debt amount to 3000 millions of livres, the revenue to 145 millions, and the expenses of government to 142 millions per annum; leaving only three millions to pay the interest upon 3000 millions.” Id. at 6.
168. Id. at 8.
169. Id.
170. Id. at 9.
171. Id.
172. Id. at 10.
privilege of trading in Louisiana and the Mississippi River region. The issuance of shares in the Mississippi company sparked a speculative frenzy. The Rue de Quincampoix in Paris became the marketplace where the shares were bought and sold. "Houses in it worth, in ordinary times, a thousand livres of yearly rent, yielded as much as twelve or sixteen thousand. . . . The story goes, that a hunchbacked man who stood in the street gained considerable sums by lending his hump as a writing-desk to the eager speculators!" "The price of shares sometimes rose ten or twenty per cent in the course of a few hours, and many persons in the humbler walks of life, who had risen poor in the morning, went to bed in affluence." Given the wild success of the Mississippi Company shares, Law became the most influential and sought after person in France. Dukes, marquises, and counts waited for hours at his doorstep in the hope that they would be issued shares.

The explosive rise in share value supported the need to issue more money, and this is where the situation began to fall apart. Law's paper money originally had tangible backing. The notes represented an underlying thing of value. However, as the stock speculation reached a frenzied state, the French government began to issue paper that had no backing in anything tangible. This was France's first experiment with fiat money. This issuance of paper money was part of Law's plan to replace commodity-backed money with fiat money, and "was the first full-scale attempt at replacing the metallic medium of exchange with paper in Europe." The fiat money was issued to support the price of the shares.

Thus the system continued to flourish till the commencement of the year 1720. The warnings of the Parliament, that too great a creation of paper money would, sooner or later, bring the

173. Id. at 12-13.
174. Id. at 14.
175. Id. at 24. The explosion of wealth transformed Paris. "It was remarked at this time that Paris had never before been so full of objects of elegance and luxury." Id. at 26. "Statues, pictures, and tapestries were imported in great quantities from foreign countries, and found a ready market. All those pretty trifles in the way of furniture and ornament which the French excel in manufacturing were no longer the exclusive play-things of the aristocracy, but were to found in abundance in the houses of traders and the middle classes in general." Id. A similar situation may be found today. The current situation with the art market in New York is summed up by these articles: Felix Salmon, *Art: The Last Unburst Bubble*, CONDÉ NAST PORTFOLIO, May 15, 2008, http://www.portfolio.com/views/blogs/market-movers/2008/05/15/art-the-last-unburst-bubble?rss=true; Colin Gleadell, *Art sales: super-rich send prices soaring*, THE DAILY TELEGRAPH, May 20, 2008, 28.
176. MACKAY, supra note 166, at 14.
177. Id. at 14.
179. Id. at 1.
180. Id.
country to bankruptcy, were disregarded. . . . [T]he higher the price of Indian and Mississippi stock, the billets de banque were issued to keep pace with it.\textsuperscript{181}

But the bottom fell out in February 1720. The shares began to collapse that year, which was accompanied by a loss of faith in the paper currency. At the beginning of May 1720, "the total amount of notes in circulation was 2600 millions of livres, while the coin in the country was not quite equal to half that amount."\textsuperscript{182} Attempts were made to shore up the value of the notes, but each attempt was met by efforts to convert paper into metal which furthered weakened the paper. The public lost confidence in the paper money, and demanded specie. Crowds gathered at the government bank to exchange their paper, and deadly riots flared up.\textsuperscript{183} In one incident, 15 people were crushed to death in the crowd.\textsuperscript{184} Law was forced to flee France for his own safety, and his property was confiscated after his departure.\textsuperscript{185}

C. SUMMARY

These historical events demonstrate the power of belief and the consequences when meaning is lost. Some people became rich because of Law's ideas because everyone believed that the paper money and shares had value, and their value was based exclusively on the willingness of everyone to believe they had value. This power of belief actually created material wealth. In Weimar Germany, by contrast, the money ceased to have any meaning. Belief in the money evaporated, and so did the value. The definition of loss of meaning (if it means nothing else) was the value of one mark falling to the point where 1 trillion of them were needed to equal one dollar. When reading this history, it is perhaps comforting to a

\textsuperscript{181} MACKAY, supra note 166, at 27.
\textsuperscript{182} Id. at 32.
\textsuperscript{183} Id. at 34.
\textsuperscript{184} Id. at 35.
\textsuperscript{185} Id. at 40-41.
contemporary reader to believe that such occurrences could never happen again. But is that really true? What will prevent them from happening again? It is beyond the scope of this paper to propose solutions. However, solutions can not be found unless the possibility is first acknowledged.

VII. THE FUTURE OF MONEY

Our money is now pure simulacra, pieces of paper completely decoupled from any tangible backing. The only reason our money functions as money is because the law requires us to treat it as such by fiat, and because the result is that we believe that the money has use and value. Our money is therefore a pure abstraction supported only by two other abstractions, law and faith. As it stands, the answers to the following questions are now settled:

Is the law to treat money as having a real, intrinsic value, based ultimately on the precious metals, which alone can serve as an international medium of exchange? In other words, is the mercantile view that money arises spontaneously from use in trade and must be essentially cosmopolitan, to be given full play, when not expressly barred by sovereign flat, or is money, always and for all purposes, to be deemed merely an ideal numerical unit created solely by action of the State, which declares and maintains what its nominal value shall be?\(^\text{186}\)

Even today, however, the warning from Justice Field from 1884 remains vital.

From the decision of the court I see only evil likely to follow. There have been times within the memory of all of us when the legal-tender notes of the United States were not exchangeable for more than one-half of their nominal value. The possibility of such depreciation will always attend paper money. This inborn infirmity no mere legislative declaration can cure. If congress has the power to make the notes a legal tender and to pass as money or its equivalent, why should not a sufficient amount be issued to pay the bonds of the United States as they nature? Why pay interest on the millions of dollars of bonds now due when congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, if the printing-press can furnish the money that is needed for them?\(^\text{187}\)

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186. Eder, supra note 5, at 54.
Just as the French post-modernists predicted a generation ago, money is now pure simulacrum in its own hyper-reality. But what does this mean as a practical matter? Professor Friedman offered these thoughts:

However, we have seen that having a widely accepted medium of exchange is of critical importance for any functioning complex society. No money can serve that function unless its nominal quantity is limited. For millennia, the only effective limit was provided by the link between money and a commodity. That link provided an anchor for the price level. Departures in general were, in Irving Fisher's words, 'a curse to the country involved.'... [T]he world is now engaged in a great experiment to see whether it can fashion a different anchor, one that depends on government restraint rather than on the cost of acquiring a physical commodity. That experiment is less than twenty years old as I write—young even on a personal time scale, let alone on a historical time scale.  

These are cautionary words, which should give everyone reason for pause. We have only one generation's worth of experience in dealing with this new reality, and now hyper-reality. The only guideposts are historical lessons that are there to be heeded or ignored.

Money is necessary for modern society, and, yet, something so necessary and powerful has such a fragile foundation. “All money is a matter of belief. Credit derives from Latin, credere, ‘to believe.’” Our money is money because our belief and our laws make it money. Is it possible that our current money could lose the power to command belief? Our money is created effortlessly through the running of the figurative and literal printing press. History has demonstrated the consequences when a government ceases to exercise restraint over its money supply. Inflation or even hyper-inflation is the certain result because it is a fundamental axiom of economics that growth in money supply is a necessary condition for inflation. Mainstream economic thinking states: “Movements in the price level result solely from changes in the quantity of money.”

188. FRIEDMAN, supra note 6, at 42.
189. See ADAM SMITH, Commanding Heights, When Currencies Start to Float, in SMITH, PAPER MONEY, supra note 151. The power of belief in fueling financial manias was manifested in seventeenth century Holland. The now infamous tulip mania took on extremes that simply seem unbelievable today. The speculation in tulip bulbs became the dominant driver of the Dutch economy. A single tulip bulb was worth, in some cases, twelve acres of land. One hapless sailor mistakenly ate a tulip bulb that could have supported a ship's crew for one year. MACKAY, supra note 167, at 11. The Dutch believed that a single bulb was worth a fortune, and so the bulb attained that value. A contemporary observer would be inclined to dismiss this mania as proof of the foolishness and gullibility of a bygone era. Was the tulip mania any different from $1-billion valuations for internet start-ups in 1999?  
190. MISHKIN, supra note 9, at 539.
period of time, its rate of money supply growth is also extremely high. Thus, dangerous levels of inflation will always be a perennial concern under a fiat money system. A failure to guard the money supply will have predictable results, as observed by one of the leading scholars of the Weimar era:

The German example is particularly instructive because it shows that, if the monetary authority—inspired by the erroneous idea that the issues of notes made in response to the demands of commerce are legitimate—does not put some limit to the issues of paper money, prices continue to rise until astronomical figures are reached.

If unrestrained, a fiat money system reaches its own natural and inevitable limits. There is a limit in fact to the power of the State to create fiat money. The confidence of the people and the cooperation of the trading community are necessary to complete money. The state can give paper money or extremely debased coin debt-cancelling power enforceable by the courts, but the experience of history proves that it is powerless to enforce it upon the community as a medium of exchange. It cannot against the general resistance of the people force them to render services or sell goods for money which the community, through lack of confidence, will have none of. The classical example is furnished by the latter days of the assignats and mandats of the French revolutionary period. They ceased to be really money.

If these limits are reached or even approached, the pendulum may then begin to swing back to a demand for something tangible as money.

The pending and unanswered question therefore remains: Is a fiat money system that utilizes a pure abstraction as money sustainable? One

191. Id. at 664.
192. One commentator observed:
Once issuing money beyond any increase in the stock of specie is understood to be the key operational element in inflation, anyone can see that the chief source of inflation in the contemporary United States is the ability of the Federal Reserve System to generate an endless stream of paper currency—Federal Reserve Notes.
Vieira, supra note 58, at 79.
This inherent danger of paper money was recognized as early as the 12th century. In a book called A Treatise on Coinage, published in 1149, a historian named Ma Twan-lin warned in strikingly modern terms that 'Paper should never be money [but] only employed as a representative sign of value existing in metals or produce... The government... wished to make a real money of paper, and thus the original contrivance was perverted.'
BERNSTEIN, supra note 25, at 167.
193. BRESCIANI-TURRONI, supra note 152, at 401.
194. Eder, supra note 5, at 60.
particular prediction is noteworthy because of the identity of the speaker:

In March 1997, long before he knew he would be honored with the Nobel Prize, [Robert] Mundell had predicted that ‘Gold will be part of the international monetary system in the twenty-first century.’ This was a bold and controversial statement, and perhaps an ominous one. Gold may again serve as the ultimate hedge in chaotic conditions. Its return to its traditional role as universal money is unlikely, however, unless the time should come when the dollar, the euro, and the yen have all failed to function as acceptable means of payment across international borders. 195

Is the world destined (or doomed) to return to gold? The answer is unknowable. However, an understanding of the circumstances today is not. In the words of one professional money manager, the creation of money by the Fed is now on a trajectory that is “nearly parabolic and pushing a 20 percent annualized rate of change.”196 This situation should concern anyone who cares about dollars.

This historically novel experiment with the fiat money system has enabled a new kind of financial market to develop, one that bears little

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195. BERNSTEIN, supra note 25, at 372. The identity of the speaker is important because advocates of a gold standard are too easily dismissed as crackpots or cranks by some mainstream economists. Another serious economist spoke recently about the possibility of a gold standard independent of central bank involvement.

And I don’t mean by gold, government run gold standard, like we had in the late nineteenth century. That’s politically impossible. Governments will never be willing to subordinate their policies to the constraints of a hard commodity ever again. . . . So how could gold make a revival as a sort of international money? Well, we don’t actually need a government run gold standard anymore. There are already private gold banks. They’ve been growing for some time. Their growth has roughly charted the decline of the dollar. People buy digital shares in gold. Gold is held in vaults by these banks, and you buy digital claims on them, just like when you buy a stock today you don’t have a physical certificate. You have a digital representation of that stock.

If we all owned digital shares in gold, and we were able to move money from our accounts between us, and we were able to walk around with smart cards carrying representations of this digital gold, we’d be able to travel around the world, and to transact with one another. Think about it. You would go into a café in Sao Paolo, and you would order your cappuccino, and you would pay with a smart card that would debit your account for some flake of gold. And since people have always had confidence in gold as a long-term store of value, there’s no reason why it couldn’t play that role.

BENN STEIL, PRESENTATION AT THE NEW YORK HARD ASSETS INVESTMENT CONFERENCE, 12-13 (May 2008), available at http://www.resourceinvestor.com/pebble.asp?relid=42915. Steil is a Senior Fellow and Director of International Economics at the Council of Foreign Relations in New York. He received his MPhil and DPhil in Economics from Oxford University. Steil’s vision of a possibility of currency issued by private banks to be used as money looks like a futuristic, international version of the Free Banking Era when private banks, and not the federal government, issued currency.

resemblance to its predecessor. As noted by The Economist newspaper:

The financial system, or a big part of it, began to lose touch with its purpose: to write, manage and trade claims on future cash flows for the rest of the economy. It increasingly became a game for fees and speculation, and a favourite move was to beat the regulator.\footnote{Wall Street's Crisis, The Economist, March 22-28 2008, at 11.}

A key (and perhaps easily overlooked) point is that finance is a service business. The role of financiers is to facilitate the work of those who work in the “real” economy. There was a time when the greatest wealth was generated by those who forged steel, found oil, or built railroads. Financiers played a supporting role in raising capital to finance the ventures. Today, the situation is reversed. The greatest wealth is generated by financial alchemists, who work in the world of hyper-reality and possess the literal (perhaps admirable) skill of making money—not by producing anything that is tangible and real, but by creating or channeling money as pure simulacrum in its own hyper-reality, disassociated from any original, underlying reality.\footnote{The use of the word “alchemy” to describe today’s complex financial transactions is not unique to this paper. See, e.g., Steven L. Schwarz, The Alchemy of Asset Securitization, 1 STAN. J. L. BUS. & FIN. 133 (1994).}

Again, the sustainability of this situation should be questioned. Is it socially beneficial for such wealth and such inequalities to be generated upon the basis of pure abstractions?

\section*{VIII. CONCLUSION}

History conclusively demonstrates that fundamental changes in money, and in the idea of money, are triggered by extraordinary financial crises or war (and usually the two accompany each other). Aside from the rare reader of this article who lived through the Great Depression, most (American) readers have been sheltered during their lifetimes from historic currency events. Even those who lived through the financial crises of the 1970s will probably be in the small minority of those who may happen across this article. But times may be changing. The country is at war, and its fiscal and trade budgets are at record levels. The Bear Stearns collapse in March 2008 may have been the initial indication that we are entering a period of currency turbulence. The Federal Reserve acted aggressively in response to the Bear Stearns collapse, because many feared that it would trigger a worldwide financial collapse.\footnote{Over the weekend of March 15 and 16, the Fed responded to Bear Stearns’ imminent collapse by approving a $30-billion credit line to JP Morgan Chase to enable it to acquire Bear Stearns, by announcing that it was ready to lend money to investment banks, and by lowering the discount rate to...}
Events since then accelerated and reached a new, previously unimaginable state of crisis. A short period in September and early October 2008 saw the seizure of Fannie Mae and Freddie Mac by federal regulators, the largest bankruptcy in American history when Lehman Brothers filed for bankruptcy protection, Merrill Lynch’s “shotgun marriage” to Bank of America, the government takeover of American International Group, the largest bank failure in American history (Washington Mutual), and the $700-billion government bailout of the financial industry. As a result, global headlines dared to proclaim statements like: “This may prove to be the dollar’s epochal moment—the moment historians look back at as its major turning point.”

It is said that generals are always fighting the last war, and perhaps the same is true for central bankers. The Fed will do anything to prevent another Great Depression, just as the former Bundesbank was prepared to do anything to prevent another hyperinflationary era. What this means for Americans (and the world, due to America’s position in the world economy) is that the Fed will not respond to economic downturn by reducing the supply of money. Ben Bernanke built his considerable academic reputation by becoming the leading scholar of the Great Depression, and he has made it clear that the Fed will run the printing press in response to crisis.

The economy, however, operates on cycles. At some point, people may begin to question again the meaning and nature of money. These questions may take on an air of urgency, if the nature of money leads (or continues to lead) to social disruptions. If one accepts the premise that money is now in its own hyper-reality, one troubling observation follows.

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3.25 percent. Edmund L. Andrews, Fed Acts to Rescue Financial Markets, N.Y. TIMES, March 17, 2008, at A1. This response from the Fed was described as “sweeping and apparently unprecedented.” Id. The Fed’s willingness to loan to investment banks was indeed unprecedented. Until then, only commercial banks were able to borrow from the Fed. The $2 bail-out, THE ECONOMIST, March 22-28 2008, at 81. The Fed took these extraordinary steps because of the fear in the financial world that a Bear Steams collapse would lead to “financial nuclear winter.” Wall Street’s Crisis, THE ECONOMIST, March 22-28 2008, at 11. The Bear Steams bail-out and the bail-out of LTCM, a hedge fund, in 1998 look a lot like the Panic of 1907. All are examples of the consequences when market participants lose faith, belief, and confidence.


202. See Central Banks: A dangerous divergence, THE ECONOMIST, March 22-28 2008. “The Great Depression is seared into Americans’ minds as the greatest economic catastrophe of the twentieth century. In other countries (notably Germany, home of the ECB) the legacy of hyperinflation is every bit as strong.” Id. The successor to the Bundesbank, the European Central Bank, considers fighting inflation to be its primary purpose. See http://www.ecb.int/mopo/html/index.en.html.
Only a small number of people are benefiting from the hyper-reality; the financial condition of the vast majority of people remains bound and restrained by the old reality. In other words, only an extremely small number are able to generate money through manipulation of the hyper-reality. Any social problem created by this situation would perhaps be minimal if the personal financial condition of every person reflected the increase of money in the new hyper-reality. However, that is not happening. Only the fortunate few, the financial alchemists, are amassing money in unprecedented amounts in a way that is completely unrelated to anything in the real world. For most people, however, the reality remains the same or is getting worse. One recent study found: "The median income for men now in their 30s, when adjusted for inflation, is 12 percent lower than what their dads earned three decades earlier, a report by the Economic Mobility Project, an initiative of The Pew Charitable Trusts, concluded."  

In this decade, the richest Americans’ share of national income hit a postwar record. So, we have a world where a $100-million price tag for a painting or a house poses no obstacle to some, while the federal minimum wage is $6.85 per hour and where the purchasing power for some (perhaps, many or most) is declining. Is a society like this politically acceptable? So far, it is.

Some may question whether this is a legal issue. Perhaps these concerns lie within the domain of sociologists and political scientists. Some may question whether the current situation is any different from the past because inequality has always been the way of the world throughout history. Both concerns may be addressed by pointing out that when social and economic inequality reaches a politically or socially unacceptable point, the law responds. As a perhaps extreme example, individual fortunes were at one time built upon the expropriation of human labor value. There came a point, however, when society decided that such

203. See Kevin Depew, Five Things You Need to Know: The Coming Decade of the Entrepreneur, MINYANVILLE, May 20, 2008, http://www.minyanville.com/articles/HD-PPI-home-producer-depot-entrepreneur/index/a/17241. Although written with reference to the Weimar era, the following observation seems eerily applicable to today’s situation:

The selection of captains of industry came about in an entirely peculiar manner. Success was the lot not of him who increased the productivity of society’s efforts, thus contributing to the increase of general welfare, but to him who had the capacity for organizing and directing great speculations on the exchange and for using wisely, with the object of personal gain, the variations of the value of money.

Bresciani-Turroni, supra note 153, at 220.

204. Id, supra note 143. “The wealthiest 1 percent of Americans earned 21.2 percent of all income in 2005, according to new data from the Internal Revenue Service. That is up sharply from 19 percent in 2004, and surpasses the previous high of 20.8 percent set in 2000, at the peak of the previous bull market in stocks.” Id. “The bottom 50 percent earned 12.8 percent of all income, down from 13.4 percent in 2004 and a bit less than their 13 percent share in 2000.” Id. The combined wealth of the richest 1 percent of Americans is greater than the combined wealth of the bottom 90 percent. See Untold Wealth, The Rise of the Super Rich, CNBC, http://www.cnbc.com/id/24791078/site/14081545/.
inequality was unacceptable, and slavery was abolished by law.

Few ask questions about money, because all the answers seem so well-settled. This paper submits that the recurring questions raised throughout history have not been resolved, and that the following observation is as forceful today as it was 35 years ago, and as it undoubtedly was since the beginning of history.

To begin with, money was not a stable, sharply defined idea. What men thought of as money changed with shifts in business practice and invention and with changed expectations or demands laid upon the general economy; uses of law affecting the money supply changed with changed ideas of arrangements which served monetary functions. Uncertain definitions of money reflected not only objective changes in social behavior but over much of the time a considerable confusion of ideas about cause and effect in the currents of affairs in which money played a part.

This paper is not an argument for a return to the gold standard. There were global economic benefits under a gold standard (namely, price stability over a long period of time), but there were also compelling reasons to abandon it (the inability to prevent deflationary depression). It is also not a prediction of hyperinflation or depression, or any other economic event. In light of the history and development of money, however, it would not be surprising if a movement to return to a gold standard were to arise (although whether that would be advisable or not will not be so clear). The study of economics is about the study of cycles, and perhaps there is a decades-long cycle in which societies swing back and forth from a gold standard to fiat money. Because the cycle can last as long, or longer, than a human lifetime, it is perhaps inconceivable or even nonsensical for a person living in the fiat money era to acknowledge the possible reality of the alternative. So, the return to a gold standard may sound like something from the fringes of reality to the contemporary reader. If it is a cycle, though, there may be a time in the near future when questions about fiat money increase at the same time that a desire for something tangible also increases. In light of where we are, the following observation still seems

205. In contrast to the nineteenth century when debates about the meaning and definition of money were the centerpiece of presidential elections, and were regarded as the most important Supreme Court cases of their day. See FRIEDMAN, supra note 6, at 104-25 (discussing the 1896 campaign of William Jennings Bryan and his famous “cross of gold” speech); see generally Dam, supra note 4.

206. HURST, supra note 2, at 4.

207. Interestingly enough, CNBC and other media outlets reported that in the midst of the financial crises in September 2008, the U.S. Mint ran out of certain gold coins to sell because of high demand. US Mint Halts Buffalo Gold Coin Sales as Demand Surges, CNBC, Sept. 26, 2008, http://www.cnbc.com/id/26905337?__source=RSS&tag=&par=RSS.
as relevant today as it was 70 years ago.

While in various periods of American legal history American courts have been confronted with problems of a monetary character, the importance and multiplicity of these questions have never been more strongly felt than within the last few years, and there is certainly no indication that this situation will change in the near future. The jural difficulties arising from monetary troubles are unusual, not only because of their financial and social implications, but also because of their theoretical intricacies.²⁰⁸

Questions about money are ignored at peril, and it may be beneficial to question fundamental assumptions periodically, especially in times like these.

²⁰⁸ Nussbaum, Basic Monetary Conceptions in Law, supra note 2, at 865.