WHOSE IMAGE IS ON THE COIN?

OR, IS THE PROVISION OF MONEY BY PRIVATE FIRMS A VIOLATION OF THE GOVERNMENT'S PREROGATIVE OVER MONEY?

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This paper was written in 1982 when, as a second-year student at the UCLA School of Law, I was on the Staff of the *UCLA Law Review* and applied for a position on the Board of Editors. I served as Managing Editor of the *UCLA Law Review* for the 1982-83 school year, but this work was never published.

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INTRODUCTION

And He said unto them, "Whose image and inscription is on this coin?"

"Caesar's," they replied.[1]

Ever since Caesar put his image and inscription on the coins, it has been generally accepted that money[2] should be supplied and regulated by the government.[3] Even those who see little need for government involvement in other areas have seemed to accept the doctrine that government regulation of money is essential.[4] Recently though, some commentators have questioned this doctrine.[5]

This paper will first describe and criticize theories supporting a government monopoly in money. The second section will introduce a suggestion that some economists have made that private firms be permitted to compete with the government in the supply of money.

The remainder of the paper will explore the government's prerogative over money and propose that while the government has the power to provide a money, this power need not be exclusive. In support of this proposal, the paper will examine the two leading English cases which define the sovereign's traditional power over money. The paper will then examine the United States government's prerogative over money. This analysis will begin by describing the United States Constitution's grant of monetary

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[1] Matthew 22:20-21, paraphrase. Matthew goes on to record Jesus' famous reply, "Render unto Caesar the things that are Caesar's, and to God the things that are God's."

[2] Money has received a variety of definitions. F. MANN, THE LEGAL ASPECTS OF MONEY 9 (3d ed. 1971) defines money as "all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the State of issue." A. NUSSBAUM, MONEY IN THE LAW 13 (rev. ed. 1950) defined money as "a thing which, irrespective of its composition, is by common usage given and received as a fraction, integer or multiple of an ideal unit." Economists generally define money by its use: "Money is defined as any commodity that acts as a Medium of Exchange, a Unit of Account, and a Store of Value." L. HARRIS, MONETARY THEORY 1 (1981). This paper will follow Harris' definition with one addition: money will also include any commodity which is intended to act as a medium of exchange, a unit of account, and a store of value. This addition included privately issued commodities which are intended to be money, but are not yet generally used as such.

[3] The Serbian and Brazilian Loan Cases, [1929] P.C.I.J, ser. A, nos. 20-21 at 44 ("[I]t is indeed a generally accepted principle that a State is entitled to regulate its own currency."); S. BREKINRIDGE, LEGAL TENDER 9 (1903) ("The power over the coinage was from pre-Norman times a part of the royal prerogative."); W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 277 (1765) ("The coining of money is in all states the act of the sovereign power…"); J. BODIN, SIX BOOKS OF THE COMMONWEALTH. 47 (English trans. 1955) (1st ed. 1576) ("[O]nly he who can make law can regulate currency.").

[4] *See, e.g.,* M. FRIEDMAN, CAPITALISM AND FREEDOM 38-39 (1962). Friedman criticizes government involvement in such areas as education, 85-107, and medical licensure, 149-60, but agrees "that government must have some responsibility for monetary matters."

[5] Edwards, *Monopoly and Competition in Money*, 4 J. LIBERTARIAN STUDIES 107 (1980); *See* Klein, *The Competitive Supply of Money,* 6 J. MONEY, CREDIT, & BANKING 423 (1974); *and* F. HAYEK, DENATIONALIZATION OF MONEY (1976).

authority, and how Congress exercised it. It will then examine the two United States cases which, like English cases, define the government's power over money. Next the paper will examine the Constitution's clause prohibiting States from providing money, and consider whether that clause requires a government monopoly in money. Examples of state and private money that have been tolerated under this clause will be discussed.

I. Rationales for a Government Monopoly in Providing Money

There are several rationales given for a government monopoly in the supply of money. This section will summarize and criticize the most commonly voiced rationales: the State theory of money; the economic necessity theory; the economic efficiency theory; and the political and economic control theory.

A. The State theory of money

The State theory of money maintains that something is money if and only if so designated by the government.[6] This theory is generally associated with G. F. Knapp whose principal work, "The State Theory of Money," gave the theory its name in 1905.[7] Following the publication of Knapp's treatise, the theory found strong case law expression in a variety of legal systems, most notably Germany's.[8] The principal English commentator on monetary law, F. A. Mann, endorses the State theory,[9] while the principal American commentator, A. Nussbaum, rejects it.[10] The Uniform Commercial Code adopts the State theory, defining money as "a medium of exchange authorized or adopted by…government as part of its currency."[11] Black's Law Dictionary defines a coin as a piece of metal stamped, "by authority of government," so that it may become money.[12]

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[6] F. MANN, *supra* note 2, at 14; A. NUSSBAUM, *supra* note 2, at 5.

[7] G. KNAPP, THE STATE THEORY OF MONEY (English trans. 1924).

[8] See Reichsgericht, Sept 25, 1919, R.G.Z. 96,262 ("Money is a measure of value and medium of payment only by virtue of the command of the state."); July 11, 1924, 58 Entscheidungen des Reichsgerichts in Strafsachen LXXXVIII, 255, 256 ("Money includes every medium of payment the value of which is certified by the government or its authorized agent and which is designated for public circulation regardless of its being a legal tender."); App. Paris, Feb. 8, 1856 D.P. 1856 II 184 (notes of the Bank of England not money because not emitted by English Government); Adelaide Electric Supply Co. Ltd. v. Prudential Insurance Co., [1934] A.C. 122, 143 (H. of L. 1933) (In deciding whether there was a difference between an English pound and an Australian pound, the majority found that there never had been any "statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct monetary unit."); Stephens v. Commonwealth, 188 Ky. 824, 224 S.W. 364 (1920) ("circulating medium by the authority of the United States").

[9] F. MANN, *supra* note 2 at 14-23. R. BANYAI, MONETARY LAW 1 (1978) lists Mann and Nussbaum as two of the principal commentators on monetary law.

[10] A.NUSSBAUM, *supra* note 2, at 5-10.

[11] U.C.C. §1-201(24); *see also* U.C.C. §2-105 (1)("Goods does not include money in which the price is to be paid); and the official comment to U.C.C. §2-105 (1).

[12] BLACK'S LAW DICTIONARY 236 (5th ed. 1979) For "money," at 906, Blacks gives the U.C.C definition and a usage definition similar to HARRIS, note 2 *supra.*

Proponents of the State theory point to the historic fact that governments have usually controlled the money. Mann argues that the State theory of money is a *consequence* of the government's monopoly.[13] Even Nussbaum recognizes that the government monopoly provides strong support for the theory.[14] Yet, while it is true that governments have long had a monopoly, this fact alone is unsatisfactory as justification for the monopoly's existence, it is merely a restatement of the conclusion.

B. Economic necessity as a reason for a government monopoly

Until recently, economists were nearly unanimous in arguing that a monopoly in the supply of money was economically essential.[15] This argument was based upon the economic model of competition.

According to that model, the price and quantity of any good or service can be determined by the supply of, and demand for, that good or service.[16] If at some time the market price of paper clips is greater than the cost[17] of producing them, then the firms in the industry will have an incentive to increase their production of paper clips. As these firms increase their output, their costs will tend to rise,[18] and the market price will tend to fall.[19] At the point where the cost of production equals the market price, there will be no increase in output.

The model above applies to all goods and services except, it has been thought, money.[20] The unique characteristic of paper money is that it costs practically nothing to print,[21] yet it is valuable. If private firms were allowed to compete, then they would have an incentive to print as much paper money as possible. Since the value of each unit of money is related to the quantity of units in circulation,[22] this

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[13] F. MANN, *supra* note 2, at 14-15 ("To permit the circulation of money that is not created or at least authorized by the State would be tantamount to a denial of the State's monetary prerogative.").

[14] A. NUSSBAUM, *supra* note 2, at 5 ("Stronger support for the State Theory may be fond in the fact that modern law confers upon the government a monopoly…").

[15] See, *e.g.,* M. FRIEDMAN, A PROGRAM FOR MONETARY STABILITY 7 (1959); *and* B. Pesek, *Comment*, 76 J. POL. ECON. 885, 889 (1968).

[16] *See generally* any introductory economics text, *e.g.*, P. SAMUELSON, ECONOMICS 58-64 (10th ed. 1976).

[17] Actually the marginal cost, or cost of producing one more unit.

[18] Diminshing marginal returns exists at some point for all industries. P. SAMUELSON, *supra* note 16, at 63.

[19] The downward sloping demand curve is described by P. SAMUELSON, *supra* note 16, at 61-62.

[20] *See* articles cited note 15 *supra.*

[21] To discourage counterfeiting, the Treasury Department uses a rather extensive engraving process to print paper money. Each bill costs two cents to manufacture, Shannon, *Saving a Buck on the Dollar*, Los Angeles Times, Sept. 11, 1981, §1, at 1, col. 4, at 14, col. 3. Another form of money, demand deposits or checking accounts, are even cheaper to create: any quantity can be created by a bookkeeping entry at a bank.

[22] The relationship between the quantity of money (M) and each unit's value (the price level of goods, P) is defined by the equation MV=PQ. V is the "velocity" of money, how often each unit changes hands, and Q is the "quantity" of goods, or real Gross National Product. Governments try to increases GNP by increasing M. The economic debate

infinite quantity of money would result in each unit being worthless.[23] Thus free competition in the supply of money would make that money worthless.

Professor Benjamin Klein recently challenged the applicability of this economic model to the money market.[24] According to Klein, the economic necessity theory assumes that the money produced by each firm is identical.[25] Specifically, if Chase Manhattan Bank were allowed to print "One United States Dollar" on pieces of paper, then it would certainly have an incentive to print an infinite quantity. However, if it were allowed to print "One Chase Manhattan Thaler" on pieces of paper, the result would be quite different. Unless the bank could convince individuals that the thaler had a value, and that it would have some comparable value in the future, the bank would not be able to "sell" any of its thalers. The cost to the bank of building confidence in its money would probably be quite high.[26] But whether or not the bank could build confidence in its money, the quantity, and therefore the value, of the United States dollar would not be affected.

With Professor Klein's refinements, the economic model of money still requires a role of government, the scope of control has only been narrowed. The original argument was that if private firms were allowed to provide money, then they would have an incentive to provide an infinite quantity, and the money would be worthless. Klein showed that this applies if the money all has the same name, the dollar. If private firms were allowed to provide dollars, then they would have an incentive to provide an infinite quantity, and the dollar would be worthless. To prevent this the government should be able to prohibit private firms from providing dollar money. This argument does not support the prohibition of money with a denomination[27] other than dollars.

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is over how effective money is at controlling GNP. M. FRIEDMAN & A. SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 (1963) argued that velocity is constant in the long term, and increasing M faster than GNP will only cause an increase in P, or inflation. Other economist prefer to concentrate on the short term "management" of M to stabilized GNP, P. SAMUELSON, *supra* note 16, at 285-288.

[23] Pesek, *supra* note 15, at 889. In Germany from 1920 to 1923 the central bank printed carloads of currency, and the value of each unit dropped to one trillionth of its original value. *See* P. SAMUELSON, *supra* note 16, at 286.

[24] Klein, *The Competitive Supply of Money*, 6 J. MONEY, CREDIT, & BANKING 423 (1974).

[25] *Id*. 420. If not indistinguishable, then that there is a fixed exchange rate, usually one for one, between the moneys.

[26] There are a variety of ways of building consumer confidence that a money will have a future value. The future value of a money will be related to its future quantity. Anything which makes the future quantity predictable will increase consumer confidence in the money. The primary way of estimating future quantity is by reputation. Certain governments have a good reputation for keeping a stable quantity of money, while others have a poor reputation. Because of the importance of reputation, a private firm with a good reputation in other financial matters would have an easier time providing a private money. Another means of building confidence would be with insurance. The insurance company would have a strong incentive to see that the issuing firm did not over-issue. Klein, *supra* note 24, at 434, suggests other ways of building confidence. Actually the incentives to a private firm to over-issue might be less than for the government. Governments are almost always debtors, when the value of the money goes down, their debts decrease. Banks are as often creditors, and would prefer money which increases in value.

[27] On "denomination" see note 62 *infra.*

The State theory of money and the economic necessity theory each argue that there must be a government monopoly in the supply of money. The previous two sub-sections of this paper have argued that a government monopoly is not essential. There are two other theories, economic efficiency, and political and economic control, which argue that the government monopoly is desirable. While a full discussion of the desirability of a government monopoly is beyond the scope of this paper,[28] these theories will be presented in the next two sub-sections.

C. Economic efficiency as a rationale for a government monopoly

A third theory in support of the government monopoly is that such a monopoly is economically efficient.[29] That is, the money industry is a natural monopoly[30] industry: it is less costly to have one firm provide all the services than to have two or more firms competing. If two or more moneys were in circulation, then financial activity would be more complicated. Sellers of goods and services would have to quote prices in each money, and buyers would have to carry each currency which might be needed.[31]

D. Political and economic control

The last theory supporting the government monopoly emphasizes the political and economic control that can be exercised by a government which has exclusive control over the money supply. This theory holds that "[i]t is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse*, and the right to wield them without restriction on occasions of national peril."[32] A society's sensitivity to money has been recognized by many social commentators,[33] including Lenin who suggested that the most effective way to destroy society was to destroy its money.[34]

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[28] If it were desirable to have a government monopoly, then private money could be prohibited. *See* notes 46 & 125 *infra.*

[29] *See* Klein, *supra* note 24, at 447; *and* Klein, *Comments and Replies,* J. MONEY, CREDIT & BANKING 513 (1976). For this reason Klein, who showed that it was theoretically possible, thinks that private money is extremely unlikely.

[30] A natural monopoly industry is one where the product becomes less expensive to produce (per unit) as the quantity increases. Thus, the firm with the largest sales will have lower prices and will continue attracting customers from smaller firms. These "increasing returns to scale" are found in most public utilities; it is cheaper to have one firm producing all an area's power than to have several firms competing. Once a firm has a monopoly, it is able to charge a higher price. Because of the potential for monopoly profits, such a firm is usually regulated to keep the price down. *See generally*, P. SAMUELSON, *supra* note 16.

[31] There are very few historical examples of multiple moneys. Klein, *Comments and Replies*, 8 J. MONEY, CREDIT & BANKING 513,514 (1976) suggests that these extra costs have discouraged the development of multiple moneys.

[32] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 563 (1870) (Bradley, J., concurring) (italics in original). The Legal Tender Cases are discussed *infra*, note 78 & accompanying text.

[33] John Maynard Keynes: "There is no subtler, no surer means of overturning the existing basis of society than to debauch the currency. The process engages all the hidden forces of economic law on the side of destruction, and does it in a manner which not one many in a million is able to diagnose." 127 FORBES No. 13, at 45 (June 22, 1981). G Sokolnikov, Soviet minister of finance in early 1920's: "The printing press is the machine gun of the proletariat, mowing down the monied class." In Gordon, *Demand for and Supply of Inflation*, 18 J. L. & ECON. 807, 807 (1975).

II. Provision of Money by Private Firms

A. Description of process

Frederich A Hayek, a Nobel Prize-winning economist, has advocated an end to the government monopoly in the supply of money.[35] He proposed the following scenario in the private money market:[36] a private firm desiring to provide a money would choose a name for its money; for example, the ducat. The firm would then offer non-interest bearing notes and demand deposits denominated in ducats. The only way this firm could "sell" its money would be to establish a value and insure that the value remained constant.[37] This firm could invest the dollars it gets in assets which were likely to keep a constant value. It would then be prepared to buy back any ducats which customers offered at the exchange rate. The firm could begin with a value of $2 per ducat. After a year of 10% inflation, the ducat should be worth $2.20.

Professor Hayek's desire for privately supplied money rests on a fundamental dissatisfaction with government. He blames government mismanagement of money for the "recurrent periods of depression and unemployment,"[38] and suggests that competition would improve the quality of money and solve these problems. The sub-section below will discuss criticism of the government's monopoly over money.

B. Criticism of the government monopoly over money

The criticism of the government monopoly is that which is made of all monopolies: without competition, consumers do not have any choice about whether or not to use the product.[39] The monopolist can charge more for the product, and yet has less incentive to insure its quality. The following section will describe briefly how sovereigns have used their monopoly power over money, "exploiting the people."[40]

The monopoly over money has been a significant source of income to governments.[41] This was more obvious when money consisted entirely of coins: gold brought to the mint would be subject to a tax,

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Ernest Hemingway: "The first panacea for a mismanaged nation is inflation of the currency; the second is war. Both bring temporary prosperity, both bring permanent ruin. But both are the refuge of political and economic opportunists." Notes on the Next War, ESQUIRE (Sept. 1935).

[34] M. Friedman, *supra* note 4, at 39.

[35] F. HAYEK, DENATIONALIZATION OF MONEY (1976); *see also* Hayek, *Toward a Free Market Monetary System*, 3 J. LIBERTARIAN STUDIES 1 (1979).

[36] F. HAYEK, DENATIONALIZATION OF MONEY 38-42 (1976).

[37] See note 26 *supra.*

[38] F. HAYEK, *supra* note 36, at 56-58.

[39] Hayek, *supra* note 5, at 22.

[40] A. NUSSBAUM, *supra* note 2, at 33.

[41] *See* A. NUSSBAUM, *supra* note 2, at 32-33.

"seigniorage."[42] Another, less reputable practice produced even great profits: the gold content of a coin would be lowered while its face value was maintained. This debasement could be done secretly, or it could be accompanied by a recall of the old coins. In either event the process decreased the value of the coin and debtors, including the sovereign, benefited.

Severe penalties were occasionally imposed for refusal to accept the debased coin or paper.[43] Thirteenth century Chinese law made rejection of imperial paper money punishable by death. In eighteenth-century France, refusal to accept assignats was punished with twenty years in chains or death.

III. Extent of the Federal Government's Prerogative over Money

The remainder of the paper will examine the federal government's prerogative over money. If the prerogative is, by nature, exclusive (e.g., the federal government's constitutional power to grant patents is exclusive[44]), then private money could not be allowed. If the federal government's prerogative over money is not exclusive (e.g., the constitutional power to establish post offices[45] does not exclude United Parcel Service), then private money could be allowed.[46] The first section will examine the English cases which define the sovereign's traditional prerogative over money. The cases will be analyzed to see if they require a government monopoly in the supply of money. The second section will examine how the federal government's prerogative over money was exercised and interpreted in the United States. The third section will look at examples of money not supplied by the United States to help interpret the Constitution's clause which prohibits the States from coining money.

A. The sovereign's traditional prerogative over money

When a government supplies a money two questions often arise. First, may the government change (regulate) what it supplies (e.g, reduce the amount of gold in a coin)?[47] Second, may the government

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[42] Seigniorage is the difference between the monetary value of coins and their cost, including the manufacturing expenses. For the fiscal year of 1978 the United States seigniorage was $367 million. THE WORLD ALMANAC 1980 84 (1979).

[43] See A. NUSSBAUM, *supra* note 2, at 53.

[44] "The sole object and purpose of the laws which constitute the patent and copyright system is to give the author and the inventor a *monopoly*…" *In re* Brosnahan, 18 F. 62 (W.D.Mo. 1883) (emphasis added). The power to grant a monopoly could not be exercised by more than one entity. This power was granted to Congress.

[45] U.S. CONST. art I, §8, cl. 7. *But see*, National Association of Letter Carriers v. Independent Postal System of America, Inc., 470 F. 2d 265 (D. Okla. 1972) ("The plain intent of the Constitution is that the United States have a monopoly in delivering letters.").

[46] Congress's authority over currency is not derived only from the power to coin money and regulate its value, but "is derived from the aggregate of the powers granted to Congress…" Norman v. Baltimore & O.R.R., 294 U.S. 240, 303 (1935). This paper will argue that having private firms supply money is not a violation of the government's prerogative over money. This is not to say that the government could not regulate it. *See* note 126 *infra.*

[47] *See, e.g.,* The Case of the Mixed Money, *infra* note 52 & accompanying text; *and* The Legal Tender Cases, *infra* note 78 & accompanying text.

prevent others from supplying something with the same denomination[48] (e.g., bank notes denominated in dollars)?[49] In answering these two questions, courts often suggest that the government has a monopoly in providing money.[50] This section will examine two English cases in which these issues have arisen. These cases are important because they are cited by commentators as defining the government's prerogative over money.[51] They will be analyzed here in an attempt to determine the necessity of a government monopoly.

1. The sovereign's right to alter what it supplies

The landmark decision, *The Case of the Mixed Money,*[52] affirmed the government's right to change what it supplies as money. At the start of the seventeenth century, Queen Elizabeth was suppressing a rebellion in Ireland. To support the Royal Army the recalled all the coin in Ireland and issued "mixed" coins with less gold. The new coins bore the same denominations as the old, but had less "intrinsic" value.[53] Debtors (including the government) were allowed to pay their debts with the less valuable coins. When a creditor refused to accept the debased coins and sued to recover the full value, the Chief Judges held that the sovereign may make money "of what matter and form he pleaseth . . ."[54] By refusing tender of the mixed money, the creditor lost his right to payment, and could be punished for contempt.[55]

The theory that the government may change the value of what is supplied as money has resulted in the doctrine of nominalism.[56] According to nominalism, a monetary obligation is not an obligation to deliver a certain value, but one to deliver a number of units bearing a certain name hence nominalism), whatever their value.

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[48] On "denomination" *see* note 62 *infra.*

[49] *See, e.g.,* The Emperor of Austria v. Day, *infra* note 57 & accompanying text; *and* Veazie Bank v. Ferno, *infra* note 86 & accompanying text.

[50] *E.g.,* The Case of the Mixed Money, HOWELL, *infra* note 52 at 116 ("[I]t appertaineth only to the king of England, to make or coin Money within his dominions.").

[51] R. BANYAI, *supra* note 9, at 2 (These "landmark cases established the precedent for the Government prerogative of issuing money.")

[52] 80 Eng. Rep. 507 (K.B. 1604), translated in *Howell,* 2 *State Trials* 114 (1816). F. MANN, *supra* note 2, at 82, refers to this case as "still the leading authority."

[53] Because of the cost of silver, the United States provided for "clad coins" with less silver in the coinage Act of 1965, Pub. L. No. 89-81 Title I, §101, 79 Stat. 254, and for no silver in the act of Dec. 31, 1970, Pub. L. No. 91-607 TitleII, §208, 84 Stat. 1769. Although the later coins have less silver, and intrinsic value, they are by law equivalent in monetary value. "All coins and currencies of the United States…regardless of when coined or issued, shall be legal tender for all debts." Coinage Act of 1965, *supra* Title I, §101 (codified at 31 U.S.C. §392 (1976)).

[54] HOWELL, *supra* note 52, at 116.

[55] *Id.* 114.

[56] See generally F. MANN, *supra* note 2 at 71-89.

2. The sovereign's right to exclude money denominated in its unit

In *The Emperor of Austria v. Day*,[57] the English count of Chancery affirmed the Hungarian government's right to regulate or exclude things bearing the name of its money. During the mid-nineteenth century Hungary was in a state of revolution. The defendant, refugee and patriot Louis Kossuth, arranged to have an English firm print 100,000,000 one-florin notes. The notes did not duplicate the design of any existing government money, but were denominated in the government's unit, the florin. Furthermore, printed on the notes was the claim that they were receivable in payments to the government, and that their value was guaranteed by the state.[58] The plaintiff, as King of Hungary, sued to have the notes destroyed. Lord Justice Turner held that Kossuth's conduct was illegal, and grated the request.

In discussions of the government's prerogative over money, the plaintiff's argument in this case is often cited as the holding.[59] "[T]he right of coining money, the *jus cudendaee monetae*, [is] universally acknowledged to be a prerogative of sovereigns…by all nations and…all writers on international law…"[60] However, this language is too broad. The Lord Justice did not base his decision on the Hungarian government's prerogative over all money, but on its prerogative over money which purported to be issued and guaranteed by the State.[61] A better statement of the holding is that things which bear the name of a government's money (i.e., are denominated[62] in its unit) may be regulated or forbidden by that government.

The holdings in the two cases examined here do not support a government monopoly over all money. The first case established that the government may change the thing which it supplies as money. The second case holds that the government may prohibit the issuing of money denominated in the

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[57] 45 Eng. Rep. 861 (Ch. 1861).

[58] "One Florin. This monetary note will be received in every Hungarian State and public pay office as One florin in silver…[I]ts whole nominal value is guaranteed by the State. In the name of the nation. Kossuth, Louis." The Emperor of Austria v. Day, *supra* note 57 at 868.

[59] *E.g.*, R. BANYAI, MONETARY LAW 3 (1978).

[60] The Emperor of Austria v. Day, supra note 57, at 868.

[61] "But I repeat that I place much reliance on the fact that the Defendant Kossuth by these notes asserts that they are guaranteed by the State, and that he has had authority to sign them in the name of the Hungarian nation." The Emperor of Austria v. Day, *supra* note 57, at 872.

[62] The "denomination of a money can be defined as the name of the unit the money is based on (the U. S. dollar), or it can be defined as the multiples of that unit ($1, $5, $10, etc.) For this paper "denomination" will refer to the name of the basic unit. The denomination of a money is important since it sets one money apart from another. F. PICK, PICK'S CURRENCY YEARBOOK, 1976-1977 (1978) describes 112 national currencies. Each national currency, from the Albanian Lek to the Zambian Kwacha, has its own denomination. *The Wall Street Journal*, Sept 11, 1981, at 43, lists over forty currencies, and gives their exchange rate to the U. S. dollar. One U. S. dollar will buy 7400 Argentinan Pesos, 230 Japanese Yen, 24 West German Marks, and .56 British Pounds. Each money is unique and has a fluctuating exchange rate with other moneys. Hayek's proposal, note 35 *supra*, is that, in addition to the 112 government moneys, we have half a dozen private moneys. Each private money would have its own denominations and a fluctuating exchange rate with all other moneys.

government's unit. Neither case discusses whether or not a private firm could issue money bearing a new denomination. The next sub-section will examine how the prerogative over money was exercised and interpreted in the United States. The focus of the inquiry will be to see if the federal government's prerogative forbids money with a different denomination.

B. The United States Government's prerogative over money

The United States Constitution gives Congress the power to supply and regulate a money. Congress has the power "to coin Money, regulate the Value thereof, and of foreign Coin…"[63] This sub-section will describe how this power was originally exercised by Congress. It will then survey the United States case law which addresses whether or not the government may change what it supplies, and whether or not the government may exclude what others supply. As was done with the English cases,[64] these will be examined to see what is the nature of the government's prerogative over money.

1. Origin of United States money

In 1792 the United States Congress created a new money.[65] First it chose a name for its new money: the denomination, ideal unit, or "money of account of the United States shall be expressed in dollars…"[66] This unit was given an initial value, "each [dollar] to be of the value of a Spanish milled dollar as the same is now current, [containing]…four hundred and sixteen grains of standard silver."[67] The next step was to supply something with the money's name, the dollar, on it to be used by the people. Gold, silver, and copper coins of certain weights were to be minted representing fractions of the unit (down to half a cent), the unit itself (a silver dollar), and multiples of the unit (up to ten dollars).[68]

At the time Congress passed this statute foreign money circulated in the States.[69] Any English coins were used to pay taxes to England, so other country's coins, primarily Spain's, were used. The framers of the Constitution recognized this situation, and granted Congress the power to make foreign coins representatives of the dollar at various exchange rates.[70] Under these laws, a debtor could pay a debt of 100 U. S dollars with 100 Spanish milled dollars or 91 French crowns, etc.[71] If the foreign government

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[63] U.S. CONST. art I, §8, cl. 5.

[64] Notes 52 & 57 *supra*, & accompanying text.

[65] An Act establishing a Mint, and regulating the Coins of the United States, Chap 16, 1 Stat. 246 (1792).

[66] *Id*. §20 (codified at 31 U.S.C. §371 (1976)). On "denomination" *see* note 62 *supra*.

[67] *Id.* §9.

[68] *Id.* §9.

[69] A. NUSSBAUM, *supra* note 2, at 556-57.

[70] Congress has the power to "regulate the Value…of foreign Coin.." *U.S. Const., supra* note 63. This power was exercised in 1793; An Act regulating foreign Coins, and for other purposes, Chap. 5, 1 Stat. 300 (1793).

[71] The gold coins of Great Britain, France, Portugal, and Spain were valued by weight. The Spanish milled dollar was valued at $1. The French crown was valued at $1.10.

changed the gold content of its coin, then Congress would change (regulate) the value of that foreign coin in terms of the dollars.[72] This power was exercised until the production of United States coins was sufficient to meet the economy's needs.[73]

Through these laws Congress exercised the sovereign's traditional power to provide and regulate a money. There is nothing within these laws to suggest that the power to provide money is exclusive.

The next two parts of this paper will examine situations where Congress did exercise its right to change what it supplies, and to exclude what others supply. This analysis will try to determine whether the United States government's prerogative is different from that described in the English cases.

2. The government's right to alter what it supplies

In a situation similar to *The Case of the Mixed Money*,[74] the Supreme Court affirmed that Congress does have the power to regulate (change) what it supplies to represent its monetary unit, the dollar. In the 1860s, the federal government issued "greenbacks"[75] to help support its war against the Confederacy.[76] The paper dollars had no intrinsic value, but by law were to be accepted as one dollar for all debts.[77] In *The Legal Tender Cases*[78] a creditor challenged the government's right to change what is supplied. The United States Supreme Court upheld the Act as a proper exercise of Congress's power to provide and regulate a money. The Court stated that a contract for the payment of money is assumed with reference to the government's power over money.[79]

This case does not support a government monopoly over money. The contract called for the payment of a certain number of dollars. A dollar is the denomination of the money created by the United States government. As part of its sovereign prerogative over money, the government may change what it supplies as money.[80] Whether gold, silver, or paper, if the government says that it is a dollar, then it is.

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[72] *See generally,* Huntington & Mawhinney, *Laws of the United States concerning Money, Banking and Loans,* SEN. DOC. NO. 580, 61st Cong. 2d Sess. (1910).

[73] An Act relating to Foreign coins and to the Coinage of Cents at the Mint of the United States, §3, Chap. 56, 11 Stat. 163 (1857).

[74] *See* note 52 *supra*, & accompanying text.

[75] Acts of Feb. 25, 1862, §1, 12 Stat. 345; March 17, 1852, §2, 12 Stat 370; July 11, 1862, §1, 12 Stat 532; Jan. 117, 1863, 12 Stat. 822 at 823; March 3, 1863, §3, 12 Stat. 709 at 710; *and* June 30, 1864, §2, 13 Stat 218.

[76] "Suffice it to say that a civil war was then waging which seriously threatened the overthrow of the government and the destruction of the Constitution itself… It was at such a time and in such an emergency that the legal tender acts were passed." Legal Tender Cases, *infra* note 78, at 540-41.

[77] Statues cited note 75 *supra*.

[78] 79 U.S. (12 Wall.) 457 (1870).

[79] *Id.* At 549.

[80] *Id.* At 548 cites The Case of the Mixed Money, *supra* note 52.

Although this power to define the dollar is broad, it need not be so broad as to include the power to define what would be accepted as money in another system. If a private money had a unit called the ducat, then the government's prerogative to define money would not necessarily include the power to regulate the ducat, only the dollar.

3. The government's right to exclude money denominated in its unit

As part of the sovereign's traditional power over money, Congress has the right to regulate or exclude others who would supply something to be used as money when that something is denominated in dollars.[81] This part will examine a case which upholds that power. Before the Civil War, state chartered and run banks issued notes denominated in dollars.[82] Some of these banks were administered with little skill, prudence, or integrity.[83] If the banks became insolvent, the government was responsible for the redemption of the bank's notes.[84] To drive the notes out of circulation, Congress placed a ten percent "death tax" on all notes not issued by the federal government.[85] In *Veazie Bank v. Ferno*,[86] the Supreme court upheld this as legitimate action to insure that only United States notes circulated as money. The accepted goal was to "secure a sound and uniform currency for the country."[87]

One interpretation of this case would be that there should only be one currency in the nation. The better interpretation would follow the facts of the case and conclude that the government has the power to insure that its currency is "sound and uniform." The way the government insures that the dollar is sound and uniform is to not allow others to supply dollars. Provision of any money denominated[88] in dollars would be subject to this power, but the power over the dollars need not extend to other, non-dollar, moneys.

C. Non-government money

The Constitution forbids States to "coin Money [or] emit Bills of Credit,"[89] that is, to provide either coin or paper money. This clause is interpreted by some courts as granting a monopoly in the supply of

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[81] This right was discussed with The Emperor of Austria v. Day, *supra* note 57.

[82] *See infra* note 120.

[83] Veazie Bank v. Ferno, 75 U.S. (8 Wall.) 533, 536 (1869).

[84] *Id.* At 549.

[85] Act of March 3, 1865, §6, 13 Stat. 469 at 484, as amended by Act of Feb. 8, 1875, §19, 18 Stat. 307 at 311 (once codified at 12 U.S.C. 562; then incorporated in Title 26, Internal Revenue Code §4881; then repealed, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat 1814).

[86] 75 U.S. (8 Wall.) 533 (1869).

[87] *Id.* At 549.

[88] On "denomination," *see* note 62 *supra.*

[89] U.S. CONST. art I, §10, cl.1.

money to the federal government.[90] However, the Constitution does not say whether or not private entities may provide money. The types of money which have been allowed under this clause will be examined to see if a narrow application of this clause is better. This section will examine a type of state money which has not been challenged, and then address whether or not the clause prohibits private entities from supplying money.

1. Maryland's tobacco money

Although the United States Constitution forbids the states to provide money, a few states seem to have provided money without being challenged.[91] Maryland's example is particularly instructive. Before the revolution, the Colonies had used a variety of commodities for money.[92] Maryland had used tobacco from its earliest days,[93] and continued to for at least twenty-five years after the Constitution was adopted.[94] In 1801 Maryland reenacted a law regulating the inspection and storage of tobacco in the state warehouses.[95] Under this law, when tobacco was delivered to the warehouse, the state inspector issued receipts.[96] These notes, denominated in pounds of tobacco, were legal tender for all debts denominated in tobacco.[97]

That the tobacco notes circulated as money is evident from the few cases reported. *In Crain v. Yates*[98] the plaintiff sued in *debet and detinet* on two obligations, one for 992 lbs. of tobacco, the other for $153.23. Under the strict rules of pleading the action of *debet and detinet* would only lie for an obligation to pay a specific sum of money. If the plaintiff was suing for damages for failure to deliver goods, then another action must be brought. The defendant asserted that there was a procedural error, a misjoinder of claims, since the plaintiff sued for money and goods tobacco) in the same action. The court rejected the

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[90] "Whatever power there is over the currency is vested in Congress." Legal Tender Cases, *supra* note 78, at 545. In 1830 Missouri's "loan certificates" were held unconstitutional: Craig v. State of Missouri, 29 U.S.. (4 Pet.) 410 (1830).

[91] Other states with tobacco money were Virginia, *infra* note 109, and North Carolina, *infra* note 101.

[92] Rice (South Carolina), wheat, beef, pork (Northern colonies), and beaver skins (New York, Connecticut) were early "country pay." Wampum was used later. *See* A. NUSSBAUM, *supra* note 2, at 554-56.

[93] A. NUSSBAUM, *supra* note 2, at 554.

[94] Judgments phrased in tobacco currency appear as late as 1828, Crain v. Yates, 2 Haw. & G. (Md.) 332 (1828). Laidler v. The State, Use of Hawkins, 2 Haw. & G. (Md.) 277 (1828). *See also* Lyles v. Lyles Ex'rs, 6 Harr. & J. (Md.) 273 (1824).

[95] MD. LAWS 1802, chap. 63.

[96] *Id.* §18 (The receipts, or notes, documented "the place and time of reception, the mark, the warehouse, number, and the gross…[and] whether of first or second quality").

[97] *Id.* ("[T]he said notes shall be payable to the said owner, or bearer, and shall be current and received in payment of all debts and contracts for tobacco…[and] tender [of the notes for]…any debt or contract for tobacco…shall be accounted lawful").

[98] 2 Harr. & G. (Md.) 332 (1828).

defense, and held that tobacco was not a good, but was a type of money.[99] One could sue directly for tobacco, there was no need to sue for the value (in coin) of the tobacco since tobacco was money itself.

The tobacco notes had all the characteristics of money.[100] They were used as a medium of exchange (buying and selling), a store of value (savings) and in contracts for future payments. As an indication that they were an independent money, the tobacco notes circulated at a flexible exchange rate with the dollar.[101] The fact that they were not denominated in dollars, and were not based on gold, led everyone to believe that they were not really money.[102] Since they were not money, the tobacco notes were not prohibited by the Constitution.[103] It appears that Maryland's tobacco notes were never challenged, so no court discussed the question of whether the federal government's prerogative to provide and regulate money was threatened by having a state provide a different money. But if the Constitutional prohibition applies only to money denominated in dollar,[104] then a private money with a different denomination (or ideal unit) would not violate the Constitution.

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[99] *Id.* 336 ("From the earliest period to this time, tobacco has been considered in our judicial proceedings as current money…[Tobacco and] coin of the state…are of the same nature, both being for debts, although in a different currency"). Nine years later a Virginia court came to the same conclusion. A suit for money or tobacco was proper under debt, any other contract breach would only recover damages. Beirne v. Dunlap, 35 Vir. (8 Leight) 514 (1837).

[100] "Tobacco was accepted and required in payment of taxes, attorneys' fees, physicians' fees, merchants' bills, and in exchange for other ware…[the notes] passed current all over the colonies.." THE SOUTHERN HISTORICAL PUBLICATION SOCIETY 5 THE SOUTH IN THE BUILDING OF THE NATION 167 (1909). CHALMERS, A HISTORY OF CURRENCY IN THE BRITISH COLONIES 6 (1893) tells the following story: "Young and uncorrupted girls imported into Virginia in 1620 and 1621 as wives for the colonists, were rated originally at 100 pounds of tobacco (£15), but subsequently at the increased price of 150 pounds (£ 22 10s). The Rev. Mr. Weems, a Virginia writer, intimates that it would have done a man's heart good to see the gallant young Virginians hastening to the waterside, when a vessel arrived from London each carrying a bundle of the best tobacco under his arm, and taking with him a beautiful and virtuous young wife."

[101] This occasionally caused problems in measuring damages for a breach of contract. *See, e.g.,* Littlejon v. Gillchrist's Ex'rs, 3 N.C. 451 (Super. Ct. 1806). In *Littlejon* the debtor had paid fewer tobacco notes than were due, but because the dollar price of tobacco was high, the debtor had already paid more dollar value than was due. The court held that since the debt was in tobacco, the full number of tobacco notes must be paid, whatever, their dollar value.

[102] Whether this belief was correct depends on the definition of money. If the definition of money included only gold, then the belief is correct. Such an interpretation would quickly solve this paper's question. If a private medium of exchange were not based on gold, then it would not be money, hence would not violate the government's prerogative. A similar result is achieved with the State theory. If only the government's medium of exchange is money, then a private medium of exchange would not be money. Only under a broader definition of money, note 2 *supra*, can a private medium of exchange threaten the government's prerogative over money.

[103] U.S. CONST., art. I §10, cl. 1, prohibits states from making anything but gold or silver legal tender.

[104] A. NUSSBAUM, *supra* note 2, at 563 suggests that the prohibition applies only to "pecuniary debts." But saying that a dollar debt is pecuniary, while a tobacco debt is not, only raises the question of the definition of money. *See* notes 2 & 102 *supra.*

2. Privately issued coins

Although the states are prohibited from issuing money denominated in dollars, the same prohibition does not apply to individuals. As discussed earlier,[105] the government may regulate or prohibit private individuals from issuing money denominated in dollars, but this prohibition must be a positive act by Congress. Until forbidden to by Congress,[106] private firms have issued both coin and paper money. The next two parts of this paper will examine examples of each.

During the California gold rush of 1849[107] many people moved to California, but few brought much money with them. Whatever money they had was used to pay for the trip and for supplies. As a result there were very few coins available to carry on the economic activity. Gold dust, which was plentiful, was used as a medium of exchange, but the inconvenience of establishing quality and quantity was great. This prompted some firms to go into the coining business.[108] The most successful, Moffat & Co. of San Francisco, provided much of the money for California's economy from 1849 until 1852 when the government began minting gold.[109]

The same events were repeated in the Pike's Peak gold rush in Colorado in 1849.[110] A shortage of money prompted Clark, Gruber & Company to coin gold pieces. These coins had slightly more gold than the government pieces. The company also issued paper money, which was backed by their own gold and which was worth more than the government's paper money. Over $3,000,000 in gold coins had been produced by this company when its mint was bought by the government to establish the Denver mint in 1863.[111]

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[105] *See* note 86 *supra*, & accompanying text.

[106] *See* notes 115-117 *infra*, & accompanying text.

[107] *See generally*, E. ADAMS, PRIVATE GOLD COINAGE OF CALIFORNIA, 1849-55 (1913).

[108] *Id., forward* at ix, lists the following "Ten dollar" coins and values: Great Salt Lake City Pure Gold, $8.50; Miners' Bank Tens, $9.87; Ormsby Tens, $9.37; Pacific Company's, $7.86; Cincinnati Mining & Trading Co., $9.70; Templeton Reid, $9.75; Moffat, $9.77.7; Norris, Gregg & Norris, $9.80; Baldwin $9.74; Shults $9.74; Dubosq $9.93. These figures give the value of the coin's gold content. Their monetary value was "at par" if the gold content was close and the mint was well known. If the business had a poor reputation, then the coins had no monetary value and had to be sold as bullion to a different mint.

[109] *Id.* 28-29. In 1852 the government contracted with Moffat & Co. to mint fifty-dollar United States coins. The lack of smaller denominations was such an inconvenience that private mints again coined gold. These private coins were often worth more than the government's coins. That is, ten five-dollar private coins would buy more than one fifty-dollar government coin. Compare that situation to the recent "penny shortage:" some stores give a discount for payments made in pennies.

[110] *See generally* W. STONE 1 HISTORY OF COLORADO 392-94 (1918). Clark, Gruber & Co. was a bank which acted as a broker sending gold to the Philadelphia Mint. The time and expense of shipping prompted the firm to begin private minting of coins.

[111] Act of April 21, 1862, 12 Stat. 382; Resolution of March 3, 1863, 12 Stat. 827.

The Bechtler mint in North Carolina was another example of private coinage.[112] For over twenty years after 1831, gold was brought from the nearby mines to be coined. The Director of the Mint did not appreciate the competition, and was probably complaining about the Bechtler mint in his Annual Report in 1841:[113] "It seems strange that the privilege…of coining gold and silver, though withheld from the States, is freely permitted to individuals, with the single restriction that they must not imitate the coinage established by law." Yet, until Congress acted,[114] it was not illegal for private firms to coin money.

After the federal government purchased the mind of Clark, Gruber & Company, Congress passed a law making it illegal to "utter or pass…any coins of gold or silver…intended for the use and purpose of current money, whether in the resemblance of coins of the united States…or of original design.."[115] The history of the bill,[116] and its broad language[117] suggests that it was intended to bar minting of coins denominated in dollars by private firms. Since the statute was enacted, only one court has been faced with private coining. In *United States v. Bogart*[118] the defendant was prosecuted under the statute for passing a gold octagon. On one side of this coin was an Indian, the other side bore the inscription "1/4 dollar, Cal." The District Court recognized that, broadly interpreted, the language of the statute could apply to the case. However, the court applied a much more narrow interpretation. In an interesting twist on the State theory of money, the court held that since only the United States could make pieces of metal into money, counterfeiting laws only apply to pieces of metal which purport to be issued by the United States. Stamping pieces of metal with "Moffat & Co.", "California" or "Plato's Republic" would not amount to an attempt to make money, only tokens!

Whether one accepts the court's narrow interpretation, that it is only stamping "United States dollar" which is illegal, or the one suggested by this paper, that stamping "dollar" is illegal, a private firm would not be prohibited from coining non-dollar money. This statute should not be interpreted as a blanket prohibition against all forms of non-government money. Only those denominated in the government's unit, the dollar, are prohibited.

3. State banks' paper money

The history of private paper money also supports a narrow reading of the Constitutional prohibition of state-issued money. As mentioned earlier,[119] this clause was used to prosecute states which provided

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[112] E. ADAMS, *supra* note 107 *forward* at xi quotes a letter by Moffat (of Moffat & Co.) where he describes the Bechtler mint.

[113] *Annual Report of the Director of the Mint for 1840, Exec. Doc. No. 75,* 26th Cong., 2d Sess. 2-3 (1840-41).

[114] *See* note 115 *infra*, & accompanying text.

[115] Act of June 8, 1864, 13 Stat. 120.

[116] W. STONE, *supra* note 110, at 394 discusses some history of the bill.

[117] A coin stamped "Clark, Gruber & Co." would not imitate U.S. coins, but would be an original design.

[118] [The full citation is missing in the original paper.]

[119] Note 90 *supra.*

money denominated in dollars. The narrowness of the prohibition is evident when one sees how easily the state got around the prohibition. A State could charter a bank, appoint its directors, and have it issue bank notes. These notes circulated like the federal government's money, but the Supreme Court held that they were not prohibited by the Constitution.[120] Since they were denominated in dollars, Congress was able to later prohibit them,[121] but only as an affirmative act, they were not otherwise illegal.

CONCLUSION

Private money presently exists only in the imaginations of a few economists. No individual has attempted to issue it, no statute explicitly forbids it, and no court has found it illegal. However, given the strong interest expressed by Professor Hayek[122] and some others, it seems likely that private money will be tried. When it is tried, the first objection will be that only the government can supply money. This paper has attempted to show that the federal government's prerogative over money is not so broad as to preclude private money.

The possibility of private money raises many new questions. How should courts handle disputes involving private money?[123] Would an obligation to pay a "sum certain" of private money be a negotiable instrument?[124] To what extent should the government regulate the firms which issue private money?[125] To what extent should other regulated industries (e.g., transportation) be allowed to use private money?[126] Discussion of these areas is beyond the scope of this paper.

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[120] Briscoe v. Kentucky, 36 U.S. (11 Pet.) 257 (1837) made the distinction that a bank could be sued while a state could not and that the credit of a bank was based on its capital stock. *Accord*, Darrington v. Branch of Alabama Bank, 54 U.S (13 How.) 12 (1851); *and* Woodruff v. Trapnall, 51 U.S.. (10 How.) 190 (1850).

[121] *See* text accompanying notes 81-88 *supra.*

[122] "I have now no doubt whatever that private enterprise…could…provide the public with [private money]…essentially stable in value [which] would…prevent[] both the excessive stimulation of investment and the consequent periods of contraction." *F. Hayek*, *supra,* note 42, at 14.

[123] Privately supplied money is, in use, similar to money supplied by a foreign government. *See* note 61 *supra*. Courts generally recognize obligations to pay foreign money, but the damages or judgment is given in the domestic currency. *See* 31 U.S.C. §371 (1976) ("[A]ll proceedings in the courts shall be kept and had in" United States dollars.); *see e.g.*, Liebeskind v. Mexican Light & Power Co., 116 F. 2d 971 (2d Cir. 1941) (Canadian dollars converted to value in United States dollars for judgment).

[124] "The rule is well settled…that a bill or note payable in specific foreign money is negotiable." Brown v. Perera, 176 N.Y.S. 215, 220 (Sup. Ct. 1919). The same rule could apply to private money.

[125] The government's power is, of course, broad enough to regulate firms which provide private money. In 1933 this power was used to modify contracts which called for payment of dollars measured by gold. *See* note 46 *supra.* If Congress felt that private money were not in the public interest it could prohibit it. For arguments against private money *see generally* notes 29-34 *supra*, & accompanying text.

[126] Many regulations specify maximum or minimum prices in dollars. These could be interpreted to mean the equivalent value of the specified dollar amount, or to mean that payment must be in dollars. Payment of the

This paper has attempted to determine whether or not private money is a violation of the government's prerogative over money. The inquiry started by looking at the theories supporting a government monopoly in the supply of money. A recent suggestion by economists that private firms be allowed to compete was then described. Legal analysis of the federal government's prerogative over money began by examining landmark English cases which defined the sovereign's prerogative. The United States Constitution's grant of monetary power and Congress's exercise of this power were then examined. This paper proposed that the government's prerogative over money extends to money with the same denomination as the government's money, but does not extend any further. If a private money had a different denomination, then it would be outside the government's monetary authority.[127]

minimum wage and overtime would probably have to be in United States cash or negotiable instrument payable at par. *See* 29 C.F.R. §531.27 (a)(1980).

[127] But not, of course, outside the government's regulatory authority. See note 125 *supra.*