

## Monetary Law and Regulation

Legal Studies Program at UC Berkeley

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Bruno Meyerhof Salama

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**GSI.** Will Darwall, wdarwall@berkeley.edu

**Description.** The world is experiencing renewed interest in the law and regulation of money. The drivers include technological developments like artificial intelligence and blockchain that led to innovations such as fintechs and cryptocurrencies, alongside fears of excessive debt levels and inflation, concerns over the loss of the US dollar hegemony, and, more recently, unconventional monetary policies enacted in response to the Great Recession of 2008 and the COVID-19 crisis. Despite the appearance of originality, many of the ensuing questions have already been addressed, in one way or another, during the process of consolidation of the modern monetary and banking system.

This course surveys the history of US monetary law from its inception to the recent, rocky rise of cryptocurrencies. It starts with a discussion of monetary affairs at the country's founding: from colonial times, through the American Revolutionary War, to the framework established at the Constitutional Convention. Next, it covers—from the 19<sup>th</sup> century fight over free banking culminating in the Civil war to the New Deal responses to the Great Depression—the Supreme Court cases that have shaped US monetary law as we know it today. The last part discusses contemporary legal dilemmas, such as the regulation of bitcoin and stablecoins, the creation of central bank digital currencies, the workarounds to the US debt ceiling and the debate over the scope of the Fed's legal authority. The course concludes by revisiting the classic questions concerning the nature and functions of money.

**Learning objectives.** This course has three goals. The first is to enable students to critically understand the law and regulation of money, including the policy choices implied in court interpretations of the US Constitution and statutory laws and regulations. The second is to conceptualize monetary law as an instrument of power as well as a technique for promoting efficient social exchanges. The third is to equip students with a basic understanding of current monetary affairs.

**Grading breakdown.**

Two written memos: 40% (20% each)

One term paper: 40%

Discussion section: 20% in total (10% participation; 10% quizzes and exercises)

**Written memos.** This syllabus mentions several court cases which we plan to discuss during the semester. You must choose two cases and then write one memo about each one of them. The memo should (i) indicate the case title and date, and summarize the basic facts, (ii) explain the legal issue at hand (what legal question is the judge determining? If more than one, which one of them is particularly important and worthy of our attention today?), (iii) explain the court decision (what is the rule articulated by the court? What is the holding?), (iv) the court analysis (what reasons were offered by the court? Were the counterarguments addressed or ignored?), (v) concurrence or dissent (was the decision unanimous? Was there an important dissent?), and (vi) provide a short comment (to help you with writing a comment, you should draw on, and cite, at least one of the bibliographical materials listed in this syllabus). Use 12-point Times New Roman, 1.5 spaced with 1-inch margins. The memo should be limited to **5 pages** and submitted through bcourses. Don't forget to write your name at the top of the page. I have shared materials with our GSI with guidelines for writing the memos, so make sure to attend the discussion sections.

**Term paper.** Write a paper that explores a topic discussed in the course (don't just come up with something that you deem to be interesting; you need to address a specific topic covered in the course!). The precise content of the paper is for you to choose. Desirable approaches include (but are not limited to): (i) discussing different viewpoints concerning a certain case covered in class; (ii) exploring the historical context in which a court decision was taken (example: international context, domestic politics, ideological changes or tensions reflected in the law, slavery and post-slavery transition and impacts, economic changes that explain legal evolution, etc.); (iii) comparing different cases or drawing lesson from the evolution of case law; (iv) contemporary legal challenges posed by changes in the business model of banking, the coming about of new technologies applied to money, or the politics of central banking. These topics are addressed in the course and are covered in the bibliography outlined in this syllabus or in other bibliographic materials referred to in PPTs or shared through bcourses. You should explore this bibliography, but you do not need to limit yourself to it. The term paper can be connected to (but needs not) ideas presented in the two written memos. The paper is expected to be **7-10 pages** not including: front page, an optional appendix for graphs or other notes, and a required bibliography for source material. Use 12-point Times New Roman, 1.5 spaced with 1-inch margins. Don't forget to include a title for your paper and to write your name at the top of the page. **Structure:** a good paper will clearly state an argument and then provide reasons. You might be tempted to describe various themes or events related to monetary law and regulation without really presenting an argument; you should avoid doing that. Clear theses that are supported with evidence and reasons and are well organized will typically be awarded higher grades. The **grading rubric** for the term paper has been made available at bcourses and will be discussed in class and in discussion sections.

**Discussion section quizzes.** Instructions will be made available in section.

**Important deadlines.**

- The first memo is due 7 days after the lecture when we finish syllabus item 6.
- The second memo is due 7 days after the lecture when we finish syllabus item 9.
- The term paper is due on December 5, 2023.

**Memos and term paper submission at bCourses.** It is your responsibility to ensure that the correct file is accessible to your GSI at the time of submission/in advance of the deadline. Absent an error on the part of the bCourses platform, submissions not accessible to the GSI at the deadline will be marked late. **Late submissions** will be accepted with a 0.5 point per hour (on the hour) penalty (e.g., memo submitted Monday 12:30am will receive a 0.5-point penalty; Monday at 1:30 am will receive a 1-point penalty, etc.), up to 20 hours after the regular deadline.

**Students with DSP accommodations granting occasional extensions on take-home assignments for disability-related circumstances may be granted a 48-hour extension.** To receive an extension on a given submission, upload your work-in-progress to bCourses and add a comment: “I have a DSP extension accommodation and am using my extension on this submission.” This work in progress will not be graded. Remember to upload your final submission to the same submission link before the extension deadline. bCourses will mark the file “late,” however assume that your extension will be granted.

**Course format (remote/recording/asynchronous participation).** This course does not accommodate asynchronous participation. Recording of lectures without a verified DSP accommodation or express permission from instructor is prohibited.

**Disability-related accommodations.** If you need disability-related accommodations in this class, you must arrange to meet with your GSI during the first week of class to discuss your requirements. Please remember that accommodations and extensions are meant to specifically address the impact of a student's disability on their ability to fully participate or to complete an assignment by the deadline provided to the other students.

**Statement on copyright and recording.** Materials in this course are protected by copyright law. Materials are presented in an educational context for personal use and study and should not be shared, distributed, or sold in print or digitally outside the course without permission. Video and audio recording of lectures and sections without instructor and fellow classmates' consent is prohibited. You may not reuse or circulate or post to websites (e.g., Course Hero, Quizlet, etc.) any recorded lectures, slides, exams, or other course resources authored by the teaching team without permission. This includes screenshots of course materials and/or participants, unauthorized recording of lectures, presentations, and discussions.

**Course materials.** There is no official textbook. The course website contains the syllabus, announcements, PDFs of court cases, readings, lecture slides, web links, and instructions for memos and term paper.

**Preparation for class.** You are required to read the assigned readings before each class. You are encouraged read the additional bibliography and to participate actively in class discussions.

**The course sequence is based on 15 items organized as follows:**

- I. Introduction (items 1-2)
- II. The Rise of the Dollar (items 3-6)
- III. Consolidation of Federal Monetary Powers (items 7-9)
- IV. The Long March Towards a Fiat Dollar Standard (items 10-12)
- V. Contemporary Issues in Monetary Law and Regulation (items 13-15)
- VI. Conclusion (item 16)

Our plan is to cover each item in one or two classes, depending on the topic at hand.

**Detailed sequence.**

## **I. Introduction**

The functions of money in social life. Impacts of money and its regulation on distributional politics and statecraft. The role of law and some basic legal concepts.

**1. Monetary law allocates power to create and regulate money. Legal tender is at the heart of sovereign authority over money.** The centrality of legal tender can be illustrated by classic cases in English Common Law (e.g. the Case of the Mixt Monies of 1604). But today, in the United States, legal tender is much less intrusive: there is no federal requirement that bills and coins be accepted in payment for goods or services (Croley v. Hunting Creek Club Condominium Assoc, 2005; Nemser v. New York City Transit Authority, 140 Misc.2d 369 (Sup. Ct. N. Y. Cty. 1988)), and case law considers electronic payments as a substitute for legal tender (as for example in Berry v. Hannigan, 7 Cal. App. 4th 587, 1992 and in Genesee Scrap & Tin Baling Co. v. City of Rochester, 558 F. Supp. 2d 432, 436, W.D. N.Y.2008). Much in this course will be devoted to documenting and understanding the evolution of US legal tender provisions over time.

**Assigned readings:** Keith Rosenn, Law and Inflation, University of Pennsylvania Press, 1982, p. 36-40; and Gerald T. Dunne, Monetary Decisions of the Supreme Court, Rutgers Univ. Press, 1960 (hereinafter, "Dunne"), p. 3-6.

Additional bibliography:

David Fox, The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations, 70 The Cambridge Law Journal 144-146 (2011).

Clayton P. Gillette, American Legal Tender Rules and Risk Allocation, in The Euro as Legal Tender: A Comparative Approach to a Uniform Concept 103 (Robert Freitag and Sebastian Omlor, eds., Walter de Gruyter GmbH, 2020)

David Fox, Money, Law, and Institutions, in Handbook of the history of money and currency (Battilossi, Cassis, and Yago, eds.), Springer, 2020 (hereinafter, the “Handbook of the History of Money”)

Tamara Kurtzman, Cashing Out. 42 Los Angeles Lawyer 22 (2019)

**2. A snapshot at the political economy of money.** Why do we have money? What social needs does it arise to serve? Preliminarily, what is money? What functions does it serve? What is money in a modern-day modern economy?

**Assigned readings:** Selections from Karl Polanyi, “The Economy as Instituted Process”; Aristotle, *Nichomachean Ethics*, Book 5-V, *Politics*, Book 8-10 ; Adam Smith, *The Wealth of Nations*, Chs 1, 2, 4 ; [These are posted to bCourses as a single pdf titled “Class 2 Reading Selections”]

Additional bibliography:

(In full) Polanyi, “The Economy as Instituted Process”

(In full) Aristotle *Nichomachean Ethics*, Book 5-V, *Politics*, Book 8

(In full) Adam Smith, *The Wealth of Nations*, Chs. 1, 2, 4

John Maynard Keynes, Review of “What is Money” by A.M. Innes

## II. The Rise of the Dollar

Step one in tracing the historical development of US money. The relationship between the money supply and money’s various functions (e.g. what are the effects on commerce when money is scarce? Too plentiful?). The relationship between the legal regulation and the money supply itself, where money “comes from” (e.g. what happens when a commodity money is given legal backing? Fractional banking: how does a bank ‘make’ money?). Conflicts of interest inherent in monetary regulations (e.g. how do legal regulations distribute power between federal and state governments? what policies generate “hard” vs. “easy” money, and who prefers hard vs. easy money policies?).

**3. Early US monetary law brings institutional innovation and illustrates the problem of monetary mischief.** Massachusetts issued indented bills in 1690, arguably the first governmental paper currency without metallic backing since medieval China. Excessive issuance led to high inflation. Government moved to outlaw note discounts, with limited success. To finance the American War of Independence, the Continental Congress issued a paper money known as the Continental currency. This currency depreciated badly during the war. The monetary prerogative set out under the Articles of Confederation would not be repeated in the US Constitution.

**Assigned readings:** Dunne p. 6-10; Arthur Nussbaum, *A History of the Dollar*, Columbia University Press, New York, 1957 (hereinafter, "Nussbaum"), p. 3-19; 35-39

Additional bibliography:

Bray Hammond, *Banks and Politics in America*, Princeton University Press, 1957 (hereinafter, "Hammond"), p. 3-39

Farley Grubb, *Money and Prices in Colonial America*, in *Handbook of the History of Money*

Jack Weatherford, *The History of Money*, Crown Publishers, Inc., 1997 (hereinafter, "Weatherford"), p. 125-137

Stephen Mihm, *American Colonists Had a Modern Monetary Theory of Their Own*, Bloomberg Opinion, Mar 15, 2019

Baack, Ben. "America's First Monetary Policy: Inflation and Seigniorage During the Revolutionary War." *Financial History Review* 15, no. 2 (October 2008): 107-121.

**4. The US Constitution says little about money, with the result that the Supreme Court would later have to say a lot.** Under the Constitution, Congress is granted powers to mint coin and establish value. States are granted legal tender powers, but only over forms of money they cannot issue. The extent of the federal government's powers over money is the object of a legendary debate between Hamilton and Jefferson. The creation of the First Bank of the United States in 1791 and the establishment of a bimetallic monetary system in 1792 vindicated Hamilton's position. But that same debate would be revisited time and again throughout the US monetary history.

**Assigned readings:** Dunne p. 10-22; Hammond p. 89-95

Additional bibliography:

Hammond p. 95-113

Nussbaum p. 51-60

James Willard Hurst, *A Legal History of Money in the United States: 1774-1970*, University of Nebraska Press, 1973 (hereinafter, "Hurst"), p. 3-18

George Selgin, *The Rise and Fall of the Gold Standard in the United States*, Cato Inst. Pol'y Analysis (June 20, 2013), p. 1-5

Christopher P. Guzelian, *A Constitutional Dollar Does Not Devalue*, *St. Mary's Law Journal*, vol. 54 (2022)

Weatherford, 111-122

**5. Monetary law becomes a locus of political struggle between the federal government and the states. Several events reveal the ascent of federal power over money.** They are: the creation of the First Bank of the United States in 1791, the use of a monetary prerogative to finance the War of 1812, and the creation of the Second Bank of the United States in 1816. In *McCulloch v. Maryland* (1819), the Supreme Court finds that the Necessary and Proper Clause of the Constitution gives the US federal government implied powers, including the power to create a bank. This doctrine is reinforced in *Osborn et al. v. The Bank of the United States* (1824) and *Craig v. Missouri* (1830).

**Assigned readings:** Dunne p. 23-40. **Assigned case:** *McCulloch*.

Additional bibliography:

Richard Timberlake, *Constitutional Money: A Review of the Supreme Court's Monetary Decisions*, Cambridge University Press, 2013 (hereinafter “Timberlake”), p. 21-34

Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 *Harv. J.L. & Pub. Pol'y* 1017 (2008)

A.P.C.U.S.G.P. (2018). *McCulloch v. Maryland (1819)*. Khan Academy.  
<https://www.khanacademy.org/humanities/ap-us-government-and-politics/foundations-of-american-democracy/constitutional-interpretations-of-federalism/a/mcculloch-v-maryland-1819>

Lev Menand, *The FED Unbound: central banking in a time of crisis*, Columbia Global Reports (2022) (hereinafter “Menand”), p. 68-85

**6. After the death of Chief Justice Marshall, a Supreme Court whose majority was appointed by President Andrew Jackson moves to reinstate state monetary powers.** In *Briscoe v. The Bank of the Commonwealth of Kentucky* (1837), the Supreme Court decides that a state can charter a note-issuing bank and control it through stock ownership. With the expiration of the charter of the Second Bank of the United States in 1836, federal monetary authority is undone, and the country moves into the free banking era that would last until the Civil War.

**Assigned reading:** Dunne p. 40-44. **Assigned case:** *Briscoe*

Additional bibliography:

Hammond p. 572-604

Hurst p. 134-150

George A. Selgin, *The Theory of Free Banking: Money Supply under Competitive Note Issue* (Lanham, MD.: Rowman & Littlefield, 1988), chapter 10: Miscellaneous Criticisms of Free Banking, p. 144-163

Timberlake p. 39-55

Charles Calomiris and Stephen Haber, *Fragile by Design: The Political Origins of Banking Crises and Scarce Credit*, Princeton University Press, 2014, p. 153-203

### III. Consolidation of Federal Monetary Powers

Step two! Delving deeper into the uses of the money supply by governments, especially such as with respect to funding wars. Contrast between commodity-backed and unbacked paper notes. Bank notes vs. singular federal currency. The effect of changes in monetary policy on the value of money, and its effect on commercial and financial contracts.

**7. The Civil War marks the end of free banking and the revival of federal power over money.** Demand notes and greenbacks with legal tender are used to finance the Union army. The National Bank Acts of 1863 and 1864 allow the incorporation of federally chartered banks. They also determine the creation of the Office of Comptroller of the Currency (OCC) and establish the dual banking system that is in place until today. In *Veazie Bank v. Fenno* (1869), the Supreme Court further articulates on federal government powers to provide a currency for the whole country.

**Assigned reading:** Dunne p. 45-52. **Assigned case:** *Veazie*

Additional bibliography:

George Selgin, *Money Free and Unfree* (Cato Institute, 2017), chapter 4: The Suppression of State Bank Notes: A Reconsideration

Matthew Jaremski, *Privately Issued Money in the US*, in *Handbook of the History of Money*, especially p. 5-6

Hammond p. 718-739

Nussbaum p. 100-118

Timberlake p. 56-71 and 79-85

**8. The Legal Tender Cases revolve around the constitutionality of the Legal Tender Act of 1862. The power of government to interfere with private contracts through monetary manipulation is in question.** The Legal Tender Act had authorized fiat paper money for all debts, but it did not explicitly address the “gold clauses”. In *Bronson v.*



Rodes (1868), the Supreme Court manifested a concern with the Legal Tender Act harming the sanctity of contracts. Legal tender and the monetary status of the greenbacks was further whittled down in *Bank of New York v. Board of Supervisors* (1869) and *Lane County v. Oregon* (1869). In *Hepburn v. Griswold* (1870), the Supreme Court held that the Legal Tender Act was an unconstitutional violation of the due process clause.

**Assigned reading:** Dunne p. 65-76. **Assigned case:** *Bronson*

Additional bibliography:

Timberlake p. 72-78

Ajit V. Pai, *Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535 (1998)

**9. A change in the composition of the Supreme Court led to a reversal of fortunes and the triumph of federal power over money.** In *Knox v. Lee* (1871), the Supreme Court reversed *Hepburn* and upheld the constitutionality of the Legal Tender Act, portraying it as an aspect of national sovereignty that is untouched by concerns with due process and property protection. In the dissenting opinions, critics of greenbacks hint at a connection between the support of greenbacks and the defense of abolition. Later, the constitutionality of the Legal Tender Act was more broadly upheld by the Supreme Court in *Juilliard v. Greenman* (1884).

**Assigned reading:** Dunne p. 76-83. **Assigned case:** *Knox v. Lee*

Additional bibliography:

Nussbaum p. 118-123

Timberlake p. 97-113

Weatherford, p. 168-177

#### IV. The Long March Towards a Fiat Dollar Standard

Step three (of three): the emergence of the modern monetary system, starting with the creation of the Federal Reserve and ending with the severing of links between the dollar and gold. Discussion of fractional banking in more detail, and of vulnerabilities of the banking system through bank runs and financial crises. Central management of the money supply, within and across national borders, and the ensuing challenges.

**10. In 1913, the Federal Reserve Act determined the creation of the Federal Reserve Bank, better known as the Fed.** The Great Deflation of 1870-1890 created the conditions for the country to return to specie parity. The Specie Payment Resumption Act of 1875 and the Gold Standard Act of 1900 sealed the reinstatement of a gold standard.

The Fed was created to mitigate the risk of bank panics and to administer the gold standard, whose rigidity was pointed out as the cause of the 1907 Panic. The Fed was also given authority to purchase government bonds in the open market. *Ling Su Fan v. United States*, 218 U.S. 302 (1910) demonstrated how monetary law was a noticeable exception to the Supreme Court's adherence to *laissez faire* during the *Lochner Era*.

**Assigned reading:** David Wessel, *In Fed We Trust*, Three Rivers Press, 2009, p. 27-41. Dunne p. 84-87 **Assigned case:** *Ling Su Fan*

Additional bibliography:

Craig K. Elwell, Cong. Research Serv., 7-5700, *Brief History of the Gold Standard in the United States* (2011), p. 1-9

Timberlake p. 114-118 and 162-169

Nussbaum p. 154-174

Menand, p. 85-104

Charles Goodhart, *The evolution of central banks*, The MIT Press, 1988, especially p. 85-102

Lawrence H. Officer, *International Monetary Regimes: The Gold Standard*, in *Handbook of the History of Money*

Matthew Jaremski, *Privately Issued Money in the US*, in *Handbook of the History of Money*, especially p. 8-9

**11. The end of the gold standard.** In 1933, a recall enacted by President Roosevelt criminalized the possession of monetary gold. Congress then passed a Joint Resolution nullifying public and private contract gold clauses, which were prevalent. After the passage of the Gold Reserve Act of 1934, gold was devalued. Successive legislation increased the powers of the Fed and sought to restrict competition between banks. In 1935, the Supreme Court upheld the nullification of gold clauses in *Perry v. United States* (gold clauses in federal bonds), in *Norman v. Baltimore and Ohio Railroad Company* (gold clauses in private contracts) and in *Nortz v. United States* (redemption of gold certificates).

**Assigned reading:** Dunne p. 87-98. **Assigned case:** *Norman v. Baltimore*

Additional bibliography:

Sebastian Edwards, *American Default: The Untold Story of FDR, the Supreme Court, and the Battle over Gold*, Princeton University Press, 2018, especially the Introduction

and chapters 6 (A Transfer of Wealth to the Debtor Class), 7 (The Gold Clause Is Gone), and 12 (Nine Old Men and Gold)

Nussbaum p. 174-208

Weatherford, p. 178-184

Lev Menand, Why Supervise Banks The Foundations of the American Monetary Settlement, 74 Vand. L. Rev. 951 (2021), section II.

Gary Richardson, Alejandro Komai & Michael Gou, Banking Act of 1935, FED. RESERVE HISTORY, FED. RESERVE BANK ST. LOUIS (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/banking-act-of-1935>.

Kenneth W. Dam, From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law, 50 University of Chicago Law Review 504 (1983)

**12. The closure of the gold window and its aftermath.** The Bretton Woods system inaugurated after World War II established an international gold standard. National currencies were fixed to the US Dollar, and the Dollar was fixed to gold. That marked the birth of International Monetary Law. In 1971, the President Nixon terminated convertibility of the US dollar to gold, bringing the Bretton Woods system to an end and rendering the US dollar a fiat currency, unbacked by any commodity. The US experienced high inflation during the 1970s. Inflation, then and now, poses difficult questions to economists and politicians. For lawyers the most noticeable problem is the destabilization of contractual obligations. But US courts have traditionally taken the view that contracts allocate risks and tended to reject contract modifications arising from inflationary price fluctuations (*Maple Farms, Inc. v. City School District* N.Y.S2d 784, (1974), *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978)). In the 1970s, inflation also disorganized other aspects of financial and monetary regulation, such as the legislated caps on interests set out under state usury laws. The Supreme Court addressed the problem in *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.* (1978).

**Assigned reading:** Nixon Ends Convertibility of U.S. Dollars to Gold and Announces Wage/Price Controls, Federal Reserve History, November 22, 2013. **Assigned case:** *Marquette*.

Additional bibliography:

Todd J. Zywicki, The Economics of Credit Cards, 3 Chap. L. Rev. 79 (2000), especially section V (“Usury Regulations and the Misunderstood Role of *Marquette*”)

Chad G. Marzen & Michael Conklin, Stagflation in American Jurisprudence, 42 PACE L. REV. 1 (2021)

David Lazarus, California's Usury Law Caps Loan Rates. Bizarrely, Most Lenders are Exempt, Los Angeles Times (July 31, 2021)

Robert Hockett & Saule Omarova, The Finance Franchise, 102 Cornell L. Rev. 1143 (2017)

Weatherford, p. 184-189

The New York Times, Gold Certificates Made Legal Again (April 25, 1964)

The New York Times, Bill Signed to Allow Owning Gold in U.S. (August 15, 1974)

## V. Contemporary Issues in Monetary Law and Regulation

Putting our understanding of money to work! Topical issues: "shadow" banking: what is it, what historical resemblances does it bear? Government and non-government "moneys": can there be a non-state currency today? Money supply and macroeconomy.

**13. The panic of 2008 marks the end of the "great moderation" and obviates the importance of the shadow banking system.** This is the network of financial intermediaries that operate outside the scope of banking regulation but produces money-like claims that are almost always treated as *securities* under existing laws. The 2008 crisis also marks a turning point in the Fed's image with the public and its relationship with Congress, in no small part due to the Fed's emergency lending programs under Section 13(3). The Dodd-Frank Act aimed but in practice failed to restrict such emergency actions, as demonstrated by the response to the 2021 Covid financial panic of 2020.

**Assigned reading:** Lev Menand, p. 30-67

Congressional Research Service, Federal Reserve: Emergency Lending, Updated March 27, 2020

Michael S. Barr, Howell E. Jackson and Margaret E. Tahyar, Financial Regulation: Law and Policy, 2<sup>nd</sup> ed., Foundation Press, p. 59-73

Kathryn Judge, Information Gaps and Shadow Banking, 103 Virginia Law Review 411 (2017)

Lev Menand, p. 105-122

Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 ADMIN. L. REV. 463 (2009)

Arthur E. Wilmarth Jr, Taming the Megabanks: Why We Need a New Glass-Steagall Act (Oxford University Press, 2020), p 265-298

Gabriel Rauterberg and Jeff Zhang, The Banking/Securities Interface, unpublished, available at bcourses

**14. Blockchain poses a new challenge to monetary law. Noticeably, Bitcoin reflects the ambition to create a government-independent money.** In the post-Fed era, the attempts to create government-independent money in the US have failed (e.g. the Liberty Dollar Case, *United States v. von NotHaus*, W.D.N.C. Nov. 10, 2014). But the decentralized nature of blockchain makes Bitcoin harder to regulate. Under *CFTC v. McDonnell*, (332 F. Supp. 3d 641, 2018 U.S. Dist. August 28, 2018), Bitcoin is qualified as a commodity. Under *United States v. Faiella*, (39 F. Supp. 3d 544, S.D.N.Y. 2014), it is qualified as money.

**Assigned readings:** Eswar S. Prasad, *The Future of Money*, Harvard University Press, 2021 (hereinafter, “Prasad”), chapter 4. **Assigned cases:** *United States v. Faiella*.

Additional bibliography:

Neel Mehta, Aditya Agashe and Parth Detroja, *Blockchain Bubble or Revolution: The Future of Bitcoin, Blockchains, and Cryptocurrencies*, Paravane Ventures, 2021, chapter 3

The New York Times, *Prison May Be the Next Stop on a Gold Currency Journey* (Oct. 24, 2012)

Bruno Meyerhof Salama and Leonidas Zelmanovitz, *What Can Go Wrong with Bitcoin, Libra and other Cryptocurrencies?* *Econlib* (August 30, 2019)

Marcelo Prates, *Money in the Twenty-First Century: From Rusty Coins to Digital Currencies*, 15 *Ohio State Business Law Journal* 164 (2021)

**15. Stablecoins and other cryptocurrencies may pose competition or instead complement the US Dollar.** What is their current regulatory status? What are the main topics currently being litigated? How should large stablecoins such as Tether and USDC be regulated? Do they harm or enhance the US Dollar’s role as a global reserve currency? Should we increase the role of sovereign money by adopting a Central Bank Digital Currency (CBDC), as in China and (possibly) in Europe?

**Assigned readings:** Prasad, chapter 5.

Additional bibliography:

Bruno Meyerhof Salama and Leonidas Zelmanovitz, *Central Bank Digital Currency and the Agenda of Monetary Devolution*, forthcoming in *Commercial Banking in Transition* (Marco Bodellini, Gabriella Gimigliano and Dalvinder Singh, eds.), American Publisher Palgrave Springer, 2022

Christina Parajon Skinner, Central Bank Digital Currency as New Public Money, University of Pennsylvania Law Review, Vol. 172 (2023)

Prasad, chapter 6

Moin A. Yahya and Nicole Pecharsky, Crypto-Litigation: An Empirical Overview for 2020-present (with Nicole Pecharsky), 25. SMU SCIENCE & TECH. L. REV. 195 (2022)

Morgan Ricks, John Crawford and Lev Menand, FedAccounts: Digital Dollars, 89 George Washington Law Review 113 (2021)

Dante Alighieri Disparte, Is America Losing the Digital-Currency Race? Project Syndicate (Jul 2, 2021)

## VI. Conclusion

**16. To conclude the course, we revisit the toughest question in monetary law: what is money?** What are the core functions of money and how have they been performed throughout the US monetary history? What is the essence of money (if any)? Who is right: chartalists espousing the state theory of money or conventionalists defending the commodity theory of money? Is money a type of credit? Moving forward, will innovation unbundle banking, money, and payments? Would that be desirable?

**Assigned reading:** Charles Proctor, Mann on the Legal Aspect of Money, Oxford University Press, 2012, (7th Edition), p. 9-26 (items B, C, and D).

Additional bibliography:

Felix Martin, Money: The Unauthorized Biography, Knopf, Random House, 2013, chapter 1.

Christine Desan, Making Money: Coin, Currency, and the Coming of Capitalism, Oxford University Press, 2014, p. 330-360; and "Money as a Legal Institution." In Money in the Western Legal Tradition, edited by Wolfgang Ernst and David Fox. Oxford: Oxford University Press, 2016.

Leonidas Zelmanovitz, Designing Capitalism, Book Review, September 8, 2015, Law & Liberty

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