

Monetary Law and Regulation

Legal Studies Program at UC Berkeley

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Instructor. Bruno Meyerhof Salama, salama@berkeley.edu. **Lectures.** TU, TH, from 9h30—11h00 at Wurster 102. **Office Hours.** Mondays 9h00-10h00 am via Skype. To schedule a meeting, just add brunosalama18 over Skype and send a message.

GSI. Matthew Hamilton, matthew_hamilton@berkeley.edu.

Description

The world is experiencing renewed interest in the law and regulation of money. This interest is driven by technological developments such as artificial intelligence and blockchain, which have spurred innovations like fintech and cryptocurrencies. Additionally, concerns about excessive debt levels, inflation, the potential erosion of the US dollar's status as the global reserve currency, unconventional monetary policies enacted in response to the Great Recession of 2008 and the COVID-19 crisis, and bank panics are significant factors. Despite the appearance of originality in these issues, many of the resulting questions have already been addressed, in various forms, during the development of the modern monetary and banking system.

This course surveys the history of US monetary law and regulation from its inception to the recent, turbulent rise of cryptocurrencies. It begins with a discussion of monetary affairs at the country's founding, covering colonial times, the American Revolutionary War, and the framework established at the Constitutional Convention. Next, it examines the 19th-century debates over free banking, culminating in the Civil War, and the New Deal responses to the Great Depression, highlighting the Supreme Court cases that have shaped US monetary law as we know it today. The final part addresses contemporary legal dilemmas, such as the regulation of Bitcoin and stablecoins, the creation of central bank digital currencies, and the debate over the scope of the Federal Reserve's legal authority. The course concludes by revisiting classic questions concerning the nature and functions of money.

Learning objectives

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

Evaluation

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, 2024.

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.

Disability-related accommodations

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 policies

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.

Sequence

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 and economic concepts.

1. Sovereign power over money

Throughout history, various commodities such as grains, livestock, tobacco, and shells have been used as money. Over time, the use of precious metals like gold and silver for coinage became widespread due to their durability, intrinsic value, and universal acceptance. Sovereign power over money was historically tied to the exclusive right to mint coins. In Western legal systems, this right allowed sovereigns to raise revenue through seigniorage—the difference between the coin’s face value and production cost. Additionally, sovereigns increased revenues by debasing coinage, reducing precious metal content while maintaining nominal value.

No assigned reading. Additional bibliography:

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”)

2. Monetary law allocates power to create and regulate money

For most of recorded history, the legal perception of the value of money was dominated by “metallism,” which is the belief that the value of money hinges upon the value of the metal it contained. During the transition to the Modern Age, “nominalism” began to displace metallism. Nominalism is the theory that the value of money is determined by the face value assigned by the issuing authority rather than the intrinsic value of the

material it is made from. Nominalism gradually became the prevailing legal doctrine for contracts involving payment in debased currency. The nominalist principle has been part of Common Law since at least 1604, as established in the famous case of the “Mixt Monies.” However, the widespread acceptance and use of the US dollar reduce the need for strict legal tender enforcement in the United States today.

Assigned readings: Gerald T. Dunne, *Monetary Decisions of the Supreme Court*, Rutgers Univ. Press, 1960 (hereinafter, “Dunne”), p. 3-6; and David Fox, *The Case of Mixt Monies: Confirming Nominalism in the Common Law of Monetary Obligations*, 70 *The Cambridge Law Journal* 144-150 (2011).

Additional bibliography:

Keith Rosenn, *Law and Inflation*, University of Pennsylvania Press, 1982, p. 36-40

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)

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

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

During the colonial period in the United States, the money supply was diverse and often inadequate to meet the needs of the economy. Several forms of money were used, reflecting the scarcity of hard currency (specie) and the need for practical solutions. Various commodities served as money, including tobacco, rice, and wampum. Foreign coins circulated widely, most notably the Spanish dollars (known as pieces of eight). In 1690, Massachusetts issued indented bills, arguably the first governmental paper currency without metallic backing since medieval China. Excessive issuance of these bills led to high inflation. The government attempted to outlaw note discounts, but with limited success. To finance the American War of Independence, the Continental Congress issued a paper currency known as the Continental currency, which depreciated significantly

during the war. The monetary prerogatives set out under the Articles of Confederation would not be repeated in the US Constitution.

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

Additional bibliography:

Dror Goldberg, *Easy Money: American Puritans and the Invention of Modern Currency*, Chicago University Press, 2023, especially chapters 13 (The Legal Tender Law, 1690) and 14 (Aftermath, 1691-1692)

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 was granted powers to mint coin and establish its value. States were granted legal tender powers, but only over forms of money they could not issue, such as gold and silver coins minted by the federal government. The extent of the federal government’s powers over money was the subject 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. However, that same debate would be revisited time and again throughout 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. These events include the creation of the First Bank of the United States in 1791, the use of 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 found that the Necessary and Proper Clause of the Constitution grants the US federal government implied powers, including the power to create a bank. This doctrine was 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. The Shift to State Monetary Powers and the Free Banking Era

After the death of Chief Justice Marshall, a Supreme Court whose majority was appointed by President Andrew Jackson moved to reinstate state monetary powers. In *Briscoe v. The Bank of the Commonwealth of Kentucky* (1837), the Supreme Court

decided 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 was undone, and the country entered the free banking era, which 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 and the Revival of Federal Monetary Power

The Civil War marks the end of free banking and the revival of federal power over money. Demand notes and greenbacks with legal tender status were used to finance the Union army. The National Bank Acts of 1863 and 1864 allowed the incorporation of federally chartered banks. These acts also established the Office of the Comptroller of the Currency (OCC) and the dual banking system that remains in place today. In *Veazie Bank v. Fenno* (1869), the Supreme Court further articulated the federal government's power to provide a uniform currency for the entire 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 and the Constitutionality of Fiat Money (I)

The Legal Tender Cases revolve around the constitutionality of the Legal Tender Act of 1862. The power of the government to interfere with private contracts through monetary manipulation was 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 expressed concern that the Legal Tender Act could harm the sanctity of contracts. The legal tender status of greenbacks was further challenged 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. The Legal Tender Cases and the Constitutionality of Fiat Money (II)

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 hinted 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. The Creation of the Federal Reserve and the Return to the Gold Standard

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. In 1913, the Federal Reserve Act established the Federal Reserve Bank, better known as the Fed. 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* (1910) demonstrated how monetary law was a noticeable exception to the Supreme Court's adherence to *laissez-faire* principles 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 at the time. After the passage of the Gold Reserve Act of 1934, gold was devalued. Successive legislation increased the powers of the Federal Reserve 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. This marked the birth of international monetary law. In 1971, President Nixon terminated the 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. However, US courts have traditionally taken the view that contracts allocate risks and have tended to reject contract modifications arising from inflationary price fluctuations (*Maple Farms, Inc. v. City School District*, 352 N.Y.S.2d 784 (1974); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978)). In the 1970s, inflation also disrupted other aspects of financial and monetary regulation, such as the legislated caps on interest rates set under state usury laws. The Supreme Court addressed the problem in *Marquette National 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. Money and shadow money

The panic of 2008 marks the end of the “great moderation” and highlights the importance of the shadow banking system. This is the network of financial intermediaries that operate outside the scope of traditional banking regulation but produce money-like claims that are almost always treated as securities under existing laws. The 2008 crisis also marks a turning point in the Federal Reserve’s image with the public and its relationship

with Congress, largely 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 financial panic of 2020 triggered by the COVID-19 pandemic.

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*, 2nd 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

Paccès, A.M. (2019). Shadow Banking. In: Marciano, A., Ramello, G.B. (eds) *Encyclopedia of Law and Economics*. Springer, New York, NY. https://doi-org.libproxy.berkeley.edu/10.1007/978-1-4614-7753-2_717

14. Blockchain and Bitcoin

Blockchain poses a new challenge to monetary law. Notably, Bitcoin reflects the ambition to create a government-independent money. Attempts to create government-independent money in the US have previously failed (e.g., the Liberty Dollar Case, *United States v. von NotHaus*, W.D.N.C. Nov. 10, 2014). However, 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 classified as a commodity. Under *United States v. Faiella* (39 F. Supp. 3d 544, S.D.N.Y. 2014), it is classified 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. Cryptocurrencies and Central Bank Digital Currencies

Stablecoins and other cryptocurrencies may pose competition to or 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 the United States increase the role of sovereign money by adopting a Central Bank Digital Currency (CBDC), as (probably) in China and (possibly) in Europe?

Assigned readings: Prasad, chapter 5; and Barry Eichengreen, *CBDCs still have not found their raison d'être*. *Financial Times*, December 4, 2023

Additional bibliography:

Bruno Meyerhof Salama and Leonidas Zelmanovitz, *Monetary Devolution and the Political Economy of Central Bank Digital Currencies*, *Law and Economics Yearly Review*, vol. 10, Part 2(37), Special Issue (2023)

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

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)

Dan Awrey, *Money and Federalism* (May 30, 2024). Cornell Legal Studies Research Paper Forthcoming, European Corporate Governance Institute - Law Working Paper No. 775/2024, available at SSRN: <https://ssrn.com/abstract=4848952>

VI. Conclusion

16. What is money?

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:

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