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GREENBACKS, CONSENT, AND UNWRITTEN AMENDMENTS

John M. Bickers*

I remember a German farmer expressing as much in a few words as the whole subject requires: “money is money, and paper is paper.”—All the invention of man cannot make them otherwise. The alchymist may cease his labours, and the hunter after the philosopher’s stone go to rest, if paper cannot be metamorphosed into gold and silver, or made to answer the same purpose in all cases.¹

INTRODUCTION

Every day Americans spend paper money, using it as legal tender. Yet the Constitution makes no mention of this phenomenon. Indeed, it clearly prevents the states from having the authority to make paper money into legal tender, and does not award this power to Congress.² Yet today, without a formal written amendment to the Constitution, America seems united in accepting this fact to a degree that greatly exceeds our unity in the vast majority of Constitutional questions that might appear. The acceptance by the people today of a power at odds with the original meaning of our Constitution offers insights into the legitimacy of the process of unwritten amendments to the founding document and the continuing meaning of the consent of the governed.

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1. THOMAS PAINE, DISSERTATIONS ON GOVERNMENT, THE AFFAIRS OF THE BANK, AND PAPER MONEY 44 (1817) (emphasis added).

2. U.S. CONST. art. I §§ 8, 10.

I. WHOSE VOICE MATTERS?

A problem has lived long at the heart of originalism. The idea that the Constitution of 1787, whether in the minds of those who drafted it,³ or in its meaning to the public of the day,⁴ should control all successive generations fits uneasily with one of the core ideas of republican government,⁵ for if that form of government, especially in its American form, has a consistent theoretical basis, it is that governmental legitimacy arises “from the Consent of the Governed.”⁶

Of course, originalism has many defenders, and many foes, in the world of legal scholarship.⁷ This Article will forego all of

3. Typically this idea is now called “original intent” jurisprudence because it focuses on the intent the Framers had for their new government. *See, e.g.*, Jacobus ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399, 399-400 (1939) (noting that the Supreme Court consistently announced “that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument”). Not that long ago, what are now described as types of originalism tended to be gathered together under the label “interpretivism.” *See, e.g.* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983) (“Such norms are found by interpreting the text, with recourse when necessary to the intent of the framers.”).

4. This is often labeled “original public meaning” jurisprudence. *See, e.g.*, James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 21-22 (2016); *see, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935 (1985) (“Madison’s interpretive theory rested primarily on the distinction he drew between the public meaning or intent of a state paper, a law, or a constitution, and the personal opinions of the individuals who had written or adopted it.”). For the purposes of this Article, the two forms of originalism are equally subject to the concerns expressed.

5. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 507 (1994) (noting that “[a] fundamental principle for republican government was that the majority should rule”).

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[T]o secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”). At least one modern scholar, though, rejects the view that the Declaration’s invocation was meant to require popular governance, instead locating the source of the power with those who govern. *See* Randy E. Barnett, *The Declaration of Independence and the American Theory of Government: “First Come Rights, and Then Comes Government,”* 42 HARV. J.L. & PUB. POL’Y 23, 27 (2019) (“It is the matter of ‘who governs’ that the Declaration says is to be decided by ‘the consent of the governed.’”).

7. The battle is both legal and political, but seldom appears in historical scholarship. *See, e.g.*, ERIC FONER, *THE SECOND FOUNDING* xxiv (2019) (“Whether the courts should base decisions on ‘originalism’ is a political, not a historical, question. But no historian believes that any important document possesses a single intent or meaning.”).

the routine objections to originalism,⁸ focusing instead on a conundrum closer to the core of the originalist project. What theory of government allows a change to Jefferson's "self evident" principal that the earth belongs to the living?⁹ Thus, originalism has long faced a "dead hand" problem: why should the understanding of the Constitution of those long dead bind us, their heirs?¹⁰ As Professor Moore noted in defending textualism from intent-based originalism, such a method has the vice of binding us to "old ideals."¹¹

As Jefferson was aware, treating the ordering of society as a matter to be decided once meant that future generations would lose control of their own destiny.¹² As he noted to Madison, the

8. Frequently raised objections to one form of originalism or another include: the difficulty of reconstructing the beliefs and understandings of a vanished time and the variance of opinions among the contemporaries whose views we are seeking, *see, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 77 (1992) ("[O]ne must plumb the fictional 'mind' of a long-dead multi-member body."); *see also* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1213 (2008) ("[T]here are elements of this lack of historical consciousness in contemporary originalism. Judges and scholars speak of the founding generation as if they were our contemporaries."); the utter inability of originalism to deliver on its supposed primary advantage, "an interpretive approach that avoided judicial subjectivity, judgment, and choice," Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 616 (2008); or the vastly different makeup of "the People" then and "the People" today, *see, e.g.*, Amar *supra* note 5, at 508 ("Women today constitute a majority of both the Massachusetts and American polities. They are today governed under a federal Constitution largely the making of men who died long ago, men who may not have had their interests foremost in mind."). It has even been noted that some difficulties arise from the fact that translations of the Constitution into German and Dutch made available in the key states of Pennsylvania and New York did not agree. *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 78-79 (2016) (considering a number of possible approaches to the different translations, and using them to demonstrate that "articulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time. It is a theoretical and selective reconstruction of elements of the past, brought to the present and employed in the present for present-day purposes.").

9. Thomas Jefferson, II. Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 392, 392 (Julian P. Boyd ed., Princeton Univ. Press 1958).

10. Reva B. Siegel, *Heller & Originalism's Dead Hand—in Theory and Practice*, 56 UCLA L. REV. 1399, 1405 (2009).

11. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) ("Better that we fill out the grand clauses of the Constitution by our notions of meaning (evolving, as we have seen, in light of our developing theories about the world), by our notions of morals, and by two hundred years of precedent. . . . The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.").

12. Jefferson, *supra* note 9, at 392-93.

logical conclusion was that “no society can make a perpetual constitution, or even a perpetual law.”¹³ Of course, as Madison recognized, perpetually remaking the fundamental laws of society would make the nation “too mutable” to hold onto its benefits, and it might too easily fall victim to “pernicious factions.”¹⁴ Madison’s strongest rejoinder, though, was that the stalwarts of the past had not merely lived on the earth; they had improved it, and it was perfectly just to find that their successors would be obligated to pay the debt of honoring the intentions of those whose improvements benefitted the current generation.¹⁵

But Madison declined to find in this principle support for a sort of divine right theory of originalism.¹⁶ Instead, he returned to the consent of the governed, finding a clear path to reconciling republican virtue with respect for the improvements of preexisting laws: tacit consent.¹⁷ As Madison noted, presuming the consent of those who participate in a society was the only way to avoid either a requirement of unanimity among society’s current members or the need to reenact every rule each time a new citizen reached the age of majority.¹⁸

As is so often the case, Madison’s common-sense philosophy has been incorporated into the sinews of American society. At least when the people do not live in one of the revolutionary, government-altering generations,¹⁹ they can only consent passively, through the ordinary acts that every day provide countless opportunities to accept or reject the system of government they have inherited.²⁰ Yet this very fact creates a

13. *Id.* at 395-96.

14. James Madison, To Thomas Jefferson (Feb. 4, 1790), in 13 THE PAPERS OF JAMES MADISON, 18, 19 (Charles F. Hobson & Robert A. Rutland eds., Univ. Press of Va. 1981).

15. *Id.* at 19-20.

16. *See id.*

17. “I find no relief from these consequences, but in the received doctrine that a tacit assent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears.” *Id.* at 20 (footnote omitted).

18. *See id.* at 21.

19. *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 7-8 (1998).

20. *See* Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 189 (2008) (“Implied consent is consent to a government as it actually operates: if one implicitly consents to the government’s authority, one does so by living under its existing rules. Accordingly, implied consent to the present constitutional regime could only establish the propriety of governance based on original constitutional meanings if the existing rules of American governance corresponded to such original meanings.”).

problem for originalism: what if a widely held current view, one receiving a large degree of tacit assent, is wrong from the perspective of the 1780s? Several originalist projects have argued that some ideas have just been mistaken over the years, resulting in government behavior that is unconstitutional.²¹ Our obligation, proponents of originalism sometimes argue, is to choose one of two paths: cease the behavior, or amend the Constitution.²² The first generation of originalists included those, like Raoul Berger and Robert Bork, who argued that Article V of the Constitution provided a fully sufficient response to the “dead hand” problem.²³ Some recent scholars have argued that the fealty to the amendment process is critical to the preservation of liberty.²⁴ Non-originalist scholars have rejected this path, based in some measure on the value of the popular consent embodied in the Declaration of Independence.²⁵ Many accept fully that the

21. As an obvious example, scholars in the late twentieth century argued that the then-current idea that the Second Amendment was not directed to protecting an individual right was incorrect, see, e.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 810 (1998); see also Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996) (“Research conducted through the 1980s has led legal scholars and historians to conclude, sometimes reluctantly, but with virtual unanimity, that there is no tenable textual or historical argument against a broad individual right view of the Second Amendment.”). *But, c.f.*, Paul Finkelman, *The Living Constitution and the Second Amendment: Poor History, False Originalism, and A Very Confused Court*, 37 CARDOZO L. REV. 623, 661 (2015) (arguing that in adopting an individual rights view of the Second Amendment, the “Court has embraced a modern interpretation of the Constitution”).

22. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 619 (1999).

23. See Siegel, *supra* note 10, at 1406.

24. See, e.g., Barnett, *supra* note 22, at 654 (noting that a written constitution “is conducive to preserving the rights of the people from infringement by government officials, but only if its original meaning is not contradicted or altered without adhering to formal amendment procedures”) (emphasis added).

25. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009) (“The proposition that, absent open revolution, we may change an ancient Constitution only through the onerous and constitutionally endogenous Article V process is both undemocratic and unattractive.”); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 65 (2009) (“The grant of an exclusive power to change the constitutional text is logically compatible with a practice in which the text’s meaning can change over time. Judicial power to engage in non-originalist constitutional interpretation is simply not tantamount to a judicial power of textual amendment.”); Siegel, *supra* note 10, at 1405 (“The living have not assented to Article V as the sole method of constitutional change. And if we are to construe the living as having implicitly consented to any constitutional understanding or arrangement, it is to the Constitution as it is currently interpreted, with its many pathways of change.”).

Constitution can be, and indeed has been, amended outside of the formal amendment process many times.²⁶ Because originalists reject in principle these unwritten amendments to the Constitution, there would be great value in determining whether the actual behavior of the people indicated consent to such an unwritten amendment.

An objector to this framework might argue that the description presented of originalism is over-simplistic. The “originalism” described here is the “old originalism,” which has been substantially altered by generations of scholars into a “new originalism.”²⁷ Some modern originalists have embraced the notion that the Constitution as understood at the time of its ratification (and subsequent amendments), does not intend to answer all modern questions.²⁸ In those areas, it is legitimate to recognize space for construction in areas where “original meaning will run out as a useful tool for judges needing to resolve the case.”²⁹ The existence of the recognition of this “construction

26. See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1072-73 (1988) (“Unless We the People of the 1980s can amend our Constitution by a simple majority—a majority of the polity, mind you, not of Congress (as I shall explain in more detail below, it is a gross mistake to equate Congress with the People)—the Constitution loses its most defensible claim to derive from the People.”) (footnote omitted); Professors Balkin and Levinson have located sources of unwritten amendments in both partisan appointments to the federal judiciary, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”), and through the actions of the political branches, administrative agencies, and even lobbying groups and think tanks, see Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 498 (2006) (“[M]uch constitutional development (and therefore much constitutional change) occurs outside of judicial case law.”) [hereinafter Balkin & Levinson, *Constitutional Change*].

27. See, e.g., Griffin, *supra* note 8.

28. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1248 (2019) (“Second, at least some constitutional provisions employ terms that are vague or open-textured; these provisions do not provide bright-line rules. Such provisions create a zone of underdeterminacy that allows for doctrinal dynamism consistent with fixed meaning.”).

29. ERIC J. SEGALL, *ORIGINALISM AS FAITH* 92 (Cambridge University Press 2018). Professor Segall notes that some modern originalists have found that the Supreme Court decisions guaranteeing marriage equality are correct originalist interpretations of the Fourteenth Amendment. *Id.* at 178. As Professor Segall observes, this is “despite the unarguable fact that in each of those cases [referring not merely to *Obergefell*, but also *Brown*

zone,” some might argue, makes my characterization of originalism as preventing unwritten amendments nothing but a strawman.

Nonetheless, this Article will persist in using a definition of originalism that binds it to the original public meaning of the Constitution or the intent of its drafters.³⁰ There are two reasons that I believe justify this decision. The first is that, whatever self-described originalist scholars may say about their project, the public face of the doctrine continues to be one that insists that it operates as a real and effective constraint upon judges,³¹ and offers the only real fealty to the written Constitution.³² When prominent political leaders,³³ public thinkers,³⁴ and members of the judiciary³⁵ all purport to subscribe to originalism for these principles, it seems fair to cabin discussion of originalism to the proclaimed theory and take it seriously as it is used in the public square.³⁶

The second reason for not treating the various schools of “New Originalism” is that they are simply too multifaceted to

v. *Board of Education* and *Lawrence v. Texas*] the justices explicitly denied that original meaning generated the outcomes.” *Id.*

30. As will be seen, for the legal tender dispute, there is no difference between the two. *See id.* at 92.

31. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 112 (Crown Forum 2019) (after claiming that originalists are constrained by a “value-neutral methodology” and a “closed record of historical evidence,” the Justice warned “[a]llow me to reign over the country as a living constitutionalist and you have no idea how I will exercise that fickle power.”).

32. *Id.* at 25 (“Originalism is simply the idea that when interpreting the Constitution, we should look to text and history and how the document was understood at the time of its ratification”).

33. *See, e.g.*, Sen. Ted Cruz, Speech to the Federalist Society National Lawyers Convention (Nov. 18, 2016), [<https://perma.cc/X8J8-6RVJ>] (describing Justice Scalia as “a passionate defender of the Constitution. Not the Constitution as it has been contorted and revised by generations of activist jurists, but the Constitution as it was understood by the people who ratified it and made it the law of the land”).

34. *See, e.g.*, Ed Whelan, *Brown and Originalism*, NAT’L REV. (May 11, 2005), [<https://perma.cc/3XK9-E5LG>] (calling the “living Constitution” an “Orwellian euphemism” whose proponents “absurdly contend that the text of the Fourteenth Amendment stating that no state shall ‘deprive any person of life, liberty, or property, without due process of law’ somehow should be twisted to guarantee rights to abortion and same-sex marriage”).

35. GORSUCH, *supra* note 31, at 110 (“Originalists believe that the Constitution should be read in our time the same way it was read when adopted.”).

36. Indeed, one might argue that old originalism continues to be the public meaning of the term originalism. *See id.* at 110-11.

constitute anything more than, as Professor Segall has put it, a matter of faith.³⁷ As the disputes about meaning among self-proclaimed new originalists show, those schools are now “indistinguishable from Justice Brennan’s theory of the living Constitution.”³⁸

Constraining the meaning of originalism to the genuine public meaning of the written document at the time of its adoption allows for a direct test of originalism’s rejection of unwritten amendments. If the theory of this Article is correct, the theory of consent of the governed must allow the people today to tacitly express their consent to a change that does not appear in the Constitution as written and formally amended.³⁹ A test occurs if a clear, unwritten amendment to the Constitution has nearly universal modern consent.⁴⁰ If one were to discover a common behavior of government that violated the original intent or the original public meaning—or both—then the originalist project should demand that we end it.⁴¹ Scholars have advocated a return to constitutional precepts about which the widely popular view of today is arguably wrong.⁴² Areas in question have ranged from the serious⁴³ to the satirical.⁴⁴

37. SEGALL, *supra* note 29, at 178 (“There is no theory of originalism that leads to agreement among scholars and judges about how the Supreme Court should decide cases.”)

38. *Id.* at 81.

39. See Griffin, *supra* note 8, at 1208.

40. Decades ago, Professor Akhil Reed Amar proposed that a source could be found for unwritten amendments in the triangle of popular sovereignty provisions formed by the Constitution’s Preamble and its Ninth and Tenth Amendments, see Amar, *supra* note 58, at 492.

41. See Griffin, *supra* note 8, at 1187.

42. Raoul Berger, *Interstate Commerce: A Response to Sanford Levinson*, 74 TEX. L. REV. 785, 786 (1996) (“[W]e must return to the Founders’ design. Our duty as scholars is to ascertain what they intended, regardless of the Court’s divagations.”); Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 FORDHAM L. REV. 669, 669 (2006) (“What *Restoring the Lost Constitution* is really about is restoring various ‘lost clauses’ that have gradually been removed from the Constitution by misinterpretation over a very long period of time.”).

43. Examples include the scope of the Commerce Clause, see Berger, *supra* note 42, at 786, and the twentieth century administrative state, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

44. See, e.g., Jordan Steiker et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237, 253 (1995). For the purpose of this Article, it must be noted that the contest for which this was an entry by Professors Steiker, Balkin, and Levinson featured, as its prize, paper money as legal tender. *Contest: Was George Washington Constitutional?*, 12 CONST. COMMENT.

A clear and easy example resides in the purse, the wallet, or the pocket of most readers of this Article. For every bill of United States currency, every bit of printed money issued by the government contains the phrase “[t]his note is legal tender for all debts public and private.”⁴⁵ And that statement is, whether viewed from the perspective of the original intention of the Framers or the original public meaning of the Constitution, unconstitutional.⁴⁶

II. THE ISSUE OF PAPER AS LEGAL TENDER

Because modern use occasionally conflates some of the terms important to this discussion, it is important to separate three

137, 138 (1995) (“First prize in each category is an attractive portrait of Washington himself, printed on special green paper . . .”).

45. Tamara Kurtzman, *Cashing Out*, L.A. LAW., Mar. 2019, at 22, 24.

46. Few originalist scholars have attempted to defend paper money as legal tender on originalist grounds. *But, c.f.*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1079 (2008) (basing this power on the express power of Congress to coin money because “the money thus ‘coined’ did not need to be metallic. Paper or any other material that Congress selected would suffice”). Professor Natelson makes as compelling a case as can probably be made that paper money as legal tender can be fitted within an originalist understanding of the Constitution. To do so, though, he has to find it possible to “coin paper” in the placement of a deleted phrase by John Rutledge, *id.* at 1057; find other references to “coin” that do not refer to specie, which he acknowledges are ambiguous, *id.* at 1061-64; and cite to comments of various key figures of the founding alluding to the legitimacy, if not the wisdom, of “paper money,” *id.* at 1078-79. Ultimately, I reject Professor Natelson’s explanation for three distinct reasons. First, even he concedes that the uses of “coin” for something other than specie are uncommon and he notes that the history of colonial uses of material other than precious metals as legal tender had not always gone well. *See* Natelson, *supra* note 46, at 1039 (“[T]he currencies in all four New England colonies performed as poorly as a pessimist might expect.”). Second, his use of “paper money” in, for example, the correspondence of Adams and Jefferson, *id.* at 1078, omits the distinction between paper money and legal tender. Indeed, he refers to the emissions of paper money during the War of 1812 referenced in Justice Field’s dissent in *Knox v. Lee*, *id.*, at 1078 n.340, but those issuances were specifically not designated as legal tender. *See* Legal Tender Cases, 79 U.S. (12 Wall.) 457, 637 (1871) (Field, J., dissenting) (“In all of them the issue of the notes was authorized as a means of borrowing money . . . and in all of them the receipt of the notes by third parties was purely voluntary.”). Finally, as noted repeatedly during the arguments and opinions of *Hepburn v. Griswold* and *Knox v. Lee*, Congress had simply never attempted to use this power before the mid-point of the Civil War. *See* Natelson, *supra* note 46, at 1019 n.3. It is an odd originalist argument that the ratifiers of the Constitution intended for the federal government to have a power, but the government of the day and those for decades after simply ignored it despite critical needs during wars and financial catastrophes. *See, infra*, notes 264-71 and accompanying text.

ideas: legal tender, currency, and money. Legal tender is that which is “approved in a country for the payment of debts, the purchase of goods, and other exchanges for value.”⁴⁷ Personal checks, for example, are not legal tender; merchants can accept them or not as they choose.⁴⁸ No creditor, though, has the right to reject an offer in satisfaction from a debtor provided that it is made in legal tender; courts will recognize the debt as having been paid.⁴⁹ Currency, on the other hand, is anything “that circulates as a medium of exchange.”⁵⁰ Issued by banks, governments, or even individuals, paper currency in earlier times was generally a record of a transaction or promise.⁵¹ Third parties might well choose to accept it or not, but that choice, as well as the value to ascribe to the currency, was just as subject to negotiation as any other term between parties.⁵² That would stop being true if, and only if, a government would grant to some form of currency the status of legal tender, as legal tender by definition always carries the value set by the government.⁵³ Money, as a technical matter, is “[t]he medium of exchange authorized or adopted by a government as part of its currency.”⁵⁴ The term “money” was generally, but not exclusively, used to refer to something having

47. *Legal Tender*, BLACK’S LAW DICTIONARY (8th ed. 2004).

48. *Genesee Scrap & Tin Baling Co. v. City of Rochester*, 558 F. Supp. 2d 432, 436 (W.D.N.Y. 2008) (“[C]hecks are not legal tender in themselves, and cannot lawfully be made such by state or municipality fiat. They may, however, be used as a substitute for legal tender, because the payee ultimately has the right to present the check to a bank and redeem it for cash in the form of United States currency.”).

49. Indeed, the modern rule protects tenders that are not legal tender unless the creditor expresses a contemporary objection to the form of the payment. *See* RESTATEMENT (FIRST) OF CONTRACTS § 305 (AM. LAW INST 1932) (“[T]ender is made of a valid check or of some form of currency which is not legal tender for the purpose, and the tender is rejected without a statement that a ground of objection is the medium of payment, the tender is not thereafter open to that objection . . .”).

50. *Currency*, BLACK’S LAW DICTIONARY (8th ed. 2004).

51. It must be noted that even those destined to lose the struggle over the legal tender status of paper money agreed that the United States had the authority to issue a paper currency. *See, e.g.*, *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 582 (1871) (Chase, C.J., dissenting) (“[W]e do not question the authority to issue notes or to fit them for a circulating medium, or to promote their circulation by providing for their receipt in payment of debts to the government, and for redemption either in coin or in bonds; in short, to adapt them to use as currency.”).

52. *See id.* at 582-83.

53. *See id.* at 583.

54. *Money*, BLACK’S LAW DICTIONARY (8th ed. 2004).

the status of legal tender.⁵⁵ Money could originally only be made from precious metals.⁵⁶ This use of coins, though, was problematic. Carrying large amounts of coin could be cumbersome, and it left one potentially vulnerable to the deprivations of the highwayman.⁵⁷

The monetary experience of the colonies during the Revolutionary War and as newly independent states operating in the Confederation was not a good one.⁵⁸ With a far greater need for resources than their limited money in the form of coins would support, colonies issued paper currency of their own, backed by a promise to pay.⁵⁹ The Continental Congress followed suit, and large parts of the revolutionary effort were funded through what were essentially debt obligations.⁶⁰ These notes could be circulated after their initial issue, but they functioned like any other bonds in this status: creditors could choose to accept them at less than face value.⁶¹ That they did so consistently and dramatically accounts for the appearance and persistence of the

55. See BLACK'S LAW DICTIONARY, *supra* note 47. Because the use of the term varied then and varies still, this Article will include the phrase "legal tender" where there might be any doubt about the intended meaning.

56. Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393, 402 (1999) ("Long before the framing of the Constitution, precious metals were used as money in and among markets of the world. Cheaper metals and raw materials were used as money only when precious metals were unknown or scarce.").

57. *Id.* at 411 ("Dealing in hard money was cumbersome and risky, especially in big transactions that required a heavy amount of gold or silver to be transported to a distant place. In such transactions, paper banknotes provided a safe and convenient substitute with a considerably low transaction cost."). Although the story is an invented one, the film *Rob Roy* locates the source of that outlaw's difficulties in a robbery that occurs after a subordinate accepts payment on his behalf in coin rather than a bank note. *ROB ROY* (United Artists Corporation 1995).

58. See, e.g., FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 175 (Univ. Press of Kan. 1985) (describing Rhode Island's issue of "a large amount of unsecured paper currency" as a method of retiring its debt, a scheme which helped it gain "the opprobrious sobriquet of Rogue's Island").

59. Rhode Island not only made its notes legal tender for all debts, but disenfranchised those who would not accept the currency at face value. See *id.* at 176 (noting that a relatively small number of debtors actually used the legal tender provision when their creditors opposed it, but observing that this fact seemed seldom noticed in other states horrified by Rhode Island's actions).

60. Khan, *supra* note 56, at 398 ("As the supply of specie was inadequate to conduct the war, Congress began to issue bills of credit[:] . . . a negotiable promissory note in a bearer form so that it could freely circulate as a money-substitute.").

61. See Timothy A. Canova, *Lincoln's Populist Sovereignty: Public Finance of, by, and for the People*, 12 CHAP. L. REV. 561, 578 (2009).

phrase “not worth a Continental” to describe an item of exceedingly small value.⁶²

In the debates at the Constitutional Convention, as well as the language during Reconstruction, it is vital to mind the boundaries of these terms. The key issue for this Article is not whether the federal government could issue currency; only a few of the Framers sought to prevent that.⁶³ Nor is the question whether the federal government could accept paper currency in satisfaction for debts it was owed, whether of its own issue or not.⁶⁴ The question for the Framers was whether the new general government would have the power recently exercised by Rhode Island:⁶⁵ the power to make paper money not only a useful currency but also a legal tender for private transactions.⁶⁶ Their answer was no.⁶⁷

III. THE FRAMERS SPEAK: PAPER MAY NOT BE LEGAL TENDER

If one’s guiding star for understanding the Constitution is the intent of those who drafted it, there are few areas in which that intent is as clear as in the question of paper money as legal tender. One event demonstrates that intent more clearly than any other: the debate over bills of credit. An early draft explicitly provided Congress the power to “emit bills on the credit of the U. States” in the power to borrow money.⁶⁸ In the middle of August, Gouverneur Morris rose to move the striking of these words, which were designed to allow Congress to issue notes of indebtedness that could circulate as currency.⁶⁹ He warned that otherwise the “Monied interest” would oppose the new

62. *Id.* (noting that “the general depreciation of the Continental currency” began a spiral by causing the Continental Congress to have to issue even more paper currency).

63. See James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 74 (1887).

64. All creditors always have this power. See *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 638 (1871) (Field, J., dissenting).

65. MCDONALD, *supra* note 58, at 175.

66. See generally James Madison, Thursday, August 16. In Convention. (1787), in 4 THE WRITINGS OF JAMES MADISON 219-21 (Gaillard Hunt ed., 1903).

67. *Id.* at 219, 221-22.

68. *Id.* at 219.

69. *Id.*

Constitution.⁷⁰ Madison, hoping to protect the power to use promissory notes, noted that it should suffice to guarantee that such currency could not be made a legal tender.⁷¹ Oliver Ellsworth responded forcefully that this was “a favorable moment to shut and bar the door against paper money.”⁷² Other Framers took their turns denouncing the evil. James Wilson noted that it would be “a most salutary influence on the credit of the U. States to remove the possibility of paper money.”⁷³ Pierce Butler argued that no European nation had the power to issue paper as legal tender.⁷⁴ Delaware lawyer George Read set the farthest boundary for supporting Morris’s proposed amendment by claiming that “the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.”⁷⁵ Although the religious views of the Framers varied, the fact that a respected elder would compare paper money to apocalyptic evil suggested the fervor with which the founding generation held this now-unfamiliar view. The motion of Gouverneur Morris passed, and the words were struck out.⁷⁶

It must be noted that the removal of this language may not have accomplished what Madison thought it did. Generations later, Congress would declare that it did have the authority to issue paper money as legal tender.⁷⁷ In considering the effect of the Morris amendment on this question, Professor Thayer would argue that “the removal of an express grant of power . . . was not a prohibition of the power,”⁷⁸ and it is a powerful justification for this view that the text agreed upon in 1787 does include a

70. *Id.*

71. Madison, *supra* note 66, at 219 (“[W]ill it not be sufficient to prohibit the making them a *tender*? This will remove the temptation to emit them with unjust views. And promissory notes in that shape may in some emergencies be best.”).

72. *Id.* at 220. He also noted that preventing Congress from having this power would win “more friends of influence . . . than by almost any thing else. Paper money can in no case be necessary. . . . The power may do harm, never good.” *Id.* at 220-21.

73. *Id.* at 221.

74. *Id.*

75. Madison, *supra* note 66, at 221.

76. *Id.* at 221-22.

77. *See infra*, Part VII.

78. Thayer, *supra* note 63, at 80.

prohibition regarding a declaration of legal tender by the states.⁷⁹ Justice William Strong would later raise this same idea.⁸⁰ But such a textualist approach⁸¹ cannot really be squared with an ideology that gives primacy to the Framers' Intent.⁸²

If one rejects an intentionalist originalism in favor of one based on the understanding of those who ratified the new Constitution, the rule against paper money as legal tender is no less clear. The other luminaries of the day were almost uniform in their hostility to paper money. The always-essential George Washington noted to Rhode Island that its problems stemmed from using paper as legal tender and were thus utterly foreseeable.⁸³ Thomas Jefferson predicted that a reversal of fortune in a place that issued paper money would cause disaster, demonstrating that "paper is poverty, that it is only the ghost of money, and not money itself."⁸⁴ Madison himself, although he had originally been uneasy about removing the whole clause that Morris objected to, had never been a friend to using paper money as legal tender. Instead he characterized it as unjust, unnecessary, and pernicious.⁸⁵ Even Alexander Hamilton agreed with Madison's characterization that paper money was sinister,

79. Farley Grubb, *The U.S. Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and How a Constitutional Transformation of the Nation's Monetary System Emerged* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11783, 2005).

80. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 546 (1871).

81. Although they are "confused," see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982), textualism and originalism are by no means the same. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988) (advocating a model that "calls for judges to apply the rules of the written constitution *in the sense in which those rules were understood by the people who enacted them*").

82. See Thayer, *supra* note 63, at 79 (noting that "the majority of the speakers thought that they were prohibiting bills of credit and paper money. They were wrong").

83. Letter from George Washington to Jabez Bowen (Jan. 9, 1787) in 4 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES* 504, 505 (W.W. Abbot ed., 1995) ("Paper money has had the effect in your State that it ever will have, to ruin commerce—oppress the honest, and open a door to every species of fraud and injustice.")

84. Thomas Jefferson, To Edward Carrington (May 27, 1788), in 13 *THE PAPERS OF THOMAS JEFFERSON*, 208, 209 (Julian P. Boyd ed., 1956).

85. James Madison, Notes for Speech Opposing Paper Money (Nov. 1, 1786), in 9 *THE PAPERS OF JAMES MADISON* 158, 158-59 (Robert A. Rutland & William M. E. Rachal ed., 1975).

suggesting at least by 1783 that it was inherently “pregnant with abuses.”⁸⁶

Less famous members of American society agreed: paper money was a horror. At least one writer of the day argued that the Constitution did not go far enough.⁸⁷ The Anti-Federalist who called himself “Deliberator,” argued in 1788 that the Constitution would in fact allow the federal government to spawn this horror:

Though I believe it is not generally so understood, yet certain it is, that Congress may emit *paper money*, and even make it a legal tender throughout the United States; and, what is still worse, may, after it shall have depreciated in the hands of the people, call it in by taxes, at any rate of depreciation (compared with gold and silver) which they may think proper. For though no state can emit bills of credit, or pass any law impairing the obligation of contracts, yet the Congress themselves are under no constitutional restraints on these points.⁸⁸

It must be noted, though, that Deliberator’s view of congressional powers was—as is appropriate for an advocate—extreme. In addition to claiming that the proposed Constitution allowed the issuance of paper money, he envisioned a world in which Congress might “if they shall think it for the ‘general welfare,’ establish an uniformity in religion throughout the United States.”⁸⁹

If Deliberator’s understanding of the paper money power was not idiosyncratic, one would expect it to a more common objection among the Anti-Federalists. Yet other Anti-Federalists do not seem to have pressed this particular attack.⁹⁰ Far more

86. Alexander Hamilton, Continental Congress Unsubmitted Resolution Calling for a Convention to Amend the Articles of Confederation (July 1783), in 3 THE PAPERS OF ALEXANDER HAMILTON 420, 422 (Harold C. Syrett ed., 1962).

87. Deliberator, *What Congress Can Do; What a State Can Not*, in THE ANTIFEDERALIST PAPERS 122 (Morten Borden ed., 1965)

88. *Id.* at 125.

89. *Id.* Even before the First Amendment’s religion clauses, it is difficult to square the assertion of this power with the textual guarantee of religious freedom. U.S. CONST. art. VI (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

90. Indeed, where opposition to the Constitution referred to paper money, it was often among those few defenders of the practice of granting it legal tender status, who were concerned with the explicit prohibition of this power of the states. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 246 (Simon &

common as an objection from the Anti-Federalists was that directed to the explicit ban on the states granting legal tender status to paper money.⁹¹ “Brutus” argued that the legal tender prohibition combined with that on duties and imposts meant that “the legislatures of the several states will find it impossible to raise monies to support their governments.”⁹² Luther Martin argued that paper money had previously offered “great benefit,” and that “it is impossible to foresee that events may not take place which shall render paper money of *absolute necessity*.”⁹³

Even though Deliberator’s argument was an uncommon one, Madison responded to it forcefully. In the *Federalist Papers* he argued that the use of paper money as legal tender was more easily avoided under the Constitution than without it.⁹⁴ He reminded the New Yorkers whose ratification votes he sought that the Constitution prohibited the states from ever again using paper as a legal tender, and reminded them what “pestilent effects” such money had “on the industry and morals of the people, and on the character of republican government.”⁹⁵ As Deliberator might well have noted, this passage was in a section specifically discussing Article I, Section 10—only a limitation on state power was at issue.⁹⁶ Yet, it is difficult to believe that an advocate like Madison would have used such inflammatory language regarding paper money if large sections of the public held the view that the Constitution gave Congress this very power, while denying it to the states. It is a fair conclusion that the ratifying public

Schuster 2010) (“Some prominent leaders in the fight against unconditional ratification of the Constitution had also fought for paper money in Maryland. Those affluent freeholders were often also debtors, having borrowed money to buy confiscated Loyalist property.”).

91. See James Philbin, *The Political Economy of the Antifederalists*, J. LIBERTARIAN STUD., 79, 88 (1994).

92. Brutus, “*If You Adopt It . . . Posterity Will Execrate Your Memory*”, N.Y. J., Oct. 18, 1787, reprinted in 1 THE DEBATE ON THE CONSTITUTION 164, 168 (Bernard Bailyn ed., 1993).

93. Luther Martin, *The Genuine Information VIII*, MD. GAZETTE, Jan. 22, 1788, reprinted in 1 THE DEBATE ON THE CONSTITUTION 645, 649 (Bernard Bailyn ed., 1993). If Martin believed that the federal government had been given this power to offset depriving the states of it, he did not say so. See *id.* at 645-51.

94. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) (listing “[a] rage for paper money” as an example of the kind of “improper or wicked project” less likely to infect the whole United States than any particular state).

95. THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961).

96. *Id.* at 280; U.S. CONST. art. I, § 10.

understood the document the same way that its authors had—they believed the Constitution took a position against paper money as legal tender.⁹⁷ This view was widespread and transcended other disagreements; a delegate to the Massachusetts ratifying convention lamented the decline in virtue and blamed paper money and lawful piracy.⁹⁸ Noah Webster’s defense of senates as checks on unwise legislation regretted that the Rhode Island senate had proven unable to stop the “rage for paper money,” but noted that Maryland’s had, despite the fact that the rage was “bordering on madness.”⁹⁹ Promoters of the Constitution frequently decried their opponents as “Paper-Money-men.”¹⁰⁰

The conclusion of the times about the borrowing clause after the Morris amendment seems to have been that ascribed to it by Madison: it gave Congress the power to issue paper notes, but neither that power nor the power to coin money allowed the federal government to demand that this paper money be accepted by private citizens as legal tender for debts.¹⁰¹ Unless huge amounts of contrary evidence have slipped away from the

97. H.A. Scott Trask, *Did the Framers Favor Hard Money?*, MISES INST. (Sept. 15, 2003), [<https://perma.cc/G2FR-QQZL>].

98. Mr. Turner, A Sharp Exchange on the Powers of Congress and Its Probable Corruption, in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 896, 897 (Bernard Bailyn ed., Library of Am. 1993) (“[T]he operation of paper money, and the practice of privateering, have produced a gradual decay of morals . . .”).

99. NOAH WEBSTER, A CITIZEN OF AMERICA (Oct. 17, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 129, 132-33 (Bernard Bailyn ed., Library of Am. 1993).

100. See, e.g., TIMOTHY PICKERING, REFUTATION OF THE “FEDERAL FARMER” (Dec. 24, 1787), reprinted in 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 289, 295 (Bernard Bailyn ed., Library of Am. 1993) (noting that if there were any opponents of the Constitution in New England, they would primarily be “Shayites & Paper-Money-men: but their numbers & characters are alike contemptible”).

101. See *Legal Tender Status*, U.S. DEP’T OF THE TREASURY (Jan. 4, 2011), [<https://perma.cc/8293-LZZV>]. Certainly not germane to the views of all originalists, but nonetheless worth noting when considering the public meaning of the Constitution is the large chronological leap this Article is about to take. This gap reflects the fact that there was not a single act of Congress making paper money a legal tender between the ratification of the Constitution and the Civil War. See E. G. SPAULDING, HISTORY OF THE LEGAL TENDER PAPER MONEY ISSUED DURING THE REBELLION 5-6 (Buffalo, Express Printing Co. 1869). The understanding of the ratifying generation seems to have held for the next several generations as well. See Natelson, *supra* note 46, at 1019.

historical record, it is difficult to make the argument that Congress could grant legal tender status to the paper it printed.¹⁰²

IV. THE JUSTICES SPEAK: PAPER MAY NOT BE LEGAL TENDER

Mrs. Hepburn owed Mr. Griswold \$12,720.¹⁰³ She had taken out a loan from him, and the principal plus interest amounted to that sum in the spring of 1864.¹⁰⁴ Haled into Chancery Court in Louisville, Kentucky, Mrs. Hepburn offered the full sum in the form of paper money—"greenbacks"¹⁰⁵—printed by the United States government.¹⁰⁶ Mr. Griswold refused, as the loan had been made in coin, he demanded coin in return.¹⁰⁷ Mrs. Hepburn then paid the court in paper money, the court accepted the offer pursuant to an 1862 Act of Congress, and the court dismissed Griswold's lawsuit.¹⁰⁸ His appeal was granted by a Kentucky court and Mrs. Hepburn then elevated the case to the United States Supreme Court.¹⁰⁹

Many events conspired to make the case of more interest than the sum of money would suggest. The notion that paper could be accepted in payment of debts was not new; indeed, for hundreds of years some people had preferred paper to coin.¹¹⁰ But in 1862, Congress took a step beyond the conventional thinking that the Constitution barred it from making true paper money.¹¹¹ While authorizing a large issue of paper currency, Congress made the greenbacks legal tender for all debts, public and private.¹¹²

102. Trask, *supra* note 97.

103. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 605 (1870).

104. *Id.*

105. So called because of the green-colored ink with which they were printed. See G. Edward White, *Reconstructing the Constitutional Jurisprudence of Salmon P. Chase*, 21 N. KY. L. REV. 41, 67 (1993).

106. See *Hepburn*, 75 U.S. (8 Wall.) at 605.

107. *Id.*

108. *Id.*

109. *Id.* The Court initially heard argument in the 1867 term, but reheard it the following year to allow the United States Attorney General to be heard on this matter of "great public importance." *Id.* at 605-06.

110. See White, *supra* note 105, at 64.

111. Legal Tender Act, ch. 33, 12 Stat. 345, 345 (1862).

112. After setting forth the authorization to the Treasury to issue non-interest bearing notes and to accept them in payment of taxes and duties owed to the United States, the law

The Secretary of the Treasury, Salmon P. Chase, was ambivalent about the legal tender provision, but desperately needed the authorization for these new notes.¹¹³ When he received that authorization, he set to work using it to fund the war effort critical to the survival of the nation.¹¹⁴ The Treasury Department even put the face of its Secretary on some of the notes.¹¹⁵

By 1869, when Mrs. Hepburn's suit reached the highest court in the land, Salmon P. Chase had become the Chief Justice.¹¹⁶ An observer might guess that he would lead the Court into a decision upholding the authority of Congress to make legal tender, even for preexisting debts, of the paper currency for which he had been responsible and which was now quite popular.¹¹⁷ That observer would be wrong.¹¹⁸

A Court intent on limiting the powers of Congress might have adopted a harsh and text-limited view of the Article I powers.¹¹⁹ After all, not one word of Section 8 granted Congress the right to set legal tender for the country.¹²⁰ Such an opinion,

added that the notes "shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States." Legal Tender Act, ch. 33, 12 Stat. 345, 345.

113. See Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 CASE W. RES. L. REV. 653, 674 (2013).

114. Roger D. Billings, Jr., Book Review, 29 AKRON L. REV. 469, 469 (1996) (reviewing JOHN NIVEN, SALMON P. CHASE, A BIOGRAPHY (1995)) ("Chase kept Lincoln's government afloat with greenbacks.").

115. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 510 (Simon & Schuster 2005) (Chief Justice Chase "was also pleased by the fact that his own handsome face would appear in the left-hand corner of every dollar bill").

116. President Lincoln had considerable doubts about Chase's ambition but put them aside to nominate his Treasury Secretary to be the new Chief Justice after Roger Taney's death. See *id.* at 679-80 (citing Lincoln's response to Chief Justice Chase's opponents that he knew of Chase's schemes but "I should despise myself if I allowed personal differences to affect my judgment of his fitness for the office").

117. Indeed, a post-war economic boom had significantly decreased the opposition to paper money that had been present only a few years earlier. See IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879*, at 165 (1964) (opponents of paper money "who would later regain their hard money fervor were to be strangely blind to the failings of paper money during the bonanza years").

118. *Id.* at 174.

119. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 628 (1870) (Miller, J. dissenting) ("[T]here have been from time to time attempts to limit the powers granted by [the Constitution], by a narrow and literal rule of construction . . ."); see also *United States v. Lopez*, 514 U.S. 549 (1995) (narrowing the Court's interpretation the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, to limit Congress's power to regulate firearms).

120. See U.S. CONST. art. I, § 8.

to those who opposed it, would resemble the bizarre formalism of the territorial governance portion of Chief Justice Taney's opinion in *Scott v. Sandford*.¹²¹ It would have been sufficiently removed from the reality of mid-nineteenth century governance that critics could simply brush it aside later.¹²²

Chief Justice Chase did no such thing. Rather than reject a limited view of Congressional power, he deliberately sought out the most famously expansive version of those powers, the one set forth by Chief Justice Marshall in *McCulloch v. Maryland*.¹²³ In defending the constitutionality of Congress chartering a national bank, the unanimous *McCulloch* Court had created a test that, while paying lip service to the notion that Congress had limited powers,¹²⁴ nonetheless preserved a broad sense of federal supremacy.¹²⁵ John Marshall had established a test that required only that the Constitution furnish a goal; Congress itself could choose any measure of seeking to attain that goal, provided only that it was a reasonable way of reaching toward it and it was not specifically prohibited.¹²⁶ This test, still relied on in the vast majority of tests of congressional power, is apparently broad enough to allow Congress to continue to incarcerate people after the completion of their judicially imposed sentences.¹²⁷ One Justice in recent years went out of his way to characterize the *McCulloch* test as "permissive."¹²⁸

121. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 436 (1857).

122. *See* *United States v. Rhodes*, 27 F. Cas. 785, 790-91 (C.C.D. Ky. 1866) (No. 16,151).

123. *Hepburn*, 75 U.S. (8 Wall.) at 614 (describing the test set forth in the permissive *McCulloch* case as one that "has ever since been accepted as a correct exposition of the Constitution").

124. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (recognizing that the federal "government is acknowledged by all to be one of enumerated powers").

125. *Id.* ("[T]he government of the Union, though limited in its powers, is supreme within its sphere of action.").

126. *Id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

127. *United States v. Comstock*, 560 U.S. 126, 129-30 (2010).

128. *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting) ("[P]rincipally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States.").

But even such a permissive test, in the hands of Chief Justice Chase, sufficed to prevent Congress from making paper currency a legal tender for private debts.¹²⁹ Chase reminded his listeners of the *McCulloch* test, noted also that the Necessary and Proper Clause lacked a requirement that the act of Congress be “absolutely necessary”, and added that money required a standard of value that could only be set by governments.¹³⁰ He acknowledged that the Constitution expressly vested that very standard-setting power in the legislature.¹³¹

The Court then found, though, that no enumerated power offered a sufficiently clear goal to allow the same power to exist regarding paper as legal tender.¹³² Using logic, the opinion quickly ruled out the power to coin money,¹³³ the war power, the power to regulate commerce, or the power to borrow funds.¹³⁴ To find a power to make legal tender out of paper from one of these sources, the Court held, would “convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers.”¹³⁵

Even though the first third of the *McCulloch* test was thus found to have been failed, the Court proceeded to find that making paper into legal tender was not a reasonable means in any event.¹³⁶ The Court had earlier noted a “well-known law of currency” guaranteeing that paper would never be at face value unless it was convertible into specie “promptly . . . at the will of the holder” of the paper.¹³⁷ It argued that adding the legal tender requirement did nothing to improve the success of the notes.¹³⁸ It held that any benefit that might accrue from compelling the acceptance of paper would be more than offset by “the derangement of business,” inflation, and an accompanying “long

129. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1870) (concluding that the legal tender acts failed the *McCulloch* test in multiple ways).

130. *Id.* at 615.

131. *Id.*

132. *Id.* at 616.

133. *Id.* (“It is certainly not the same power as the power to coin money.”).

134. *Hepburn*, 75 U.S. (8 Wall.) at 617.

135. *Id.* at 618.

136. *Id.* at 622.

137. *Id.* at 608. Thus, the Court concluded that only coined specie had real value, and that paper currency could never be more than a mere placeholder for it.

138. *Id.* at 620 (citing for this proposition “eminent writers”).

train of evils.”¹³⁹ Such a means was not “appropriate and plainly adapted” to the Constitution’s purposes.¹⁴⁰

Finally, the Court turned to the observation of Chief Justice Marshall that the means chosen by Congress “must be not prohibited, but consistent with the letter and spirit of the Constitution.”¹⁴¹ To find the spirit of the Constitution, Chief Justice Chase looked, in the style of an originalist, to the words and behavior of the framing generation.¹⁴² Anticipating the discussion still ongoing between the original intent and public meaning schools, he based his findings on the intent of both “those who framed and those who adopted the Constitution.”¹⁴³ He discovered their opposition to the use of paper as money in the prohibition of the impairment of contracts,¹⁴⁴ the requirement that private property not be taken without just compensation,¹⁴⁵ and the due process protection of property.¹⁴⁶ It is difficult not to smile a little at Salmon P. Chase’s proffered self-defense over the fact that a former Treasury Secretary who oversaw this very change was authoring the very opinion announcing that the change had been unconstitutional.¹⁴⁷ It is much more difficult, though, to argue that he was wrong as a matter of either textual logic or the original intent (or public meaning) of the Constitution.¹⁴⁸

Not everyone agreed with the outcome of the case: Justice Miller was joined by two other Justices in dissenting.¹⁴⁹ Yet their dissent does not demonstrate that the Chief Justice was wrong about the text or the original meaning of the Constitution.¹⁵⁰ On

139. *Hepburn*, 75 U.S. (8 Wall.) at 621.

140. *Id.*

141. *Id.* at 622.

142. *Id.*

143. *Id.* at 623.

144. *Hepburn*, 75 U.S. (8 Wall.) at 623.

145. *Id.*

146. *Id.* at 624.

147. *Id.* at 625 (“[A]mid the tumult of the late civil war . . . different views, never before entertained . . . were adopted by many. . . . If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts . . .”).

148. *Id.* at 625-26.

149. *Hepburn*, 75 U.S. (8 Wall.) at 626 (Miller, J., dissenting). Justices Swayne and Davis, both appointed by President Lincoln, joined the dissent. *Id.*

150. *See id.* at 626-39.

the contrary, they simply showed less concern for the text of the Constitution than the majority had, and none whatsoever for the original meaning of that document.¹⁵¹

As to the former, the best argument Justice Miller could summon was that the Constitution prohibited the states from making anything but gold or silver a lawful tender, but had no such prohibition upon Congress.¹⁵² Indeed, this fact, especially in conjunction with Congress's power to coin money, might be an arguable textual source for the paper money power, but not even Justice Miller could find that power located there.¹⁵³

Ultimately Justice Miller relied on the war power.¹⁵⁴ He found that the Civil War's unparalleled destruction brought with it the necessity for Congress "to devise some new means of borrowing money on the credit of the nation."¹⁵⁵ This openly non-originalist argument focused on the risk of a shortage of capital that might have brought on the loss of the Civil War, the division of the country, and the impoverishment of the people.¹⁵⁶ Justice Miller expressed his certainty "[t]hat the legal tender act prevented these disastrous results."¹⁵⁷ Without the legal tender requirement, he maintained, the notes of the United States would have sunk "to the dead level of worthless paper."¹⁵⁸ In short, the necessity of the war allowed for the appearance of a wholly new power.¹⁵⁹

That this was an extraordinarily non-originalist approach appeared as a concession when Justice Miller spoke about the governing officials who had ultimately passed the 1862 and 1863 Acts. He observed about them that they "had been trained in a school which looked upon such legislation with something more than distrust."¹⁶⁰ Indeed, that American society had continued the founding generation's view of the evils of paper as money is

151. *See id.*

152. *Id.* at 627.

153. *Hepburn*, 75 U.S. (8 Wall.) at 627. *But, c.f.*, Natelson, *supra* note 46, at 1079.

154. *Hepburn*, 75 U.S. (8 Wall.) at 632.

155. *Id.*

156. *Id.* at 632-33.

157. *Id.* at 633.

158. *Id.* at 634.

159. *Hepburn*, 75 U.S. (8 Wall.) at 633-34.

160. *Id.* at 634.

evident in nearly every line of both the majority and the dissent. Chief Justice Chase's opinion carried with it the regret that better judgment was not exercised by those with "patriotic hearts."¹⁶¹ Justice Miller in response embraced the idea of paper as legal tender as one that had been received during the Civil War "with almost universal acquiescence."¹⁶² In other words, for him it simply did not matter what the founding generation thought—the fact was that the dissenters agreed with the government and the people of their own time who found the law to be "a necessity in the most stringent sense in which that word can be used."¹⁶³

But the dissenters were outvoted.¹⁶⁴ The Court had spoken. The Congress of the United States was without authority to make paper currency into a legal tender for all debts, public and private.¹⁶⁵

V. THE PEOPLE SPEAK: PAPER MAY BE LEGAL TENDER

The assassination of Abraham Lincoln shook the body politic of the United States.¹⁶⁶ The efforts of his successor to prevent meaningful societal change in the newly readmitted former confederacy led to his impeachment, which was another unprecedented moment for the nation.¹⁶⁷ The campaigns of revanchist violence that savaged the African-American population of those states tore at the fabric of the country as

161. *Id.* at 625 (majority opinion).

162. *Id.* at 638 (Miller, J., dissenting).

163. *Id.* at 635.

164. Some controversy remains whether the decision should be thought of as 5-3 or 4-3. As Chief Justice Chase noted in his opinion, Justice Grier voted with the majority, but retired from the Supreme Court before the decision was ultimately announced. *Hepburn*, 75 U.S.(8 Wall.) at 626 (majority opinion); *see, infra*, notes 176-84 and accompanying text.

165. *See Hepburn*, 75 U.S. (8 Wall.) at 626.

166. JAY WINIK, APRIL 1865: THE MONTH THAT SAVED AMERICA 259 (2001) (calling the events surrounding the assassination "a time when the institutions of American democracy faced perhaps their greatest test").

167. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 333 (1988) ("[T]o the many dramatic innovations Reconstruction brought to American politics, the spring of 1868 added yet another: the unprecedented spectacle of the President's trial before the Senate for 'high crimes and misdemeanors'").

well.¹⁶⁸ All of these events were widely fretted over at the time.¹⁶⁹ Compared to them, the battle over paper money as legal tender was small. Yet it too upset the natural political order, and it too led to significant changes in the United States.¹⁷⁰

The long-term advocates of paper money never treated *Hepburn v. Griswold* as the last word on the subject.¹⁷¹ Indeed, it could not be. Although the opinion was technically limited to the repayment of debts contracted *before* the Legal Tender Act, not one word of Chief Justice Chase's opinion regarding the power of Congress made an analysis of debts contracted *after* the Act any different.¹⁷² After all, the Court had invoked the "permissive" language of *McCulloch* in finding that paper money was beyond the power of Congress.¹⁷³ If the federal government lacked the power to make paper money legal tender, the awareness of the parties that the government claimed this power should make no logical difference. There might be more sympathy for the creditor whose expectations of specie repayment were dashed than one who knew beforehand that greenbacks would repay any debt. Sympathy for the wronged, though, cannot be the basis for congressional power—at least not if the idea of congressional power is that it has any limits at all. Opposition to the decision seemed to understand that it could not be cabined to pre-1862 debts.¹⁷⁴

168. *Id.* at 425 (“[T]he wave of counterrevolutionary terror that swept over large parts of the South between 1868 and 1871 lacks a counterpart either in the American experience or in that of other Western Hemisphere societies.”).

169. See UNGER, *supra* note 117, at 163.

170. The magnitude of *Hepburn* upsetting of the political order was not immediately apparent, possibly because the holding explicitly concerned only legal tender for debts that predated the 1862 act. See *id.* 117 at 176 (noting that because of this limitation “[o]nly long-term obligations of states, municipalities, and—among business firms—railroad corporations, together totaling some \$350 million, were involved”).

171. See 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88, at 691 (1971) (“Greenbackers became a force in politics.”).

172. See *id.* at 705.

173. See, *supra* notes 127-29 and accompanying text; *id.* at 703-04.

174. Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 346 (1935) (noting “[a] powerful movement in Congress and among the masses” against the decision).

In the words of the *Boston Daily Advertiser*, “there is little disposition to accept [the *Hepburn* decision] as final.”¹⁷⁵ Because of a fluke of timing, opposers would not have to. Efforts to prevent President Andrew Johnson from replacing Justices had reduced the Court to eight, and it was on its way to seven.¹⁷⁶ Almost a year before the *Hepburn* decision, Republicans had become convinced that the election of Ulysses Grant had defeated Johnson’s program for the nation just as thoroughly as the victories of Ulysses Grant had defeated Lee’s program for secession on the battlefield.¹⁷⁷ To increase Grant’s ability to affect the Court, they passed an act in April 1869 that affected the size of the Court in two ways. On the one hand, it restored the size of the Court to nine; at the same time, it provided an incentive for new vacancies to appear through judicial retirement, as any Justice over seventy years of age who had already served for at least ten years would receive his salary for life if he retired any time after that December.¹⁷⁸ When Justice Grier retired, as Congress had no doubt hoped, President Grant suddenly had the opportunity to remake the Court with two appointments.¹⁷⁹

Scholarly opinions have varied over the generations about the extent to which the change in personnel of the Court was deliberately related to the *Hepburn* decision. Defenders of the President, most notably former Attorney General Hoar, argued that the selections were made before the decision came out; they were delivered to the Senate the day of the decision, but the selections of William Strong and Joseph Bradley preceded the knowledge that the Court would rule against the constitutionality

175. FAIRMAN, *supra* note 171, at 767.

176. See David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 432 (2008) (“Congress had provided that until deaths or resignations reduced the number of Supreme Court Justices from nine to seven, no vacancies on that tribunal should be filled.”).

177. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 123 (2017) (“One of the first laws signed by President Grant in 1869 expanded the Supreme Court back to nine Justices . . .”).

178. FAIRMAN, *supra* note 171, at 716-17 (noting that the other Justices of the Court gave Justice Grier their “unanimous view” that he should retire, which he agreed to do with an effective date of the end of January 1870).

179. It might have been three, as Justice Samuel Nelson, like Justice Robert Grier, met the statutory requirements for the full-pay retirement. *Id.* at 716. Nelson did not retire until 1872. *Id.* at 657.

of paper money.¹⁸⁰ Unfortunately for the Hoar defense, the memoir of Treasury Secretary George Boutwell revealed that the Chief Justice warned him of the *Hepburn* decision before its release; as a former Secretary of the Treasury, Chase was concerned about the possibility that the decision would cause a run on gold.¹⁸¹ Scholars have long noted that the view of the question taken by the two nominees was likely known to the president—Justice Strong had even ruled in favor of paper as legal tender when he was a justice on the Pennsylvania Supreme Court.¹⁸² This Grant never denied; he would say only that he did not “exact anything like a pledge or expression of opinion from the parties he might appoint to the Bench.”¹⁸³ Ultimately, Professor Fairman’s view seems sound: even if President Grant had as a key criterion for selecting Justices a confidence that they would overturn *Hepburn*, use of such criteria was not inappropriate.¹⁸⁴

But the confidence that *Hepburn* was not a final settlement was not merely based on the make-up of the Court. In embracing the call for a rehearing, the *Boston Daily Advertiser* focused on the practical impact of the decision, which was “much greater than its defenders admit.”¹⁸⁵ Writing of the decision as if it were the sort of executive action that might be readily reversed, the *Advertiser* warned of a great evil “if the decision is maintained.”¹⁸⁶ Actions by a diverse and widespread group of interests showed that they continued to view paper money as legal tender, the opinion of the United States Supreme Court notwithstanding; some state government authorities announced

180. Ratner, *supra* note 174, at 349.

181. *Id.* at 352.

182. *Id.*; Shollenberger v. Brinton, 52 Pa. 9, 56-71 (1866) (Strong, J., dissenting).

183. Ratner, *supra* note 174, at 351.

184. See Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1128, 1133 (1941) (noting that if President Grant knew about the outcome of *Hepburn* in advance he doubtlessly “regarded the decision as profoundly wrong, and nominated judges whose opinions, according to the best information available, he approved. Would anyone in his place have done otherwise?”).

185. FAIRMAN, *supra* note 171, at 767.

186. *Id.* at 767-78.

that they would continue to accept paper money¹⁸⁷ and some private corporations, especially railroad interests, announced that they would pay their debts in paper money.¹⁸⁸

The decision's opponents would prove to be correct; in just over a year, the Court would again involve itself in the controversy. The additions of Justices Bradley and Strong proved vital to the reconsideration of the constitutional issue. *Harper's Weekly*, which supported paper money as legal tender, noted that the new decision, *Knox v. Lee*, was not a normal constitutional decision: "except for certain political hopes and expectations that opinion would probably not have been rendered."¹⁸⁹

VI. THE JUSTICES SPEAK AGAIN: PAPER MAY BE LEGAL TENDER

Only one year after the critical decision in *Hepburn v. Griswold*, a supplicant asked the Supreme Court to consider the legal matter again.¹⁹⁰ This time, the occasion was the sale of a herd of sheep owned by a Pennsylvanian named Mrs. Lee that found itself in Texas upon the outbreak of hostilities.¹⁹¹ The Confederacy seized and sold the sheep to a Mr. Knox.¹⁹² After the war, Mrs. Lee's lawsuit against the buyer for conversion took a constitutional turn when she sought to introduce evidence that the greenbacks in use at the time were less valuable than the gold and silver specie with which the sheep had originally been valued.¹⁹³ The trial court declined to admit such evidence, but reminded the jury at the end that their decision regarding the amount of the damages could take into consideration that Mr.

187. *Id.* at 768-69 (citing a Maine resolution and a decision by a Pennsylvania State Fund, although the latter was overturned by a state statute requiring the state treasurer to comply with the Supreme Court decision).

188. *Id.* at 769-70 (offering examples of resolutions to use paper money but pay the difference between them and their gold value in one case "if the present decision of the Supreme Court of the United States is not reversed within a year").

189. *Id.* at 766 (adding somewhat sadly that the Supreme Court was "not free from the soliciting whispers of political ambition").

190. *See* *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

191. *Id.* at 457. In the *Legal Tender Cases*, *Knox v. Lee* was paired with *Parker v. Davis*, a case from Massachusetts involving a sale of land. *Id.* at 461-62.

192. *Id.* at 457.

193. *Id.* at 458.

Knox could pay any judgment “in legal tender notes of the United States.”¹⁹⁴ Mr. Knox complained that this instruction increased the amount of damages, and took the case to the Supreme Court.¹⁹⁵

The Court he faced consisted of nine Justices, including seven that decided the *Hepburn* case.¹⁹⁶ These seven Justices split precisely along the lines they had the previous term.¹⁹⁷ The four remaining members of the *Hepburn* majority held to their view that the Constitution did not allow for the making of paper money into a legal tender.¹⁹⁸ They were now a dissenting minority, though, as the three dissenters from the previous battle were joined by the two newly appointed Justices in finding that the Constitution imposed no barrier at all to such legislation.¹⁹⁹

The claims and counterclaims of the opinions—two for the majority and three for the dissent—speak loudly about the theories of constitutional governance offered by both sides.²⁰⁰ For in overturning a one-year old case, the Court did not use some of the classic approaches for such changes of direction: the application of the law was misguided,²⁰¹ we know more now than we did then,²⁰² or we are not actually changing anything.²⁰³ This time, the court simply came to a different conclusion based on a

194. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 458.

195. *Id.* at 459.

196. *See id.* at 603-04 & n.158 (Clifford, J., dissenting).

197. *Compare id.* at 529, 554 with *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 606, 626 (1870).

198. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 529; *Hepburn*, 75 U.S. (8 Wall.) at 606.

199. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 529, 554; *Hepburn*, 75 U.S. (8 Wall.) at 626 (Miller, J., dissenting); Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 144-45 (2006).

200. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 529, 554, 570, 587, 604, 634.

201. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring) (explaining their change in vote from the previous *Gobitis* case because “[l]ong reflection convinced us that although the principle is sound, its application in the particular case was wrong”).

202. *See, e.g.*, *Brown v. Board of Educ.* 347 U.S. 483, 494 (1954) (considering the previously rejected claim that segregation did not cause feelings of inferiority but noting that “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority”).

203. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873 (1992) (rejecting the trimester framework while simultaneously reaffirming the “central holding” of *Roe v. Wade*).

different vote. Indeed, the majority went to some lengths to suggest that overturning a case was not a particularly unusual event.²⁰⁴ That is especially so, the majority noted, when the court deciding the previous opinion was smaller than some thought it ought to have been.²⁰⁵

Newly appointed Justice Strong delivered the majority opinion.²⁰⁶ His pronouncement was an overtly prudentialist one.²⁰⁷ Moments into his opinion he observed that a decision striking down the legal tender status of paper money would lead to “great business derangement, widespread distress, and the rankest injustice.”²⁰⁸ Such a statement might have been hyperbolic, but it would at least have been legitimate as the observation of a Court that was considering a new issue and writing on a blank slate. But the *Knox* Court had no such blank slate: the same Court in the same chambers had struck down just such a law only a year before.²⁰⁹ To warn of the consequences of an unprecedented decision is one thing; to warn of the consequences of merely reaffirming a recent precedent makes considerably less sense. This is especially true when those consequences are external to the actual record in the case.²¹⁰

Having signaled the Court’s approval of paper as legal tender, Justice Strong then proceeded to explain how the Court considered the matter.²¹¹ Unsurprisingly, the majority relied on

204. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 554 (“[I]t is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made.”).

205. *Id.* at 553-54.

206. *Id.* at 529.

207. See BOBBITT, *supra* note 81, at 61 (“Prudential argument is constitutional argument which is actuated by the political and economic circumstances surrounding the decision.”).

208. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 529.

209. *Id.* at 553; *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1870).

210. Modern discussions of the dangers of *overturning* precedent have generally included reliance interests. See, e.g., *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”). Whatever the new majority thought of the reasoning of the decision, it is surprising to see a reversal of a precedent couched in a claim for stability. See *Legal Tender Cases*, 79 U.S. (12 Wall.) at 529.

211. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 547.

McCulloch, just as all the Justices had in the previous term.²¹² But if Justice Strong used a similar approach to that of Justice Miller in *Hepburn*, it was different in a particularly significant way. For Justice Miller, the legitimate ends provided by the Constitution for the first prong of *McCulloch* had arisen from the war power.²¹³ For Justice Strong, in what may have been a bit of foreshadowing, no such reliance on the single war power was necessary.²¹⁴

Instead, Justice Strong found that the ends provided by the Constitution need not come from any single enumerated power; indeed, the goal in question might “be deduced fairly from more than one” enumerated power, or even “from them all combined.”²¹⁵ In language somewhat prescient of that which Justice Douglas would later use to locate the source of the right to privacy,²¹⁶ Justice Strong concluded that a court might “group together any number of them and infer from them all that the power claimed has been conferred.”²¹⁷

Moving to the second part of the test, the Court denied that the relationship of Congress’s means to the constitutional end need be “direct and immediate.”²¹⁸ To determine that relationship, in this case, he again turned to its consequences.²¹⁹ If the legal tender laws had demonstrated their efficacy by saving the nation, how could they be called unreasonable?²²⁰

The final step, that of showing that the laws did not conflict with the Constitution’s letter or spirit, proved no more a barrier for the Court than the first two steps.²²¹ As to the letter, Justice Strong used logic to demonstrate that the power to coin money did not limit the ability to issue paper notes and declare them legal

212. This was a feature of all the legal tender cases. See Magliocca, *supra* note 199, at 124 (“Despite their differences in result, all three cases relied on *McCulloch* and each claimed that it was the best reading of Marshall’s work.”).

213. See *Hepburn*, 75 U.S. (8 Wall.) at 631-32 (Miller, J., dissenting).

214. See *Legal Tender Cases*, 79 U.S. (12 Wall.) at 534.

215. *Id.*

216. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”).

217. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 534.

218. *Id.* at 543.

219. See *id.* at 541-43.

220. *Id.* at 541.

221. See *id.* at 544-53.

tender.²²² After all, Congress was only empowered to punish a small group of crimes in the Constitution, yet it criminalized much other behavior, often with *McCulloch* as its guide.²²³ Justice Strong did the same by reversing the previous majority's assumption regarding the prohibition of states from making paper a legal tender: "when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive."²²⁴

The spirit of the Constitution he identified with the prohibition of the impairment of contracts.²²⁵ Yet this too the Court rejected as the source for a possible limitation on Congress.²²⁶ Expanding beyond the limited exception of the Bankruptcy Clause, Justice Strong concluded that state law governed contracts for the delivery of goods, but that federal law was supreme in the area of contracts for money payments.²²⁷ He used the fluctuation in the weight of gold coins of the United States to illustrate that this power resided in Congress.²²⁸

It is worth pausing a moment to consider the meaning of the Strong *McCulloch* test for federal power.²²⁹ The opinion pays even less homage than *McCulloch* itself to the notion that the federal government is one of limited and defined powers; instead, it substitutes a strong sense of deference to a co-ordinate federal branch.²³⁰ In determining whether Congress had exceeded its limits, the Court now held that: (1) the Constitution provides the goals of the federal government, *but those goals may be inferred from any collection of powers available to national*

222. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 544-45.

223. *See id.* at 536-37.

224. *Id.* at 546.

225. *Id.* at 547.

226. *Id.* at 548.

227. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 549.

228. *Id.* at 551-52.

229. Professor Magliocca has persuasively argued that it is best thought of as a new standard. *See Magliocca, supra* note 199, at 122 ("While Chief Justice Marshall's landmark decision is credited with creating the framework that governs the scope of federal power, the operative standard really comes from the *Legal Tender Cases* decided following the Civil War.").

230. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 531 ("[T]he judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution.").

governments;²³¹ (2) the means chosen by Congress must be reasonable, *but might only be indirect moves toward those penumbral goals*;²³² and (3) a constitutional prohibition would limit Congress, *but the Constitution would have to explicitly spell it out for it to be effective*.²³³ In short, the Court altered each of the three parts of the *McCulloch* test; under this new version, it is difficult to imagine that any power claimed by a majority of the members of Congress may be found unconstitutional.²³⁴

Almost completely absent from Justice Strong's opinion is any role for the Founding Fathers or the generation that ratified the Constitution. Indeed, his only real observation about those people is the rather startling conclusion that they must have been aware that "emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people."²³⁵ In other words, the founding generation *must* have realized that sometimes the nation would run short of specie and would simply have to print notes and declare them to be legal tender for all debts, public and private. Why that generation did not create a slightly less opaque way of providing for this crisis that they saw looming is a mystery that Justice Strong chose not to solve for us.

Justice Bradley's concurrence offered a slightly more limited, but no more originalist, perspective on the problem.²³⁶ For although Justice Bradley seemed to take a sweeping, organic view of federal power similar to that later espoused by Justice Holmes,²³⁷ he did attempt to cabin the majority decision

231. *Id.* at 534.

232. *See id.* at 536 ("[T]he whole history of the government and of congressional legislation has exhibited the use of a very wide discretion . . . in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed . . .").

233. *Id.* at 531 (noting that to find a law in violation of the Constitution, proponents must show a clear violation and not merely raise a doubt).

234. This was not lost on the dissenters, who lamented the loss of limited government. *See id.* at 633 (Clifford, J., dissenting) (insisting that for the Court to ignore the meaning of the limited powers delegated to Congress was "to establish a new Constitution or to do for the people what they have not chosen to do for themselves").

235. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 546 (Bradley, J., concurring).

236. *See id.* at 554-70.

237. *Compare id.* at 555 ("The United States is not only a government, but it is a National government . . . It has jurisdiction over all those general subjects . . . which affect the interests of the whole people equally . . ."), *with Missouri v. Holland*, 252 U.S. 416, 433

somewhat by grounding it in the emergency conditions of the day.²³⁸ Without ever varying significantly from the majority's analysis, he asserted that the context of that analysis was an existential threat to the United States.²³⁹ Giving paper money legal tender status was merely incidental to its printing, he noted reassuringly.²⁴⁰ It was certainly not a radical act, "like the coinage of leather or ivory or kowrie shells."²⁴¹ It was merely a traditional note—a pledge that could be redeemed in specie at some future date.²⁴² "No one supposes," he predicted (inaccurately), "that these government certificates are never to be paid—that the day of specie payments is never to return."²⁴³

For Justice Bradley, this issuance of what seemed to be merely promissory notes—and certainly not an attempt to "make dollars" out of paper—had proven vital to the survival of the Republic.²⁴⁴ This power was only small, and nonthreatening, but nonetheless would not "be resorted to except upon extraordinary and pressing occasions, such as war."²⁴⁵ He seemed confident in his prediction that things would soon return to normal. They would not.

Unlike Justice Strong, Justice Bradley did exhibit some concern for the experiences of the generation that framed the Constitution. He noted the experiments during the Revolutionary War, and paused to share Benjamin Franklin's observation that the depreciation of paper money would reduce the public debt by

(1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)) ("[I]t is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. ").

238. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 567 (Bradley, J., concurring) ("[T]he power to make treasury notes a legal tender . . . is nevertheless a power not to be resorted to except upon extraordinary and pressing occasions.").

239. Justice Bradley did deny that this was limited to wartime, though. *Id.* (refusing to limit the source of legal tender authority to the war power as "other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it").

240. *Id.* at 560.

241. *Id.*

242. *Id.*

243. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 561. Of course, the day of specie payments has never returned. See generally Jacob Goldstein & David Kestenbaum, *Why We Left the Gold Standard*, NPR: PLANET MONEY (Apr. 21, 2011), [<https://perma.cc/57W5-ZC44>].

244. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 561 (Bradley, J., concurring).

245. *Id.* at 567.

the very act of depreciating.²⁴⁶ Remarkably, his survey of the pre-constitutional experiences of paper money led him to conclude that the decision to make paper a legal tender was “always a question for the legislative discretion.”²⁴⁷ After this astonishing—and unconvincing—review of the founding generation, he returned to his present, prudentialist framework. Here he concluded that the broad power at issue was necessary to prevent the “heart of the nation” from being “crushed out.”²⁴⁸

The four dissenters could not have agreed less with this proposition. Between them, they offered three distinct dissents.²⁴⁹ All cover much of the same ground, but they share the sentiment expressed by the Chief Justice that the new result was merely the product of having new Justices on the Court.²⁵⁰ The remaining members of the previous year’s majority, who now “find themselves in a minority on the court,” were utterly unpersuaded by the decision.²⁵¹ Chief Justice Chase then walked again the ground he had trod in *Hepburn*, applying *McCulloch* and finding the law wanting.²⁵² Indeed, he assured the country “[r]eflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained, and in the importance of them to the country.”²⁵³

Chief Justice Chase rejected “wholly” Justice Strong’s aggregate powers argument.²⁵⁴ Not only was this idea, that constitutional grants of authority emanated powers beyond their words, “advanced for the first time” in this case, but the acceptance of such a doctrine, the Chief Justice claimed, would alter the entire system.²⁵⁵ That idea, plus the idea that Congress

246. *Id.* at 557.

247. *Id.* at 558.

248. *Id.* at 564.

249. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 570, 587, 634 (Chase, C.J., Clifford & Field, JJ., dissenting).

250. *Id.* at 572, 634 (Chase, C.J. & Field J., dissenting).

251. *Id.* at 572 (Chase, C.J., dissenting) (noting that the four Justices might be a minority but that “[t]heir convictions, however, remain unchanged.”)

252. *Id.* at 572-74.

253. *Id.* at 572.

254. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 582.

255. *Id.*

could judge the necessity of its acts, made the federal government “practically absolute and unlimited.”²⁵⁶

Chief Justice Chase also focused on the means chosen by Congress as the most troubling part of the test. He found “no connection” between the power to coin money and the ability to make paper a legal tender.²⁵⁷ Indeed, he found the law to be not just illegitimate but actually counterproductive. He argued that the making of the paper as legal tender showed the government to be weak, as an admission by the United States that people would otherwise not accept them.²⁵⁸

Returning to his argument that both the letter and spirit of the Constitution forbade the action, Chief Justice Chase again sought the high ground of originalism. He noted Madison’s agreement in removing the ban on the federal power to issue notes because he understood that such notes might have some utility, but they simply could not be made a legal tender.²⁵⁹ He found a similar rejection of the scourge of paper money in the absence of such a power in the Federalist Papers,²⁶⁰ and in Daniel Webster’s confident assertion that only silver and gold could constitute a legal tender.²⁶¹

Justice Clifford added his voice to that of the Chief Justice, and spoke even more directly from an originalist perspective.²⁶² The founding generation, he reminded listeners, knew “from bitter experience” the “calamitous effects” of using paper as a legal tender.²⁶³ He tracked the early experiences of the young constitutional republic to demonstrate that none of the early Congresses had acted as if they had this power.²⁶⁴ He even reached into the period before the Constitution, a time that was important because it was when “all America had come to the

256. *Id.*

257. *Id.* at 574.

258. *Id.* at 579 (noting that by mandating acceptance of the greenbacks, the United States “virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent”).

259. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 585 (arguing that removing the ability to emit bills of credit “cut off the pretext for a paper currency”).

260. *Id.*

261. *Id.* at 586.

262. *See id.* at 589-95 (Clifford, J., dissenting).

263. *Id.* at 589.

264. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 590-95.

conclusion that all the paper currency in circulation was utterly worthless, and that nothing was fit for a standard of value but gold and silver coin.”²⁶⁵ He thus found a consistent view of the question from that critical generation, noting that acts of Congress before the Constitution and just after it aligned with the Convention itself; none were interested in allowing the paper money experiment of the Revolution to be repeated.²⁶⁶ He found a consistency, too, in Framers who had a wide variety of opinions in other areas. He quoted Madison,²⁶⁷ he quoted Ellsworth,²⁶⁸ he even quoted Hamilton.²⁶⁹ He found that the seventy years that had passed between then and now showed no act by any member of any body of the government that “affords the slightest support” to the theory embraced by the majority.²⁷⁰ This was true even though those decades witnessed “two foreign wars, the creation of the second national bank, and the greatest financial revulsions through which our country has ever passed.”²⁷¹

It was this intent of the Framers that mattered, Justice Clifford argued in his own dissent, not the convenience or even necessity of the particular action.²⁷² To argue that somehow powers merely implied by the war power created such authority was “a mere waste of words.”²⁷³ Congress had the power to collect taxes, borrow money, and sell public lands; those would surely be enough.²⁷⁴

Justice Clifford also directly refuted the majority’s notion that *Hepburn* was suspect because it was the product of a less than full Court.²⁷⁵ Like the Chief Justice, Justice Clifford reminded

265. *Id.* at 595.

266. *Id.* at 596-98.

267. *Id.* at 607 (citing Madison for the idea that prohibiting bills of credit would serve to prevent “making the bills a tender, either for public or private debts”).

268. *Id.* at 606 (quoting the future Chief Justice as hoping that the ban on bills of credit would “shut and bar the door against paper money”).

269. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 608 (citing Hamilton’s opposition to paper money because the government should not be trusted with “so seducing and dangerous an element”).

270. *Id.* at 610.

271. *Id.* at 629.

272. *Id.* at 633.

273. *Id.* at 630.

274. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 630-31 (stating that to suggest those methods were insufficient was “a mere chimera”).

275. *See id.* at 604.

the majority that the Court had been legislatively reduced to eight,²⁷⁶ and that five of those eight had agreed with the Framers that paper money could not be a legal tender.²⁷⁷

Unafraid to travel ground already at least partially covered by his colleagues, Justice Field offered a separate dissent as well.²⁷⁸ Bringing his own distinctive voice to the controversy, Justice Field went beyond merely citing *Hepburn* to praising it by claiming that no previous case had been “more fully argued or more maturely considered.”²⁷⁹ He then proceeded to calmly work through a number of styles of constitutional analysis, finding the majority’s decision hopelessly flawed in every one.

As a textualist, Justice Field argued that the issuing of greenbacks as *currency* was perfectly legitimate.²⁸⁰ He found that it stemmed from the borrowing power, “which is granted to Congress without limitation.”²⁸¹ But he denied that this power would ever allow the government to make the paper currency thus printed legal tender for private debts.²⁸² The power to borrow given to the federal government, he argued, was the same as any individual’s ability to borrow.²⁸³ As no individual could dictate the terms of third-party relationships, the borrowing power of the federal government could not logically support the legal tender designation.²⁸⁴ He then dismissed quickly the other claimed sources of power: “to declare war, to suppress insurrection, to raise and support armies, and to provide and maintain a navy.”²⁸⁵ He saw the Civil War as having increased the need for funds, but not the powers vested in Congress, concluding that “[t]he wants

276. The legislative reduction of the Court would not allow any new Justice to be appointed until the number reached six. *Id.*

277. *See id.* at 599-600, 604.

278. *Id.* at 634 (Field, J., dissenting).

279. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 634. By comparison, he obliquely insulted the overturning majority, noting “I shall not comment upon the causes which have led to a reversal of that judgment. They are patent to every one.” *Id.*

280. *See id.* at 635-36.

281. *Id.* at 635.

282. *Id.* at 638.

283. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 638.

284. *See id.* at 639 (arguing that nothing within the power to borrow allowed “that the rights or interests of third parties, strangers to the matter, shall be in any respect affected”).

285. *Id.* at 648.

of the government can never be the measure of its powers.”²⁸⁶ He similarly rejected swiftly any claims that printing money could be subsumed under coining money, noting not only that coins must have intrinsic value, but also that the counterfeiting clause allowed Congress to criminalize both the falsifying of coins and securities.²⁸⁷

As a structuralist, he denied that Congress even had the factual power to make paper money a legal tender, at least as to its face value.²⁸⁸ He cited “the universal law of currency” that what determined the worth of paper money was not a dictate of the law but “the confidence which the parties receiving the notes had in their ultimate payment.”²⁸⁹ He cited not only the Revolutionary War examples, but also the more recent experience of the Civil War itself, when the value of the greenbacks fluctuated not according to acts of Congress but rather to battlefield successes and setbacks of the Union army.²⁹⁰ Indeed, he argued that a test of utility would lead to a Congress of unlimited power, as the greenbacks could be made successful by an act of Congress providing that “the notes of the government should serve as a free ticket in the public conveyances of the country.”²⁹¹ He noted that no advocate would concede the appropriateness of that.²⁹² He further argued that the structural choice to extend an express bankruptcy power to Congress demonstrated the lack of a more general power to interfere with private contracts in the way made inevitable by the legal tender declaration.²⁹³

Justice Field even engaged the majority on its preferred ground of prudentialism. While the Court had insisted that making paper money a legal tender was something that had to be

286. *Id.* at 648-49.

287. *Id.* at 649-50.

288. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 643-44.

289. *Id.* at 644.

290. *Id.* at 646 (“[T]he notes of the United States issued under the Legal Tender Act rose in value in the market as the successes of our arms gave evidence of an early termination of the war, and that they fell in value with every triumph of the Confederate forces.”).

291. *Id.* at 643.

292. *Id.* (harkening back to *McCulloch*, he noted that not even an “advocate of the most liberal construction” would suggest that such an act “would be appropriate as a means to the execution of the power to borrow”).

293. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 663 .

done for the benefit of the nation, Justice Field invoked “the demoralizing tendency, the cruel injustice, and the intolerable oppression of a paper currency.”²⁹⁴ Coupled with the suggestion that the real success of the greenbacks was attributable solely to military success, he argued that there was no good reason for sustaining the claim of power on such utilitarian grounds.²⁹⁵

Where Justice Field was at his most powerful, though, was in his use of a historical, originalist modality. He cited a Hall of Fame of voices from the Constitutional Convention, men such as Morris,²⁹⁶ Ellsworth,²⁹⁷ Butler,²⁹⁸ and Madison himself.²⁹⁹ He even foresaw Judge Harold Leventhal’s much noted observation that citing to legislative history was “akin to ‘looking over a crowd and picking out your friends.’”³⁰⁰ Justice Field acknowledged that “opinions and intentions of individual members of the Convention . . . are not to control the construction of the plain language.”³⁰¹ Yet he could not help but note that although “opposite opinions on many points were expressed” in other areas, that was not true on the paper as legal tender question.³⁰² Here, on the contrary, there was unanimity not only in the convention itself but “in the several State conventions and in the discussions before the people.”³⁰³ From this uniformity of thought, plus the three-quarter century of practice since,³⁰⁴ he concluded that to set aside such evidence of the intention of the

294. *Id.* at 652-53.

295. *Id.* at 653 (claiming that the precious metal “ever has been and always must be recognized by the world as the true standard” and only that could “facilitate commerce, protect industry, establish justice, and prevent the possibility of a recurrence of the evils” brought on by paper money in the Revolutionary era).

296. *Id.* at 653-54 (noting that it was Morris’s motion to strike the power to “emit bills on the credit of the United States”).

297. *Id.* at 654 (quoting Ellsworth’s confidence that “[p]aper money can in no case be necessary”).

298. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 654 (who observed that “paper was a legal tender in no country in Europe”).

299. *Id.* at 654-55.

300. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

301. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 655.

302. *Id.* at 656.

303. *Id.*

304. *Id.* Field noted not only the practice—or lack thereof—of using paper money as legal tender since ratification of the Constitution, but also cited the opinions of members of the post-framing Hall of Fame such as Daniel Webster. *See id.* at 659.

framing generation “would require very clear evidence.”³⁰⁵ No such evidence appeared in the majority opinion.

As he concluded with a despairing pledge to obey the Constitution³⁰⁶ amid warnings that Congress now could use this “constructive power”³⁰⁷ to subject the nation to its “unrestrained will,”³⁰⁸ it is possible that Justice Field hoped that the damage might yet be contained. After all, the majority had at least hinted that the legal tender power grew from the crisis of war, and thus might not last forever.³⁰⁹

That any such hope was in vain was made plain almost a decade and a half later. Less than a generation after Mrs. Lee received paper money for her lost sheep, the controversy appeared one last time in the Supreme Court. In the 1884 case of *Juilliard v. Greenman* the paper money issue ended with barely a whimper.³¹⁰

The scene was set by a change of Congressional minds. In 1875, as Reconstruction drew to an end, Congress concluded that the emergency caused by the war had come to an end. It passed a law “to provide for the resumption of specie payments,” which would methodically remove the paper money from circulation.³¹¹ Perhaps, as Justice Bradley had predicted, the emergency that required the government to issue legal tender notes was now past.

Within three years, things had changed. After severe disruptions of the kind predicted by the majority in *Knox v. Lee*, Congress replaced the 1875 act with one forbidding the retirement of paper money by requiring that that greenbacks traded in for coins “not be retired, canceled or destroyed, but they shall be reissued and paid out again and kept in circulation.”³¹² Any

305. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 667.

306. *Id.* at 681 (he compared his loyalty to the Constitution to his Christianity, citing “our great Master” for his requirement to keep his commandments).

307. *Id.* at 666.

308. *Id.* at 664.

309. *Id.* at 540 (majority opinion) (“[A] consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important.”). Additionally, Justice Bradley’s concurrence had made this explicit. *See Legal Tender Cases*, 79 U.S. (12 Wall.) at 561 (Bradley, J., concurring).

310. *Juilliard v. Greenman*, 110 U.S. 421 (1884).

311. *Id.* at 436-37 (quoting Specie Payment Resumption Act, ch. 15, 18 Stat. 296 (1875)).

312. *Id.* at 437 (quoting Act of May 31, 1878, ch. 146, 20 Stat. 87).

language in *Knox* that was tentative or linked to the war power was now to be tested.³¹³

The Court yawned. The eight-Justice majority, after noting that all nine agreed that *Knox* controlled, proceeded to apply the extremely deferential version of the *McCulloch* test that had been featured in the *Knox* case.³¹⁴ The power to borrow money, the majority held, amply justified the means of making paper as legal tender.³¹⁵ Indeed, the Court noted, any determination of when such a means was appropriate was “a political question, to be determined by Congress.”³¹⁶

In one breathtaking display, the majority went significantly further than the *Knox* Court had. After emphasizing the powers of Congress that arose from the absence of the term “expressly” in the Tenth Amendment’s limitation of powers,³¹⁷ the Court reexamined the framing of the Constitution.³¹⁸ Justice Gray acknowledged that “[s]ome of the members of the Convention . . . expressed the strongest opposition to paper money.”³¹⁹ He nonetheless made the astonishing claim that the notes of the Constitutional Convention “afford no proof of any general concurrence of opinion upon the subject before us.”³²⁰ Turning back to the removal of the “emit bills” section of the borrowing power and Madison’s claim that it prevented paper being used as legal tender, Justice Gray took Madison to task for not explaining why that would be so.³²¹ Finding evidence in the absence of evidence, he then noted that “it cannot be known how many of the other delegates, by whose vote the motion was adopted, intended neither to proclaim nor to deny the power to emit paper

313. That test was, in the words of Professor Fairman, “contrived.” FAIRMAN, *supra* note 171, at 771. He noted that the case was orchestrated by opposing members of Congress, Benjamin Butler and Simeon Chittenden, coordinating a cotton sale between citizens of different states, with the amount of the sale having been designed to be just over the Supreme Court’s then-existing jurisdiction limit. *Id.* at 771-72.

314. *Juilliard*, 110 U.S. at 438.

315. *Id.* at 449.

316. *Id.* at 450.

317. *Id.* at 442.

318. *Id.*

319. *Juilliard*, 110 U.S. at 443.

320. *Id.*

321. *Id.*

money.”³²² As one could not know whether the prohibition on state issue of paper money was meant to deny Congress that power,³²³ and as European countries were now “universally understood” to have that power as an aspect of sovereignty,³²⁴ it was available to Congress.

Although he was now alone, Justice Field fought on. His dissent offered little that was new. He insisted that on this point the intentions of the Framers were known “with moral certainty.”³²⁵ He rejected the comparison to European nations as irrelevant to a Constitution providing for a limited federal government.³²⁶ He denounced as evil the “fraud, chicanery, and profligacy” of paper money in the pre-constitutional era.³²⁷ He fretted that the argument that this had been a necessary act of war was now forsaken and that what was once justified as “the ‘medicine of the Constitution’ has now become its daily bread.”³²⁸

Field made two ominous predictions. One warned that there would now be no limit on the federal government: “why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, if the printing press can furnish the money that is needed for them?”³²⁹ The other was that the paper money controversy would not go away, that it would “continue to come until it is settled so as to uphold and not impair the contracts of parties, to promote and not defeat justice.”³³⁰ That simply did not happen.

322. *Id.*

323. *Id.* at 446.

324. *Juilliard*, 110 U.S. at 447.

325. *Id.* at 451 (Field, J., dissenting).

326. *Id.* at 467.

327. *Id.* at 452 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1371, at 268 (Boston, Little, Brown & Co. 1883)).

328. *Id.* at 458.

329. *Juilliard*, 110 U.S. at 470.

330. *Id.* at 451.

VII. THE PEOPLE (TACITLY) SPEAK AGAIN: PAPER MONEY IS CONSTITUTIONAL

An external observer of the United States during the period of the Greenback cases might well have concluded that Justice Field was right, and that the struggle would end no time soon. The observer would be wrong.³³¹ For although a battle would continue over paper money, it was a significantly different one that would captivate political movements for the next hundred years.

The battle over the gold standard, pitting hard money interests against soft money interests, was certainly related to the legal tender battle. The battle crossed and re-crossed party lines.³³² President Grant, whose appointees saved paper money, later stated that he sought a repeal of the Legal Tender Act.³³³ This statement, coupled with his veto of an 1874 bill to expand the supply of paper money, had the effect of an explosion that, in the view of one contemporary, threatened to destroy the Republican Party.³³⁴

But the underlying question, whether legal tender could be made of paper, was clearly settled. Even the proponents of the gold standard assumed that the legal tender within the United States could be more than gold and silver.³³⁵ They recognized that battle to have been lost, and sought simply to avoid forfeiting even more ground to the soft money interests.³³⁶ The American people then, and ever since, have tacitly assented to this new—if unwritten—amendment to the Constitution: Congress may now, when it sees fit, issue paper currency and grant it the status of legal tender for all private debts.³³⁷

Indeed, the brutally complete nature of paper money's victory is visible in the remarks of one of the most famous

331. FAIRMAN, *supra* note 171, at 774 (“Evils which Justice Field predicted did not arise . . .”).

332. UNGER, *supra* note 117, at 172 (noting Democratic opposition to the Republican-sponsored Legal Tender Act on constitutional grounds).

333. *Id.* at 245.

334. *Id.* at 246.

335. *See id.* at 229-30.

336. *See id.* at 234.

337. *See* BERNARD H. SIEGAN, *THE SUPREME COURT'S CONSTITUTION* 27 (1987).

defenders of originalism of the late twentieth century. When nominated to be an Associate Justice of the Supreme Court, Judge Robert Bork was already a fierce proponent of originalist ideas.³³⁸ Nonetheless, even he recognized the limits of originalism in this context: “[s]cholarship suggests that the framers intended to prohibit paper money. Any judge who today thought he would go back to the original intent really ought to be accompanied by a guardian rather than be sitting on a bench.”³³⁹ Setting aside the unnecessarily gentle term “suggests,” the problem with the originalist project appears in full force in this brief moment. As noted earlier, few scholars of originalism have undertaken the project of defending paper money as legal tender; with the rare exception of authors like Professor Natelson,³⁴⁰ most have simply accepted it as a *fait accompli*, as Judge Bork did.³⁴¹ But why should that be so? Why, precisely, should a judge be committed to a guardianship for recognizing that the language of the Constitution, the intent of its authors, and the understanding of the people of its day all make clear that paper money is unacceptable? Why should the will of Reconstruction-era Americans, which was never formalized through the Article V process, affect the meaning of the Constitution?

CONCLUSION

Assuming that Judge Bork was right to surrender Justice Field’s unsuccessful struggle, what lessons are available to the modern student of the Constitution? Must we begin a quixotic crusade to undo a century and a half of fiscal reality? If not, have we broken faith with our Constitution? Or does Madison offer us a way forward?

One way to view the Constitution is as an operational document, one that gave birth to a living organism of

338. Mark A. Graber, *Robert Bork, the Original Originalist*, BALT. SUN (Dec. 24, 2012), [<https://perma.cc/C436-WFBK>].

339. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 113 (1989) [hereinafter *Bork Nomination*] (statement of J. Robert Bork, nominee).

340. See *supra* note 46.

341. *Bork Nomination*, *supra* note 339, at 113.

governance.³⁴² The life of that government has resulted in changes to it and not all of those are contained in formal amendments to the birth document.³⁴³ If James Madison was right that the tacit assent of the people solves the Jeffersonian problem of rule by the dead, that assent must provide a place for unwritten amendments. Such amendments, ratified by the behavior of generations of Americans, demonstrate their consent.³⁴⁴ Such amendments and alterations cannot be removed by an originalist project designed to restore features put aside by today's United States, at least if republicanism is to have meaning for the living. To insist otherwise is to remove any current relevance of the idea of consent of the governed.

There is little doubt that the Constitution does not textually provide the power to make paper money into legal tender. There is little doubt that the drafters of the Constitution intended to prevent paper money from gaining the status of legal tender. There is little doubt that the original public meaning of the document, followed for generations thereafter, concurred. But when the needs of the Civil War demanded a solution that could be offered by precisely this legal tender designation, the government granted it. The people consented. When the Supreme Court initially rejected this unwritten amendment to the written Constitution, the people treated it as a temporary aberration. Their patience was rewarded a year later, when the Court reversed itself and acceded to the demands of the nation. That decision the country accepted. More importantly, the people of the United States today show their continued assent with every paper money private transaction they make. That fact demonstrates the remarkably long-lasting level of consent to this unwritten change to the Constitution.

Thomas Jefferson warned us that the dead had no right to exercise control over the living.³⁴⁵ James Madison noted in

342. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being . . .”).

343. *See, e.g.*, Balkin & Levinson, *Constitutional Change*, *supra* note 26, at 497-98.

344. *See* Madison, *supra* note 14, at 24.

345. Jefferson, *supra* note 9, at 395-96.

response that the living might well avoid the chaos of anarchy by granting their consent tacitly to the structures erected by the dead by continuing to use them.³⁴⁶ The wisdom of both of these men demonstrates the lasting value of the legal tender cases and the fundamental flaw in originalism. The continuing consent of a century and a half of practice have ratified the Civil War amendment that granted an unwritten power to Congress, validating a power over legal tender that would have horrified the authors and ratifiers of the Constitution. To set aside the generations of consent, including current consent, in favor of restoring the original meaning of the document is to denigrate the very idea of republicanism. Even if the project of originalism to eliminate unwritten amendments was attainable, the commitment to the consent of the governed would stand in its way.

346. See Madison, *supra* note 14, at 24.