

## GOLD AND SILVER AS CONSTITUTIONAL ALTERNATIVE CURRENCIES

*Edwin Vieira Jr.*

In his Inaugural Address of 1933, Franklin D. Roosevelt warned his fellow Americans that “in our progress towards a resumption of work we require two safeguards against a return of the evils of the old order: there must be a strict supervision of all banking and credits and investments, so that there will be an end to speculation with other people’s money; and there must be provision for an adequate but sound currency.” Nonetheless, Roosevelt proceeded to promote an exceedingly unsound currency—with the seizure of most Americans’ gold, devaluation of gold coinage, removal of domestic redemption of Federal Reserve Notes in gold, and the nullification of gold clauses in both public and private contracts (Vieira 2002: 867–1235).

Subsequently, this country moved even further away from Roosevelt’s professed desideratum (ibid.: 1235–40). To be sure, Americans’ right to own gold was restored in 1973, gold clauses were once again permitted for private citizens in 1978, and starting in 1985 the U.S. Treasury began to mint large quantities of gold and silver coins denominated in “dollars” and impressed with the character of “legal tender” (ibid.: 1269–1311). Yet, it cannot be said that the United States now enjoys “an adequate but sound currency” based upon silver and gold in the manner the

---

*Cato Journal*, Vol. 35, No. 2 (Spring/Summer 2015). Copyright © Cato Institute. All rights reserved.

Edwin Vieira Jr. is an attorney and author. This article is adapted in part from Vieira (2010 and 2011).

Constitution requires (*ibid.*: 27–205). Rather, by providing financial aid and comfort to the overexpansion of the General Government, the operations of the Federal Reserve System—in particular, the use of Federal Reserve Notes, irredeemable in either gold or silver, as Americans’ almost exclusive currency—have validated the prophecy of Justice Stephen J. Field, dissenting in *Dooley v. Smith*, that the fallacious arguments the Supreme Court employed to rationalize the constitutionality of irredeemable legal-tender paper currency

tend directly to break down the barriers which separate a government of limited powers from a government resting in the unrestrained will of Congress. . . . Those limitations must be preserved, or our government will inevitably drift . . . into a vast centralized and consolidated government [80 U.S. 604, 607–8 (1872)].

But exactly what corrective is now to be applied? At least two alternatives for dealing domestically with the present situation are available: (1) reforming the Federal Reserve System by introducing a redeemable currency somehow “backed” by gold, and preferably by silver as well, because no monometallic gold standard can exist under the Constitution; and (2) replacing the present monetary regime with an entirely new system of economically sound, honest, and especially constitutional money. In this article, I shall focus on the second alternative, as I have shown in detail elsewhere the unconstitutionality and imprudence of attempting to salvage the Federal Reserve System by returning its notes to redeemability in gold or silver (Vieira 2002).

## Replacing the Present Monetary Regime with Sound, Honest, and Constitutional Money

Replacement of the present monetary regime would begin with the introduction of alternative currencies consisting solely of gold and silver to compete with Federal Reserve Notes. Here, three possibilities exist:

- First, the American people could fashion such currencies for their own use, under the aegis of the Ninth and Tenth Amendments to the Constitution, and of certain statutes, with

the hope that the General Government and the States would then adopt those currencies.

- Second, the General Government could provide such currencies for everyone's use, through the exercise of Congress's power "[t]o coin Money, regulate the Value thereof, and of foreign Coin" in Article I, Section 8, Clause 5 of the Constitution.
- Third, the States could adopt such currencies for themselves and their own people (with the hope that the General Government would then follow suit), on the basis of the States' explicit constitutional duty in Article I, Section 10, Clause 1 of the Constitution not to "make any Thing but gold and silver Coin a Tender in Payment of Debts"—and therefore of their implicitly reserved constitutional right and power *to* "make . . . gold and silver Coin a Tender in Payment of Debts."

### *Alternative Currencies through Private Action*

The qualification *ultimately* to be recognized as official money by all public authorities takes into account that such a reform could be initiated by *private*, rather than governmental, action. In Article I, Section 8, Clause 5, the Constitution delegates to Congress the power "[t]o coin Money, regulate the Value thereof, and of foreign Coin", and in Article I, Section 10, Clause 1 imposes upon the States the duty not to "make any Thing but gold and silver Coin a Tender in Payment of Debts," and through the latter duty reserves to the States the right and power to "make . . . gold and silver Coin a Tender." Nothing in the Constitution, however, precludes Americans, as private individuals, from employing whatever honest media of exchange—in particular, gold and silver—as "Tender" in their private transactions. Indeed, besides the Ninth and Tenth Amendments, the very duty of the States to "make . . . gold and silver Coin a Tender in Payment of Debts" guarantees that private right and power. For most "Debts" arise out of private contracts, are made payable in currency of some sort, and are enforceable in the States' courts. So those courts are constitutionally required to enforce with the actual "Tender" of "gold and silver Coin" contracts that specify the payment of "Debts" in such "Coin"—no matter what other forms of currency Congress may have generated. The reserved duty, right, and power of the States to "make . . . gold and silver Coin a Tender"

plainly limits the reach of Congress's power "[t]o coin Money, [and] regulate the Value thereof" (or any other power, for that matter) because the Constitution cannot be read to license Congress to override the very duty, right, and power it simultaneously reserves to the States.<sup>1</sup> In addition, Americans enjoy a statutory right under Title 31, United States Code, Section 5118(a) and (d)(2) to enter into private contracts that contain gold clauses or silver clauses<sup>2</sup>—which the States' courts must enforce pursuant to Article VI, Clause 2 of the Constitution. Thus, as a matter of law, nothing precludes common Americans from adopting gold and silver as their currencies in private transactions in preference to Federal Reserve Notes, even if the General Government and the States' governments were to continue to require people to employ those notes in financial interactions with public agencies.

As a matter of fact, however, powerful disincentives work against widespread adoption of alternative currencies by individuals on their own initiatives.

*First*, information costs. Before people can employ gold and silver clauses in their contracts, they must educate themselves about their legal rights and the economic advantages that might accrue from exercising them. Moreover, they must also learn how to draft legally binding and fully protective gold or silver clauses—or pay competent attorneys to do so.

*Second*, transaction costs. Economic actors who understand the advantages of gold and silver clauses must search out complementary partners who also know, or can quickly be educated, about those advantages; must convince them to consummate such arrangements; and must prepare the necessary documents to the satisfaction of various attorneys, accountants, corporate boards, and other supervisors and advisors. In addition, if those actors also enter into other deals pursuant to which they employ Federal Reserve Notes as their media of exchange, they must maintain complex systems of accounting which record receipts and expenditures sometimes in gold and silver,

<sup>1</sup>Compare *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), with *Dick v. United States*, 208 U.S. 340, 353 (1908), and *South Dakota v. North Carolina*, 192 U.S. 286, 328 (1904) (White, J., dissenting), and with, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975).

<sup>2</sup>See *Bronson v. Rodes*, 74 U.S. 229 (1869), and *Butler v. Horwitz*, 74 U.S. 258 (1869).

sometimes in notes, and which track exchanges of gold and silver for notes and vice versa.

*Third*, opportunity costs. In the absence of banks that pay interest in gold and silver on deposits of such currencies, people who employ gold and silver clauses can only “hoard” the gold and silver they receive but do not spend. This may prove economically disadvantageous.

*Fourth*, regulatory costs. Individuals who employ U.S. gold and silver coinage statutorily denominated in “dollars” as their media of exchange are typically required by tax gatherers and courts to report their gross receipts, incomes, sales, and other financial data, and to calculate and pay taxes, not on the basis of the face values of the coins in “dollars” as mandated by Congress, but instead on the basis of the much greater so-called fair market values of the coins expressed in Federal Reserve Notes (Vieira 2002: 1311–40). Although this requirement should be disallowed on both constitutional and statutory grounds, to challenge it is a costly and chancy endeavor.<sup>3</sup>

So, to expect individuals in large numbers spontaneously to adopt gold and silver as alternative currencies is unrealistic. Moreover, that many Americans did employ such alternative currencies in their private transactions would not by itself guarantee that the General Government and the States’ governments would accept those currencies as media of exchange in the normal run of public transactions.

### *Alternative Currencies through the Federal Government*

Pursuant to Title 31, United States Code, Section 5112(a)(7 through 10), (e), (h), and (i), the General Government already issues gold and silver coins as official currencies with the status of “legal tender.” But it has not arranged for these coins to compete with Federal Reserve Notes in the marketplace on anything approaching equal terms (primarily because of the confusion surrounding how the “dollar” values of payments in such coins are to be determined). In the present political climate, the likelihood that any such arrangement will be made is essentially nil.

<sup>3</sup>Contrast *Thompson v. Butler*, 95 U.S. 694 (1878), and 31 U.S.C. § 5112(a)(7 through 10), (e), (h), and (i)(1)(B), with, e.g., IRS Notice 2008-14, *Frivolous Positions*, ¶ 15.

Moreover, although Congress has mandated in Title 31, Section 5119(a) that “the Secretary [of the Treasury] shall redeem gold certificates owned by the Federal reserve banks at times and in amounts the Secretary determines are necessary to maintain the equal purchasing power of each kind of United States currency”, and although Congress has declared in Title 31, Section 5117(b) “the value (for the purpose of issuing those [gold] certificates . . . ) of the gold held against” them to be “42 and two-ninth dollars a fine troy ounce,” U.S. gold coins do not exchange against Federal Reserve Notes in the free market at anything close to that figure—and no one has called the Secretary to account for this discrepancy.

### *Alternative Currencies through the States*

Not entirely unlikely, though, is that one or more of the States may recognize the economic necessity of adopting gold and silver as alternative currencies within their own territories. The constitutionality of such action is beyond question. The ultimate purpose of a State’s adoption of an alternative currency would be to protect the economic, social, and political well-being of her citizens against the inherent instability of the Federal Reserve System and its paper currency. To this end, the States’ “police power” is particularly well suited.

“The police power” “is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive” (*In re Rahrer*, 140 U.S. 545, 554 [1891]). “The police power” “is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the States to the general government” (*House v. Mayes*, 219 U.S. 270, 282 [1911]).<sup>4</sup> The States possess “the police power” “in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government” (*Nebbia v. New York*, 291 U.S. 502, 524 [1934]). So “the police power” subsumes *all* of the sovereign powers of a State government reserved to it by the Constitution of the United States. It is, there-

<sup>4</sup>*Accord*, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318 (1905) (“the States possess, because they have never surrendered, the [police] power”).

fore, the primary subject of the Tenth Amendment with respect to the States, because it embraces *all* of “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [which] are reserved to the States respectively.” That being so, “the police power” is “one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government” (*District of Columbia v. Brooke*, 214 U.S. 138, 149 [1909]).<sup>5</sup>

In particular, “the police power of a State embraces regulations designed to promote . . . the general prosperity” (*Chicago, Burlington & Quincy Railway Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 592 [1906]),<sup>6</sup> and “to enforc[e] the primary conditions of successful commerce” (*Noble State Bank v. Haskell*, 219 U.S. 104, 111 [1911])—and in a free-market economy “the general prosperity” cannot be advanced through “successful commerce” without a politically honest and economically sound medium of exchange.

The States possess “the police power” “in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government” (*Nebbia v. New York*, 291 U.S. 502, 524 [1934]). The States’ “jurisdiction”—that is, their legal authority—to employ gold and silver coin as alternative currencies is a “subject . . . which is not surrendered to the federal government.” Rather, the Constitution itself explicitly reserves that power to the States. Article I, Section 10, Clause 1 of the Constitution provides that “[n]o State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts.” So, on the very face of the Constitution, the States *may* “make . . . gold and silver Coin a Tender”—and, according to the principle that the Constitution must always be read with an eye toward fully achieving its purposes, the States *should always* “make . . . gold and silver Coin a Tender” whenever the situation calls for it. For no one should “construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them” (*Prigg v. Pennsylvania*, 41 U.S. 539, 612 [1842]). True it is that the authority to “make any Thing *but* gold and silver Coin a Tender”

<sup>5</sup>Quoted in *Eubank v. City of Richmond*, 226 U.S. 137, 142–43 (1912).

<sup>6</sup>*Accord*, *Bacon v. Walker*, 204 U.S. 311, 317 (1907); *Eubank v. City of Richmond*, 226 U.S. 137, 142 (1912); *Sligh v. Kirkwood*, 237 U.S. 52, 59 (1915).

is drafted as an exception to the States' general disability to "make . . . Tender[s]"—that is, as an exception to an absence of power. But an exception to an absence of power is necessarily the recognition of that power to the full extent of the exception. And the exception in favor of "gold and silver Coin" knows no bounds in terms of the times at which, the circumstances in which, or the degree to which the States may apply it. So the States may and should "make . . . gold and silver Coin a Tender" under *all* circumstances considered appropriate *by them*.

"Tender" is generally defined as "[a]n offer of money; the act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim of demand, without any stipulation or condition"; and "[l]egal tender is that kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount" (Black's: 1637). So, perforce of Article I, Section 10, Clause 1, the States may not compel a creditor to accept, in payment of any "Debt]" solvable in money, "any Thing but gold and silver Coin," but *may* compel him—and certainly may allow him, and even assist him—to receive such "Coin" in fulfillment of a contract in which such "Coin" has been designated the medium of payment. On the other hand, if a creditor and a debtor have entered into an enforceable contract that specifies as the exclusive medium of payment something other than "gold and silver Coin," no State can compel them by some subsequently enacted law to substitute any other medium of payment, including "gold and silver Coin"—because Article I, Section 10, Clause 1 also declares that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Because it is directed toward promoting "the general prosperity," the States' power to "make . . . gold and silver Coin a Tender" is necessarily a component of, and as exhaustive in its own domain as, their "police power" in general. Perhaps most important in this regard, except in one respect the Constitution in no way limits the ambit of the States' authority to "make . . . gold and silver Coin a Tender" with respect to the possible *sources* of such "Coin." The only "gold and silver Coin" excluded from the States' power to "make . . . a Tender" is the "Money" that *the States themselves* might purport to generate, because Article I, Section 10, Clause 1 declares that "[n]o State shall . . . coin Money." Otherwise, "where no exception is made in terms,



none will be made by mere implication or construction” (*Rhode Island v. Massachusetts*, 37 U.S. 657, 722 [1838]). Therefore, the States may declare any and every domestic “gold and silver Coin a Tender,” in addition to any relevant declaration Congress has put forth. The States may declare any and every foreign “gold and silver Coin a Tender,” even when (as is the case today) Congress has refused to do so under Title 31, United States Code, Section 5103. And the States may declare even private “gold and silver Coin a Tender,” too.

The *only* condition on the States’ exercise of their power “to make . . . a Tender” is that they must apply it comprehensively to *both* “gold and silver Coin.” Under Article I, Section 10, Clause 1, a State may not adopt a monometallic “gold standard” or “silver standard,” but must always employ the two metals in tandem—and, of course, always in such a manner as to ensure that, in every particular transaction, “a Tender” required to be made in “gold . . . Coin” will deliver the same purchasing power as “a Tender” in “silver Coin,” as the Constitution requires perforce of Article I, Section 10, Clause 1 (“[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts”) and Amendment XIV, Section 1 (“nor shall any State deprive any person of . . . property, without due process of law”). This, however, would be quite easy to accomplish. For, under such a duometallic system, the required equivalence would be controlled by the free market. For instance, “a Tender” in gold of X grains could also be made with Y grains of silver, where Y equaled X *times* E (the market exchange rate between gold and silver). Or, “a Tender” in silver of Y grains could also be made with X grains of gold, where X equaled Y *times* the reciprocal of E. The matter would be entirely one of economic arithmetic, not of arbitrary political policy.

Besides being part of their “police power”—because it is “a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive” (*In re Rahrer*, 140 U.S. 545, 554 [1891])—the States’ power to “make . . . gold and silver Coin a Tender” is, because of its placement in the Constitution, effectively *absolute* (Vieira 2002: 104–12). The States enjoy a right and power to “make . . . gold and silver Coin a Tender” *no matter what Congress may decree in the monetary field*.

The Supreme Court has arrived at the same conclusion on a different but complementary basis. In *Lane County v. Oregon* (74 U.S.

71 [1869]), the State courts had ruled that, as a matter of State law, certain county and State taxes were required to be collected in silver and gold coin. At issue in the Supreme Court was whether, notwithstanding State law, the taxes could be paid in U.S. Treasury notes that were at the time not redeemable in either gold or silver coin, pursuant to the congressional mandate that those notes “shall be receivable in payment of all taxes, internal duties, excises, debts and demands due to the United States, except duties on imports . . . ; and shall also be lawful money and legal tender in payment of all debts, public and private, within the United States” (74 U.S. at 75, quoting An Act to authorize the Issue of United States Notes, and for the Redemption or Funding thereof, and for Funding the Floating Debt of the United States, Act of 25 February 1862, Chap. XXXIII, § 1, 12 Stat. 345, 345). The Supreme Court held that the State could *not* be compelled to accept payment of taxes in those notes. “The people of the United States”, the Court explained,

constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. . . . [T]o them and to the people all powers not expressly delegated to the national government are reserved. . . .

Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. . . . There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. . . . If, therefore, the condition of any

State, in the judgment of its legislature, requires the collection of taxes . . . in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national government can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered [74 U.S. at 76–78, followed in *Union Pacific Railroad Company v. Peniston*, 85 U.S. 5, 29 (1873), and *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 706 (1884)].

The doctrine of *Lane County* recognizes that certain kinds of monetary laws that Congress may make applicable to the government of the United States and to private individuals acting in their personal capacities it cannot make applicable to the States or to individuals performing State governmental functions. The Supreme Court later explicitly affirmed this interpretation in *Juilliard v. Greenman* (110 U.S. 421, 448 [1884]), when it observed that “Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals”—but, as the studied absence of any reference to the States makes clear, *not* as regards the States’ governments or individuals acting in some official capacity on their behalf or under their auspices.

Thus, *Lane County* and related decisions laid down a wide avenue for the States’ self-emancipation from congressional media of exchange other than “gold and silver Coin.” For, although those particular decisions all involved State taxes, their reasoning rested on a principle that encompasses every monetary transaction arising from a State’s exercise of any and every one of her attributes of sovereignty. After all, taxation is no more “indispensable” to or “an essential function of government” (*Lane County*), or an “attribute of sovereignty” (*Peniston*), than (say) spending public moneys on public functions, borrowing on the public credit, paying just compensation to persons expropriated under the power of eminent domain, or awarding damages or collecting fines in judicial proceedings. All of these, and more, are quintessentially “sovereign” activities, including:

- Taxation, which *Lane County*, *Peniston*, and *Hagar* so held;
- Public spending, as to which *Taub v. Kentucky* (842 F.2d 912, 919 [6th Cir. 1988]) noted that “State sovereignty extends to the

total conduct of a State's fiscal affairs," and that "[a] sovereign must have the authority to determine how tax revenues are to be spent, or the power to tax is illusory";<sup>7</sup>

- Public borrowing evidenced in and enforceable through "binding obligations," which *Perry v. United States* (294 U.S. 330, 353 [1935]) held to be "a competence attaching to sovereignty";
- The power of eminent domain, which *Boom Company v. Patterson* (98 U.S. 403, 406 [1879]) described as "an attribute of sovereignty";<sup>8</sup>
- The jurisdiction of the courts, which *The Schooner Exchange v. McFaddon* (11 U.S. 116, 136 [1812]) treated as "a branch" of "independent sovereign power";
- All of the matters within the ambit of "the police power," which *Nebbia v. New York* (291 U.S. 502, 524 [1934]) held that the States may exercise "in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government"; and
- The regulation and operation of the State's militia, which the Second Amendment declares to be "necessary to the security of a free State," and which therefore constitutes the ultimate embodiment and guarantor of *all* aspects of the State's sovereignty (Vieira 2012).

## The Practicality of Electronic Gold and Silver Currencies

The practicality of having States offer alternative currencies based on gold and silver is also plain.

*First*, through the use of "Coin," a State could exercise her authority under Article I, Section 10, Clause 1 of the Constitution to

<sup>7</sup>*Accord*, e.g., *State ex rel. Walton v. Parsons*, 58 Idaho 787, 792, 80 P.2d 20, 22 (1938) ("the power to levy and collect taxes and the power to appropriate public funds are coexistent and rest upon the same principle"); *Mills v. Stewart*, 76 Mont. 429, 438, 247 Pac. 332, 334 (1926) (same); *Agricultural & Mechanical College v. Hagar*, 121 Ky. 1, 14, 87 S.W. 1125, 1129 (1905) (same). See U.S. Const. art. I, § 8, cl. 1, which explicitly links the power "To lay and collect Taxes" with the power "to pay the Debts and provide for the common defence and general Welfare".

<sup>8</sup>*Accord*, *Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923); *Adirondack Railway Co. v. New York*, 176 U.S. 335, 346-47 (1900).

“make . . . gold and silver Coin a Tender in Payment of Debts,” and render such alternative currencies economically and politically by:

- Listing various domestic and foreign gold and silver coins—properly valued according to their actual contents of fine metal—as suitable for “Tender in Payment of Debts”;
- Declaring that only those coins would be employed in certain (perhaps, eventually, all) financial transactions or other payments in the nature of “Debts” that involved the State, her subdivisions, and their employees, agents, and contractors;<sup>9</sup>
- Recognizing that everyone else in the State could enter into contracts payable in whatever currencies the parties agreed to use (including but not necessarily limited to “gold and silver Coin”), and specifically enforceable *in those terms and only those terms* in the State’s courts;<sup>10</sup> and
- Facilitating the use of “gold and silver Coin [as] a Tender” by *inter alia*
  - (i) creating a State depository which would establish and manage accounts in “Coin” for the State and her citizens, transfer ownership of gold and silver among these accounts (by such means as electronic assignments, debit-cards, and checks), and maintain appropriate accounting-records for depositors;
  - (ii) providing businessmen in the State with the necessary computer-software and instructions to enable them to price their goods and services in terms of “gold and silver Coin”;
  - (iii) offering incentives to businessmen to encourage their customers to employ “gold and silver Coin [as] a Tender” in dealing with their businesses;
  - (iv) simplifying the calculation and collection of State and local taxes by allowing (for example) transactions effected in gold

<sup>9</sup>Other payments that were not “Debts” in the strict constitutional sense of that term, such as taxes, could also be made subject to the “Tender” of “gold and silver Coin”, under the constitutional rationale of *Lane County*. Although the legal explanations would differ, the practical effects would be the same.

<sup>10</sup>See *Bronson v. Rodes*, 74 U.S. (7 Wallace) 229 (1869); *Trebilcock v. Wilson*, 79 U.S. (12 Wallace) 687 (1872). On the valuation of such contracts where the currency is nominally valued in “dollars”, see *Thompson v. Butler*, 95 U.S. 694 (1878).

and silver to be valued, and taxes on or related to those transactions to be paid, in gold and silver; and

- (v) collecting selected taxes, fees, and other public charges in “gold and silver Coin” as soon as practicable, so as to familiarize as many citizens as possible with the existence, operations, and advantages of the alternative currency system (see Vieira 2002: 1664–66 for a model statute for this purpose).

*Second*, through the use of gold and silver in forms other than “Coin.” Economically sound, constitutional, and honest alternative currencies consisting of gold and silver need not employ those metals only in the form of “Coin.” For nothing in the Constitution prohibits a State from adopting *any* alternative currency as long as, in so doing, the State itself does not attempt to exercise any powers which the Tenth Amendment recognizes as “prohibited by [the Constitution] to the States,” in particular the powers denied by Article I, Section 10, Clause 1 to “coin Money; emit Bills of Credit; [or] make any Thing but gold and silver Coin a Tender in Payment of Debts.”

From a technological perspective, probably the best alternatives available today are so-called electronic gold and electronic silver currencies. Here, “electronic” refers to the method for recording and transferring legal title to specific amounts of gold or silver bullion actually held by an “electronic currency provider” in separate accounts for each depositor’s use as money. Such “electronic” currencies offer numerous advantages both of and over gold and silver coins:

- *Security*: The gold and silver are owned by the depositors themselves and not by the “electronic currency providers” that hold those deposits. The depositors are bailors of the specie, the “providers” bailees. (With a typical bank, conversely, a deposit becomes the property of the bank, with the depositor merely a general creditor of the bank for the value of his deposit.)
- *Ubiquity*: Anyone maintaining an account with an “electronic currency provider” can easily acquire gold and silver through the “provider” and then deal with anyone else holding such an account, anywhere in the world.
- *Convenience*: transactions in gold and silver can be effected with debit cards or like instruments, so that payment is had immediately; but the actual specie may never have to leave the

“electronic currency providers” vaults. (Transactions also can be effected on the basis of paper orders in the nature of checks and drafts, or actual physical delivery of gold or silver, if the parties so desire.)

- *Flexibility*: Transactions of very small and exact values can be made—down to thousandths of a grain or a gram, or even less—which is impossible with coins. And
- *Accuracy*: Details can be automatically recorded for purposes of accounting, including *inter alia* the date, the time, and the parties to a transaction; the location, nature, and purpose of the transaction; and its value in gold, silver, Federal Reserve Notes, or any other common media of exchange.

To implement such a system, a State would establish within her government an official “electronic gold and silver currency provider.” This agency might develop its own “electronic currency,” or license the necessary technology from some private vendor. The constitutionally as well as politically most secure arrangement would be to staff this agency with properly trained members the State’s militia, and to secure the gold and silver bullion in a depository under the militia’s direct supervision, operation, and physical control (Vieira 2012: 1208–33). This would provide the inestimable advantage of maintaining actual possession of the people’s gold and silver in the people’s own hands at all times. Particular depositors’ gold and silver would be held in separate bailment accounts, so that the system could not be accused of operating on the basis of fractional reserves. This is critically important, inasmuch as any scheme utilizing “fractional reserves” would also necessarily implicate “Bills of Credit”—for if the State purported to credit a depositor’s account with amounts of gold or silver bullion not owned by him, or not immediately subject to his order (either because they were not physically in the depository or were somehow legally encumbered), then those credits would amount at best to promises by the State to pay those amounts upon the depositor’s demand at some future time, which is the essence of a “Bill of Credit” that functions as currency (*Craig v. Missouri*, 29 U.S. 410, 431-2 [1830]). Yet the depositors’ gold and silver would always be impressed with the attributes of the State’s sovereign authority, because the State had designated the metals as her own alternative currencies (*Ling Su Fan v. United States*, 218 U.S. 302, 311 [1910], and *Norman v. Baltimore & Ohio Railroad Co.*, 294

U.S. 240, 304 [1935]). Thus, the gold and silver in the State's depository would be serving, not only the particular purposes of the various depositors, both public and private, but also the overarching public purpose of guaranteeing the State's economic "homeland security."

Consequently, not only the gold and silver deposited by the State and all of the governmental bodies and agencies within her jurisdiction, but also the specie deposited by members of her militia in their capacities and pursuant to their duties as such—which would include essentially all of her adult population—would be protected by a intergovernmental immunity, arising out of federalism itself, from any form of interference on the part of rogue agents of the General Government. For, under Article I, Section 8, Clause 15 of the Constitution, Congress can "provide for calling forth the Militia" only "to execute the Laws of the Union, suppress Insurrections and repel Invasions." A State's adoption of an alternative currency involves neither an "Insurrection" nor an "Invasion." And, as no merely statutory "Laws of the Union" can interfere with the constitutional duty, right, and power of the States to "make . . . gold and silver Coin a Tender," the militia cannot be "call[ed] forth" on behalf of the federal government "to execute the Laws of the Union" with respect to such monetary matters *except to support the States in their fulfillment and exercise of that constitutional duty, right, and power*. Moreover, except for the president of the United States, no officials of the General Government can interfere by way of command in the operations of the militia within the States, because Article I, Section 8, Clause 16 of the Constitution "reserv[es] to the States respectively, the Appointment of the Officers." Even the president cannot interject himself into the matter, because under Article II, Section 2, Clause 1 of the Constitution he is "Commander in Chief . . . of the Militia of the several States" only when they are "called into the actual Service of the United States"—which "Service" can embrace only one or more of the three constitutional functions set out in Article I, Section 8, Clause 15. Indeed, this intergovernmental immunity would extend to the silver and gold used as media of exchange by *every one* of the State's citizens, whether members of her militia or not, because all such use would be in aid of preserving the State's economic "homeland security" by and through her militia.

*Third*, the constitutional equivalency of "Coin" and "electronic" currencies. The distinction between "electronic" gold and silver



currencies, on the one hand, and actual “gold and silver Coin”, on the other, is small in practice and inconsequential in principle. Instructive in this regard is the Supreme Court’s decision in *Bronson v. Rodes* ( 74 U.S. 229 [1869]). At issue was whether a private contractual obligation of “dollars payable in gold and silver coin, lawful money of the United States” was, notwithstanding that stipulation, payable in United States Treasury notes which Congress had declared to be “legal tender” but were not redeemable in either gold or silver. In order to determine “the precise import in law” of the key contractual phrase, the Court reviewed the coinage acts of Congress from 1792 onwards, observing that “[t]he design of all this minuteness and strictness in the regulation of coinage . . . recognizes the fact, accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such . . . are the only proper measure of value; that these values are determined by weight and purity”—and that “[e]very . . . dollar is a piece of gold or silver, certified to be of a certain weight and purity, by the form and impress given to it at the mint . . . and therefore declared to be legal tender in payments” (74 U.S. at 247–50). From all this, the Court concluded that

[a] contract to pay a certain number of dollars in gold or silver coins is, therefore, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable . . . , in principle, from a contract to deliver an equal weight of bullion of equal fineness. It is distinguishable, in circumstance, only by the fact that the sufficiency of the amount to be tendered in payment must be ascertained, in the case of bullion, by assay and the scales, while in the case of coin it may be ascertained by count.

Thus, “mak[ing] . . . gold and silver Coin a Tender” should not be distinguishable in constitutional principle from “mak[ing] . . . [an equal weight of bullion of equal fineness] a Tender”. The only concern should be how to assure in practice that in either case a constitutionally “equal weight” of metal is delivered. This will depend, however, upon how “equal weight” is defined—whether physically or economically.

Traditionally, a coin containing a certain weight of gold or silver has been considered to be of somewhat greater market value than—that is, has commanded a “premium” over—gold or silver bullion of the same weight. This, because each coin is so designed as to certify its source, substance, content, and in most cases nominal legal value as money, and therefore on its face imparts more information than an equal weight of mere bullion. Also, coins are fabricated in sizes deemed convenient for commerce, and with a small amount of base metal added to the gold or silver in order to harden the resulting alloy so as to facilitate exchange in hand-to-hand transactions—and therefore are more useful than bullion in that context. Such design and fabrication add economic value to the bullion a coin contains.<sup>11</sup> And for quite a while the Treasury minted gold and silver coins according to the constitutional principle of “free coinage”, whereby an individual who brought some weight of gold or silver bullion to the Mint would receive, after a time, coins containing the selfsame weight of metal, struck at no charge to him; or, if he preferred immediate receipt (and the Mint concurred), could accept coins containing some lesser weight according to a fixed formula. For example, the first coinage act enacted under the Constitution provided that “any person” might

bring to the . . . mint gold and silver bullion, in order to their being coined; and . . . the bullion so brought shall be . . . coined as speedily as may be after the receipt thereof, and that free of expense to the person . . . by whom the same shall have been brought. And as soon as the said bullion shall have been coined, the person . . . by whom the same shall have been delivered, shall upon demand receive in lieu thereof coins of the same species of bullion which shall have been so delivered, weight for weight, of the pure gold or pure silver therein contained: *Provided, nevertheless,* That it shall be at the mutual option of the party . . . bringing such bullion, and of the director of the . . . mint, to make an immediate

<sup>11</sup>Some contemporary private purveyors of gold and silver bullion fabricate small bars stamped with such information, *except for a nominal legal value*. The absence of the latter distinguishes these bars from coins. Of course, if the legal unit of monetary value were a standard measure of weight—say, the troy grain or the metric gram—then a designation of weight on such a bar would simultaneously be a designation of its legal value in such units, and no practical difference would exist between bullion in that form and coin.

exchange of coins for standard bullion, with a deduction of one half per cent. from the weight of the pure gold, or pure silver contained in the said bullion, as an indemnification to the mint for the time which will necessarily be required for coining the said bullion, and for the advance which shall have been so made in coins [“An Act Establishing a Mint, and Regulating the Coins of the United States,” Act of 2 April 1792, CHAP. XVI, § 14, 1 Stat. 246, 249].

The rationale for this statute was that the conversion of bullion into coinage has always been considered a prerogative of sovereignty that performs an indispensable public function (*see Ling Su Fan v. United States*, 218 U.S. 302, 311 [1910], and *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 304 [1935]), and therefore the cost of which is rightfully chargeable to the public, unless some special benefit is to be provided to the purveyor of the bullion, in which case any excess charge that has to be incurred may fairly be laid upon him. The principle of “free coinage”—with its implicit recognition of the premium between coinage and bullion, and its allocation of the cost of generating new coinage to the public in the first instance—constitutes an integral part of Congress’s constitutional power “[t]o coin Money” under Article I, Section 8, Clause 5 of the Constitution,<sup>12</sup> and therefore must be taken into consideration if a State chooses to employ bullion as alternative currency in conjunction with “Coin”, so that nothing the State does in the course of “mak[ing] . . . gold and silver Coin a Tender” under the authority of Article I, Section 10, Clause 1 conflicts with that power.

A further consideration must be taken into account. With “electronic” gold and silver currencies, almost all transfers of ownership of bullion are effected, not “by count” as with coins, but by weight.<sup>13</sup> Nonetheless, these transfers do not require recourse to the cumbersome procedure of “assay and the scales,” because the bullion is so controlled in the depository that its susceptibility to substitution or adulteration is for all practical purposes precluded. Therefore transfers of ownership of aliquots of bullion between account-holders can

<sup>12</sup>Compare Act of 2 April 1792, § 14, 1 Stat. at 249, with *Myers v. United States*, 272 U.S. 52, 174-5 (1926), and *Field v. Clark*, 143 U.S. 649, 691 (1892).

<sup>13</sup>Conceivably, a few transfers could be effected by actual physical delivery of some number of standard bars of bullion. These, however, would likely involve exceptionally large values of gold or silver.

be effected with speed, security, accuracy, and confidence through electronic accounting rather than anyone's physical involvement with the bullion. Indeed, the system can operate for most purposes without any disturbance of the bullion once lodged in the depository. Also, because an "electronic" currency can be subdivided into exceedingly small units, transactions of almost any value can be conducted—a flexibility impossible to achieve with coins, because coins of only a few different values are ever minted, which requires that so-called "token coinage" of base metals (or, worse yet, paper notes) be generated for use in small transactions and to "make change". So, with the advent of "electronic" gold and silver currencies, the former advantages of "Coin" arising out of special designs and fabrication have largely disappeared; and the few sizes of "Coin" available have become more of a liability than ever. As a result, any premium might now run in favor of gold and silver bullion in an "electronic-currency depository" over equal weights of such metals in the form of "Coin" held outside of such a depository. The weight of gold and silver in "Coin" held within such a depository could also be treated as bullion until the "Coin" were actually paid out, at which point some calculation involving a premium could come into play.

Obviously, investigation by experts will be necessary to determine whether any premium between bullion and "Coin" will arise, and if so what it may be and to the advantage of which it may accrue, when a State employs "electronic" gold and silver currencies as "Tender in Payment of Debts." In any event, a State must so arrange her system that the "Tender" for any "Debt[ ]" will, as a matter of both fact and law, be some actual "gold [or] silver Coin" or the amount of gold or silver bullion of weight and fineness "equal" to the weight and fineness of that metal in the "Coin," corrected for the premium (if any) in favor of either "Coin" or bullion, as the case may be. Moreover, the bullion in the State's depository must always be fully and freely convertible into "Coin," and "Coin" in the free market convertible into bullion in the depository, according to the same principle of relative valuation. A depository might also find it convenient to employ "Coin" as well as bullion as the basis for its "electronic" currency, because the problem of *inter-valuation* between the two would be merely a matter of arithmetic once the formulae for assigning and calculating any premium have been established. This, however, is a technical matter best left to specialists to sort out.

## Implementation of an Electronic Gold and Silver Plan

Implementation of an electronic gold and silver currency plan would be highly advantageous.

*First and foremost*, adoption of alternative gold and silver currencies would be an act of foresight. It would recognize that resuscitation of the Federal Reserve System may prove impossible, and in any event is inadvisable.

*Second*, adoption of alternative gold and silver currencies would be an act of scientific insight, because it would introduce currencies the values of which could always be verified or falsified in terms of fixed amounts of gold and silver measured by universal standards of weight, not the fanciful names historically attached to various coins. Because a unit-weight of gold is always a unit-weight of gold, and no less for silver, these would be objective and permanent values everywhere and at all times throughout the world, no matter what economic, political, or social conditions happened to prevail here or there.

*Third*, under this plan, holders of these currencies not only would have some claim to, but would actually own, and at their discretion could themselves physically possess, the gold and silver that would constitute the currencies. Contrast this with Federal Reserve Notes: Even when those notes were redeemable in gold, some Federal Reserve Bank or the United States Government actually owned and possessed the gold that “backed” the notes; and holders of the notes had no more than a claim to redemption. Only upon actual redemption did actual title to and possession of the gold change hands. And that right of redemption was eventually cancelled, both domestically and internationally. As to gold, then, Federal Reserve Notes proved to be, as the late John Exter so trenchantly put it, “an I.O.U. nothing currency,” because the notes and the gold were separate things, under the control of different people. But with actual weights of gold and silver as currencies, nothing is owed, and the holders of the currencies can always possess the actual gold or silver, so no promise of redemption can ever be repudiated.

*Fourth*, alternative gold and silver currencies would allow for more than one experiment to be conducted—indeed, as many as 50 separate experiments in each of the several States would be possible. Should any single trial fail in any particular, it would do so only locally, not nationally. If it succeeded, it could be expanded easily

enough elsewhere. And by the process of judicious experimentation, constant improvements on initial successes would eventuate. Moreover, even if politically influential factions could succeed in frustrating the adoption of alternative currencies in one State, they would be unlikely to wield the political clout necessary to suppress such currencies in every other State as well. And if they could not stop the experiment everywhere, honest public officials and the free market would put the theory into practice somewhere, and then expand its application elsewhere.

*Fifth*, adoption of alternative gold and silver currencies could be accomplished incrementally and gradually, allowing the free market to set and equilibrate prices as more and more people employed the new currencies in preference to Federal Reserve Notes. No sudden, economically disorienting jump from Federal Reserve Notes to gold and silver would have to occur.

*Sixth*, quite unlike the Federal Reserve System and Federal Reserve Notes, alternative currencies of gold and silver would be fully constitutional. As explained above, the Supreme Court in *Lane County v. Oregon* has already ruled that the States constitutionally cannot be compelled to use a currency emitted by Congress—in particular, that they may choose to employ gold and silver in preference to irredeemable paper currency, even when Congress has declared that currency to be “legal tender.” Thus, the adoption of alternative gold and silver currencies would return each State to the rule of constitutional law and federalism with respect to money.

*Seventh*, introduction of alternative gold and silver currencies would not depend upon a State’s having any gold or silver in her treasury at the beginning of the process. To be sure, under Article I, Section 8, Clause 5; Article I, Section 10, Clause 1; and Article VI, Clause 2 of the Constitution, only Congress enjoys the power “[t]o coin Money”—that is, the “[official] Money” which all public agencies must recognize and employ for public purposes. But the Constitution is utterly silent as to purely “[private] Money” which individuals may create and exchange among themselves. Indeed, as “powers” with respect to the prohibition of “private Money” are “not delegated to the United States,” and as the States’ authority to “make . . . gold and silver Coin a Tender” is sufficiently broad to enforce “private Money” as “Tender” in private contracts so providing, under the Tenth Amendment the power to create and exchange

“private Money” must be “reserved . . . to the people.” Beyond that, inasmuch as alternative gold and silver currencies could—and initially should—consist of bullion, not coin, no State would find itself dependent upon the assistance of Congress and the U.S. Treasury for her adoption of such currencies.

*Eighth*, employment of alternative gold and silver currencies would not involve a State in the rat’s nest of central economic planning. A State would not be required to attempt to regulate the supply of money against a so-called price level, to fix interest rates, or to engage in any of the other political-cum-economic manipulations characteristic of a central bank. Whatever amounts of gold and silver the people desired to use as their alternative currencies would become currency. The free market would then rationally establish and mutually adjust the prices in gold and silver of all goods and services, and competition in the free market between Federal Reserve Notes and the alternative currencies would control the rate at which the latter replaced the former.

*Ninth*, adoption of alternative gold and silver currencies would serve, not just one set of special interests, but instead all of society, by facilitating on a State-by-State basis the separation of private banking from government with respect to currency.

*Tenth*, if adoption of alternative currencies showed promise, with more and more people preferring those currencies to Federal Reserve Notes in more and more transactions, the banks would be forced to compete. Some of them might try to generate a new currency redeemable in or otherwise “backed” by gold, silver, or both. Exactly how they might do this one cannot predict, because such a new bankers’ currency would have to be as secure as the alternative gold and silver currencies, which would require that it not be based on fractional reserves, or that it offered to its users some significant economic advantage, suitably enforceable by law, that offset the risk from fractional reserves—and that the right of the holders of the currency to its redemption in gold or silver were absolutely guaranteed, not only against default by the banks but also against any intervention by the government in favor of the banks which enabled them to default or otherwise prevented or delayed redemption. Yet even a few banks moving in that direction could facilitate the present system’s orderly transformation or liquidation, rather than its sudden collapse.

## Conclusion

Why, then, are the champions of sound money, limited government, and free markets not aggressively promoting the adoption of alternative gold and silver currencies? The present economic crisis presents the best opportunity since 1932 to free Americans from their thralldom to the Federal Reserve System. Under the pressure of this crisis, common people are awakening to their predicament, and sensing what needs to be done—because, as Samuel Johnson once reputedly quipped, nothing focuses a man’s mind more than his impending hanging. So, Americans can now be convinced that this country’s economy cannot be restored by some “Rube Goldberg” tinkering with the existing faulty edifice of money and banking, but only by its total replacement. The present structure lacks the capacity to survive—and, constitutionally speaking, can claim no right to be saved. A new structure must be built from the ground up, on a new site, according to a different plan. If this can be accomplished, then for the first time in generations Americans will enjoy honest weights and measures in the monetary field—and with that reform, will have a realistic hope to restore honest commerce and even honest politics as well.

## References

- Black’s Law Dictionary* (1968) Revised 4th ed. St. Paul, Minn.: West Publishing Co.
- Vieira, E. Jr. ([2002] 2011) *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution*. Gold Money Special Edition. Chicago: R. R. Donnelley & Sons.
- \_\_\_\_\_ (2010), “A Cross of Gold.” An address presented to the October 2010 Meeting of the Committee for Monetary Research and Education, New York City.
- \_\_\_\_\_ (2011) *An Introductory Primer on the Constitutional Authority of the States to Adopt an Alternative Currency*. Available at [www.knology.net/~bilrum/Alternative%20Currency%20Defense%20.pdf](http://www.knology.net/~bilrum/Alternative%20Currency%20Defense%20.pdf).
- \_\_\_\_\_ (2012) *The Sword and Sovereignty: The Constitutional Principles of “the Militia of the Several States” (Constitutional Homeland Security)*. Front Royal, Va. (Author’s CD-ROM edition).