STATE ATTEMPTS TO TAX SALES OF GOLD COIN AND BULLION IN THE UNITED STATES: THE CONSTITUTIONAL IMPLICATIONS

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I. Introduction

When the U.S. Congress, in 1974, legalized private ownership of gold coin and bullion[1] after forty years of prohibition, Congress did not state whether it intended to permit the states to tax gold coin[2] and bullion[3] sales and purchases.[4] Although at least one state has declined this new opportunity for tax revenue,[5]

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1. Act of Aug. 14, 1974, Pub. L. No. 93-373, § 2, 88 Stat. 445 (repealing 31 U.S.C. § 443 (1976)) (Act prohibits the acquisition and use of gold in violation of law).

2. Gold bullion coins are marked with the imprint of a sovereign nation, and include the Krugerrand of the Republic of South Africa, the Maple Leaf of Canada, the Gold Corona of Austria, the Gold Peso of Mexico, the Gold Sovereign of Great Britain, and the Gold Bars of the Credit Bank of Switzerland. American Arts Gold Medallions issued by the U.S. Government under Act of Nov. 10, 1978, Pub. L. No. 95-630, 92 Stat. 3679, are not legal tender in the United States. A full-page advertisement for Mexico's gold pesos that appeared in the *New York Times Magazine* on December 13, 1981 states that the coins are legal tender "supported by the Central Bank of Mexico, Banco de México, which guarantees full redemption at a price based on the current market value of gold." *See* N.Y. Times, Dec. 13, 1981, § 6 (Magazine), at 135.

3. Gold bullion is sold in the form of coins or medallions or in ingots of recognizable form, weight and fineness made by government agencies, such as Swiss Bank ingots, or by private manufacturers, such as Engelhard. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Gold and Silver: Precious Metal Opportunities at Merrill Lynch 2 (1981) [hereinafter cited as Precious Opportunities].

4. President Franklin Delano Roosevelt, on March 10, 1933, ordered that all persons in the United States holding gold surrender it to the U.S. government in exchange for paper currency. Executive Order No. 6073 (March 10, 1933). Act of Aug. 14, 1974, Pub. L. No. 93-373, 88 Stat. 445, signed by President Gerald Ford on August 15, 1974, permitted private ownership of gold in the United States after December 31, 1974. See J. Cochran, Money, Banking and the Economy 48 (3d ed. 1975) [hereinafter cited as Cochran].

5. Section 6355 of the California Revenue and Taxation Code: (1) exempts "gross receipts from the sales in bulk of monetized bullion which are substantially equivalent to transactions in securities or

and the courts of another state have ordered it not to tax gold coin and bullion sales,[6] other states want to share in the "gold boom" bonanza of the late 1970's by taxing these transactions.[7]

The U.S. Constitution grants the U.S. government exclusive authority to coin and regulate the value of money.[8] The Constitution prohibits the states from issuing paper currency or making anything but gold and silver legal tender.[9] The Framers of the Constitution wanted to assure uniformity of the value of the nation's money by giving control over all money in the United States, domestic and foreign, to the U.S. government.[10] The Framers wanted to avoid the problems that the federation had experienced before the Constitution when each state issued its own money and made its own laws for foreign coins circulated within its borders.[11]

The U.S. Congress made gold and silver coin the foundation of American money until the twentieth century.[12] Although Congress authorized the issuance

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commodities through a national securities or commodities exchange and the storage, use or other consumption in this state of monetized bullion as sold," CAL. REV. & TAX CODE § 6355 (West 1973 & Supp. 1980); (2) defines "sales in bulk" as a transaction that "totals, in face amount, the sum of one thousand dollars ($1,000) or more, or its equivalent," *id.* and, (3) defines "monetized bullion" as "coins or other forms of money manufactured of gold, silver, or other metal and heretofore, now, or hereafter used as a medium of exchange under the laws of this state, the United States, or any foreign nation." *Id.* This exemption applies to Mexican gold pesos, Austrian gold coronas, and other "real money coins, not private-minted tokens or medallions." Alan Van Vliet Enterprises, Inc. v. California State Board of Equalization, 135 Cal. Rptr. 716, 717, 65 Cal. 3d 964, 965 (1977).

6. An appellate court in the State of Florida found that the Krugerrand is an official coin of the Republic of South Africa, and for that reason could not be determined to be "tangible property" subject to the state's sales tax. Smith v. Dept. of Revenue, 376 So. 2d 421 (Fla. Dist. Ct. App. 1979).

7. New Jersey has taken the position that under the New Jersey Sales and Use Tax Act, gold and silver bullion and coins, the value of which is determined by metal content, is taxable as tangible personal property. Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 7-8 (T.C.N.J. Feb. 19, 1981) (stipulation of facts). *See* N.J. STAT. ANN. 54:32 B-8 (West 1960).

New York imposes sales tax on the same items under N.Y. Tax Law § 1105(a). New York has taken the position that a coin, such as a rare coin or commemorative coin, which is legal tender, but is either not in general circulation, or is purchased at a rate not reflecting actual currency value or at a value determined by the precious metal content of the coin, is to be deemed purchased for numismatics, coin collecting or investment purposes and is a sale of tangible personal property subject to sales tax. 2 N.Y. State Tax Rep. (CCH) ¶ 65-174.

In the Tax Reform Code of 1971, Act of Mar. 4, 1971, No. 2, Pennsylvania imposes a sales and use tax under Article II, Tax for Education. Pennsylvania has taken the position that gold or silver bullion is not a form of legal tender and is tangible personal property subject to tax. 2 Penn. State Tax Rep. (CCH) ¶ 60-101.40.

8. U.S. CONST. art. I, § 8, cl. 5.

9. *Id.* art. I, § 10, cl. 1.

10. THE FEDERALIST No. 42, at 285 (J. Madison) (J. Cooke ed. 1961). *See generally* P. STUDENSKI & H. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 33-44 (2d ed., 1963) [hereinafter cited as STUDENSKI & KROOSS]; COCHRAN, *supra* note 4, at 38-40.

11. COCHRAN, *supra* note 4, at 38-40. *See generally* G. DUNNE, MONETARY DECISIONS OF THE SUPREME COURT 3-16 (1960) [hereinafter cited as DUNNE].

12. *See* COCHRAN, *supra* note 4, at 38-48.

of paper money in order to finance the Civil War and Reconstruction, Congress intended this measure to be temporary. The government eventually redeemed all of this paper money.[13] Although Congress, the Supreme Court and presidents in the twentieth century have affirmed many times by their actions the power of the U.S. government to control and regulate gold and silver coin and bullion, the question of state taxation remains unanswered.[14] To what extent, if any, has the U.S. government, by permitting private ownership of gold coin and bullion since December 31, 1974, granted to the states the power to enact various taxes on coin and bullion?

States that want to assess sales tax on gold transactions may assume that the U.S. government "demonetized" gold when Congress ended the convertibility of dollars into gold.[15] Whereas states could not tax gold when gold was officially legal tender, these states may contend that the gold in circulation in the United States today, even foreign gold coins, is a tangible commodity, transactions in which the states may tax.[16] An alternative point of view asserts that ownership of gold coin and bullion in the United States is a "privilege" allowed by the federal government.[17] According to this view, the U.S. government's lifting of the ban on private ownership of gold coin and bullion as part of the plan for international monetary reform does not mean that gold coins and bullion are not money or that the various states may now make a distinction between gold coins and other coins.

Although Congress returned the privileges to own gold to Americans, it may revoke that privilege. The laws and Supreme Court decisions which supported confiscation of gold coin and bullion by the U.S. government during the Great Depression are still effective.[18] Much of the gold that currently circulates in this

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13. *See* STUDENSKI & KROOSS, *supra* note 10, at 145-46.

14. *See* § II.B.3 *infra.*

15. Congress set the gold certificate requirement of 25% backing for Federal Reserve notes in March 1968. This action placed the entire U.S. gold stock behind American dollar liabilities to foreigners. COCHRAN, *supra* note 4, at 50,431. The United States closed the gold window to foreign nations on August 15, 1971. *Id.* at 50. *See also* R. SOLOMON, THE INTERNATIONAL MONETARY SYSTEM 1945-1976: AN INSIDER'S VIEW 109, 119 (1977) [hereinafter cited as SOLOMON].

On March 14, 1968, the U.S. Senate approved an amendment to the Gold Reserve Act which repealed the requirement that 25% of the nation's currency in circulation be backed by gold. When President Johnson signed the bill a few days later, Act of Mar. 18, 1968, Pub. L. No. 90-269, § 8, 82 Stat. 50 (codified at 31 U.S.C. § 408a (1976)), all of the stock of gold held by the United States — about 11.5 billion dollars' worth — became available to maintain the parity of the dollar under the IMF Articles of Agreement. *See generally* A. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM 99 ed. note (1977) [hereinafter cited as LOWENFELD]. On August 15, 1971, President Nixon announced that the United States would no longer convert foreign-held dollars into gold or other reserve assets. Address of President Nixon, 7 WEEKLY COMP. PRES. DOC. 1170 (Aug. 15, 1971).

16. *See* note 7 *supra.*

17. *See* Holzer, *Private Gold Ownership: Right Versus Privilege,* 92 BANKING L. J. 334, 340-46 (1975) [hereinafter cited as Holzer].

18. *E.g.,* Trading With The Enemy Act, ch. 106, § 5(b), 40 Stat. 415 (1917) (codified at 12 U.S.C.

country is in the form of coins issued by foreign nations or their central banks.[19] The U.S. Gold Commission[20] is studying the possibility of issuing new U.S. gold coins to compete with these foreign issues.[21] The United States also is reportedly considering a return to the gold standard, which could require redemption of privately owned gold by the U.S. government.[22] These factors, and the existence of specific federal tariff items for "metal coins" and "bullion,"[23] tend to show that gold coin and bullion in this country are subject to the exclusive uniform regulation of the federal government.

This article addresses three issues: (1) whether the various states in the United States may impose a tax on sales of the Krugerrand and other gold coins that are declared to be legal tender by official act in their respective countries of origin; (2) whether the states may impose a tax on sales of gold coins that bear the imprint of a sovereign nation but that are not declared to be legal tender by official act in their respective countries; and (3) whether the states may impose a tax on sales of gold bullion.

The article points out that "foreign coin" is subject to uniform federal regulation under the U.S. Constitution, and concludes that foreign gold coins, like the Krugerrand, fall within the Constitution's meaning of "foreign coin." Thus, states cannot claim that these coins are "tangible" personal property for certain purposes. The article asserts that the same result should apply to non-legal tender foreign coins and gold bullion. The article then outlines how the U.S. government has controlled private gold ownership from the birth of the United States to the present under its broad constitutional power to coin and regulate the value of money, and concludes that such coins and bullion also are subject to uniform federal authority.

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§ 95(a) (1976)). Proclamation No. 2039, 31 C.F.R. 340 (1982), *reprinted in* 48 Stat. 1689 (1933), *and in* II THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE YEAR OF CRISIS 24-29 (1938); Emergency Banking Relief Act, ch. 1, § 3, 48 Stat. 1 (1933) (codified at 12 U.S.C. § 956 and 50 U.S.C. app. § 5 note (1933)); Executive Order No. 6073, 31 C.F.R. 341 (1982); Gold Reserve Act of 1934, ch. 6, § 2(a), 48 Stat. 337 (1934) (codified at 31 U.S.C. §§ 441, 490 (1976)); Norman v. Baltimore & O.R.Co., 294 U.S. 240 (1935); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935). *See* § II.B.3.b *infra* for a discussion of the above cases. For a summary of U.S. laws enacted during the Great Depression, which led to abandonment of the gold standard, *see generally* STUDENSKI & KROOSS, *supra* note 10, at 382-402; M. FRIEDMAN & A. SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES: 1867-1960, at 462-83 (1963) [hereinafter cited as FRIEDMAN & SCHWARTZ].

19. *See* Maidenberg, *Gold, Through Thick and Thin,* N.Y. Times, Feb. 1, 1981, § III, at 13, col. 1. *See* PRECIOUS OPPORTUNITIES, *supra* note 2.

20. 31 U.S.C. § 822a note (1980). *See Agency Favors U.S. Gold Coin,* N.Y. Times, Jan. 9, 1982, at 39, col. 6. Congress established the U.S. Gold Commission to "conduct a study to assess and make recommendations with regard to the policy of the United States Government concerning the role of gold in [the] domestic and international monetary systems." Act of Oct. 7, 1980, Pub. L. No. 96-389, § 10, 94 Stat. 1555.

21. *Agency Favors U.S. Gold Coin,* N.Y. Times, Jan. 9, 1981, at 39, col. 5.

22. *Id.*

23. *See* Tariff Schedules of the United States (TSUS), 19 U.S.C. § 1202, items 653.22 & 605.20.

Following this discussion, the current role of gold coin and bullion in international affairs is examined. The article then analyzes whether state sales taxes on gold coin and bullion transactions would infringe on the power of the U.S. government to conduct foreign commerce, concluding that such taxation would be an infringement on this power. Finally, the article analyzes whether a state sales tax of gold coin and bullion would violate the General Agreement on Tariffs and Trade (GATT)[24] to which the United States subscribes and asserts that states which attempt to collect sales tax on certain foreign gold coin or bullion but not on similar issues by other nations violate the U.S. commitment to the GATT.

II. FEDERAL POWER TO CONTROL MONEY

A. *Constitutional Power to Control and Regulate the Nation's Monetary Affairs*

1. Pre-Constitution

When the Founding Fathers drafted the U.S. Constitution, they included little detail with respect to money. The provisions they did include give control over money to the federal government and forbids interference by the states. The Constitution grants Congress the power to "coin money, regulate the value thereof, and [regulate the value] of foreign coin."[25] The Constitution forbids the states to "coin money" or "emit bills of credit."[26] Through these provisions, the Constitution's signers intended to give control over the nation's money supply to the federal government.[27] "[T]he Constitution," James Willard Hurst, the legal historian, has written, "determined that ultimate control of the money supply

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24. *See* § IV *infra*.

25. U.S. CONST. art. I, § 8, cl. 5.

26. *Id.* art. I, § 10, cl. 1. Since metallic money was scarce and commodity money was unsatisfactory, the early American colonists began to issue three types of paper money: bills of credit issued by the legislatures, bank notes issued by publicly-owned banks, and bank notes issued by private banks. Bills of credit were a cross between short-term notes issued in anticipation of tax collection and outright fiat money. Since the government used bills of credit to pay expenses, these bills were a form of borrowing which set a precedent for the issuance of non-interest-bearing "continentals" during the Revolution and of "treasury notes" during the War of 1812 and Civil War. Massachusetts issued the first bills of credit in 1690 to pay soldiers returning from the campaign against Quebec. Massachusetts intended to redeem the bills from taxes, but since the colonists loathed paying taxes and paper money seemed to be an easy way of paying government expenses, Massachusetts continued to issue new bills in order to retire the old bills as well as to pay new expenses. As the other colonies learned of the "marvels," they also began to issue bills of credit. Price inflation, caused by the increasing unlikelihood of the bills' redemption in coin, became common in varying degrees throughout the colonies. STUDENSKI & KROOSS, *supra* note 10, at 14-15.

27. THE FEDERALIST No. 42, at 285, and No. 44, at 299-300 (J. Madison) (J. Cooke ed. 1961).

should be a matter of national policy, in some respects fixed directly in the Constitution, and in others put under the authority of Congress."[28]

During the American Revolution, the fledgling state governments as well as the Continental Congress issued paper bills of credit to raise funds for the war effort.[29] The multitude of currencies in circulation and the swollen paper money supply created havoc with respect to the values of the paper currencies.[30] After the Revolution, the Continental Congress paid off their dollar at one-fortieth of par, despite the solemn "pledge" of "the United States and the public faith" contained in the Twelfth Article of Confederation for payment and satisfaction of all credit and debt of the confederation.[31] This situation gave rise to the popular saying, "not worth a Continental."[32] Devaluation of state bills of credit also occurred.[33] For example, Virginia creditors found Virginia paper to be worth ten percent of its face value.[34]

In the winter of 1786-87, Daniel Shays led a rebellion of debtors and farmers in Massachusetts who wanted the state legislature to print and issue more paper money that could be used to pay debts.[35] Although suppressed, Shays' Rebellion focused attention on the need for monetary uniformity in the new nation.[36] The

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28. J. HURST, A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970, at 8 [hereinafter cited as HURST].

29. *See* STUDENSKI & KROOSS, *supra* note 10, at 25, 30; DUNNE, *supra* note 11, at 6-10.

30. *See* STUDENSKI & KROOSS, *supra* note 10, at 37-8; DUNNE, *supra* note 11, at 7-10.

31. DUNNE, *supra* note 11, at 9.

> All bills of credit emitted, moneys borrowed, debts contracted, by or under the authority of congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

U.S. ARTICLES OF CONFEDERATION art. 12 (1778).

32. COCHRAN, *supra* note 4, at 40.

33. STUDENSKI & KROOSS, *supra* note 10, at 28-30; DUNNE, *supra* note 11, at 11.

34. DUNNE, *supra* note 11, at 11.

35. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 284-85, 325, 412-13 [hereinafter cited as WOOD]. Shays' Rebellion in central and western Massachusetts expressed the discontent which was widespread throughout New England during the economic depression following the Revolution. Led by Daniel Shays, a Revolutionary War veteran and officeholder from Pelham, Massachusetts, the insurgents resorted to armed efforts to intimidate and close the courts to prevent action against debtors. By February 1787, state troops had suppressed the rebellion. THE FEDERALIST No. 6, at 31, ed. note (A. Hamiltion) (J. Cooke ed. 1961). "If Shays had not been a desperate debtor it is much to be doubted whether Massachusetts would have been plunged into a civil war." *Id.*

36. *See* WOOD, *supra* note 35, at 412-13. Although the Articles of Confederation referred to bills of credit issued by act of Congress, U.S. ARTICLES OF CONFEDERATION arts. 9, 12 (1778), they did not exclusively delegate this power to Congress. Since each state thereunder "retain[ed] . . . every power, jurisdiction and right . . . not . . . expressly delegated to the United States [,bills of credit were] left in their hands by the confederation as a concurrent right with that of Congress." THE FEDERALIST No. 44, at 299-300 (J. Madison) (J. Cooke ed. 1961). In an expression of relief at the Constitution's prohibition of state-issued bills of credit, Madison continued:

> The loss which America has sustained since the peace, from the pestilent effects of paper money, on the necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people, and on the character of Republican

issue culminated when, in the late spring of 1787, the fifty delegates to the first Constitutional Convention of the United States met in Philadelphia. Keynote speaker Edmund Randolph noted that "the havoc of paper money" was a major problem to be considered by the Convention.[37]

2. Constitutional Remedies

The U.S. Constitution empowers Congress to coin and regulate the value of money. In response to the existing monetary problems, the delegates to the Constitutional Convention restricted state interference with monetary affairs in five ways. First, the Constitution forbids the states to coin money,[38] a power the states had shared with Congress under Article Nine of the Articles of Confederation.[39] This Article was a step towards achieving uniformity in the value of current coin.

Second, only Congress can regulate the value of money and of foreign coin.[40] This clause continued the policy under the Articles of Confederation that gave Congress the sole authority to determine the value of coin minted by the states or the national government.[41] The clause also corrected a defect in the Articles, which omitted Congressional power to control the value of foreign coin.[42] As James Madison wrote in *Federalist No. 42:* "It must be seen at once that the proposed uniformity in the *value* of the current coin might be destroyed by subjecting that of foreign coin to the different regulations of the different States."[43]

> Government, constitutes an enormous debt against the States chargeable with this unadvised measure . . . or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which shew [sic] the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State [these rights], there might be as many different currencies as States; and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States would be injured; and animosities be kindled among the States themselves. The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member . . . . The power to make any thing but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of striking of paper currency.

Id. at 300-301.

37. DUNNE, *supra* note 11, at 11. The sentiments at the Constitutional Convention were generally split between those who thought all "paper currency" should be avoided and those "who were able to distinguish between the excesses of a paper currency and the obvious role that this medium would have to play in any future national monetary mechanism." *Id.*

38. U.S. CONST. art. I, § 10, cl. 1.

39. *See* STUDENSKI & KROOSS, *supra* note 10, at 36-37; U.S. ARTICLES OF CONFEDERATION art. 9 (1778). *See* notes 41-42 and accompanying text *infra*.

40. *See* U.S. CONST. art. I, § 8, cl. 5.

41. HURST, *supra* note 28, at 8.

42. U.S. ARTICLES OF CONFEDERATION art. 9 (1778).

43. THE FEDERALIST No. 42, at 285 (J. Madison) (J. Cooke ed. 1961).

Third, the Constitution prohibits the states from emitting bills of credit.[44] For the same reasons that the Framers denied the states the power to regulate coin, the states "were not to be at liberty to substitute a paper medium in place of coin."[45] Madison argued in *Federalist No. 44* that without a prohibition on the issuance of state currencies, competition between various state currencies would have a disuniting and injurious effect. Moreover, the Union itself could be discredited in the eyes of foreign powers.[46]

Fourth, the Constitution declares "[n]o state shall . . . make anything but gold and silver coin a tender in payment of debts . . . ."[47] The Framers withdrew the power to make anything but gold or silver a tender in payment of debts from the states as to prevent the states from issuing money.[48] This prohibition changed the Articles of Confederation, which by silence left the matter of creating legal tenders to state discretion.[49]

Finally, the Constitution empowers Congress "[t]o provide for the punishment of counterfeiting the securities and current coin of the United States."[50] This clause provides the legal basis for prosecuting those who counterfeit U.S. coins or securities. Its purpose is to secure the value of both.[51] According to James Willard Hurst, this clause "is part of the implied bias of the Constitution toward making the federal government the primary authority, if not the monopolist, in regulating the money supply."[52]

Besides clearly separating state and federal powers respecting money by Constitutional fiat, the Framers exhibited a complete accord that the federal government should control money by decisively defeating two proposals that would have liberalized the money clauses in favor of the states at the Constitutional Convention. Several convention participants suggested that the Constitution should allow the states to emit bills of credit or define legal tender subject to Congressional authorization or veto.[53] Either of these provisions would have allowed states to issue paper money. The Convention voted eight to one, with

44. U.S. CONST. art. I, § 10, cl. 1.

45. THE FEDERALIST No. 44, at 300 (J. Madison) (J. Cooke ed. 1961). For a discussion of this prohibition, *see* note 36 *supra*.

46. THE FEDERALIST No. 44, at 300 (J. Madison) (J. Cooke ed. 1961).

47. U.S. CONST. art. I, § 10, cl. 1.

48. *See* STUDENSKI & KROOSS, *supra* note 10, at 37.

49. *Id. See* note 36 *supra*.

50. U.S. CONST. art. I, § 8, cl. 6.

51. THE FEDERALIST No. 42, at 285 (J. Madison) (J. COOKE ed. 1961).

52. HURST, *supra* note 28, at 13.

53. *Id.* at 9. The Articles of Confederation had allowed both of these rights to the States. *Id.* In the matter of bills of credit, the Articles had "left to the states full discretion in issuing evidences of debt which might circulate as money." *Id.* at 9. By stating that "no state shall . . . make anything but gold and silver coin a tender in payment of debts," U.S. CONST. art. 1, § 10, cl. 1, the Framers likewise deprived the states of discretion to define legal tender. HURST, *supra* note 28, at 9. This is clear evidence that the Framers intended that ultimate control of the money supply be a matter of national policy. *Id.*

one state divided, not to allow the states to emit bills of credit.[54] Further, the Convention unanimously rejected the proposition that the Constitution permit the states to make anything but gold and silver legal tender.[55] Every state ratifying the convention approved this decision; none offered opposing or qualifying amendments.[56] "Throughout," James Willard Hurst has stated, "the explicit denial of state coinage and the implicit denial of state authority to fix money values stood in absolute form."[57]

The Framers sought to promote "harmony and proper intercourse" among the states and between the new nation and foreign nations through the new Constitution.[58] With this in mind, the Framers directed the monetary provisions of the Constitution toward standardizing and stabilizing the money supply by giving absolute power to control coins and currencies, U.S. and foreign, to the national government.[59]

B. *Currently Circulating Foreign Gold Coins and Bullion*

The gold bullion coins that the State of New Jersey[60] and other states seek to subject to their sales taxes include: American Arts Gold Medallions,[61] South African Krugerrands,[62] Canadian Gold Maple Leafs,[63] British Gold Sovereigns,[64] Austrian Gold Coronas and Mexican Gold Pesos.[65] Of these coins, the Krugerrand,[66] the Gold Maple Leaf[67] and the Sovereign[68] are statutor-

54. HURST, *supra* note 28, at 8.

55. *Id.* For the original votes *see* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, at 435, 439 (rev. ed. 1937).

56. HURST, *supra* note 28, at 9-10 (citing C. WARREN, THE MAKING OF THE CONSTITUTION 550, 775, 776 (1928)).

57. *Id.*

58. THE FEDERALIST No. 42, at 287 (J. Madison) (J. Cooke ed. 1961).

59. *Id.;* HURST, *supra* note 28 at 9; *see also* STUDENSKI & KROOSS, *supra* note 10, at 41.

60. Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 3-6 (T.C.N.J. Feb. 19, 1981) (stipulation of facts).

61. The U.S. government issued these coins pursuant to the American Arts Gold Medallion Act, Pub. L. No. 95-630, 92 Stat. 3679 (1978).

62. The South African Chamber of Mines issues the Krugerrand pursuant to the South African Mint and Coinage Act, No. 78 of 1964, *as amended by* South African Mint and Coinage Further Amendment Act, No. 40 of 1966.

63. *See* Currency and Exchange Act, CAN. REV. STAT., ch. C-39, § 4, sched. 1 (1970) (*amended by* Order of Privy Council No. 3048 (1979)). This Act assigns to the maple leaf gold coin a value of $50 (U.S.). *Id.*

64. *See* Coinage Act, 1971, ch. 24, §§ 1-2, sched. 1.

65. Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 4 (T.C.N.J. Feb. 19, 1981) (stipulation of facts).

66. *See* South African Mint and Coinage Act, No. 78 of 1964, *as amended by* South African Mint and Coinage Amendment Act, No. 21 of 1966 *and* South African Mint and Coinage Further Amendment Act, No. 40 of 1966, §§ 11-12; S. Afr. Gov't Proc. No. R 280 of 1972, *reprinted in* 88 REPUB. S. AFR. GAZ., Oct. 25, 1972 at 1; S. Afr. Gov't Proc. No. 154 of 1967, *reprinted in* 25 REPUB. S. AFR. GAZ., July 21, 1967, at 1.

67. *See* Currency and Exchange Act, CAN. REV. STAT. ch. C-39, § 4, sched. 1 (1970).

68. *See* Coinage Act, 1971, ch. 24, § 2, sched. 1.

ily recognized by their respective governments as legal tender.[69] Investors trade the other coins under the classification of "official government restrike."[70]

The current price of gold as determined on the international commodities market establishes the prices of these items.[71] Generally a dealer offers these items for sale during the hours of the day when the international commodities market is open to transactions in gold at prices which include a brokerage commission.

The Division of Taxation of the State of New Jersey has declared a policy that according to the Sales and Use Tax Act the retail sale of gold and silver bullion, U.S. coins priced by metal content rather than face value, and gold coins issued by foreign governments are sales of "tangible personal property."[72] The New Jersey Division of Taxation predicates this policy upon the fact that the prices of such gold and silver bullion, U.S. coins and foreign government-issue coins are determined by the price of gold and silver on the international commodities market.[73]

1. Legal Tender Gold Coins

Proponents of state taxation of gold coins contend that legal tender foreign gold coins such as the Krugerrand and the Maple Leaf are subject to sales tax because they do not circulate as an every day medium of exchange anywhere in the world, and they are tangible personal property with inherent, rather than a representative, value, as determined on international commodities markets.[74] However, no precedent in U.S. law supports or permits a state to distinguish between types of foreign coins. Only Congress can make such a distinction. Such action by Congress would entail deciding that certain foreign coins are not "coins" within the meaning of the Constitution. Only then could states tax transactions involving these coins. Never in U.S. history has Congress given this kind of control over foreign money to the states.

A decision by an appellate court of the State of Florida supports the proposition that no precedent exists for a state to distinguish between types of foreign

69. Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 4 (T.C.N.J. Feb. 19, 1981) (stipulation of facts).

70. *See generally* MANFRA, TORDELLA & BROOKS, INC., FOREIGN QUOTATIONS (1981).

71. *See, e.g., id.*

72. Sales and Use Tax Act, N.J. STAT. ANN. 54: 32 B-2(g) (West 1980). This section defines tangible personal property as "corporeal personal property of any nature." *Id. See* Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 6 (T.C.N.J. Feb. 19, 1981) (stipulation of facts). *See also* III STATE TAX NEWS (Aug.-Sept. 1974).

73. Armstrong v. Director, Div. of Taxation, No. ST 253A-81, at 6 (T.C.N.J. Feb. 19, 1981) (stipulation of facts).

74. *Id.* at 6-7.

coins. In *Smith v. Department of Revenue,*[75] the court determined that the Florida legislature did not intend to tax coins such as the Krugerrand. Florida sales tax applies to retail sales of tangible personal property.[76] The Florida statute makes a distinction between tangible and intangible personal property and excludes intangible property from the sales tax.[77] The statute further defines "intangible personal property" to include "money."[78] Thus, the Florida legislature excluded money from the sales tax.[79]

The issue before the Court was whether the Krugerrand is subject to the Florida sales and use tax. The state contended that the Krugerrand is not money. The trial court held that the sale of Krugerrands is taxable as a sale of tangible property. The trial court judge made the following findings of fact:

> "1. That the gold Krugerrand is a unique gold coin without a fixed value and which cannot be viewed in the subject transactions as being true legal tender of South Africa, notwithstanding its designation as such by statute.
>
> "2. That the Krugerrand is not used and freely circulated as coinage/currency since its value would diminish by the loss of gold content.
>
> "3. That the primary purposes of minting gold Krugerrands is for sale of gold in an attractive and convenient form rather than a gold bullion requiring assaying.
>
> "4. That gold Krugerrands, when sold in the State of Florida, are properly to be deemed tangible property subject to Florida sales tax as provided by statute."[80]

On appeal, the State of Florida urged that the term "money" means only U.S. money and that the definition does not "include money which is a bullion-type coin, such as the Krugerrand."[81] The appellate court did not agree. The court found that case law does not support "a distinction between foreign and U.S. money in determining whether the former is tangible or intangible personal property."[82] The court found no basis for the drawing of such a distinction. Accordingly, the appeals court reversed the trial court's judgment.[83]

In another set of cases the U.S. Court of Appeals for the Ninth Circuit recognized the Krugerrand to be currency for purposes of U.S. tariff laws. The

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75. 376 So. 2d 421 (Fla. Dist. Ct. App. 1979).
76. FLA. STAT. § 212.05 (West 1977).
77. *Id.* §§ 199.023(1), 212.05, 212.02(12).
78. *Id.* § 199.023(1).
79. Smith v. Dep't of Revenue, 376 So. 2d at 422.
80. *Id.* at 421-22.
81. *Id.* at 422.
82. *Id.*
83. *Id.*

cases of *Benson v. Hightower*[84] and *Seguin v. Eide*[85] both involved suits by private persons against U.S. Customs officials who had wrongfully detained the plaintiffs for failure to declare Krugerrands upon entry into the United States. The government had dropped charges against the plaintiffs, based on a finding that the Krugerrand is currency.[86] The U.S. Tariff Schedules state that currencies do not need to be declared.[87] The U.S. Court of Appeals for the Ninth Circuit did not challenge this conclusion.

The Tariff Schedules of the United States exempt from declaration "currency (metal or paper) in current circulation in any country and imported for monetary purposes."[88] The Schedule, however, does contain specific items for gold coins and bullion. Gold coins, such as the Krugerrand, which (a) are the genuine issue of the government concerned, and (b) are declared by official proclamation to be accepted as legal tender, are metal coins. Metal coins enter the United States duty-free.[89] Gold bullion, the form, shape or markings of which does not increase the value of the mass beyond that of the metal itself, also enters duty-free.[90] U.S. Customs enters other articles of gold at a duty rate of 17.1% ad. val.[91] Retail distributors of Krugerrands are subject to penalties under the Currency and Foreign Transactions Act if they do not keep records with respect to their transactions.[92] Further, counterfeiters of Krugerrands can expect to be prosecuted under federal counterfeiting laws.[93] These facts are consistent with the view that all foreign coin in the United States, declared to be legal tender in the country of origin, is subject to national, and not to state, regulation. To allow states to assess sales tax on gold coin transactions would violate the principle of federalism.

2. Non-Legal Tender Gold Coins

Aside from the Krugerrand and the Maple Leaf, the remaining gold coins that currently circulate in the United States may or may not be legal tender in their respective countries of origin. Neither the U.S. Treasury Department nor the

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84. 633 F.2d 869 (9th Cir. 1980).

85. 645 F.2d 804 (9th Cir. 1981).

86. *See* Berson v. Hightower, 633 F.2d at 869-70; Sequin v. Eide, 645 F.2d at 807.

87. TSUS, 19 U.S.C. § 1202 hn. 5(b) (1976).

88. TSUS, 19 U.S.C. § 1202 hn. 5(b) (1976).

89. *Id.* § 1202 item 653.22.

90. *Id.* § 1202 item 605.20. *See* Letter to the author, Neal S. Solomon, from Jordan Luke, Assistant General Counsel, U.S. Dept. of the Treasury 1 (August 12, 1981).

91. TSUS, 19 U.S.C. § 1202 item 656.10 (1976).

92. Act of Oct. 26, 1970, Pub. L. No. 91-508, § 2, 84 Stat. 1118 (codified at 31 U.S.C. §§ 1051-1081 (1976)). *See also* meaning of terms, 31 C.F.R. § 103.11, which defines monetary instrument to include coin of any other country the title of which passes upon delivery. The reporting requirement of the Currency and Foreign Transactions Act applies to currency and other monetary instruments. *Id.* § 103.23.

93. *See Bogus K-Rands Bum Texans*, World Coin News, Mar. 17, 1981, at 7, col. 2.

U.S. Customs Service maintains a list of foreign gold coins which are legal tender.[94] The lack of a list supports the argument that an official declaration of legal tender status is not necessary as long as the coin bears the mark of a nation. However, regardless of whether these other gold coins are not declared to be legal tender in their respective countries of origin and are "bullion," rather than "coins," the conclusion that non-legal tender gold coins cannot be subject to various state sales taxes does not change. This conclusion is the subject of the next section of this article, which argues that bullion is money under the U.S. Constitution and is subject to the same uniform federal authority as U.S. and foreign coins and currencies.

3. Gold Bullion

a. *The U.S. Tradition of Gold as Money*

According to current textbooks, money has three functions: it serves as (1) a medium of exchange; (2) a unit of account (or measure of value); and (3) a store of value (one of many media in which wealth may be held).[95] Gold and silver coins and bullion also serve these same functions. Gold has a limited supply, can be stored, carried or traded conveniently, and maintains a monetary value independent of its value for non-monetary practical uses.[96] In the case of either coin or bullion, one can determine value readily by reference to weight and fineness.[97] Excluding "collector coins," markings or changes in the form of the coins and bullion do not alter their value.[98] Therefore, as this analysis suggests, gold, whether in coin or bullion form, is money.

People have used gold and silver as money since the earliest days of commerce.[99] During the past four centuries, European and North American nations have coined gold and silver and have regulated the paper money supply by

94. Letter to the author, Neal S. Solomon, from Jordan Luke, Assistant General Counsel, U.S. Dep't of the Treasury 1 (Oct. 29, 1981). The author wrote to the Office of General Counsel, U.S. Department of the Treasury, on August 27, 1981, to ask, among other things, for a list of the gold coins entered into the United States under Item 653.22 of the Tariff Schedules of the United States.*see* 19 U.S.C. § 1202 item 653.22, which (a) were the genuine issue of the government concerned, and (b) were declared by official proclamation to be legal tender. That Office on October 29, 1981 replied: "Lack of the necessary information also prevents us from responding to the remainder of your numbered questions. As to your first question, neither the Treasury Department nor the Customs Service maintains a fixed list of the coins included in TSUS, item 653.22." Letter to the author, Neal S. Solomon, from Jordan Luke, Assistant General Counsel, U.S. Dep't. of the Treasury (Oct. 29, 1981). This response leads one to question: "[D]oes it matter whether or not a gold bullion coin is declared to be legal tender by its country of origin." *Id.*

95. *See* SOLOMON, *supra* note 15, at 4. *See, e.g.,* COCHRAN, *supra* note 4, at 8-9.

96. COCHRAN, *supra* note 4, at 23.

97. *See, e.g.,* LOWENFELD, *supra* note 15, at 9.

98. *Id.*

99. *Id.* at 21.

holding gold in their treasuries.[100] When several of the current nations of the world formed the International Monetary Fund (IMF) for the purpose of regulating the world monetary system,[101] the charter provided for each Fund member to establish, with Fund approval, a par value for its currency and to undertake to maintain market exchange rates for its currency within one percent of the declared par value.[102] A related provision[103] stated that the IMF would deem countries which freely buy and sell gold in settlement of international transactions to be adhering to this undertaking. Thus, the United States, the only country which met this condition, did not have to intervene in the foreign exchange markets. Rather, this provision required that other countries intervene principally by buying or selling dollars against their own currencies in order to maintain their own currencies' par value.[104] The result was that other countries had to keep their market exchange rates within one percent of their parities with the dollar, while the value of the dollar remained tied to the value of gold.[105]

Although the U.S. government will no longer redeem dollars with gold,[106] this policy has not suspended the use of gold as money. The United States still holds a large portion of its reserve assets in the form of gold.[107] People and nations buy gold because gold is a medium of exchange that may be preferable to paper money, especially in time of inflation. Gold has a limited supply, can be stored or carried conveniently, is readily identifiable by weight and fineness and maintains a monetary value apart from its non-monetary uses.

b. *Gold and the Early Development of U.S. Monetary Policy*

Gold, silver and bills of credit are the only forms of money specifically named in the Constitution.[108] While the Constitution empowers Congress to regulate coin money,[109] it is silent as to whether or not Congress can issue paper currency. The U.S. Constitution prohibits the states from issuing paper money and allows them to make only gold or silver — and no other commodity — legal tender.[110]

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100. *Id.* at 21-29.

101. The IMF exists to promote international monetary cooperation, to enhance exchange stability, to improve the conditions of international trade, to promote and maintain widespread high levels of employment and real income, and to assist in adjusting disequilibrium in international balances of payments. IMF art. 1 (1944). *See generally* LOWENFELD, *supra* note 15.

102. SOLOMON, *supra* note 15, at 12. Original Articles, *infra* note 233, at art. IV (1-3).

103 Original Articles, *infra* note 233, at art. IV (4)(b).

104. SOLOMON, *supra* note 15, at 12.

105. *Id.*

106. *See* note 15 *supra.*

107. SOLOMON, *supra* note 15, at 334.

108. *See* HURST, *supra* note 28, at 16. "No state shall . . . emit bills of credit . . . [or] make anything but gold and silver a tender in payment of debts . . . ." U.S. CONST. art. I, § 10, col. 1.

109. *See* note 25 *supra.*

110. U.S. CONST. art. I, § 10, cl. 1.

These constitutional provisions affirm and protect the integrity of specie as money, at least so far as the states are concerned. As James Madison wrote: "The power to make anything but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principal with that of issuing a paper currency."[111]

Many of the delegates to the Constitutional Convention opposed a currency unsupported by specie, which explains why the Constitution does not expressly permit Congress to issue paper money.[112] In *The Federalist,* Madison denounced the "pestilent effects of paper money" which, he charged, had occasioned economic chaos and had inflicted destruction "on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government."[113] By a vote of nine states to two, the Constitutional Convention defeated a proposed provision which would have permitted Congress to issue bills of credit.[114] James Madison and other delegates believed that the Congressional grant of power "to borrow money" permitted the U.S. government to issue paper notes for limited, emergency purposes.[115] Other delegates believed that eliminating the proposed clause barred the U.S. government from issuing paper money of any description for any purpose.[116] In accordance with general expectations, the nation's first coinage act in 1792[117] placed the United States on a bi-metallic standard of gold and silver coins.[118] The U.S. government refrained from issuing paper money, irredeemable in specie, until the Civil War "greenbacks."[119]

During the early history of the United States, Congress successively chartered two national banks designed to provide some overall direction for the national economy.[120] A debate took place among U.S. policy makers over the constitu-

111. THE FEDERALIST No. 44, at 301 (J. Madison) (J. Cooke ed. 1961).

112. DUNNE, *supra* note 11, at 11-16.

113. THE FEDERALIST No. 44, at 300 (J. Madison) (J. Cooke ed. 1961).

114. HURST, *supra* note 28, at 14.

115. *Id.*

116. *Id.*

117. An Act establishing a mint, and regulating the coins of the United States, ch. 16, § 1, 1 Stat. 214 (1792).

118. *See* COCHRAN, *supra* note 4, at 40-41. The Founding Fathers were determined that a currency standard better and stronger than the paper standard should be established. Both gold and silver had forceful proponents among leaders in the government. Bi-metallism, a money standard based on both gold and silver, represented a compromise between the advantages of gold for large transactions and those of silver for small transactions. It was also a compromise between the gold monetary standard preferred by wealthy countries, such as Great Britain, and the silver preferred by poorer countries, such as those of Latin America. While the market value of gold varied less than that of silver, Spain had used silver most often in colonial trade. *Id.* at 41.

119. *See* HURST, *supra* note 28, at 43, 49.

120. An Act to incorporate the subscribers to the Bank of the United States, ch. 10, § 1, 1 Stat. 191 (1791); An Act to incorporate the subscribers to the Bank of the United States, ch. 49, § 1, 3 Stat. 266 (1816).

tionality of the banks (bank charters are not among Congress' enumerated powers), the effect of national banking on state banks, and the public/private composition of the boards of directors.[121] No controversy existed, however, over whether national bank paper was redeemable in specie. The bi-metallic standard was an integral part of each bank's charter.[122]

The need for money to finance the Civil War strained the U.S. government's reliance on specie.[123] In February 1862, Congress passed the Legal Tender Act,[124] which ultimately brought $450 million worth of Greenbacks into circulation.[125] Like the Continentals of the Revolutionary era, the Greenbacks were paper currency, irredeemable in specie, authorized by Congress for wartime and intended to be temporary. When the Union government located an alternate method of financing the war — establishing another national bank — the issuance of Greenbacks decreased.[126]

Congress intended that the Greenbacks be retired after the Civil War ended.[127] Although retirement progressed erratically in the post-war period, the government eventually completed the retirement of Greenbacks. In January

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121. *See* B. HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1957) [hereinafter cited as HAMMOND]; STUDENSKI & KROOSS, *supra* note 10, at 60-62, 72-73, 83-88, 103-07. Hamilton proposed the establishment of the First Bank of the United States in 1790, arguing that such a bank would make a threefold contribution to the economy. He asserted that it would: (1) increase the country's productive capital, because under the principle of capital reserve, a bank could issue two or three dollars in paper money for every dollar it had in specie; (2) help the government in borrowing; and (3) facilitate the payment and collection of taxes. *Id.* at 60. The Jeffersonian Party opposed the Bank as unconstitutional, since the power to create a bank was not among the enumerated powers of the Constitution, and would be a dangerous extension of federal power. These opponents also insisted that banks created usury, divested funds from agriculture, increased speculation, and drove specie out of the country. Hamilton replied both that the bank charter could avoid those problems and that a national bank would promote low interest rates by increasing the supply of money. *Id.* at 60-61. In February 1811, Congress refused to recharter the First Bank due, according to one author, to "an extensive and effective propaganda campaign, charging that the Bank was controlled by foreigners and was unconstitutionally created monopoly, far less efficient than the state banks." *See generally id.* at 72-73.

Congress chartered the Second Bank of the United States in the aftermath of the War of 1812. *Id.* at 75-84. That War had left the United States in the midst of unstable prices, a magnified national debt, swollen government expenses, and high taxes. *Id.* at 82. National leaders generally agreed that the most pressing fiscal problem was to restore order to the banking and currency system by returning to specie payments, which the state banks had suspended in 1814 in response to gold-hoarding. Since state banks would not resume specie payments, Congress deemed that a new national bank was in order. *Id.* at 79-80, 83. Congress voted to recharter the Second Bank in 1832, but President Jackson vetoed the recharter for many of the same reasons that Congress refused to recharter the First Bank. Efforts to recharter the Bank continued until 1837 when the Second Bank failed in a depression. *Id.* at 103-07.

122. STUDENSKI & KROOSS, *supra* note 10, at 124-25.

123. *Id.* at 138-43.

124. Legal Tender Act, ch. 3, 12 Stat. 345 (1862).

125. *See* HURST, *supra* note 28, at 176; FRIEDMAN & SCHWARTZ, *supra* note 18, at 7, 44-50.

126. STUDENSKI & KROOSS, *supra* note 10, at 153-54.

127. *Id.* at 71; I. UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879, at 13-16 (1964).

1875, Congress passed the Resumption Act, directing the U.S. Treasury to begin, effective January 1, 1879, the redemption in coin of all Greenbacks.[128] With passage of the Resumption Act, the nation returned to a de facto gold standard, ending the Greenback period of 1862-1879.[129]

The major debate with respect to money in the United States from the Civil War until 1900, when the U.S. Congress officially adopted the gold standard,[130] centered on gold versus silver. Neither side of the debate, the "free silverites" or the "gold bugs,"[131] questioned the legitimacy of gold as the primary metal supporting the nation's currency. However, they debated the merits of a mono- (gold) or bi-metallic (gold and silver) standard.

Led by William Jennings Bryan, the Silverites demanded the return of legal tender status to silver.[132] Bryan spoke for an agrarian debtor class which believed that government issuance of silver coins would lower the cost of money by putting more money in circulation. His opponent, William McKinley, represented supporters of a uniform gold standard which their platform stated would not "debase our currency or impair the credit of our country."[133] In the Presidential election of 1896, McKinley overwhelmingly won.[134]

Following McKinley's victory, Congress enacted the Gold Standard Act (officially called the Currency Act) on March 4, 1900.[135] The Gold Standard Act placed the United States on a de jure gold standard for the first time by designating the gold dollar as the official standard unit of value.[136] The Act directed the Secretary of the Treasury to maintain all forms of money in parity with gold.[137] In addition, the Act required the Secretary to set aside $150 million in gold coin and bullion to be used to redeem the Greenbacks and the Treasury notes of 1890.[138]

In 1910, the U.S. Supreme Court affirmed that private ownership of silver is subject to the monetary authority of the U.S. government.[139] After the United States had acquired the Philippine Islands, Congress established a governing commission for the Islands which adopted a silver coinage of less than bullion value and which prohibited the export of silver coins from the islands. The

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128. Specie Payment Resumption Act, ch. 15, § 3, 18 Stat. 296 (1875) (codified at 31 U.S.C. § 402 (1976)).
129. COCHRAN, *supra* note 4, at 45; FRIEDMAN & SCHWARTZ, *supra* note 18, at 7, 85.
130. Currency Act of 1900, ch. 41, 31 Stat. 45 (codified at 41 U.S.C. § 314 (1978)).
131. STUDENSKI & KROOSS, *supra* note 10, at 231-34.
132. *Id.*
133. *Id.* at 232 (quoting the Republican platform).
134. *Id.* at 233; COCHRAN, *supra* note 4, at 45-46. *See also* P. GLAD, MCKINLEY, BRYAN AND THE PEOPLE 189, 200-01 (1964); S. JONES, THE PRESIDENTIAL ELECTION OF 1896, at 332-50 (1964).
135. Currency Act of 1900, ch. 41, 31 Stat. 45 (codified at 41 U.S.C. § 314 (1978)).
136. *Id.*
137. *Id.* § 1.
138. *Id.* § 2.
139. Ling Su Fan v. United States, 218 U.S. 302 (1910).

Philippine government tried and convicted a Chinese resident, who had attempted to export silver coins, of violating the prohibition. The defendant, Ling Su Fan, appealed, claiming deprivation of property without due process of law in violation of the fifth amendment.

The U.S. Supreme Court unanimously upheld the conviction. While the Court expressed its preference for "laissez faire" principles and noted that the law at issue might be "unwise," it nonetheless upheld the law as a valid exercise of the power derived from an express act of Congress.[140] The court stated:

> Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. . . . They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. . . .
>
> However unwise a law may be, aimed at the exportation of such coins . . . there can be no serious doubts but that the power to coin money includes the power to prevent its outflow from the country of its origin. . . .[141]

In 1913, Congress authorized new paper currency, Federal Reserve Notes, by the Federal Reserve Act.[142] Under this Act, Congress intended that the notes be supported by not less than forty percent in gold and gold certificates.[143] The Act required each federal reserve bank to maintain a minimum gold reserve.[144] This reserve helped to put U.S. gold-supported currency on a solid basis.[145] By the end of World War I the United States held forty percent of the world's known gold reserves.

During World War I, in response to the flow of gold out of the U.S. Treasury, Congress enacted the Trading With the Enemy Act,[146] which gives the President emergency powers, including the power to regulate or prohibit transactions in gold and to prohibit the "hoarding" of gold.[147] Although Congress enacted this

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140. *Id.* at 310. *See* Act of July 1, 1902, ch. 1369, 32 Stat. 691, 692. Ling Su Fan v. United States, 218 U.S. at 310.

141. The court also stated that the quality of coins "as a legal tender is an attribute of law aside from their bullion value," *id.* at 310, which gives to coins "a value which does not attach as a mere consequence of intrinsic value." *Id.* at 310-11. However, the court appears to have made this statement in response to the appellant's contention that the law deprived him of property without compensation, i.e., the difference between value of the bullion and the coin. *See id.* at 310.

142. Federal Reserve Act, ch. 6, § 16, 38 Stat. 251, 266 (1913); *see* FRIEDMAN & SCHWARTZ, *supra* note 18, at 190-92; STUDENSKI & KROOSS, *supra* note 10, at 258-60; COCHRAN, *supra* note 4, at 47.

143. *See* STUDENSKI & KROOSS, *supra* note 10, at 259; Federal Reserve Act, ch. 6, § 16, 38 Stat. 251, 266 (1913).

144. Federal Reserve Act, ch. 6, § 16, 38 Stat. 251, 266 (1913).

145. *See* COCHRAN, *supra* note 4, at 47.

146. Ch. 106, § 5(b), 40 Stat. 415 (1917) (codified at 12 U.S.C. 95(a) (1976)).

147. *See* STUDENSKI & KROOSS, *supra* note 10, at 294. Violation of the regulations promulgated under this Act carry penalties of up to ten years in jail and $10,000 in fines. Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 415 (1917) (codified at 12 U.S.C. 95(a) (1976)).

Act in 1917, the federal government did not fully utilize the provisions of the Trading With the Enemy Act until the Great Depression.[148] The Depression confronted the government with a serious monetary crisis. Most commercial banks in the United States had closed by Inauguration Day, March 4, 1933.[149] Many banks had failed, and the executive orders of state governors barred others from doing business. Anxious Americans, demanding gold, had reduced the Federal Reserve's gold supply almost to the legal minimum.[150] Faced with a banking crisis, President Franklin Delano Roosevelt, shortly after taking office, and relying on the Trading With the Enemy Act, proclaimed a "bank holiday" on March 6, 1933. This proclamation closed all banks and prohibited them from authorizing the withdrawal of specie.[151] The effect was to cut off all access to gold coin and bullion located in bank vaults and personal safe deposit boxes. Three days later, Congress passed the Emergency Banking Relief Act, giving the U.S. government wide discretionary powers, including the power to require Americans to surrender their gold — whether bullion, coin or certificates — for paper money.[152] President Roosevelt then, by an executive order on March 10, 1933, outlawed the export of gold coin, bullion and gold certificates without a license from the Secretary of the Treasury,[153] placed an embargo on all international gold dealings, and ordered that all persons in the United States holding gold surrender such gold to the government in return for currency.[154]

On June 5, 1933, Congress, by joint resolution, voided all clauses in private and public contracts which required payment in gold, declaring such clauses to be "against public policy."[155] That same year, Congress passed the Thomas Amendment to the Agricultural Adjustment Act, making all U.S. coins and currency legal tender.[156] President Roosevelt, in accordance with discretionary powers authorized by the Thomas Amendment, devalued the gold dollar by reducing its gold content.[157]

These actions effectively placed the United States on a floating exchange rate

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148. *See* STUDENSKI & KROOSS, *supra* note 10, at 383.

149. *Id.* at 381.

150. *Id.* at 380.

151. Proclamation No. 2039, 31 C.F.R. 340 (1982), *reprinted in* 48 Stat. 1689 (1933), *and in* II PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE YEAR OF CRISIS 24-29 (1938).

152. Emergency Banking Relief Act, ch. 1, § 3, 48 Stat. 1 (1933) (codified at 12 U.S.C. § 95(b) and 50 U.S.C. appeal § 5 note (1980)). *See* FRIEDMAN & SCHWARTZ, *supra* note 18, at 328, 421-22; STUDENSKI & KROOSS, *supra* note 10, at 294, 383.

153. Executive Order No. 6073, 31 C.F.R. 341 (1982).

154. *See* FRIEDMAN & SCHWARTZ, *supra* note 18, at 463.

155. To assure uniform value to the coins and currencies of the United States, ch. 48, § 1, 48 Stat. 112-13 (1933).

156. Thomas Amendment to Agricultural Adjustment Act, ch. 25, § 43, 48 Stat. 31, 52 (1933), *repealed by* Act of July 23, 1965, Pub. L. No. 89-81, § 210, 79 Stat. 257 (1965).

157. STUDENSKI & KROOSS, *supra* note 10, at 386-87; FRIEDMAN & SCHWARTZ, *supra* note 18, at 465.

until January 1934, when Congress passed the Gold Reserve Act.[158] This Act placed the United States on an international gold bullion standard and on a domestic irredeemable paper standard. The Gold Reserve Act further granted to the U.S. government title to all gold coin and bullion held by any U.S. citizen.[159] This Act also prohibited the minting of gold coins and empowered the Secretary of the Treasury to buy and sell gold.[160] Treasury Secretary Morgenthau then fixed the price of gold at $35 per ounce, and President Roosevelt devalued the dollar to 59.06% of its former value.[161] Persons surrendering gold, however, received only the former price of $20.67 per ounce.[162]

The issue of the constitutionality of the joint Congressional resolution abrogating gold clauses came before the U.S. Supreme Court in 1935. In *Norman v. Baltimore & Ohio Railroad Co.*,[163] the aggrieved party held a railroad bond that called for payment in gold, and disputed the government's right to force him to accept devalued currency. Chief Justice Hughes, after surveying the money cases from *McCulloch v. Maryland*[164] through *Ling Su Fan*,[165] denied Norman's claim, stating:

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.[166]

In describing the federal government's Constitutional power to regulate the value of money, the Court stated that "[t]he states cannot declare what shall be money, or regulate its value."[167]

In a second case, *Nortz v. United States*,[168] the appellant held a gold certificate representing bullion. Nortz claimed that by requiring him to surrender his gold certificate for irredeemable paper currency the government was depriving him

158. Gold Reserve Act of 1934, ch. 6, § 2(a), 48 Stat. 337 (codified at 31 U.S.C. §§ 441, 490 (1976)).

159. *Id.* ch. 6, §§ 2, 6. *See* FRIEDMAN & SCHWARTZ, *supra* note 18, at 469-71; STUDENSKI & KROOSS, *supra* note 10, at 389-90.

160. Gold Reserve Act of 1934, ch. 6, §§ 5, 8, 48 Stat. 337 (codified at 31 U.S.C. §§ 441, 490 (1976)).

161. STUDENSKI & KROOSS, *supra* note 10, at 390.

162. *See id.* at 390 n.4.

163. Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935).

164. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (determined the constitutionality of the First Bank of the United States under the composite constitutional power of Congress to control the national monetary system and currency). The court stated that the Constitution gave Congress such exclusive power in order to achieve "a national government with sovereign powers." *Id.* at 404-07.

165. Ling Su Fan v. United States, 218 U.S. 302 (1910).

166. Norman v. Baltimore & O.R. Co., 294 U.S. at 307-08.

167. *Id.* at 303.

168. Nortz v. United States, 294 U.S. 317 (1935).

of property in violation of the due process clause of the fifth amendment. Nortz argued that upon surrender of the certificates he should receive payment based on the amount of gold represented by the certificates. At that time, the amount of gold represented by the certificates had a value in excess of the face amount of the certificates in devalued U.S. dollars, on the commodities exchanges; gold was selling on the world market for $33.43 an ounce. Therefore, Nortz claimed that he should receive that amount, and not the pre-devaluation price of $20.67.[169] The Court, however, refused to accept the world market price as a standard by which to measure Nortz's loss. Relying on *Ling Su Fan,*[170] the Court found gold, "as a legal tender and as a medium of exchange," to be subject to the authority of the government.[171] The Court reasoned that the promise in the certificate to pay in gold was just a promise to pay in current money which Congress made under its authority to regulate currency. The Court found that plaintiff had not suffered any loss because he had received payment in money.[172]

In the same year, In *Perry v. United States*[173] a petitioner made a similar argument to require the government to pay him $16,921.14 in devalued paper currency for the $10,000 Liberty bond he held. However, unlike *Norman*[174] and *Nortz,*[175] *Perry* involved a public contract with a gold clause. The Court nonetheless denied the petitioner's claim based on the market value of gold because, since Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange," he could show no damages.[176] Justice Stone in the concurring opinion of the 5-4 decision rejected the petitioner's claim that the obligation of the gold clause in government bonds was greater than in private bonds:

> [I]t is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency.[177]

Justice Stone based his conclusion on the importance of the sovereign power to regulate money:

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169. *Id.* at 323.
170. 218 U.S. 302 (1910).
171. Nortz v. United States, 294 U.S. at 330.
172. *Id.* at 328-29.
173. Perry v. United States, 294 U.S. 330 (1935).
174. 294 U.S. 240 (1935).
175. 294 U.S. 317 (1935).
176. Perry v. United States, 294 U.S. at 357.
177. *Id.* at 359.

> I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money. . . .[178]

c. *The Post World War II Period*

The United States entered the post-World War II period in a strong position relative to the war-ravaged nations of Europe.[179] Between 1945 and 1950, European nations eagerly pursued American dollars, which were backed by gold reserves exceeding $20 billion, or over sixty percent of the world's total gold stock.[180] By the 1960's, however, U.S. balance of payments problems and international inflation caused U.S. gold reserves to begin to plummet.[181] As of 1980, reserves totalled approximately $12 billion, reportedly 265 million troy ounces, which amounts to perhaps twenty-five percent of the world's known gold reserves.[182]

In response to the growing U.S. balance of payments problem and in an attempt to halt the outflow of U.S. gold reserves, the Congress and four presidential administrations have instituted a variety of measures. In 1961, President Eisenhower issued an executive order restricting the holding of gold overseas by U.S. citizens.[183] In 1962, President Kennedy issued an executive order prohibiting American citizens from owning gold bullion overseas and requiring those who held gold abroad to sell it.[184]

As international confidence in the dollar waned, demand for gold increased. When the United States realized that maintaining the market price of gold close to the official price by selling U.S. gold reserves was no longer feasible,[185] Congress in 1968 removed the twenty-five percent gold requirement on Federal Reserve currency and ended the convertibility of dollars into gold for Americans.[186] In the spring of that year, a group of international bankers put into operation a two-tier gold price system.[187] This system permitted the free market

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178. *Id.* at 361.

179. *See* SOLOMON, *supra* note 15, at 9-18.

180. *See* FRIEDMAN & SCHWARTZ, *supra* note 18, at 606.

181. *See* SOLOMON, *supra* note 15, at 34-36; R. MILLER, ECONOMICS TODAY 697 (3d ed. 1979).

182. New York Times, June 19, 1980, at Dl, D11, cols. 2, 3.

183. Exec. Order No. 10905, 26 Fed. Reg. 321 (1961).

184. Exec. Order No. 11037, 27 Fed. Reg. 6967 (1962).

185. *See* SOLOMON, *supra* note 15, at 114-19; LOWENFELD, *supra* note 15, at 91-98.

186. *See* note 15 *supra*.

187. In the fall of 1961, the Federal Reserve Bank of New York, together with the Bank of England and a number of European central banks concluded a "gentleman's agreement" establishing the London Gold Pool. LOWENFELD, *supra* note 15, at 93-94 (citing *The London Gold Market*, 4 BANK OF ENG. Q. BULL. 16 (1964)). The Pool bought and sold gold in the London market with the purpose of stabilizing the market price of gold in the world. The United States contributed half of the Pool's requirement of gold, the rest coming from the other nations in fixed proportions. In the first six years

price of gold to move higher than the official, fixed monetary price of $35 an ounce.[188]

Despite the two-tier system, the United States was unable to support the dollar relative to gold.[189] President Nixon temporarily suspended the convertibility of the dollar into gold for foreign nations in 1971.[190] He followed this action by increasing the dollar price of gold to $38 per ounce, which amounted to an eight percent devaluation of the dollar.[191] Less than two years later, President Nixon raised the official price of gold to $42.22, where it has remained.[192]

In the following years, Congress took several steps towards allowing private ownership of gold. In 1973, Congress passed legislation giving the President the discretionary authority to legalize the private ownership of gold upon a showing that legalization would not "adversely affect the United States' international monetary position."[193] President Nixon chose not to exercise this option, however.[194] In the following year, Congress enacted legislation which permitted the

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of its operations, the Pool accomplished its purpose without any singificant drain on the members' gold holdings. The British devaluation of November 1967, however, among other factors, reversed the Pool's long-held position as a net buyer of gold. *See generally* LOWENFELD, *surpa* note 15, at 91-94. The Pool paid out around $2.5 billion from November 18, 1967 to March 15, 1968, an estimated $1 billion of that in the first two weeks of March.

> Faced with the alternative that the United States would end completely its commitment to buy and sell gold, the central bankers took a step at their meeting in Washington that many economists had long urged (and others had opposed with equal vehemence). They now agreed to distinguish officially between two kinds of transactions in gold — those between central banks to settle accounts or change the composition of their reserves, and the rest, generally (at least in form) private transactions. Until April 1968, the monetary authorities of the leading countries had done their best to see to it that the price at which the two kinds of transactions were carried on was the same. Now they agreed that no efforts should be made to maintain the parity between official and private transactions. The United States, the other Gold Pool countries, and the IMF would continue to conduct their official dealings at $35 per ounce. But they would not promise to buy gold from non-official holders or to make gold available to them. Monetary authorities would no longer be concerned with the supply of gold for non-official transactions, and the price of gold in such transactions would be left to seek its own level like that of any other commodity.

Id. at 95-96 (discussing communiqué issued by Governors of Central Bank and statement by Pierre-Paul Schweitzer, Managing Director of the International Monetary Fund). *See generally* SOLOMON, *supra* note 15, at 114-24.

188. *See generally* SOLOMON, *supra* note 15, at 114-19.

189. A variety of factors contributed to an abrupt reversal of the U.S. balance of payments position in early 1970. *Id.* at 176-87.

190. President Nixon announced on radio and television that the United States would no longer convert foreign-held dollars into gold or other reserve assets "except in amounts and conditions determined to be in the interest of monetary stability and in the best interests of the United States." Address of President Richard Nixon, 7 WEEKLY COMP. PRES. DOC. 1170 (Aug. 15, 1971). Technically, the decision took the form of notification to the IMF that the United States would no longer freely buy and sell gold for the settlement of international transactions. LOWENFELD, *supra* note 15, at 128 n.*o*.

191. COCHRAN, *supra* note 4, at 50.

192. *Id.*

193. Act of Sept. 21, 1973, Pub. L. No. 93-110, 87 Stat. 352, *repealed by* Act of Oct. 19, 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2661.

194. *See* Holzer, *supra* note 17.

private ownership and holding of gold after December 31, 1974,[195] or sooner if the President reported to Congress that earlier legalization "would not harm the international monetary system or the United States."[196] On August 15, 1974, President Ford signed this bill into law, ending the forty year ban on private gold ownership.[197]

The private ownership of gold is a privilege, not a right. Congress revoked the privilege of private ownership in 1933 and restored it in 1974. Congress could easily revoke the privilege again. In fact, at no time during this century has the U.S. government recognized the right of private gold ownership.[198] The Trading With the Enemy Act,[199] which President Roosevelt invoked in 1933 to restrict private gold transactions,[200] remains law.[201] The government could reactivate the machinery, which the Trading With the Enemy Act established, to implement gold confiscation.[202]

d. *The Gold Medallion Act*

For several years, the U.S. Treasury conducted sales of U.S. gold reserves in order to strengthen the value of the dollar overseas.[203] The Treasury, however, has not sold all of the U.S. gold stockpile at market price because of the continuing important role of gold as a monetary reserve. As C. Fred Bergsten, Assistant Secretary for International Affairs, Department of the Treasury told Congress:

> The international agreements that have been reached on demonetization of gold have very explicitly envisioned gradual phasing out over time. [Sale of the gold stock] may happen but I think it's essential for us to maintain flexibility in the pace at which we do sell the U.S. gold stock.[204]

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195. Act of Aug. 15, 1974, Pub. L. No. 93-373, 88 Stat. 445 (codified at 31 U.S.C. § 442 n. (1976)).

196. *Id.*

197. *Id.*

198. Holzer, *supra* note 17.

199. Trading With the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified at 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1917)).

200. *See* note 148 and accompanying text *supra.*

201. *See* Trading with the Enemy Act, ch. 106, § 5(b), 40 Stat. 411 (1917) (codified at 12 U.S.C. 95(a) (1976)).

202. *See* Holzer, *supra* note 17.

203. *See* SOLOMON, *supra* note 15, at 105-06. J. GOLD, SDRs, GOLD AND CURRENCIES: THIRD SURVEY OF NEW LEGAL DEVELOPMENTS 41 (1979). Treasury sales of gold are related to the Gold Reserve Act and the official price of gold set under the Act. Gold Reserve Act of 1934, ch. 6, § 2(a), 48 Stat. 337 (1934) (codified at 31 U.S.C. §§ 441, 490 (1976)). The Treasury uses part of the proceeds equal to the official price to retire gold certificates. The balance goes into the general account of the Treasury.

204. *Hearings before the Comm. on Banking, Housing and Urban Affairs on S.2843,* 95th Cong., 2d Sess. 37 (1978) [hereinafter cited as *Senate Hearings*].

While the U.S. Government sold gold overseas to support the dollar, Americans imported a wide variety of foreign gold coins and bullion.[205] This offset the benefit of the Treasury sales of gold to the U.S. balance of payments.[206]

Congress confronted this problem by enacting the Gold Medallion Act of 1978.[207] The Gold Medallion Act provides for the minting and sale of one-half ounce and one ounce gold medallions from the reserves of the U.S. Treasury.[208] The Act has two main objectives: (1) to permit U.S. citizens to buy and hold gold for investment purposes in relatively small amounts;[209] and (2) to compete with the Krugerrand and other foreign gold coins, so that less gold is imported into the United States and fewer dollars are exported.[210]

Although the current policy of the Congress is to demonetize the role of gold in the economy,[211] Congress, by enacting the American Arts Gold Medallion Act, recognized that many investors still attribute monetary qualities to gold.[212] Congress has not condemned or condoned this position.[213] Congress has recognized that many Americans, lacking confidence in paper currency, have exported U.S. dollars abroad to purchase foreign gold coin and bullion in order to hedge against inflation,[214] and has responded with the passage of the Gold Medallion Act. In acting to improve U.S. balance of payments through the American Arts Gold Medallion Act, Congress continues to exercise its power to regulate money and coin. Inherent in this power is the authority to define "money" and "coin."

4. Comity Among Nations

The concept of comity among nations is another factor which militates against state taxation of transactions involving the currency of foreign nations. The usual definition of comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[215] Comity, as a legal concept, represents a mode of state behavior.[216] It does not

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205. *Id.* (statement of Sen. Hatch).
206. *Id.* (statement of Sen. Garn).
207. American Arts Gold Medallions Act, Pub. L. No. 95-630, 92 Stat. 3679 (1978).
208. *Id.* § 402.
209. *Senate Hearings, supra* note 204, at 37 (statement of Sen. Helms).
210. *Id.* (statement of Sen. Hayakawa).
211. *Id.* (statement of C. Fred Bergsten, assistant secretary for International Affairs, Deparment of the Treasury).
212. *Id.* (statement of Sen. Lugar).
213. *Id.* (statement of Sen. Helms).
214. *See id.*
215. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).
216. L. OPPENHEIM, INTERNATIONAL LAW 34 n. 1 (8th ed. H. Lauterpacht ed. 1955).

involve absolute binding legal obligations; neither does it involve mere courtesy and good will.[217] The U.S. Supreme Court has long recognized the concept of comity on the "broad ground that international law is founded upon mutuality and reciprocity."[218]

The executive branch of the federal government, through the Treasury Department, recognizes this principle impliedly through actions and explicitly through public statement. During the Senate hearings on the American Arts Gold Medallions Act, Chairman William Proxmire questioned the U.S. Treasury Representative as follows:

> THE CHAIRMAN. Why does the U.S. Government classify the Kruggerand as a coin for customs purposes? If it were classified as a medallion it would cost duty and would discourage sales, wouldn't it?
>
> MR. BERGSTEN. (Asst. Secy. for Intl. Affairs, U.S. Dept. of Treasury). The reason is, it is defined by the issuing government as a coin. We have respected that in our tariff classification as does practically every other country in the world in their tariff classification. We have looked at that and seen what other countries do and they follow that same practice. It's a simple matter of accepting at face value what the producer says his product is.[219]

This special tariff treatment of gold coin and bullion supports the conclusion that these items are subject to uniform federal regulation, and that the states cannot collect sales taxes on transactions in these items. The U.S. government makes all policy decisions with respect to national monetary affairs and all international affairs, including monetary affairs. Its special tariff treatment of foreign gold coin and bullion is consistent with the power of the U.S. government to control all kinds of money, coin or currency, foreign or domestic, including bullion, in the interest of monetary uniformity.

5. Sole Federal Authority

The principle of federalism contained in the Constitution with respect to the regulation of money and foreign coin cannot be outweighed by state desire to tax transactions in foreign gold coin and bullion. Coin which is declared by its country of origin to be legal tender is money, and only the federal government can regulate it. The argument arises that such coins are not in fact money because no one and no market actually ever uses such coins as money. The principle of comity among nations, however, should prevent the United States or any state from unilaterally determining that such coins are not money where the

217. Hilton v. Guyot, 159 U.S. at 163-64.
218. *Id.* at 228. *See also* The Paquette Habana, 175 U.S. 677 (1900).
219. *See Senate Hearing, supra* note 204, at 38.

country of origin has by specific legislation determined that these coins are money.

Where coins are not declared to be legal tender, or where gold is in the form of bullion, history and tradition compel leaving the regulation of these items solely with the federal government. Since all consideration of gold as money has not absolutely ceased, the possibility, however unlikely at the present time, continues to exist that the United States could again consider gold to be a major form of money. The federal government should maintain sole authority over the regulation of gold coin and bullion.

III. IMPROPER INTRUSION INTO CONGRESSIONAL POWER TO REGULATE COMMERCE WITH FOREIGN NATIONS

A. *Congressional Jurisdiction to Regulate Commerce with Foreign Nations*

"Congress shall have power . . . to regulate commerce with foreign nations, and among the several states. . . ."[220] This clause of the U.S. Constitution gives the federal government the exclusive power to regulate foreign commerce.[221] Although the Constitution grants Congress the power to regulate both interstate and foreign commerce in parallel phrases, the evidence suggests "that the Founders intended the scope of the foreign commerce power to be greater."[222] U.S. Supreme Court cases, stressing the need for uniformity in the treatment of other nations, echo this distinction.[223] States may exercise authority over foreign com-

220. U.S. CONST. art. I, § 8, cl. 3.

221. Cooley v. Board of Wardens, 12 U.S. (1 How.) 299, 316-17, (1851).

222. Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 448 n. 12 (1979). *E.g.*, THE FEDERALIST No. 42, at 279-83. (J. Madison) (J. Cooke ed. 1961); 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (J. Madison) (1911). *See* Note, *State Taxation of International Air Carriers*, 57 NW. U.L. REV. 92, 101, & n.42 (1962); Note, *State Taxation of International Air Transportation*, 11 STAN. L. REV. 518, 525-26 & n.29 (1959); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 465-75 (1941) (concluded, after an exhaustive survey of contemporary materials that "[d]espite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations.' " *Id.* at 475).

223. *Japan Line*, 441 U.S. at 448 n.13. *E.g.*, Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904) ("exclusive and absolute" power of Congress over foreign commerce); Bowman v. Chicago & N.R. Co., 125 U.S. 465, 482 (1888) ("It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation."); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876) (regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected"); Gibbons v. Ogden, 14 U.S. (9 Wheat.) 1 (1824) (Johnson, J., concurring). *See also* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434 (1932). In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. The Court did not suggest that Congress' power to regulate foreign commerce could be so limited.

merce only where such exercise is not repugnant to the idea that only a single authority should exist.[224] Thus a discussion of the foreign commerce power must distinguish between what is purely foreign commerce and what is merely connected to the general subject of commerce with foreign nations.[225]

Where the exercise of power is intimately connected with the subject of foreign commerce, Congressional power over the area is exclusive.[226] In other situations, however, Congress and the states hold the general commerce power concurrently.[227]

B. *Gold is Intimately Connected With Foreign Commerce*

For centuries, people throughout the world have used gold as money.[228] For much of its history, the United States linked the value of its currency to the value of gold.[229] The international monetary system has also been closely linked with this most precious of metals.

In broad terms, the international monetary system involves the management of three processes: (1) the adjustment of balance-of-payments positions, includ-

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224. *See* Cooley v. Board of Wardens, 12 U.S. (1 How.) at 317-18. Several cases deal with the constitutional question as to the extent of a state's power to regulate foreign commerce. *See, e.g., Japan Line,* 441 U.S. at 434; Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976); K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed,* 435 U.S. 982 (1978). *Brown v. Maryland* held invalid a state law requiring an importer of foreign goods to obtain a state license for a fee on the grounds that federal control of foreign commerce is exclusive. 25 U.S. (12 Wheat.) 419 (1827). Modern decisions also preclude any state regulation of foreign imports or exports. *See Japan Line,* 441 U.S. at 452. *See also Michelin Tire,* 423 U.S. at 285. In *Japan Line,* the California Supreme Court held that the state could not levy a property tax on cargo containers owned by Japanese shipping companies that were temporarily in California ports. *Japan Line,* 441 U.S. at 453-54. The Court indicated that, in contrast to situations involving interstate commerce, state interests have little relevance where foreign commerce is concerned. *Id.* at 455-56. The court stated: "If other states follow California's example . . . foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously would make speaking with one voice impossible." *Id.* at 453. In *Michelin Tire,* the Court relied upon the import-export clause of the U.S. Constitution (art. I, § 10, cl. 2) to support the federal government's foreign commerce power. 423 U.S. at 283. The Court stated that a state tax which discriminates against foreign products undermines a uniform U.S. trade policy. *Id.* at 285. *See Japan Line,* 441 U.S. at 453.

225. *See* Cooley v. Board of Wardens, 12 U.S. (1 How.) at 316-19.

226. *Id.* at 316-17.

227. *Id.*

228. *Id.* The Keeper of Coins at the Ashmolean Museum of Oxford University begins the preface to his monograph on gold as follows:

> The number of single substances which have held the attention of man in every age, recorded or remembered, is not large. Most of them have been the simplest and most basic necessities of life: flour to eat, clay for bricks with which to build houses, wool for warm clothing, copper and iron for implements, and timber for a thousand constructional purposes. Gold does not come into the category of simple and basic necessities.

C. SUTHERLAND, GOLD, ITS BEAUTY, POWER AND ALLURE 8, *quoted in* Gold, *Gold in International Monetary Law: Change Uncertainty and Ambiguity,* 15 J. INT'L L. & ECON. 323 [hereinafter cited as *Gold in International Monetary Law*].

229. *See* note 15 and accompanying text *supra.*

ing the establishment and alteration of exchange rates; (2) the financing of payments imbalances among countries by the use of credit or reserves; and (3) the provision of international money (reserves).[230] Immediately following World War II, as part of the International Monetary Fund system, the United States supplied or absorbed dollar reserves through its buying or selling of gold in transactions with foreign monetary authorities.[231] Despite changes in the IMF system, which resulted in today's system of floating exchange rates, gold is still a major portion of the monetary stockpiles of most nations.[232]

The International Monetary Fund came into existence under the Articles of Agreement adopted at the United Nations Monetary and Financial Conference, at Bretton Woods, New Hampshire.[233] The original 1944 IMF Articles continued using gold as the foundation of the international monetary system by defining currency convertibility in terms of gold: "The Fund . . . may deem holdings of the currency of [members] which carry specified rights of conversion into another currency *or into gold* to be holdings of convertible currency for the purpose of the calculation of *monetary reserves*."[234] The Original Articles of Agreement provided for an official price of gold.[235] The IMF required individual members who wished their currency to be considered convertible in the Fund to deposit gold valued at the official price with the IMF.[236] This deposited gold served as the Fund's asset reserve for currency exchange.[237]

The Original Articles also tied the concept of the convertibility of a nation's currency to the willingness of that nation to exercise the undertakings of Article VIII(2)(3) and (4) by not placing restrictions on payments and transactions for current international transactions.[238] The Articles provided that "[a] member's

230. *See* SOLOMON, *supra* note 15, at 6.

231. *See Id.* at 18-20; *Gold in International Monetary Law, supra* note 228, at 324-25.

232. *See id.* at 264-89, 333-34; *Gold in International Monetary Law, supra* note 228, at 363. *See also* note 275 and accompanying text *infra.*

233. Articles of Agreement of the International Monetary Fund, Dec. 7, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (1947) [hereinafter cited as Original Articles], *amended* July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (1976) [hereinafter cited as First Amendment], *and* Apr. 1, 1978, IMF Board of Governors Res. No. 31-4 [hereinafter cited as Second Amendment]. The president was given authority to accept membership for the United States in the International Monetary Fund by Act of July 31, 1945, ch. 339 § 2, 59 Stat. 512 (codified at 22 U.S.C. § 286 (1945)).

234. Original Articles, *supra* note 108, art. XIX (g) (emphasis added). The Original Articles also defined "a member's monetary reserves" in terms of gold. *Id.* art. XIX (a).

235. "The Fund Shall prescribe a margin above and below par value for transactions in gold . . . and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin." *Id.* art. IV(2).

236. *Id.* art. III(3)(b).

237. *Id.* art. IV (8)(a). *See* COCHRAN, *supra* note 4, at 548; J. GOLD, SDRs, GOLD AND CURRENCIES 6 (IMF Pamphlet No. 26, 1979); SOLOMON, *supra* note 15, at 114-19.

238. Consonant with the IMF's purpose to "facilitate the expansion and balanced growth of international trade," Original Articles, *supra* note 108, art. I (ii), and to "assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade," *Id.* art. I (iv), the

holdings of convertible currencies means its holdings of the currencies of other members which are not availing themselves of the transitional arrangements under Article XIV, Section 2. . . ."[239]

During the period soon after World War II the IMF served as the official international market for currency exchange between certain nations.[240] The IMF and its gold reserves helped support international trade by nations with war-damaged currencies through the establishment of a system of international credit.[241] The United States, in turn, supported this system by continuing its policy of converting dollars into gold in both the marketplace and in transactions with other nations.[242] This system temporarily kept the price of gold relatively stable and maintained international confidence in the dollar.

IMF requires each member to undertake to: (1) avoid restrictions on the making of payments and transfers for international transactions; (2) avoid discriminatory currency practices; and (3) buy balances of its currency held by another member if the latter represents that it acquired the balances as the result of current transactions or that conversion is necessary in order to make payments for current transactions. *Id.* art. VIII (2)(3) and (4). "The buying member shall have the option to pay either in the currency of the member making the request or in gold." *Id.* art. VIII (4). These obligations define the concept of "market convertibility," which the parties intended to retain through each of the ensuing Amendments to the IMF Articles. Gold, *Convertible Currency Clauses,* 13 J. INT'L L. & ECON. 241, 244 (1979) [hereinafter cited as Gold]. Market convertibility was possible after many members "had relaxed exchange controls, abandoned the compulsory centralization of foreign exchange, and permitted dealings in foreign exchange through commercial channels." *Id.* at 245. The IMF defined the term "payments for current transactions" as:

> payments which are not for the purpose of transferring capital, and includes, without limitation:
>
> (1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
>
> (2) Payments due as interest on loans and as net income from other investments;
>
> (3) Payments of moderate amount for amortization of loans or for depreciation of direct investments;
>
> (4) Moderate remittances for family living expenses.

Original Articles, *supra* note 233, art. XIX(i).

239. Original Articles, *supra* note 233, art. XIX(d). The quoted reference to Article XIV(2) refers to that provision which allows members who, because of their post-World War II economic difficulties, cannot freely comply with the undertaking to not restrict payments and transactions for current international transactions. *See* note 238 *supra.* These members may temporarily restrict such payments. Such action, however, renders that nation's currency nonconvertible. Original Articles, *supra* note 233, art. XIX(d).

240. *See* COCHRAN, *supra* note 4, at 547. *See generally* SOLOMON, *supra* note 15, at 1-33, 114-19. Exchanges between nations include transactions with the central banks or treasuries of those nations. *Id.*

241. SOLOMON, *supra* note 15, at 9-20.

242. *Id.* at 114-19. From 1934 on, the United States had promised to sell gold for dollars and dollars for gold to foreign monetary authorities at the fixed prices of $35 an ounce, and this commitment had been incorporated into the arrangements made at Bretton Woods. LOWENFELD, *supra* note 15, at 93. The action closest to a formal commitment, prior to the IMF Agreement, was a statement by the Secretary of the Treasury, in 1934, on the occasion of the fixing of the new weight of the gold dollar pursuant to the Gold Reserve Act of 1934, ch. 6, § 2(a), 48 Stat. 337 (codified at 31 U.S.C. § 408a (1976)), which provided: "In connection with the announcement today [Proclamation No. 2072, *reprinted in* 48 Stat. 1730 (1934)] that the Treasury will buy gold, the Secretary of the Treasury states that, until further notice, he will also sell gold for export to foreign central banks whenever our exchange rates with gold standard currencies reach export point." 20 FED. RESERVE BULL. 69 (1934), *quoted in* LOWENFELD, supra note 15, at 135 n.g. The Presidential Proclamation to which the Secretary's announcement referred

The 1967 devaluation of the British pound,[243] however, precipitated a major world loss of confidence in the dollar.[244] In response to the first rush on gold immediately after devaluation — about $580 million in the week of November 20-24, 1967 — the governors of the central banks of seven nations announced a series of reciprocal credit arrangements designed "to ensure by coordinated action orderly conditions in the exchange markets and to support the present pattern of exchange rates based on the fixed price of $35 per ounce of gold."[245] Although this action was successful in reducing the worldwide sale of sterling and dollars for a short time, the United States still faced an unacceptable continuing depletion of its gold reserves into 1968.[246] In March 1968, the United States repealed its promise to back privately-held dollars by gold,[247] and the international banking community announced the cessation of its efforts to maintain the parity between the official and private prices of gold.[248]

Meanwhile, another problem of the international monetary system had been occupying economists and political leaders for close to a decade. Although the framers of the original IMF Agreement sought to promote exchange stability, to minimize artificial restraints on international transactions, and to assist nations with balance of payments difficulties by creating a pool of assets that could be drawn on for temporary periods, nothing in the Articles of Agreement provided

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said: "This proclamation shall remain in force and effect until and unless repealed or modified by act of Congress or by subsequent proclamation; and notice is hereby given that I reserve the right by virtue of the authority vested in me to alter or modify this proclamation as the interest of the United States may seem to require." *Id.*

On May 20, 1949, Secretary of the Treasury John W. Snyder wrote to the Managing Director of the IMF as follows:

> My Dear Mr. Gutt: In connection with the obligations of members of the International Monetary Fund under Article IV, Section 4(b), of the Articles of Agreement of the Fund, I wish to advise you that the Government of the United States, for the settlement of international transactions, in fact freely buys and sells gold within the limits prescribed by the Fund under Article IV, Section 2. The policy of the United States in this respect has not been changed since prior to the signing and entry into force of the Articles of Agreement.

Id.

President Kennedy gave a personal pledge to maintain his country's official price of gold in his first State of the Union message on January 30, 1961. President's State of the Union Message, [1961] PUB. PAPERS 21, item 11 (Jan. 30, 1961). He amplified the pledge in a Special Message on Gold and the Balance of Payments a week later. *Id.* at pp. 59-60, item 23. *See* LOWENFELD, *supra* note 15, at 135-36.

243. *See generally* LOWENFELD, *supra* note 15, at 45-82.

244. *See generally id.* at 91-93. Since the United States was prepared to convert dollars held by foreign official holders into gold without limit at a fixed rate, foreigners could express a lack of confidence in the dollar by selling dollars for gold. A country's own currency does not form part of that country's reserves, so an exchange of gold for dollars meant a reduction in the United States' reserves. *Id.* at 92.

245. N.Y. Times, Nov. 27, 1967, at 1, col. 6-7; at 79, col. 3-5, *quoted in id.*, at 92-93. These nations created short term reciprocal credit lines whereby, for example, the Bank of England could draw a given amount of dollars from the Federal Reserve Bank of New York and the Federal Reserve Board could draw a corresponding amount of pounds from the Bank of England. *Id.* at 73.

246. *See* LOWENFELD, *supra* note 15, at 92-95.

247. *See* note 15 *supra.*

248. *See* note 187 *supra.*

for growth in reserve assets in proportion to increase in overall economic activity.[249] Many economists and monetary authorities of the international monetary system thought, in the 1960's, that world reserves were deficient in several respects. First, the total of world reserves was not keeping up with the total of economic activity. By 1967, the ratio of world reserves to the volume of imports had declined from about fifty-seven percent, in 1958, to thirty-seven percent. Notwithstanding the United States, whose reserves were declining as other nations' reserves were growing, world trade measured by imports increased in the period from 1950-1966 by about eight percent per year, while reserves increased by only five and one-half percent per year. Second, by 1967, nations held over forty percent of world reserves in the form of dollars and sterling, both currencies increasingly becoming a cause for anxiety. Third, the gold component of reserves depended in large part on production decisions by South Africa, on industrial uses, and on purchases by hoarders and speculators, none of which "bore any rational relation to the needs of the world economy."[250]

In response to these problems, the members and Board of Governors of the IMF passed the First Amendment to the Articles, effective in 1969.[251] The First Amendment's main objective was to replace the traditional reserve assets with "Special Drawing Rights" (SDRs),[252] a new unit of international exchange which the IMF could allocate to members in order to provide them with a supplement to existing reserve assets and, in this way, meet the long-term global need for reserves.[253] Under the plan, a country in deficit could use SDRs to settle its accounts by selling them to a country designated by the Fund. The designated country would be obligated to take the SDRs and to provide, in return, convertible currency, which the country in deficit could then use to extinguish foreign balances.[254]

In answer to the question of which currency the designated nation could provide in return for the SDRs which the IMF forced it to accept, the First Amendment created a new concept of convertibility, "currency convertible in fact."[255]

> Currency convertible in fact means:
> (1) . . . the currency of a participant that
> (i) has accepted the obligations of Article VII, Sections 2, 3, and 4, or

249. *See* LOWENFELD, *supra* note 15, at 101-104.
250. *Id.* at 102-03.
251. *See* note 233 *supra*.
252. First Amendment, *supra* note 233, Intro. Art. (i). Gold, *supra* note 238, at 245.
253. *Id.* First Amendment, *supra* note 233, art. XXIV(i); Gold, *supra* note 238, at 248.
254. Gold, *supra* note 238, at 248. First Amendment, *supra* note 233, art. XXV. LOWENFELD, *supra* note 15, at 105.
255. Gold, *supra* note 238, at 248.

> (ii) for the settlement of international transactions in fact freely buys and sells gold within the [par value] limits prescribed by the Fund . . . .[256]

The First Amendment retained the definition of currency convertibility, in terms of either gold or of an undertaking to comply with Article VIII(2)(3) and (4), as defined in the Original Agreement.[257] The value of SDRs was, according to the First Amendment, to be equal to 0.888671 gram of fine gold,[258] then precisely equal to one U.S. dollar at its rate of $35 per ounce.[259]

The Second Amendment of the IMF Articles of Agreement, which took effect in 1978,[260] had the two main objectives of gradually reducing the role of gold in the international monetary system and of advancing the SDR to the position of principal reserve asset in the system.[261] The Second Amendment eliminated any definition of currency convertibility, producing "what might seem to be the strange result that the central legal instrument of the international monetary system contains no formal definition of a convertible currency."[262] This development occurred because the distinction between the currencies that met the definition of convertibility and those that did not ceased to be necessary in the financial activities of the IMF.[263] Furthermore, the United States pushed for the elimination of the definition because after August 15, 1971, when it repudiated official convertibility of the U.S. dollar into gold,[264] the United States wanted to avoid any express or implied obligation to resume official convertibility under Article VII.[265]

The language of convertibility survived, in the Second Amendment, only in Article VIII(4).[266] Joseph Gold, then-General Counsel and Director of the IMF's Legal Department,[267] explained the reason that the Second Amendment retained that Article, with its references to convertibility: "[T]he explanation is that some other members were unwilling to appear to concur in the demise of the official convertibility of the U.S. dollar . . . ."[268]

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256. First Amendment, *supra* note 233, art. XXXII(b).
257. For a discussion of Article VIII (2), (3), & (4), *see* note 238 and accompanying text *supra*.
258. Gold, *supra* note 238, at 252; First Amendment, *supra* note 233, art. XXI(2).
259. Gold, *supra* note 238, at 253. LOWENFELD, *supra* note 15, at 189.
260. Gold, *supra* note 238, at 253. *See* note 233 *supra*.
261. Solomon, *supra* note 15, at 72. Second Amendment, *supra* note 233, art. VIII(7); *Gold in International Monetary Law*, *supra* note 228, at 351-52.
262. Gold, *supra* note 238, at 252.
263. Gold, *supra* note 238, at 40, 252. The fact that the currency of a member did not meet the definition did not necessarily mean that the member was in a weak balance of payments and reserve position. *Id.*
264. *See* note 15 *supra*.
265. Gold, *supra* note 238, at 252.
266. *See* note 238, *supra*.
267. Gold now holds the title of Senior Consultant to the IMF.
268. Gold, *supra* note 238, at 253.

In place of "currency convertible in fact," the Second Amendment created the new concept of "freely useable currency," meaning: "a member's currency that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets."[269] The Fund determined that, initially, the freely useable currencies were the German mark, French franc, Japanese yen, pound sterling and U.S. dollar.[270]

The SDR is no longer defined in terms of gold, but the Second Amendment authorizes the IMF to determine the method of its valuation.[271] Joseph Gold explained this development as follows:

> Even before the Second Amendment, the Fund found, after the withdrawal by the United States of its undertaking to buy and sell gold freely,[272] that there was no currency that had a gold value and therefore no currency that could be the medium for determining the exchange rates of currency in relation to the SDR.[273]

All three versions of the IMF Articles of Agreement have dealt specifically with gold. The legal role of gold was central to the original articles. Although this role declined under the First and Second Amendments, "[t]he legal changes have not added to the Decalogue the commandment that thou shalt not covet gold. Although gold may not reconquer the legal ground it has lost, it cannot be dismissed as irrelevant in international monetary affairs."[274] According to Joseph Gold:

> It is a widespread view among members that gold continues to be a reserve asset and continues to have monetary functions. This view persists notwithstanding the change in the legals status of gold and the absence of its use in official settlements or in support of currencies. Gold is still a reserve asset that is desired by many members, not only because it has appreciated in value and may appreciate further, but also because it gives a sense of confidence to its owners and to

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269. Second Amendment, *supra* note 233, art. XXX(f).

270. Decision No. 5719-(78-46), Mar. 31, 1978, [1978] IMF ANN. REP. 127, *cited in* Gold, *supra* note 238, at 256 n.36.

271. The IMF approved a system, effective July 1, 1974, whereby the value of the SDR would be based on a "basket of 16 currencies," weighted roughly in proportion to the exports of goods and services on the part of the countries that issued them. Decision No. 4233-(74/67) S2 of June 13, 1974, *summarized in* 3 IMF SURVEY 177 (1974), 3 IMF SURVEY 209 (1974), *reprinted in* [1974] IMF ANN. REP. 116. "Thus, as currencies floated up and down against one another, the value of the SDR would remain in the center, appreciating against the weaker and depreciating against the strong. By definition, the SDR's value would remain constant in terms of all of the currencies composing the basket." LOWENFELD, *supra* note 15, at 190.

272. *See* note 15 *supra*.

273. *Gold in International Monetary Law*, *supra* note 228, at 353-54.

274. *Id.* at 324.

> others. According to unofficial reports, some monetary authorities in the Middle East, Southeast Asia, and Latin America have purchased gold in the market in order to diversify their reserves. The continuing attitude to gold is no surprise to the drafters of the Second Amendment, because, as realists, their objective did not go beyond a gradual reduction in the role of gold.[275]

The participants in the European Monetary System have made an interesting new use of gold. Each participant in the exchange rate and intervention arrangements of that System must contribute twenty percent of its gold holdings to the European Monetary Cooperation Fund in return for European Currency Units.[276] The next stage of the System's development involves a "final transfer" of contributed reserve assets to a central financial authority, "an internationalization or centralization of a substantial amount of gold."[277] However, Joseph Gold points out that "[i]t is said that members of the community are unwilling to make an outright alienation of [their] gold."[278] Perhaps this unwillingness to alienate gold and the related hesitancy in Europe toward the IMF's abandonment of the gold standard are both explained in a statement by Robert Solomon, a former international economist for the Federal Reserve Board:

> The basis for [the European desire to preserve a significant role for gold] is difficult to pin down, for it is never articulated publicly. It seems to involve, in the last analysis, a fear that international cooperation may some day founder and the IMF become unworkable or, at least, that it might function in a manner inimical to the interests of Europe. . . . In a period of monetary hostility, if worse came to worst, the use of [SDRs] could be blocked. This leads them to see the preservation of a significant role for gold as a fall-back or fail-safe mechanism in the event that international cooperation should give way to international monetary enmity.
>
> Those who hold this view are able to point to the fact that a large proportion of the reserves of the United States is already in the form of gold. Thus the United States is not taking many risks as to the future usability of its reserves.[279]

In fact, Section 405(b) of the Currency Act supports the view that the dollar is or might soon be backed by gold. This section provides that:

> The Secretary of the Treasury is authorized to issue gold certificates in such form and in such denominations as he may determine, against any gold held by the United States Treasury. [The sole

275. *Id.* at 362-63.
276. *See id.* at 365-66.
277. *Id.* at 366.
278. *Id.*
279. SOLOMON, *supra* note 15, at 334.

> limitation is that the] amount of gold certificates issued and outstanding shall at no time exceed the value, at the legal standard provided in section 449 of this title on October 19, 1976, of the gold so held against gold certificates.[280]

Although Congress repealed Section 449, effective April 1978,[281] Section 405(a) remains in effect, and incorporates the former Section 449 standards.[282] Section 449 provided for a valuation of the dollar at $42 2/9 per fine troy ounce of gold. It also provided that the par value of the U.S. dollar would be one dollar equals SDR .828948.[283] While the United States does not currently back its dollar by gold,[284] the laws of the United States stand ready to support a future return to the gold standard.

Furthermore, Section 449a of the Par Value Modification Act authorizes the Treasury Secretary "to maintain the value in terms of gold of the holdings of United States dollars of the International Monetary Fund . . . to the extent provided in the articles of agreement of such institutions."[285] Since the Second Amendment provides that a member may not maintain the external value of its currency in terms of gold,[286] the United States may not, due to Section 449a, maintain the value of the IMF's dollar holdings in gold.[287] Should a future change in the IMF Articles provide for a return of the gold standard to the international monetary system, existing U.S. law can accommodate that change.

The Reagan Administration came into office advocating a return to the gold standard in both the domestic and international monetary systems.[288] The U.S. Treasury dumped gold by auction in the late 1970's, ostensibly to show the world that the United States was not dedicated to a policy of retaining gold in its reserves,[289] but some observers consider this action to be "evidence of a continuing monetary role for gold because the United States was using gold in dealing with the deficit in its balance of payments. According to this view, the United States was no longer trying to demonstrate the monetary irrelevance of the price [of gold] or to undermine the vertiginous rise in price but to take advantage of that price in support of the U.S. dollar."[290]

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280. 31 U.S.C. § 405b (1981) (emphasis added).

281. 31 U.S.C. § 449 (1976) *repealed by* Act of Oct. 19, 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2661.

282. 31 U.S.C. § 405(b) (1976); Gold, *supra* note 238, at 40.

283. 31 U.S.C. § 449 (1976), *repealed by* Act of Oct. 6, 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2661.

284. *See* note 15 *supra*.

285. 31 U.S.C. § 449a (1976).

286. Second Amendment, *supra* note 233, art. IV(2), (6).

287. *See* note 285 and accompanying text *supra*.

288. *E.g.*, Farnsworth, *Golden Days*, N.Y. Times, Dec. 8, 1980, at D2, col. 2; Mundell, *Gold at $10,000*, N.Y. Times, Oct. 19, 1980, at D2, col. 5; Silk, *Reagan's Gold Advisors*, N.Y. Times, Mar. 14, 1980, at D2. col. 1; Beckner, *Gold, Tenacious, Is Still An Either Ore*, N.Y. Times, Apr. 25, at 1980, at 27, col. 1 [hereinafter cited as Beckner].

289. *Gold in International Monetary Law*, *supra* note 228, at 365; Beckner, *supra* note 288.

290. *Gold in International Monetary Law*, *supra* note 228, at 365 (citing Marsh, *A Monetary Renaissance*,

Gold remains a medium of international exchange in spite of a recent U.S. policy to demonetarize it and a part of the foundation of the world system of commerce. Even if one argues that recent U.S. policy has temporarily removed gold from international commerce, gold is nonetheless recognized by the great weight of history and by the current laws of the United States as a major factor in the valuation of the U.S. dollar. Recent events show the possibility of an upcoming change in the U.S. policy of demonetarization. Such a change would weaken any argument that gold is not intimately connected to "commerce with foreign nations" under the Constitution.

C. *A State Must Meet a High Standard to Defeat a Challenge Based on Interference with Foreign Commerce*

The recent decision of the U.S. Supreme Court in *Japan Lines, Ltd. v. County of Los Angeles*[291] addressed the propriety of State taxation of instrumentalities of foreign commerce. At issue in *Japan Lines* was the taxation of shipping containers used exclusively in foreign commerce. California sought to impose a tax on the containers under the state ad valorem property tax.[292]

Writing for the majority, Justice Blackmun articulated two tests applicable to state taxes on foreign, as opposed to domestic, commerce. First, the Court restated the test of *Complete Auto Transit v. Brady* which requires a showing that: (1) the res and taxing state have a substantial nexus to justify taxation; (2) the tax is fairly apportioned; and (3) the tax is nondiscriminatory.[293] Second, the Court held that when a state seeks to tax an instrumentality of foreign commerce, two other considerations come into play:[294] "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments."[295] Applying these tests, the Court struck down the California tax levied upon the containers domiciled in Japan.[296] The Court found that the state tax interfered with national policy for federal uniformity, stating, "[i]f other States follow California's example (Oregon already has done so), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter."[297]

Finan. Times of London, June 12, 1979, at 14, Gold, *A Myth Comes Back to Life,* Financial Times of London, Dec. 24, 1979, at 8.

291. *Japan Line,* 441 U.S. at 434.

292. *Id.* at 436-37.

293. Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977).

294. *Japan Line,* 441 U.S. at 446.

295. *Id.* at 451.

296. *Id.* at 451-53.

297. *Id.* at 453.

The Court specifically rejected the three major objections of appellants: (1) that any multiple taxation is attributable to Japan's full taxation, rather than California's apportioned taxation, of the containers; (2) that multiple taxation could be cured by Congressional legislation or international agreement;[298] and (3) that some overlapping of tax is permissible.[299] In rejecting each of these claims, the Court relied upon the fact that the objects sought to be taxed were in foreign rather than domestic commerce. The Court stated:

> The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation. But it long has been "accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. . . ." Appellees' argument, moreover, defeats, rather than supports, the clause it aims to promote. For to say that California has created a problem susceptible only of congressional — indeed only of international — solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. *California may not tell this Nation or Japan how to run their foreign policies.*[300]

The Court completely rejected the concept of any permissible overlapping of taxes in a foreign commerce context stating that "[t]his case concerns foreign commerce. Even a slight overlapping of tax — a problem that might be deemed *de minimis* in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."[301] The same reasoning applies to collection of sales taxes on transactions involving foreign gold coin and bullion.

D. *A State Sales Tax on Foreign Gold Coin and Bullion Cannot Meet the High Standard Needed to Outweigh Its Interference With Foreign Commerce*

Japan Lines established five criteria which a State tax must meet to be valid when applied to an instrument of foreign commerce: nexus, proper apportionment, nondiscrimination, no risk of multiple taxation, and lack of interference in an area requiring uniform federal regulation.[302] A sales tax on gold transac-

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298. *Id.*
299. *Id.* at 455.
300. *Id.* at 454-55 (emphasis added). *See also* Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). *Accord* Hughes v. Oklahoma, 441 U.S. 322, 326 (1979); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977).
301. *Japan Line,* 441 U.S. at 456.
302. *See* notes 293-95 and accompanying text *supra*.

tions would satisfy *only* the first requirement. That is, the transaction of gold coin and bullion sales by state resident retailers within the borders of the state would constitute proper nexus.

As for proper apportionment, a sales tax would be apportioned according to the number of times that the coin or bullion is sold or traded. Since the use of gold coins will presumably always be one of monetary investment, a sales tax would not be apportioned according to the taxed item's value or use.[303] Concerning the third criterion, a sales tax might or might not be discriminatory, depending on whether the tax applies to U.S. gold coins or medallions, and whether it distinguishes among various foreign gold coins.[304]

Concerning the fourth criterion, the risk of multiple taxation is extreme. The very nature of coin and bullion necessitates that these items change hands often. Depending on the states in which the gold coin or bullion is sold, it would be subjected to various degrees of multiple taxation. Should various states discriminate in taxing different types and nationalities of gold coins, they could create the kind of animosities that Madison in 1787 feared multiple currencies would cause.[305]

Finally, taxation of gold coin and bullion is an area reserved for uniform federal regulation. State sales taxes interfere with uniformity in this area of national concern. State sales taxes also could give rise to retaliatory taxation by foreign nations. If one accepts the conclusion that a Krugerrand, because it is legal tender, is "currency of the Realm" and thus not taxable, the question arises as to whether taxation of a similar non-legal tender Mexican peso would constitute a statement in support of apartheid. Should states be allowed to make these kinds of political decisions, whether innocent or intended, the result would be an unconstitutional infringement upon the exclusive federal authority established under the foreign commerce clause of the U.S. Constitution.

IV. VIOLATION OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

A. *The Most-Favored-Nation Principle of Article1(1) of GATT*

The United States signed the original General Agreement on Tariffs and Trade (GATT) at Geneva on October 30, 1947.[306] Today, the GATT has

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303. *See Japan Line*, 441 U.S. at 445; Complete Auto Transit, Inc. v. Brady, 430 U.S. at 285. *See also* Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959) (a state must apportion its tax in accordance with local activities within the state).

304. *Japan Line*, 441 U.S. at 445.

305. THE FEDERALIST No. 44, at 300-01 (J. Madison) (J. Cooke ed. 1961). *See* note 36 and accompanying text *supra*.

306. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

eighty-three contracting signatories, 3 provisional signatories, and twenty-five countries or territories which comply in fact.[307]

The explicitly stated purpose of the GATT is to provide "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce. . . ."[308]

The primary principle of GATT, which facilitates the accomplishment of GATT's stated purposes, is the most-favored-nation principle.[309] In its unconditional form,[310] the most-favored-nation principle embodies the situation where one country promises to extend to another "the most favorable trade concessions it has granted, or may grant, to any third country."[311] According to Article I(1) of GATT, signatories must apply the most-favored-nation principle with respect to "customs, duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports."[312] The most-favored-nation clause provides that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[313]

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307. GATT, GATT ACTIVITIES IN 1979 AND CONCLUSION OF THE TOKYO MULTILATERAL TRADE NEGOTIATIONS (1973-1979), at 86 (1980).

308. GATT, *supra* note 137, preamble.

309. Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most-Favored-Nation Principle*, 12 LAW & POL'Y INT'L BUS. 59, 60 (1980) [hereinafter cited as Hufbauer, Erb & Starr].

310. There are two "forms" of the most-favored-nation principle, conditional and unconditional. *Id.* at 59. Nations adopting the principle in unconditional form automatically extend trade benefits to "like products" of other countries unless the particular country is excluded expressly from the trade benefit. SUBCOMM. ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE, 96TH CONG., 1st SESS., MTN STUDIES PT. 1: AGREEMENTS BEING NEGOTIATED IN THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA 6 (Comm. Print 1979). Nations adopting the conditional most-favored-nation principle would grant trade benefits only on receipt of reciprocal benefits from the other country. *Id.*

311. Hufbauer, Erb & Starr, *supra* note 309, at 59. It is important to note that:

> The most-favored-nation clause has not yet crystallised into a rule of international customary law. It is pre-eminently an optional standard which derives its validity from the treaties in which it is embodied. No state can demand it as a matter of right except on the basis of a treaty and it generally operates on the basis of reciprocity. Therefore, discrimination in matters of tariff and trade is not illegal *per se*, however undesirable it may be from a purely economic or political point of view if it does not violate, or deny, rights embodied in a particular treaty. Trade discrimination in international law becomes meaningful only in relation to the most-favored-nation clauses and the principle of non-discrimination contained in various bilateral and multilateral treaties.

K. HYDER, EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW 33-34 (1968) [hereinafter cited as HYDER].

312. GATT, *supra* note 306, art. I(1).

313. *Id.* The language employed in the most-favored-nation clause is not very precise, however, and wide latitude for different and often conflicting interpretations exists. HYDER, *supra* note 311, at 55. "For instance, terms like charges of any kind, or any advantage, favor or privilege or immunity, and in respect of duties and charges can often be manipulated in such a way as to evade the most-favored-

A state sales tax on foreign gold coin and bullion violates the most-favored-nation principle if the tax distinguishes between imports from GATT-contracting parties.[314] For example, if a state decides to exempt from tax sales of legal tender gold coins like Kruggerands and Canadian Maple Leafs, but to tax sales of similar gold coins such as Mexican gold pesos or gold bullion such as Swiss bank wafers, a violation of Article I(1) of GATT occurs.[315] Under the most-favored-nation principle, a government must afford equal treatment to "like products."[316] Discriminatory state treatment of similar foreign goods, such as the disparate taxing method for the sale of gold coins, causes the United States to be in violation of its commitments under Article I of the GATT.[317]

B. *The Natinal Treatment Principle of Article III(2) of GATT*

In keeping with its liberalized trade objective, and in order to "preclude the dissipation of concessions through restrictive measures imposed after imports have entered a country,"[318] GATT contains various provisions whose object is to limit trade barriers to the duties imposed at the customs boundary.[319] The provision most relevant to this discussion is Article III(2), the national treatment principle, which provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principle set forth in paragraph [1(10)].[320]

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nation obligations." *Id.* In addition, although the GATT embodies a strong statement of the unconditional most-favored-nation principle in Article I, paragraph 1, several other provisions qualify the principle. Hufbauer, Erb & Starr, *supra* note 309, at 63-64. Among the provisions qualifying the principle are Article XXV, which provides for the waiver of GATT obligations "in exceptional circumstances;" Articles XX and XXI, the general and security exceptions; and, Article XIV, which provides exceptions to the rule of non-discrimination. *Id.* at 64.

314. *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 249-72 (1969) [hereinafter cited as JACKSON].

315. *Id.*

316. *Id.* at 258.

317. *Id.* at 273.

318. Note, *United States Participation in the General Agreement on Tariffs and Trade,* 61 COLUM. L. REV. 505, 547 (1961) [hereinafter cited as *United States Participation*].

319. *Id.*

320. GATT, *supra* note 306, art. III(2). Article I(10) of GATT provides as follows:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Id. art. I(10).

The overall goal of the national treatment principle is to prohibit a nation from favoring products of domestic origin over imported like products.[321] "National treatment" in GATT means that imported goods should receive the same treatment as goods of local origin with respect to matters under government control, such as regulation and taxation.[322] This provision recognizes that the imposition of internal taxes is discriminatory under GATT,[323] in this regard, and possibly violative of the most-favored-nation principle set forth in Article 1(1).

U.S. courts have frequently considered the issue of discriminatory tax with respect to GATT obligations. In *China Liquor Distribution Co. v. United States,*[324] the court examined the taxation scheme for imported and domestic distilled spirits. By law, the government taxes spirits entered or withdrawn above proof, i.e., over fifty percent alcohol, on the volume the spirits would have if diluted to fifty percent, while those spirits entered or withdrawn under proof, are taxed on the actual volume.[325] Domestic distillers pay the tax on their product at or above

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321. JACKSON, *supra* note 314, at 273. Note, *State Buy-American Laws — Invalidity of State Attempts to Favor American Producers,* 64 MINN. L. REV. 389, 392-93 (1980) [hereinafter cited as *State Buy-American Laws*]. Article III(4) of GATT further provides that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

GATT, *supra* note 306, art. III(4).

322. *Id.*

323. A tax can be either discriminatory on its face or indirectly discriminatory because it results in the discouragement of exports. *United States Participation, supra* note 318, at 548. Although a literal reading of Article III might suggest that any tax having a protective effect upon domestic goods would violate the Agreement, in practice the proposition that a tax non-discriminatory on its face is violative of the Agreement has not been supported by the contracting parties. *Id.* Rather, the parties involved in such a situation usually negotiate their differences, striving to accommodate the most crucial interests of each. *Id. But see* R. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 110-20 (1975) [hereinafter cited as HUDEC]. Hudec points out that "[t]he major trading countries had long considered the widespread use of discriminatory internal taxes to be a particularly serious breach of good commercial policy and one of their major goals in the GATT/ITO negotiations had been a strong 'national treatment' provision prohibiting such discrimination absolutely." *Id.* at 113. Hudec describes the Franco-Brazilian dispute over a Brazilian tax law which required the tax on imported goods to be double the tax for domestic goods. *Id.* at 111. Brazil argued that the law did not violate Article III for two reasons. First, under the Protocol of Provisional Application, Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, through which GATT is applied, one provision granted a reservation from GATT obligations for existing legislation. Brazil argued that since its passing of the tax law in 1945, the reservation applied, and therefore, the tax was not violative of Article III. HUDEC, *supra,* at 111. Secondly, Brazil argued that even if the reservation did not apply, the tax law could not be violative of Article III unless France could show some actual trade damage as a result. *Id.* Brazil inevitably lost both of these arguments, as Hudec points out, since the major trading countries were not about to undercut the strong "national treatment" provision of Article III through "liberal interpretation of the Protocol, or through a trade damage requirement that would make the law uncertain in every case." *Id.* Although the complaint arose in 1949, Brazil did not adopt a uniform taxation system until November, 1957. *Id.* at 120.

324. 343 F.2d 1005 (C.C.P.A. 1964), *cert. denied,* 380 U.S. 962 (1965).

325. *Id.* at 1006. The relevant tax law was I.R.C. § 5001(a) (1954).

proof, add water and bottle thereafter. Importers, however, can only minimize the tax if they bottle after importation, which not all are able or willing to do. The court, in holding that the tax did not contravene the provisions of GATT, relied heavily on the earlier customs court decision in *Bercut-Vandervoort & Co., Inc. v. United States.*[326] *Bercut* involved the almost identical issue. In this case, the customs court concluded that the tax did not violate GATT, because the tax had been long established and had also consistently and uniformly been applied.[327] In *Select Tire Salvage Co. v. United States,*[328] the Court of Claims took judicial note of the *China Liquor* case, noting that "GATT could not have been intended to demand the impossible task of eliminating even inadvertent and *de minimis* discriminations."[329] An analysis of the *Bercut* and *China Liquor* cases shows that the decisions were unacceptable "under any reasonable interpretation of Article III."[330] The decisions overlooked the existence of the word "indirectly" in Article III, "which seems designed to cover the exact situation presented in the *Bercut-Vandervoort* [and *China Liquor* cases]; one in which the internal tax, although non-discriminatory on its face, forces the importer either to forego certain advantages that accrue from foreign production, in this case bottling abroad, or be subject to a higher impost."[331]

The tax in the *Bercut* and *China Liquor* cases was not discriminatory on its face and was, therefore, perhaps less invidious and easier to uphold than a facially discriminatory tax. However, a state sales tax which taxes imported gold coin and bullion sales while exempting gold medallions struck by the U.S. Treasury under the American Arts Gold Medallion Act[332] or other laws would clearly violate the national treatment principle of GATT.[333]

The U.S. government specifically offers gold medallions for sale in order to compete with Krugerrands issued by the Government of South Africa and other foreign gold in various forms.[334] The medallions struck under authority of the Act in the coining department of the Philadelphia mint are in two sizes: one-half ounce and one ounce of troy gold.[335] The requisite fineness is nine parts of fine gold to one part of alloy.[336] The medallions bear the imprint of a sovereign nation, the United States of America. Criminal penalties under U.S. law protect

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326. 46 C.C.P.A. 28, *cert. denied,* 359 U.S. 953 (1959).

327. *Id.*

328. 386 F.2d 1008 (C.C.P.A. 1967).

329. *Id.* at 1013.

330. *United States Participation, supra* note 318, at 550.

331. *Id.* at 550-51.

332. American Arts Gold Medallion Act, Pub. L. No. 95-630, § 402, 92 Stat. 3679 (1978).

333. Such a situation would be directly analogous to the Franco-Brazilian situation described by Hudec above. *See* note 316 *supra.*

334. *See* note 204 *supra.*

335. American Arts Gold Medallion Act, Pub. L. No. 95-630, §§ 403(a)-404, 92 Stat. 3679 (1978).

336. *Id.*

the medallions from counterfeiting.[337] Representatives of the U.S. Treasury opposed the Act permitting this minting because they thought that Americans would use the medallions as legal tender.[338] The Treasury sells these coins competitively with other gold coins, such as the Krugerrand, the Canadian Maple Leaf and the Mexican Gold Peso — each of which bears the imprint of a sovereign nation.

Dissimilarities exist among the medallions and bullion[339] and Krugerrands.[340] An argument that the medallions and the Krugerrands are not "like products," within the ambit of Article III(2) might be reasonable. However, such an argument would not be persuasive for several reasons. First, given the special nature of gold, buyers are primarily interested in the value of the gold itself, not its markings. The basis for determining the price of all gold, whether finished or unfinished, a medallion or a Krugerrand, is the fair market value of the gold, which the market determines solely by the weight and fineness of the gold. The medallions, therefore, must be "like products" since any of the differences are immaterial. Second, "the major trading nations regard the imposition of internal taxes to be a particularly serious breach of good commercial policy."[341] The policy against discriminatory taxes would certainly outweigh the argument that the medallions were not like products, in light of the weaknesses in that argument.[342]

Finally, and most importantly, the medallions are directly competitive with Krugerrands, other gold coins, wafers and bullion on the gold market. The interpretation of Article III positively includes within its scope "competitive and substitutable products."[343] In fact, the original text of the Article contained the language:

> [I]n cases in which there is no substantial domestic production of like products of national origin, no contracting party shall apply new or increased internal taxes on the products of the territories of other contracting parties for the purpose of affording protection to the production of directly competitive or substitutable products which are not similarly taxed. . . .[344]

Although the text of the Article eliminated this language when the 1948 amendments became effective, GATT members added Interpretive Note No.

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337. *Id.* § 405.
338. *See Senate Hearings, supra* note 204, at 25.
339. The medallions are a finished product while bullion is unfinished.
340. The Krugerrands, unlike the Medallions, can be used for currency. *See* note 66 and accompanying text *supra*.
341. HUDEC, *supra* note 323, at 113.
342. *See* note 323 and accompanying text *supra*.
343. HYDER, *supra* note 311, at 133.
344. GATT, Final Act, Geneva, art. III(1), 55 U.N.T.S. 204 (1947).

19 which preserved the obligation with respect to "directly competitive or substitutable products."[345] The liberalized trade objectives of GATT bolster this argument. An interpretation of the national treatment principle in Article III should be liberal in order to be faithful to both the letter and the spirit of GATT.[346]

C. *The General Exception of Article XX of GATT*

GATT contains a general exception which at first may seem to validate a state sales tax on imported gold coin and bullion. Article XX provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, *nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*[347]
>
> . . . .
>
> (c) relating to the importation or exportation of gold or silver. . . .[348]

The purpose of Article XX is to provide an exception for national governments which subscribe to GATT and which possess the power to regulate the individual monetary system and to regulate foreign commerce.[349] A state government, however, cannot rely on this exception. First, a state is not a contracting party of GATT. The terms of the Agreement are binding because of U.S. acceptance of GATT by valid executive agreement.[350] Second, the U.S. government, not the states, has the specific authority to regulate the monetary system.[351] Third, a state has little or no power to regulate foreign commerce.[352]

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345. Protocol Modifying Part II and Article XXVI of the GATT, Dec. 14, 1948, 62 U.N.T.S. 80. JACKSON, *supra* note 314, at 282.

346. *Id.* at 264. "But most broad is the concept of 'competing' product . . . invoked by the Interpretive Note to paragraph 2 of Article III." *Id.*

347. GATT, *supra* note 306, art. XX (emphasis added). In effect, this clause contains a modified form of both the most-favored-nation obligation and the national treatment obligation. JACKSON, *supra* note 314, at 143. The MFN clause prohibits discrimination among countries, whereas this clause prohibits "arbitrary unjustifiable discrimination between countries where the same conditions [exist]." *Id.* at 143 n.1. The national treatment obligation prohibits discrimination against imported goods. *Id.* at 143 n.2. All import restrictions favor domestic goods to some extent, but Article XX requires that those restrictions falling within the exceptions of that Article avoid being "a disguised restriction on international trade." *Id.*

348. GATT, *supra* note 306, art. XX (emphasis added).

349. *See generally* JACKSON, *supra* note 314.

350. *See generally* Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law*, 66 MICH. L. REV. 249 (1967) [hereinafter cited as *GATT in Domestic Law*].

351. U.S. CONST. art. I, § 8, cl. 5.

352. *See State Buy-American Laws, supra* note 321, at 399-406. *See also* § III *supra*.

D. *The Right to Invoke GATT Against a State Tax*

On October 30, 1947, President Truman entered the United States into GATT under an executive agreement.[353] In justifying U.S. adherence to GATT, the executive branch relies on the Reciprocal Trade Agreements Act[354] and the constitutional authority of the president to conduct foreign affairs.[355] As a matter of domestic and international law, an executive agreement is equivalent to a treaty when such an agreement binds the Nation.[356] Courts equate the legal significance of GATT to that of a valid treaty,[357] and thus conclude that GATT is, under the federal constitution, "the Supreme Law of the Land."[358]

Article XXIV(12) of GATT provides that "each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."[359] Courts have interpreted this Article to mean that parties to the action can invoke GATT as a matter of law in any state proceeding involving state law.[360] Further, courts generally have concluded that GATT applies to and overrides state or territorial law.[361] A state law must yield when it

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353. *GATT in Domestic Law, supra* note 350, at 253.

354. The Reciprocal Trade Agreements Act as amended and extended for three years in 1945, contains the basic congressional delegation of power which the President relied upon in accepting GATT. Pub. L. No. 70-130, 59 Stat. 410 (1945) (codified at 19 U.S.C. § 1351 (1976)). *GATT in Domestic Law, supra* note 350, at 255.

355. U.S. CONST. art. V, § 2. *See GATT in Domestic Law, supra* note 350, at 274.

356. Under the U.S. Constitution, the federal government can establish international treaty obligations in three ways: (1) an agreement negotiated by the President, with the advice and consent by a 2/3 vote in the Senate; (2) an executive agreement of the President, acting under authority delegated by an act of Congress; and (3) an executive agreement of the President, acting under his constitutional power to conduct foreign affairs. McDougal & Lans, *Treaties and Congressional-Executive Presidential Agreements: Interchangeable Instruments of National Policy (pts. 1 & 2)*, 54 YALE L.J. 181, 534 (1945) [hereinafter cited as McDougal & Lans].

357. United States v. Belmont, 301 U.S. 24 (1937). United States v. Pink, 315 U.S. 203 (1942).

358. U.S. CONST. art. VI, cl. 2. *See* K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774, 778 (1977), *appeal dismissed,* 45 U.S. 982 (1978). *See generally* McDougal & Lans, *supra* note 356.

359. GATT, *supra* note 306, art. XXIV(12).

360. KSB Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. at 280-81, 381 A.2d at 778.

361. *Id.* (court held that GATT would supersede conflicting state law; in this particular instance no conflict was found); Baldwin-Lima-Hamilton Corp. v. Superior Court, 201 Cal. App. 2d 803, 817-20, 25 Cal. Rptr. 798, 808-09 (1962) (court held California Buy America statute to be superseded by GATT and FCN Treaty with Japan); Pacific Meat Co. v. Otagaki, 47 Hawaii 652, 660-61 & n.7, 394 P.2d 618, 623 & n.7 (1964) (court held state statute governing poultry labelling to be consistent with GATT by implication); Territory v. Ho, 41 Hawaii 565, 567-72 (1957) (court held state statute regulating chicken imports to be invalid because of conflict with GATT). *But see* American Inst. for Imported Steel, Inc. v. County of Erie, 58 Misc. 2d 1059, 1064, 297 N.Y.S. 2d 602, 607 (Sup. Ct. 1968) (court upheld a county Buy America resolution on the ground, among others, that GATT does not in and of itself supersede local legislation), *modified,* 32 App. Div. 2d 231, 302 N.Y.S. 2d 61 (1969) (court left lower court's finding on GATT unexamined). *Cf.* Bethlehem Steel Corp. v. Board of Comm'rs, 276 Cal. App. 2d 221, 226-27 & n.9, 80 Cal. Rptr. 800, 803-04 & n.9 (1969) (court held California Buy American Act unconstitutional

is inconsistent with or impairs the policy or provisions of a treaty.[362] Since GATT is a treaty, the articles of GATT must prevail over conflicting state law.

The Supreme Court of New Jersey recognized this principle in *K.S.B. Technical Sales Corporation v. North Jersey District Water Supply Commission.*[363] The case involved a New Jersey Buy-American statute in a bid solicitation by the state for water pumping equipment. The court's analysis rested on treating GATT as a valid executive agreement that overrides state law. Although the Buy-American condition in the bidding specifications appeared on its face to conflict with the national treatment principle of Article III(4), the court concluded that the procurement of the pumps fell within the government procurement exception of paragraph (8) of Article III of GATT.[364] Because of the Article III exception, GATT did not preempt state jurisdiction.[365] Since no GATT exception applies to state taxation of gold coin and bullion, GATT must, therefore, override state law on this issue.

E. *Conflicting State Law Must Yield*

GATT supersedes the application of state law due to its classification as a treaty under U.S. law.[366] Thus, a state cannot impose a sales tax on imported gold without first considering the legal implications of such a tax under the provisions of GATT. A state sales tax would violate the most-favored-nation principle of Article I and the national treatment principle of Article III because of the discriminatory treatment of imported gold coins under such a tax.[367] Not only would the tax favor domestic goods, but it may provide dissimilar treatment amongst "like products" from foreign markets.[368] In addition, a state sales tax would not qualify for the Article XX exception because the U.S. government, not the state government is responsible for the regulation of gold imports.[369] Due to the legal position of GATT in U.S. law, conflicting state law must yield to GATT rules.

V. CONCLUSION

The U.S. Government has the power to regulate the value of coin and currency, U.S. or foreign, in this country and wherever the U.S. Constitution

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as conflicting with federal power to conduct foreign trade policy; the court did not decide on the alleged violation of GATT and expressly refused to rule on the effect of GATT).

362. *See* note 361 *supra.*

363. 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed,* 435 U.S. 982 (1978).

364. *Id.*

365. *Id.* at 289-90, 381 A.2d at 782.

366. *See* § III.D *supra.*

367. *See* §§ III.A, B *supra.*

368. *See id.*

369. *See* § III.C *supra.*

applies overseas. This constitutional authority applies to foreign gold coins. It also applies to bullion, whether or not it is legal tender in the United States or elsewhere. States cannot assess sales taxes on gold coin and bullion because the monetary and foreign commerce clauses of the U.S. Constitution give the U.S. government the sovereign power to regulate the value of money, including gold coin and bullion, and to conduct foreign commerce. No act or omission of the U.S. government has given this power to the states.

States which seek to assess sales taxes on gold coin and bullion transactions are interfering with federal authority intended to promote monetary uniformity and international harmony. State sales taxes on foreign legal tender gold coins, other gold coins or bullion would give rise to two dangers: (1) discriminatory taxation within a state; and (2) multiple and differing taxations among states. Individual state taxation of gold coin and bullion could result in disputes among states or nations. With respect to money, including gold coin and bullion, the U.S. Constitution provides a means to avoid these dangers by giving the federal government exclusive power in this area.