No. 86- .

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

REGINALD H. HOWE,
PETITIONER,

v.

UNITED STATES OF AMERICA, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL OPEN MARKET COMMITTEE AND SECRETARY OF THE TREASURY,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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November 26, 1986

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Questions Presented.

This case challenges the constitutionality of the current monetary system of the United States, and raises the following constitutional questions:

(1) Does a citizen have a right under the Constitution to the use and benefits of lawful, *i.e.*, constitutional, money?

(2) Does a citizen have a right under the Fifth Amendment to hold his savings in money that is not subject to secular depreciation arising from government manipulation of the monetary system?

(3) Does the Constitution require that the dollar be legally and credibly defined with reference to gold or silver?

(4) Does the Constitution authorize a dollar that maintains neither its value in gold or silver nor its purchasing power?

(5) Notwithstanding the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553, 560-562 (1870), may the government promulgate an indeterminate paper standard of value?

(6) Notwithstanding *Perry* v. *United States*, 294 U.S. 300, 350-351, 353-354 (1935), may the government use its monetary powers to depreciate the purchasing power of its own obligations, including Federal Reserve notes?

(7) Is the government's abuse of its monetary powers undermining the very structure of government established by the Constitution, including the independence of the judiciary?

Because both the district court and the court of appeals refused to adjudicate any of these issues, and because so far this shirking of judicial obligations has met with approval from the Judicial Council of the First Circuit, this case raises two overriding issues of even greater importance:

(1) Do the courts have the courage and the will to enforce the monetary principles of the Constitution, and if not, what claim have they to act as the ultimate arbiter of other provisions of the Constitution?

(2) Do we have a government of law based on the Constitution, or merely a government of men posturing under the Constitution?

Table of Contents.

Opinions Below 1
Jurisdiction 1
Constitutional Provisions 2
Statement of the Case 2
Reasons for Granting Certiorari 3
I. Under all traditional tests, the plaintiff has standing and this case is appropriate for judicial resolution. 7
A. Injury 8
B. Causation 10
C. Redressability 11
D. Prudential Considerations 12
II. The Constitution requires that Congress provide sound and stable money for the nation. 13
III. The Constitution requires that the dollar be legally and credibly defined with reference to gold or silver. 24
IV. The Constitution does not authorize Congress to use its monetary powers to depreciate the purchasing power of obligations of the United States, including Federal Reserve Notes. 27
Conclusion 29
Appendices 1a
A. Memorandum and Order of Court of Appeals, July 30, 1986 1a
B. Memorandum of District Court, April 18, 1986 2a
C. Order of District Court, April 18, 1986 4a
D. Order of Court of Appeals denying petition for rehearing, August 29, 1986 5a
E. Order of Court of Appeals denying request for certification under 28 U.S.C. § 1254(3), July 8, 1986 6a
F. Petition for Rehearing 7a
G. Form of Special Interrogatories 11a
H. Order of "Acting Chief Judge" on Complaint under 28 U.S.C. § 372, September 25, 1986 13a

I. Petition for Review by the Judicial Council 15a
J. The Purchasing Power of the Dollar and Gold 18a

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Gold Reserve Act of 1934, 48 Stat. 337	18, 19
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U.S. Const., Art. I, § 10, cl. 1	2, 7, 16n
U.S. Const., Art. II, § 2, cl. 2	5n
U.S. Const., Art. III, § 1	9n
U.S. Const., Fifth Amendment	8
U.S. Const., Seventh Amendment	4n
U.S. Const., Tenth Amendment	16n
5 U.S.C. § 702	2
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12 U.S.C. § 263	5n, 10n
12 U.S.C. § 411	10n, 21
12 U.S.C. § 413, as amended by 59 Stat. 237 (1946)	20
15 U.S.C. § 1021	10n
15 U.S.C. § 1022e	10n
28 U.S.C. § 372(c)	3

28 U.S.C. § 1254 1, 3

28 U.S.C. § 2201 2

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Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the court of appeals (A. 1a) is not reported; the opinion of the the district court (A. 2a-4a) is reported at 632 F.Supp. 700.

Jurisdiction.

The decision of the court of appeals was entered July 30, 1986, and a petition for rehearing denied August 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions.

The monetary powers and disabilities of the Constitution are contained in Art. I, § 8, cl. 5 ("The Congress shall have power . . . To coin Money, regulate the Value thereof, and of foreign Coin"), and Art. I, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts").[1]

Statement of the Case.

The complaint requests declaratory relief under 28 U.S.C. § 2201 against the United States and the agencies of the United States responsible for administering its monetary system. The respondents are subject to suit under 5 U.S.C. § 702.

The petitioner contends that he has a right under the Constitution to the use and benefits of lawful money, and that none of the currency now issued under the authority of Congress, principally Federal Reserve notes, is "money" within the meaning of that charter. Rather, it is unlimited fiat money that fails to meet the constitutional requirements for money in three major respects: (1) the dollar is not legally and credibly defined with reference to gold or silver (or any other thing having intrinsic value); (2) the dollar fails to maintain either its value in gold or silver or its purchasing power; and (3) the power to regulate the value of money is being used systematically to depreciate and destroy the purchasing power of obligations of the United States, including Federal Reserve notes. Finally, the petitioner contends that he has a right under the Fifth Amendment not to have a portion of his savings effectively confiscated by government manipulation of the monetary system.

The district court dismissed the complaint for lack of standing and failure to state a claim upon which relief can be granted

[1] The word "money" appears in three other clauses of the Constitution: Art. I, § 8, cl. 2 ("To borrow Money on the credit of the United States"); Art. I, § 8, cl. 12 ("To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); and Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

(A. 2a-4a). The district court did not make a declaration, and its memorandum of less than two pages did not address any of the issues that the petitioner asked to have adjudicated. The court of appeals, after denying *en banc* the petitioner's request to certify the case to this Court without decision under 28 U.S.C. § 1254(3) (A. 6a), denied oral argument and entered a one sentence summary affirmance (A. 1a), which also failed to address any of the issues raised by the petitioner. A petition for rehearing (A. 7a-11a), including Special Interrogatories to the Court to Determine its Holdings on the Principal Issues Raised by the Plaintiff (A. 11a-12a), was denied without opinion or action on the special interrogatories (A. 5a).

Because both the district court and the court of appeals refused to adjudicate the issues presented, the petitioner filed a complaint under 28 U.S.C. § 372(c) with the Judicial Council of the First Circuit against both courts charging them with failure to carry out their judicial duties and conduct prejudicial to the proper administration of justice. This complaint was dismissed by a district court judge (A. 13a-14a), who lacked authority to act on it (28 U.S.C. § 372(c)(2) and (3)), and the petitioner filed a petition for review by the full judicial council (A. 15a-17a), including a request that the matter be certified to the Judicial Conference of the United States under 28 U.S.C. § 372(c)(7)(B)(ii) (A. 17a).

The questions presented by this case cannot properly be evaded. They have not been answered by the lower courts because only two sets of answers are possible: one would embarrass the government by declaring that the current monetary system is unconstitutional; the other would embarrass the courts by making them apologists for practices that just men abhor and that the framers of the Constitution meant to foreclose. However, by refusing to answer any of these questions, the lower courts have put at issue the integrity of the judicial system itself.

Reasons for Granting Certiorari.

The landmark constitutional decisions on the nation's monetary system are the *Legal Tender Cases* (*Knox* v. *Lee* and

Parker v. *Davis*), 79 U.S. (12 Wall.) 457 (1870), reversing *Hepburn* v. *Griswold*, 75 U.S. (8 Wall.) 603 (1869); *Juilliard* v. *Greenman*, 110 U.S. 421 (1884); and the *Gold Clause Cases*, 294 U.S. 240-381 (1935), including *Norman* v. *Baltimore & Ohio Railroad*, 294 U.S. 240 (1935), *Nortz* v. *United States*, 294 U.S. 317 (1935), and *Perry* v. *United States*, 294 U.S. 330 (1935).[2] Each arose out of monetary events brought on by one of the two great domestic crises in our history: the Civil War and the Great Depression. All except *Juilliard* were decided by a single vote.[3]

Despite periodic bouts of inflation, the United States dollar maintained its long-term purchasing power from 1792 to about 1940, five years after the Court's decision in the *Gold Clause Cases*.[4] Since 1940, the dollar has lost about 90 percent of its purchasing power. According to the government's own statistics, which many believe understate the true extent of the dollar's depreciation, one dollar today has the same purchasing power as about 13 cents in 1940 (A. 18a-21a). This secular depreciation of the dollar, which reflects an average annual

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[2] For a comprehensive scholarly study of the history and meaning of the monetary provisions of the Constitution, see E. Vieira, *Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution* (Devin-Adair, 1983). As the author points out (pp. 62-70, 95-100), the "dollar" referred to in the Constitution (Art. I, § 9, cl. 1, and Seventh Amendment) is the Spanish milled dollar, which under the Coinage Act of 1792, 1 Stat. 246, became the standard dollar weighing 371.25 grains of silver.

[3] Excluding *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), probably no decisions of the Court have provoked as much popular dissatisfaction as the *Legal Tender Cases* and *Juilliard* v. *Greenman*. See 3 C. Warren, *The Supreme Court in United States History* (Little Brown, 1924), pp. 247-249, 376-382. The latter inspired George Bancroft's fiery pamphlet, *A Plea for the Constitution of the United States Wounded in the House of its Guardians* (1886); the *New York Times* described *Juilliard* as a decision (quoted in 3 C. Warren, *supra*, p. 378):

> which, while it must command obedience, cannot command respect, a decision weak in itself and supported by reasoning of the most defective character, inconsistent with the previous decisions of the Court on like issues, and singularly, almost ridiculously, inconsistent with the traditional interpretation of the Constitution, with the spirit of that instrument and its language.

[4] Because this case was decided on a motion to dismiss, the allegations of the complaint must be taken as true, which they are, and construed in favor of the petitioner. *Warth* v. *Seldin*, 442 U.S. 490, 501 (1975).

inflation rate since 1940 of about four percent, is the direct result of changes in the monetary system since that date. These changes include: (1) the gradual severance of all official links between the value of the dollar and gold or silver; and (2) the systematic monetization of U.S. government debt. See *infra*, pp. 10-11.

None of these changes has been considered by this Court, which has not decided a case involving the constitutionality of the monetary system since the *Gold Clause Cases* in 1935. The lower courts continue to cling to the fiction that this Court's pre-1940 decisions validate the current monetary system, but, as this case demonstrates, they can no longer even attempt to articulate why. See also *Milam* v. *United States*, 524 F.2d 629 (CA9 1974).[5] In truth, as future historians will

[5] These changes have resulted in a quantum increase in the powers and responsibilities of the Federal Reserve System in general and the Federal Open Market Committee in particular. See *infra*, p. 10 n.8. Judicial reluctance to consider the constitutionality of these changes combined with increasing concern over democratic control of these increased powers has prompted a series of four cases challenging the composition of the Federal Open Market Committee on the ground that the appointments of the five members elected annually pursuant to 12 U.S.C. § 263(a) by the boards of directors of the Federal Reserve banks from among their presidents and first vice presidents violate Art. II, § 2, cl. 2 (the appointments clause) of the Constitution. *Reuss* v. *Balles*, 584 F.2d 461 (CADC 1978), *cert. denied*, 439 U.S. 997 (congressman lacked standing in official capacity or as private bondholder to raise issue); *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873 (CADC 1981), *cert. denied*, 454 U.S. 1081 (senator had standing but case dismissed for prudential reasons since private party might have standing); *Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538 (CADC 1985) (private parties lacked standing); and *Melcher* v. *Federal Open Market Committee*, ___ F.Supp. ___, 55 U.S.L.W. 2181 (D.D.C. 1986) (decided Sept. 25, 1986) (motion under Rule 59, Fed.R.Civ.P., filed Oct. 6, 1986) (senator's challenge considered on merits; five Reserve Bank members not government officers and to the extent that they exercise monetary powers, these powers may be delegated to private persons).

In his pending case, Senator Melcher (D. Mont.) implicitly assumes that the government may under the Constitution substitute unlimited fiat money having no intrinsic value for a dollar defined by Congress with reference to weight of gold or silver. He then argues that the role thrust upon the Federal Open Market Committee under the current monetary system has fundamentally changed the nature of its powers, thereby rendering all its members officers of the United States who must be appointed by the President and confirmed by the Senate. The difference between Senator Melcher's case and this one is that the petitioner contests the predicate on which Senator Melcher's argument rests. The determinative constitutional deficiency in the Federal Open Market Committee is not its composition in light of its current powers, but its usurpation recognize, the current monetary system violates two basic principles of these earlier cases: (1) that the dollar must be defined with reference to weight of gold or silver and cannot be an indeterminate paper standard of value (*Legal Tender Cases*, *supra*, 79 U.S. (12 Wall.) at 553) (see *infra*, part III); and (2) that the government cannot use its monetary powers to depreciate the purchasing power of its own obligations, including Federal Reserve notes. *Perry* v. *United States*, *supra*, 294 U.S. at 350-351, 353-354. See *infra*, part IV.

This petition asks this Court to grant certiorari to enforce these irreducible monetary principles of the Constitution, and thereby halt fiat money inflation in the United States before it leads to the complete destruction of the dollar. See A. D. White, *Fiat Money Inflation in France* (orig. ed. 1876; Foundation For Economic Education, 1959).[6] The real issue is not

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of a power — the power to create unlimited fiat money — that is not delegated to the federal government under any provision of the Constitution.

[6] This classic essay by the founder and first president of Cornell University was originally read by the author to members of the House and Senate in 1876 as a warning of the inevitable consequences of unlimited paper money. It tells the story of the French assignats of the 1790's. The similarities between the French experience, which destroyed what was then the world's leading currency — the livre, and modern America are haunting.

As White points out, rising prices are only one aspect of paper money inflation, and even they do not move upward all the time. There were in France periods when the value of the currency rebounded, when confidence returned. But, as soon as business activity seemed to lag, another injection of paper money was applied, first publicly in open sessions of the National Assembly, and later privately in secret sessions of the Committees on Public Safety and on Finance. Thus there is in the French experience direct precedent for the Federal Open Market Committee. See *infra*, p. 10 n.8. Indeed, the French even had their Paul Volcker. Cambon, the finance minister during much of the Reign of Terror, was generally recognized as one of the most skillful and honest financiers in Europe.

Each round of stimulation produced in France, as it does in America today, proportionately less growth and more inflation. These inflationary cycles led inexorably to enormous increases in government and private debt, the obliteration of savings, sharp curtailment of long term capital investment, and the growth of a speculating class, based in the city centers. General stagnation set in, affecting the agricultural and manufacturing interests first, then spreading to merchants and others. To save the situation, the French tried measures that did not work then in the shadow of the guillotine and do not work now: legal tender laws, wage and price controls (the "Law of the Maximum"), exchange controls, forced loans, currency reforms that exchange one form of paper for what the Constitution requires, but whether the courts will carry out their sworn duty to uphold and enforce it.

I. Under All Traditional Tests, the Petitioner Has Standing and this Case Is Appropriate for Judicial Resolution.

The petitioner asserts a direct, personal, substantive constitutional right to the use and benefits of lawful money, *i.e.*, money within the meaning of that word as it is used in the Constitution. This Court has recognized fundamental rights or values which do not have a specific textual basis in the Constitution or its amendments. See, *e.g.*, *Bates* v. *City of Little Rock*, 361 U.S. 516, 522-523 (1960) (freedom of association); *Shapiro* v. *Thompson*, 394 U.S. 618, 629-631 (1969) (right to interstate travel); *Griswold* v. *Connecticut*, 381 U.S 479, 484-486 (1965) (right to privacy). Like all these rights, the right to the use and benefits of sound and stable money is essential to "liberty and the pursuit of happiness" in a free society. Moreover, it has a specific textual basis in the Constitution.

The Constitution vests Congress with exclusive power to coin money and regulate its value. Art. I, § 8, cl. 5; Art. I, § 10, cl. 1. "The great end and object of this restriction on the power of the states . . . was . . . to give to the United States the exclusive control over the coining and valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it." *Craig* v. *Missouri*, 29 U.S. (4 Pet.) 410, 442-443 (1830) (opinion of the Court by Marshall, C.J.). See *The Federalist*, No. 42 (Madison) (Modern Library ed. at 275-276), and No. 44 (Madison) (Modern Library ed. at 290) (quoted *infra*, p. 30). See also 2 J. Story, *Commentaries on the Constitution of the United States* (5th ed., 1891), esp. §§ 1118, 1119, 1372.

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another, and finally repudiation: all in vain. Counterfeiting, cheating and corruption thrived. "It ended," as White wrote (*id.* at 110): "in the complete financial, moral, and political prostration of France — a prostration from which only a Napoleon could raise it."

The government's monetary powers rest on a different basis than its powers over commerce. *United States* v. *Marigold*, 50 U.S. (9 How.) 261, 262-263 (1849). As described by this Court (*id.* at 263):

> They appertain rather to the execution of an important trust invested by the constitution, and to the obligation to fulfil that trust on the part of the government, namely, *the trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union.* The power of coining money and of regulating its value was delegated to congress by the constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value . . . . [Emphasis supplied.]

The petitioner asserts that the government has breached this trust and duty, thereby violating his right to the use and benefits of lawful money. He has standing because he seeks to vindicate a fundamental constitutional right belonging to himself, as it does to all citizens.

The petitioner's Fifth Amendment claims are based on the personal consequences to him of the constitutional defects in the current monetary system, and thus also meet all constitutional requirements for standing. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471-475 (1982).

A. *Injury.*

The petitioner alleges that secular inflation will erode the purchasing power of his savings. By secular inflation, the petitioner means long-term, persistent, structural inflation, as opposed to transitory price increases due to shortages, wars or other events external to the monetary system, or even inflation resulting from cyclical expansions of credit by the banking system. This injury is neither speculative nor conjectural. In recent years many courts have recognized the economic injury caused by secular inflation. See, *e.g.*, *Jones* v. *Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 547-549 (1983); *Culver* v. *Slate Boat Co.*, 722 F.2d 114 (CA5 1983); *Hunter* v. *Reardon Smith Lines*, 719 F.2d 1108, 1113-1114 (CA11 1983), *cert. denied*, 104 S.Ct. 2387 (1984); *Gretchen* v. *United States*, 618 F.2d 177, 181 (CA2 1980).[7]

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[7] In *Atkins* v. *United States*, 536 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), 140 federal judges sued the federal government alleging that the purchasing power of their salaries declined by almost 35 percent from 1969 to 1975, and that this loss of purchasing power violated the compensation clause of Art. III, § 1, which provides that federal judges shall "receive for their services, a Compensation, which shall not be diminished during their continuance in office." The judges argued that the term "Compensation" was intended "to convey the idea of payment in real value" rather than in nominal dollars. *Id.* at 1050. The Court of Claims was unpersuaded, and in a lengthy opinion held against the judges, but noted that "were Congress not to budge on the nominal dollar salaries it allowed judges in the face of hyperinflation . . . a demand for their relief under article III would be difficult to refute." *Id.* at 1054.

In looking only to the compensation clause, the judges adopted too narrow a view of their constitutional predicament. The intent of the compensation clause was to secure to every judge all that "has been promised by law for his services" (*Evans* v. *Gore*, 253 U.S. 245, 254 (1920)), and more generally to minimize insofar as practicable the dependence of the judiciary on the political branches of government. See *Atkins, supra*, 556 F.2d at 1045-1047. The compensation that is constitutionally protected was not intended to be expressed in real purchasing power, but neither was it intended to be expressed in an inconvertible, unlimited paper currency. Rather, the framers assumed and intended that it be expressed in lawful money under the Constitution. So expressed, it would be subject to "'changes in the value of the metals'" (*id.* at 1047), but not to the secular loss of purchasing power inherent in unlimited paper money.

With regard to the more general purpose of the compensation clause, the degree of judicial dependence on the political branches is greatly increased under a monetary system that systematically depreciates the purchasing power of the dollar. Madison's proposal to lessen even further the dependence of the judiciary by a prohibition on increases in judicial salaries was rejected by the Constitutional Convention, not so much because of possible fluctuations in the value of the metals as because salary increases might be warranted by increases in the general standard of living or the work of the judges. *Id.* at 1045-1047. There is no evidence that the framers ever contemplated that the judiciary (or anyone else) would have a continuing need over many years for what are today called "cost-of-living" increases. However, the secular inflation that began in the early 1940s has required federal judges regularly to request salary increases from Congress just to maintain the purchasing power of their salaries. The current monetary system has thus made them annual supplicants along with all other government employees and beneficiaries, certainly a far

Causation.

Secular inflation since 1940 has been caused primarily by the monetary system that has evolved since that date, and in particular by the Federal Reserve System monetizing excessive amounts of U.S. government debt.[8] The contention that monetizing government debt is the primary engine of secular inflation is supported by economists both in and out of government. See, *e.g.*, M. Rothbard, *The Mystery of Banking* (Richardson & Snyder, 1983), pp. 171-177 (containing a de-

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cry from the minimal dependence for sporadic increases contemplated by the framers of the Constitution.

[8] Monetizing debt is the modern equivalent of printing money. It may be effected in several ways, but most commonly occurs when debt obligations of the United States are sold to banks or other depository institutions (collectively "banks") and then purchased by the central bank, *i.e.*, one of the Federal Reserve banks, resulting in an increase in the reserves of the banks, and, under fractional reserve banking as authorized and practiced under the Federal Reserve System, a multiple increase in their demand or other reserve-based deposits. The Federal Open Market Committee directs and controls all open market purchases by the Federal Reserve banks (12 U.S.C. § 263(b)), which make payment therefor by crediting the reserve accounts of the banks with them. No appropriation of money by Congress is necessary for these purchases, which are made solely on the credit of the United States as extended through the Federal Reserve System.

Reserves of banks at the Federal Reserve banks are book entries denominated in dollars and, subject to reserve requirements, freely transferable into Federal Reserve notes, which are obligations of the United States. 12 U.S.C. § 411. See *infra*, p. 21. Federal Reserve notes in circulation and reserves of banks at the Federal Reserve banks constitute the current "money" of the United States, commonly referred to as the monetary base.

The monetary base constitutes the vast bulk of the liabilities of the Federal Reserve banks. The corresponding assets are primarily United States debt obligations, obtained in major part through open market purchases, and gold certificates representing the official gold reserves of the United States. However, since the elimination of the gold cover requirements for Federal Reserve deposit liabilities and notes in circulation (see *infra*, pp. 20-21), the size of the monetary base has rested in the almost unlimited discretion of the Board of Governors of the Federal Reserve System and the Federal Open Market Committee. See 12 U.S.C. § 255a. See also 15 U.S.C. §§ 1021(a) and (c), 1022e(a) and (b). Accordingly, the present currency of the United States is indistinguishable from and inextricably intertwined with its obligations, enabling the United States to pay its debts in dollars of constantly depreciating purchasing power rather than in lawful money of stable value as contemplated by the Constitution.

tailed description of the banking mechanics of monetizing debt); W. C. Melton, *Inside the FED* (Dow Jones-Irwin, 1985), pp. 146-149. As explained by the current chairman of the Council of Economic Advisers (B. W. Sprinkel *et al.*, *Winning with Money* (Dow Jones-Irwin, 1977), pp. 80-81, 193):

> The most descriptive definition of inflation is too much money chasing too few goods . . . . Today the most common method of increasing the money stock is for Federal Reserve officials to purchase government securities held by the public. The payment for these securities ends up as an addition to the money supply.
>
> . . . .
>
> [L]arge deficits can lead to pressures for large increases in the money supply. Since the Federal Reserve System is the U.S. Treasury's banker, it feels an obligation to assure that the government's debt is sold successfully. The greater the Treasury's deficit, the greater the temptation for the Federal Reserve to purchase the debt . . . .

C. *Redressability.*

The relief requested by the petitioner, or any significant part of it, would almost certainly terminate secular inflation. A declaration that the Constitution requires a dollar that maintains either its value in terms of gold or silver or its purchasing power would by its very terms require the elimination of secular inflation, although it would leave the choice of means up to the respondents or Congress. A declaration that the dollar must be legally and credibly defined with reference to gold or silver would itself provide the means to terminate secular inflation.

Prior to this century, the United States did not suffer from secular inflation, but it did suffer from hyperinflation as a consequence of the Revolutionary War and severe inflation as a consequence of the Civil War. In both cases, inflation was terminated by the restoration of a standard dollar of gold or silver, and the economy entered a long period of growth and prosperity. See B. Siegel ed., *Money in Crisis* (Ballinger, 1984), pp. 248-268 (A. Reynolds, "Gold and Economic Boom, Five Case Studies, 1792-1926"). Furthermore, notwithstanding the government's efforts to demonetize gold in recent years, restoration of the free market in gold has proven that gold retains its purchasing power far better than the unlimited, inconvertible paper currency managed by the respondents (A. 18a-20a, 22a). See R. W. Jastram, *The Golden Constant* (Wiley, 1977), *passim.*

D. *Prudential Considerations.*

Although the complaint raises issues of wide public significance, these issues are neither abstract nor inappropriate for judicial resolution. This case is the logical successor to the *Legal Tender Cases*, *Juilliard* v. *Greenman* and the *Gold Clause Cases*, seeking to apply the principles enunciated in those cases to the current monetary system.[9] Any case involving the constitutionality of the monetary system necessarily involves an injury shared by many if not all citizens. But, as the Court stated in *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973):

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

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[9] The question of standing was not raised as an issue in any of these prior cases. When *Juilliard* was decided in 1884, the plaintiff could have accepted the notes offered and immediately redeemed them in gold coin at par since specie payments had been resumed. See *infra*, p. 18. As a practical matter, therefore, *Juilliard* was purely and simply a test case of the government's constitutional authority to issue legal tender notes in peacetime.

II. The Constitution Requires that Congress Provide Sound and Stable Money for the Nation.

The distinctions between money and bills of credit, and bills of credit and other types of debt obligations, were well established in common parlance, legal usage and popular economic literature at the time of the adoption of the Constitution.[10]

In *Craig* v. *Missouri*, *supra*, 29 U.S. (4 Pet.) at 432, Chief Justice Marshall stated:

> The word "emit," is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.
>
> At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emited for this purpose have been frequently denominated bills of credit. During the war of our revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually

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[10] Adam Smith's *The Wealth of Nations* was first published in 1776. It contained an extensive discussion of money, arguing, *inter alia*: "No law, therefore, could be more equitable than the act of parliament, so unjustly complained of in the colonies, which declared that no paper currency to be emitted there in time coming, should be a legal tender of payment." A. Smith, *The Wealth of Nations* (Random House, 1937), p. 311.

> changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all; the people declared in their constitution, that no state should emit bills of credit. If the prohibition means any thing, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purpose of common circulation.

In *Briscoe* v. *Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 330 (1837), Justice Story, dissenting, stated:

> If we look into the meaning of the phrase [bills of credit] as it is found in the British laws, or in our own laws, as applicable to the concerns of private individuals, or private corporations, we shall find that there is no mystery about the matter; and that when bills of credit are spoken of, the words mean negotiable paper, intended to pass as currency, or as money, by delivery or indorsement. In this sense, all bank notes, or, as the more common phrase is, bank bills, are bills of credit. They are the bills of the party issuing them, on his credit, and the credit of his funds; for the purposes of circulation as currency or money. Thus, for example, as we all know, bank notes payable to the bearer, (or when payable to order, indorsed in blank,) pass in the ordinary intercourse and business of life, as money; and circulate, and are treated as money. They are not, indeed, in a legal and exact sense, money; but, for common purposes, they possess the attributes, and perform the functions of money.

And in *Juilliard* v. *Greenman*, 110 U.S. at 454-455, Justice Field, dissenting, quotes "an elaborate speech on [the subject of the currency], made in the Senate in 1836" by Daniel Webster:

"Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business; but if we understand by currency the legal money of the country, and that which constitutes a legal tender for debts, and is the standard measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain and of the highest importance. The States are expressly prohibited from making anything but gold and silver a legal tender in payment of debts, and although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches; it has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown. To overthrow it would shake the whole system." [4 Webster's Works, 271.]

The elimination of money in the legal and constitutional sense understood by Marshall, Story and Webster has proceeded by stages, two of which received the approval of this Court under the duress of domestic crisis. But the Court has never given its approval to the current monetary system, which differs fundamentally from that approved by it in the *Gold Clause Cases* over one-half century ago.[11]

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[11] The government defendants have cited *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), for the proposition that "Congress has the right to

The power of the federal government to emit bills of credit was declared in *dictum* in *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869).[12] The issue in *Hepburn* v. *Griswold* and the *Legal Tender Cases* was whether Congress had the power to make bills of credit legal tender for private debts.

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create banks and authorize them to issue currency." The second Bank of the United States, of course, had no power to issue money in the constitutional sense, to issue legal tender notes, or even to issue bills of credit on the credit of the United States. What it had was the power to issue its own bank notes, on its own credit, redeemable in standard gold or silver dollars, and thereby to issue notes that might pass as currency in ordinary transactions. Furthermore, although the bank was held to be a necessary, proper and constitutional means for effecting certain powers delegated to the federal government, the power to coin money and regulate its value was not one of the powers on which the Court relied. As Chief Justice Marshall wrote (17 U.S. at 422):

> Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government.

Under the circumstances, it is inconceivable that Marshall would have omitted reference to the government's monetary powers if he thought that they lent any support to its power to charter a bank. Yet the power to coin money and regulate its value is nowhere even mentioned in Marshall's opinion. This omission is but a further demonstration of the then universal view set forth 30 years later in *United States* v. *Marigold, supra,* 50 U.S. (9 How.) at 262-263, that the government's monetary powers rest on a different basis than its other powers, and involve the execution of "the trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union." *Id.* at 263.

[12] Under the Articles of Confederation, Congress had "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States" (Art. IV, ¶ 4), and also had "authority . . . to borrow money, *or emit bills* on the credit of the United States" (Art. IV, ¶ 5) (emphasis supplied). By a nine to two vote, the Constitutional Convention deleted the power to emit bills of credit from the original draft of Art. I, § 8, cl. 2, where it had been included with the borrowing power, just as under the Articles of Confederation. 2 *The Records of the Federal Convention of 1787* (M. Farrand ed., 1966), pp. 308-311. The power of the states to emit bills of credit was expressly withdrawn under Art. I, § 10, cl. 1. Read in light of the Tenth Amendment, these actions reflect a conscious design by the framers to eliminate the further emission of bills of credit by any government — state or federal — within the United States. See Vieira, *supra,* pp. 70-77.

Juilliard v. *Greenman*, 110 U.S. at 449-450, held that it did, in peace as well as war:

> Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution[13]; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

As a result of the Civil War legal tender acts, two different kinds of dollars came into general circulation: paper and specie. They are described in *Trebilcock* v. *Wilson*, 79 U.S. (12 Wall.) 687, 694-695 (1871):

> The note of the plaintiff is made payable, as already stated, *in specie*. . . . [H]ere the terms, *in specie*, are

[13] This statement reverses the usual principle that ours is a government of delegated powers and that sovereignty resides in the people. See, *e.g.*, *Afroyim* v. *Rusk*, 387 U.S. 253, 257 (1967).

merely descriptive of the kind of dollars in which the note is payable, there being different kinds of circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants and bankers, and are the opposite of the terms, *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars. [Citations omitted.]

In 1879 the federal government resumed making specie payments at the prewar parity of $20.67 per ounce of fine gold. The United States formally returned to the gold standard under the Gold Standard Act of 1900, 31 Stat. 45, which obligated the Secretary of the Treasury to maintain the gold parity of the dollar. 31 U.S.C. § 314, repealed by Pub. L. 97-258, § 5, 96 Stat. 877 (1982). Nevertheless, because of the Civil War legal tender acts and the decisions upholding them, so-called "gold clauses" came into common use in contracts.

The extraordinary monetary measures adopted in 1933 and 1934, culminating in the Gold Reserve Act of 1934, 48 Stat. 337, are summarized in *Norman* v. *Baltimore & Ohio Railroad*, 294 U.S. at 295-297, the first of the *Gold Clause Cases*. In essence, private ownership of gold bullion or coin (but not silver bullion or coin) was prohibited except under government license,[14] and the dollar was devalued from $20.67 to $35 per

[14] The power of Congress to compel all citizens to deliver their gold bullion and coins to the government was not challenged in the *Gold Clause Cases*, but was upheld in *dictum* in *Nortz* v. *United States*, 294 U.S. at 328, citing *Norman* v. *Baltimore & Ohio Railroad*, the *Legal Tender Cases* and *Julliard* v. *Greenman*, none of which stands for any such proposition, and *Ling Su Fan* v. *United States*, 218 U.S. 302 (1910), holding that the government of the Philippine Islands, drawing its authority from an act of Congress, had the power to prohibit the export of silver coin. Assuming that "the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin" (*Norman* v. *Baltimore & Ohio Railroad*, 294 U.S. at 304),

ounce of fine gold. Gold clauses in all existing contracts, including not only private obligations but also notes and bonds of the United States, were declared against public policy and unenforceable. However, it remained the legal duty of the Secretary of the Treasury to maintain the gold parity of the dollar at the new standard (31 U.S.C. § 314, *supra*), which continued to govern official foreign exchange transactions until 1971. See *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 248-249 (1984).

Although the dollar was devalued with reference to gold in 1934, it retained its value both in silver and in purchasing power. See *infra*, p. 26 n.20, A. 18a-20a. In *Perry* v. *United States*, 294 U.S. at 353, the Court held that Congress was without authority to nullify or override the gold clauses in government bonds (see *infra*, pp. 27-29), but that the "[p]laintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever." *Id.* at 357. "On the contrary," said the Court, ". . . payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment." *Id.* at 358.

As applied to private contracts, the Gold Reserve Act of 1934 and related measures were held constitutional. *Norman* v. *Baltimore & Ohio Railroad*, 294 U.S. at 315-316.

The *Legal Tender Cases* and the *Gold Clause Cases* focused primarily on the tension between the government's authority over the nation's monetary system and private rights of contract. Little consideration was paid in those opinions to the nature of money, or its relation to the structure of government established by the Constitution. Economists since Adam Smith have generally recognized four fundamental types of monetary system: (1) gold or silver coin; (2) gold or silver coin together with paper money convertible into coin or bullion; (3) inconvertible paper currency tied to coin or bullion; and (4) inconvertible, unlimited paper currency. In this context, the *Legal Tender Cases* approved a modification of system (2): the ad-

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it does not follow that the power to coin money also includes the power to confiscate gold or silver coin, let alone gold or silver bullion.

dition of a temporarily inconvertible paper currency ("greenbacks") to circulate together with gold and silver coin. The *Gold Clause Cases* sanctioned a hybrid of systems (2) and (3): a paper currency convertible domestically only into silver but legally pegged to gold and convertible at the legal rate in official foreign exchange transactions. However, since 1934 the nation's monetary system has evolved in patchwork fashion under various acts of Congress into system (4): unlimited fiat money.

Following World War II, the United States subscribed to the Bretton Woods Agreements, 59 Stat. 512 (1945), which obligated it to redeem dollars presented by foreign states at the legal standard of $35 per ounce of fine gold. See Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 2 U.N.T.S. 39, T.I.A.S. No. 1501 (1945). The United States honored its commitments under the Bretton Woods Agreements until August 1971, when it ceased making payments in gold for dollars presented by foreign states. This unilateral action was ordered by President Nixon, in violation of treaty obligations of the United States, due to a substantial outflow of gold caused by failure of the Secretary of the Treasury to fulfill his legal duty to maintain the gold parity of the dollar at its legal standard. In 1972, Congress authorized and directed the Secretary of the Treasury to establish a new par value for the dollar of $38 per ounce of fine gold (Pub. L. 92-268, § 2, 86 Stat. 116 (1972)), which it amended in 1973 to $42.22 per ounce of fine gold or .828948 IMF Special Drawing Right. Pub. L. 93-110, § 1, 87 Stat. 352 (1973). Effective April 1, 1978, Congress repealed the 1973 par value act, leaving the dollar for the first time since 1792 statutorily undefined with reference to gold or silver. Pub. L. 94-564, § 6, 90 Stat. 2661 (1976), repealing 31 U.S.C. § 449. See 31 U.S.C. §§ 314, 821, repealed by Pub. L. 97-258, § 5, 96 Stat. 877 (1982).

The demise of the dollar's international convertibility into gold had its domestic counterpart in the gradual elimination of the gold cover requirements for Federal Reserve notes and the deposit liabilities of Federal Reserve banks. 12 U.S.C. § 413, as amended by 59 Stat. 237 (1946) (reducing gold cover from 35 to 25 percent against deposits and from 40 to 25 percent against notes in circulation), Pub. L. 89-3, § 1, 79 Stat. 5 (1965) (eliminating gold cover for deposits), and Pub. L. 90-269, § 3, 82 Stat. 50 (1968) (eliminating gold cover for notes in circulation). In 1968, under the Silver Certificate Act of 1967, Pub. L. 90-29, 81 Stat. 77, the dollar also lost its convertibility into silver. Accordingly, when the United States closed the gold window in 1971, its dollar for the first time since the adoption of the Constitution was no longer convertible, directly or indirectly, into gold or silver.

Today the dollar is neither defined with reference to gold or silver nor required to be backed by any gold or silver reserves. Rather, it is merely the unit in which "United States money is expressed" (31 U.S.C. § 5101), and is issued primarily in the form of Federal Reserve notes, which are declared to be legal tender. 31 U.S.C. § 5103. Federal Reserve notes are declared to "be obligations of the United States" and are required to "be redeemed in lawful money" (12 U.S.C. § 411), which is nowhere defined and does not exist. See 31 U.S.C. §§ 5118(b), 5119(a). Accordingly, unlike the notes at issue in the *Legal Tender Cases* and *Juillard* v. *Greenman* (see *infra*, pp. 24-25), Federal Reserve notes are not even bills of credit in the strict sense and do not represent promises to pay lawful money of standard value; rather, they represent the creation of purely fiat money.[15] They are, as one commentator describes them, "promises to pay that are never paid because no means exists to pay them; they are endlessly circulating debt." Vieira, *supra*, p. 338.[16]

[15] See Subcommittee on Domestic Finance, House Committee on Banking and Currency, *A Primer on Money*, 88th Cong., 2d Sess. (1964), p. 19: "American citizens holding these [Federal Reserve] notes cannot demand anything for them except (a) that they be exchanged for other Federal Reserve notes, or (b) that they be accepted in payment for taxes and all debts, public and private."

[16] This fall, under 31 U.S.C. § 5112, as amended by Pub. L. 99-61, Title II, § 202, 99 Stat. 115 (Liberty Coin Act), and Pub. L. 99-185, 99 Stat. 1177 (Gold Bullion Coin Act of 1985), the United States began issuing gold and silver legal tender coins in the following weights and denominations:

No statesman or economist has ever achieved enduring honor or respect by championing an inconvertible, unlimited paper currency.[17] As John Stuart Mill explained years ago (*Principles of Political Economy* (5th ed., 1877), Bk. III, Ch. XIII, § 3):

Metal	Weight	Denomination
gold	1 oz. fine gold	$50.00
gold	.5 oz. fine gold	25.00
gold	.25 oz. fine gold	10.00
gold	.1 oz. fine gold	5.00
silver	1 oz. fine silver	1.00

The coins are sold to the public at a price equal to the market value of the bullion at the time of sale plus costs of minting and distribution. 31 U.S.C. § 5112(f) and (i)(2)(A). They are legal tender under 31 U.S.C. § 5103 along with all other U.S. coins and currency, including Federal Reserve notes. However, because they cannot be obtained at the Treasury in a dollar-for-dollar exchange for Federal Reserve notes or any other coin or currency (31 U.S.C. § 5118(b), as amended by Pub. L. 99-185, § 2(d), 99 Stat. 1178), they neither define the value of the dollar nor fulfil any other functions of money under the Constitution. Instead of bringing a uniform standard of value to the dollar, these amendments create three new dollars of different intrinsic values: 1/50 ounce gold; 1/40 ounce gold (the $10 gold coin); and one ounce silver; none of which bears any reasonable relationship to the market price of these metals, *i.e.*, the current actual gold or silver value of the dollar.

[17] Although Lord Keynes severely criticized the classical gold standard as "a barbarous relic" (J. M. Keynes, *Monetary Reform* (Harcourt, Brace, 1924), p. 187), he was one of the two major architects of the Bretton Woods Agreements, which still sought to anchor the international monetary system to gold. He was also a vigorous opponent of paper money inflation. J. M. Keynes, *The Economic Consequences of the Peace* (Harcourt, Brace, 1920), pp. 235 ff. As he put it (*id.* 235, 236):

> By a continuing process of inflation, governments can confiscate, secretly and unobserved, an important part of the wealth of their citizens.
>
> . . . .
>
> Lenin was certainly right. There is no subtler, no surer means of overturning the existing basis of society than to debauch the currency. The process engages all the hidden forces of economic law on the side of destruction, and does it in a manner which not one man in a million is able to diagnose.

More generally, as a former chairman of the Council of Economic Advisers has observed: "'An almost hysterical antagonism toward the gold standard is one issue that unites statists of all persuasions. They seem to sense that gold and economic freedom are inseparable.'" Alan Greenspan, quoted in D. R. Casey, *Crisis Investing* (Harper & Row, 1980), p. 162.

> Although no doctrine in political economy rests on more obvious grounds than the mischief of a paper currency not maintained at the same value with a metallic, either by convertibility, or by some principle of limitation equivalent to it; and although, accordingly, this doctrine has, though not till after the discussions of many years, been tolerably effectually drummed into the public mind; yet dissentients are still numerous, and projectors every now and then start up, with plans for curing all the economical evils of society by means of an unlimited issue of inconvertible paper. There is, in truth, a great charm to the idea. To be able to pay off the national debt, defray the expenses of government without taxation, and in fine, to make the fortunes of the whole community, is a brilliant prospect, when once a man is capable of believing that printing a few characters on bits of paper will do it. The philospher's stone could not be expected to do more.

Can anyone truly believe that the Constitution authorizes the adoption of this elixir? The framers did not intend that it should. No Justice of this Court has ever said that it does. On what basis, then, can our present inconvertible, unlimited paper currency be held constitutional? Are the pretensions and arrogance of modern money manipulators a substitute for constitutional analysis? Does the Constitution provide for the Volcker standard, or the Smith standard, or the Jones standard? Or, following the example of our forefathers, should we frankly admit that recent monetary contrivances have failed dismally to repeal the wisdom of the ages on the subject of money?[18]

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[18] The Federal Reserve System was established in 1913 (38 Stat. 251), largely in response to the banking panics of 1873, 1884, 1893 and 1907. Since 1913, the nation and the world have experienced both the Great Depression and a secular inflation without parallel since the sixteenth century, when gold plundered from the New World by the Spanish flooded Europe. See D. Dreman, *Contrarian Investment Strategy* (Random House, 1979), pp. 220-221 (chart showing consumer price index from 1275-1975). Whether the dollar's loss of purchasing power is measured from its peak in 1913 or its more average level in 1940 (A. 20-21), the record of the Federal Reserve in managing the nation's money fully validates a famous remark attributed to George Bernard Shaw,

Rather, have they not, as Webster predicted that they would, "'shake[n] the whole system'" (*supra*, p. 15), leading not only to massive depreciation of the purchasing power of the dollar, but also to massive government spending and deficits, virtual congressional paralysis on fiscal policy, and proposals for a constitutional provision never before suggested nor thought necessary: the balanced budget amendment?[19]

III. THE CONSTITUTION REQUIRES THAT THE DOLLAR BE LEGALLY AND CREDIBLY DEFINED WITH REFERENCE TO GOLD OR SILVER.

In the *Legal Tender Cases*, 79 U.S. (12 Wall.) at 553, the opinion of the Court expressly rejected the notion that Congress could make paper money a standard of value or that the notes at issue were anything other than promises to pay gold dollars at some future though unspecified date:

> It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender

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himself a Fabian socialist as well as a playwright: "'Between trusting in the natural stability of gold and the natural stability of the honesty and intelligence of the members of government, I advise you to vote for gold.'" Quoted in J. E. Sinclair *et al.*, *How You Can Profit from Gold* (Arlington House, 1980), p. 133.

[19] The monetary system that has developed since the mid-1960's has fundamentally changed the nature of government borrowing. Formerly, with metallic money or legal tender notes directly or indirectly redeemable in gold or silver, the government was under substantial pressure to conduct its fiscal and monetary affairs in a manner consistent with its obligation to repay its borrowings in money of the existing standard of value. Today, with an unlimited, inconvertible paper currency, the government is not held to any external monetary standard. Its credit now rests not on its financial prudence or even its power to tax, but on its exclusive power to print or otherwise create unlimited amounts of paper dollars having no defined or intrinsic value. Its borrowing power at least in its own currency is thus virtually unlimited, and so therefore is its ability to run budget deficits.

> acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, the Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. . . . It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

These same points were emphasized in the concurring opinion of Justice Bradley (79 U.S. (12 Wall.) at 560, 561-562):

> This power [to emit legal tender notes] is entirely distinct from that of coining money and regulating the value thereof. It is not only embraced in the power to make all necessary auxiliary laws, but it is incidental to the power of borrowing money. It is often a necessary means of anticipating and realizing promptly the national resources, when, perhaps, promptness is necessary to the national existence. It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed.
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> . . . .
>
> No one supposes that these government certificates are never to be paid — that the day of specie payments is never to return. . . . And their payment may not be made directly in coin, but they may be first convertible into government bonds, or other government securities. Through whatever changes they pass, their ultimate destiny is *to be paid*. [Emphasis in original.]

Accord, *Bronson* v. *Rodes*, 74 U.S. (7 Wall.) 229, 251-252 (1869) (coined dollars and legal tender notes not equivalents;

contracts requiring payment in coin not satisfied by tender of notes).

As used in the Constitution, the words "To coin Money, regulate the Value thereof, and of foreign Coin" are unambiguous. They authorize Congress to mint coins in such denominations as it considers appropriate, and to fix their value by weight of gold or silver and in relation to foreign coins.[20] These words do not refer at all to bills of credit, or paper money, and certainly not to inconvertible paper. They do not authorize Congress to regulate the value or fix the price of gold or silver bullion as commodities, but rather only to set the bullion weight of its coins. In context, the word "value" is not a reference to some inchoate concept of purchasing power; rather, it refers only to weight of gold or silver. Similarly, the word "regulate" does not mean to destroy or systematically debase the value of United States money, or to surrender control over its value relative to the money of other nations; rather, it refers only to setting the weight of gold or silver in domestic coins, and establishing the equivalent domestic weight for foreign coins.

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[20] Between 1792 and 1972, the gold weight of the dollar was changed only twice. In 1834 the gold dollar was reduced from 24.75 grains of pure gold ($19.39/ounce of fine gold) to 23.22 grains ($20.67/ounce) to equalize the mint ratio with the market ratio of silver to gold, the latter by operation of Gresham's law having fallen out of circulation. At that time, both metals were standard money, but the silver dollar was the standard dollar and standard of value. See F. B. Garver and A. H. Hansen, *Principles of Economics* (Ginn, 1928), pp. 322-324. In 1934, with the nation on the gold standard and the gold dollar as the standard of value, the dollar was devalued to $35 per ounce of fine gold. Reflecting the low market price of silver, the weight of the silver dollar was left unchanged at 371.25 grains, where it remained until 1968. The intent of the 1934 devaluation was to raise prices during a period of severe price deflation. See J. P. Warburg, *The Money Muddle* (Knopf, 1934), esp. pp. 147, 211. The economic theoreticians of this measure were professors George F. Warren of Cornell and James Harvey Rogers of Yale, who urged a "commodity dollar" under which the gold parity of the dollar would be allowed to fluctuate to maintain a constant purchasing and debt-paying power. *Id.* at 134-140. President Roosevelt himself described his goal more modestly as "'a medium of exchange which will have over the years less variable purchasing and debt-paying power for our people than that of the past.'" *Id.* at 161. See *id.* at 179-182.

IV. The Constitution Does Not Authorize Congress to Use Its Monetary Powers to Depreciate the Purchasing Power of Obligations of the United States, Including Federal Reserve Notes.

In *Perry* v. *United States*, which dealt with gold clauses in government bonds, the Court stated the fundamental issue (294 U.S. at 350):

> There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. . . . [T]he Government [contends] that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

It held (294 U.S. at 350-351, 353-354):[21]

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[21] Justice Stone did not join in this portion of the opinion. *Perry,* 294 U.S. at 361. However, given the position of the four dissenting justices that all gold clauses should remain enforceable according to their terms, it is fair to treat this portion of the opinion as commanding the support of eight of the nine Justices. Indeed, with regard to government bonds, the dissenting opinion states (294 U.S. at 377):

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States*," the Congress is authorized to pledge that credit as an assurance of payment as stipulated, — as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. [Emphasis in original.]

. . . .

The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government, — upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. *Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations*. [Emphasis supplied.]

Congress may coin money; also it may borrow money. Neither power may be exercised so as to destroy the other; the two clauses must be so construed as to give effect to each. Valid contracts to repay money borrowed cannot be destroyed by exercising power under the coinage provision.

The Court in *Perry* thus rejected the notion that the government established by the Constitution possessed the authority to depreciate the purchasing power of its own obligations, or even to change their gold value when stated in a contract. Although the latter may have been a wrong without a remedy, the former was actionable if more than nominal damages could be shown. See *supra*, p. 19.

The monetary system that has evolved since 1940 is primarily characterized by secular inflation and a corresponding secular depreciation of the purchasing power of the dollar, all as a consequence of monetizing U.S. government debt. This monetary system has accomplished for many years, and continues to accomplish, precisely what *Perry* forbids: the intentional and systematic depreciation of the purchasing power of U.S. government obligations, including Federal Reserve notes, making "the credit of the United States . . . an illusory pledge." *Id.* at 350.

Ultimately, the government's treatment of its creditors is not merely an issue of law, but of fundamental justice and national character. In 1925, as Chancellor of the Exchequer, Winston Churchill returned Britain to the gold standard at the prewar parity " 'because he thought that if you dropped [the rate] you were cheating your creditors.' " Hans Hock, quoted in M. Mayer, *The Bankers* (Ballantine, 1974), p. 467. See also W. Manchester, *The Last Lion* (Little Brown, 1983), p. 792. Richard Nixon, on the other hand, apparently had no qualms about taking the nation and the world off gold in 1971. Nothing could better express the difference between gold and unlimited fiat money than the contrast between these two men: the great British statesman who by force of character saved his nation in its "sternest" hour, and the disgraced American president who by cheating and dishonesty nearly ruined his.

Conclusion.

The inconvertible, unlimited paper currency issued in recent years by the federal government presents the very same evils as the paper currencies issued by the states prior to the adoption of the Constitution. This Court should grant certiorari to preserve the historic integrity of the judicial system and to apply the remedy prescribed by the Constitution and advocated in *The Federalist*, No. 44 (Madison) (Modern Library ed. at 290):

> 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 government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; 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.

Respectfully submitted,

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November 26, 1986

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1430

REGINALD H. HOWE,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES.

Before
Campell, *Chief Judge*,
Coffin and Bownes, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered July 30, 1986

We concur in the conclusion of the district court that the authority of Congress to issue and regulate currency in the manner objected to by appellant is well-established. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870); *Juilliard* v. *Greenman*, 110 U.S. 421, 448 (1884); *Ling Su Fan* v. *United States*, 218 U.S. 302, 310 (1910); *Norman* v. *Baltimore & Ohio R.R.*, 294 U.S. 240 (1935); *Nortz* v. *United States*, 294 U.S. 317 (1935); *Perry* v. *United States*, 294 U.S. 330 (1935). We therefore summarily affirm the judgment of the district court. *See* 1st Cir.R. 12.

By the Court:
/s/Francis P. Scigliano
Clerk.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

REGINALD H. HOWE,
PLAINTIFF,

v.

CIVIL ACTION
NO. 85-4504-C

UNITED STATES OF AMERICA,
BOARD OF GOVERNORS OF THE FEDERAL
RESERVE SYSTEM, AND FEDERAL OPEN
MARKET COMMITTEE,
DEFENDANTS.

MEMORANDUM

April 18, 1986

CAFFREY, CH. J.

This is a complaint for declaratory relief under 28 U.S.C. § 2201 in which Attorney Reginald H. Howe, acting *pro se*, seeks to challenge the constitutionality of the current monetary system of the United States. Defendants are the United States and the entities responsible for administering the monetary system, namely the Board of Governors of the Federal Reserve System, and the Federal Open Market Committee. This Court has previously allowed a motion to drop the Secretary of the Treasury as a party defendant.

The matter came before the Court on the basis of plaintiff's motion for summary judgment and on the basis of the remaining defendants' motion to dismiss the complaint. The motions have been briefed and orally argued and after hearing, I rule as follows: that the complaint should be dismissed on the basis of several well-established legal doctrines.

1) This Court lacks subject matter jurisdiction because plaintiff lacks standing to sue. *See, Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, 766 F.2d 538, 539 (D.C. Cir. 1985); *Horne v. Federal Reserve Bank of Minneapolis*, 344 F.2d 725, 727-28 (8th Cir. 1965). *See also, Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978).

2) Plaintiff has failed to state a claim upon which relief can be granted because he seeks to attack acts of Congress, the constitutionality of which have been upheld by decisions of the Supreme Court in a number of reported opinions, such as the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870); *Juilliard v. Greenman*, 110 U.S. 421 (1884); as well as the so-called *Gold Clause Cases, Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); and *Perry v. United States*, 294 U.S. 330 (1935). Accordingly, I rule that the complaint herein should be dismissed.

Order accordingly.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

REGINALD H. HOWE,
PLAINTIFF,

v.

CIVIL ACTION
NO. 85-4504-C

UNITED STATES OF AMERICA,
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, AND FEDERAL OPEN MARKET COMMITTEE,
DEFENDANTS.

ORDER

April 18, 1986

CAFFREY, CH. J.

In accordance with memorandum filed this date, it is ORDERED:

1. Plaintiff's motion for summary judgment is denied.
2. Defendants' motion to dismiss is allowed.
3. Complaint dismissed.

/s/Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1430

REGINALD H. HOWE,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES.

Before
Campell, *Chief Judge*,
Coffin and Bownes, *Circuit Judges*.

ORDER OF COURT

Entered August 29, 1986

Appellant's petition for rehearing under Fed.R.App.P. 40 is denied.

By the Court:
/s/Francis P. Scigliano
Clerk.

Appendix E.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1430

REGINALD H. HOWE,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS-APPELLEES.

Before
Campell, *Chief Judge*,
Coffin, Bownes, Breyer, and
Torruella, *Circuit Judges*.

ORDER OF COURT

Entered July 8, 1986

Appellant's request for an en banc hearing or certification to the Supreme Court are denied.

By the Court:
FRANCIS P. SCIGLIANO, Clerk

By:/s/Richard W. Gordon
Chief Deputy Clerk.