The Constitutional Imperative In Reform Of The Monetary And Banking Systems Of The United States

by

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Foreword

Dr. Edwin Vieira, Jr., presented the original version of *The Constitutional Imperative in Reform of the Monetary and Banking Systems of the United States* to the Ludwig von Mises Institute's Seminar Series in Public Policy, at the Heritage Foundation's Lehrman Auditorium, Washington, D.C., on 8 December 1988. His purpose, then and now in this expanded monograph, was to explain that:

Monetary and banking reform in the United States must be appreciated and approached as a matter of law, as well as a matter of economics.

- The most important—indeed, the *controlling*—law in the United States is the *Constitution*.
- The *Constitution*, rightly understood and applied, provides an unequivocal mandate for a *particular* monetary and banking system. And, therefore,
- Debate over monetary and banking reform that does not begin with a clear statement and acceptance of this *constitutional imperative* is not only uninformed, but also subversive of the uniquely American system of political economy.[1]

As the inexorable events of the present banking crisis in the United States finally compel the political establishment to face the necessity of basic reform of the monetary and banking systems, the insights set out in *The Constitutional Imperative* will become

[1] *See* Edwin Vieira, Jr., *Approaching the Crossroads: The American System or the Corporate State?*, National Alliance for Constitutional Money Monograph No. 2 (1990).

ever more important, if *real* reform is to be achieved. For, as Dr. Vieira points out, the leading authorities on economic reform of these systems recognize that the key to correction of contemporary problems is the enforcement of a "monetary constitution" to confine the discretion of government within narrow limits.

These experts disagree among themselves, however, on exactly what the principles of this "monetary constitution" should be. In *The Constitutional Imperative,* Dr. Vieira argues that, if the experts would focus on what the *Constitution* prescribes now, they would largely have the solution to the problem of reform in their hands obviating further discussion, debate, and dissention; and placing the inestimable moral, political, and legal force of the *Constitution* squarely behind their efforts.

Hopefully, *The Constitutional Imperative* will cause people to comprehend that the Founding Fathers already foresaw the United States' obvious need for a "monetary constitution," and took the necessary steps to guarantee that "constitution" in the *Constitution*.

Richard L. Solyom, Chairman,
Sound Dollar Committee

Introduction

The potentially key role of the *Constitution* of the United States in returning this country, and ultimately the entire free world, to a system of sound money and honest banking was but little perceived and almost never debated as few as ten years ago. To a very great degree still, the constitutional imperative in reform of America's monetary and banking arrangements remains largely unappreciated and certainly unarticulated. However, a growing awareness does exist today among free-market economists, political scientists, and particularly students of "public-choice" theory that

- the Federal Reserve System—a domestic cartel of private banks specially licensed to emit legal-tender fiat paper currency and create "deposit-credit money"—is both intellectually indefensible and economically unworkable;

- the increasingly unstable international monetary and banking system can no longer rely on the chronically depreciating Federal Reserve Note as the "world reserve currency,"

- new domestic and international monetary and banking arrangements must soon be implemented, based on some set of enforceable political and legal restraints on governmental action—what public-choice theorists call a "monetary constitution"; and

- in the United States, this "monetary constitution" can arise from the imposition of limitations on the government's powers that derive from either: (a) our domestic *Constitution* as it now exists or may be amended hereafter; or (b) a new supranational monetary and banking regime that effectively supersedes the *Constitution* and subordinates to a scheme of globalist controls America's national sovereignty over money and banking.

The rapidly increasing attention being paid in both academic and political circles to the necessity of some kind of monetary constitution" is encouraging, as far as it goes. More to the point in a country that prides itself on the "rule of law," however, would be for those promoting a purportedly "new" constitutional order in money and banking first to investigate what the monetary and banking powers and disabilities of the United States *Constitution* are now. For such an investigation would uncover how the proper interpretation and rigorous implementation of the *present Constitution* could largely solve America's contemporary monetary and banking crises, and secure her national sovereignty against inroads by new supranational institutions.

Analysis

I. That most people concerned with establishing a "monetary constitution" in the abstract overlook the United States *Constitution* in particular as a possible solution to the problem is paradoxical. The United States, after all, is a *legally constrained political economy*. It is a *political* economy because the government exercises political power to affect economic interrelationships among individuals and groups. But it is also a *legally constrained* political economy because the *Constitution* grants only certain defined powers to the government, denies all other powers, and confines and qualifies the exercise of even the granted powers with various substantive and procedural limitations and requirements. Ours, then, is a political economy characterized by both governmental powers *and disabilities*, *by both* governmental authority to act and individual *immunities (or rights to be free)* from governmental action in the economic sphere.

The set of all governmental powers and disabilities in that sphere defines America's "economic constitution.” The extensive sub-set of these powers and disabilities that deal with money, credit, legal tender, and banking defines America's "monetary constitution.” The proper construction and application of these monetary powers and disabilities may be debatable. But that this country does have some kind of a "monetary constitution" *de jure* is unquestionable.

Also beyond serious dispute is the defective nature of the present *de facto* monetary and banking arrangements of the United States, and the undesirable political-economic outcomes that have emerged as consequences of those arrangements from the actions of the government, the markets, the banks, various interest-groups, individuals, and so on. The demerits of the present regime are distressingly manifest on every level of inquiry:

Intellectually, America suffers from the radically nominalistic conception that treats circulating "credit" as "money,” that disconnects the creation of credit from the production or even the existence of any tangible medium of exchange, and that asserts the possibility of creating "new purchasing power out of nothing.”[2] This currently fashionable monetary wisdom forgets that nothing can be created out of nothing, least of all *credit*—which rests on the belief by the lender that the borrower will in fact repay what he has borrowed. If the government (or a specially privileged

[2] J.A- Schumpeter, The Theory of Economic Development (1961), at 73.

bank) truly tries to fashion credit "out of nothing" that is, without a reasonable anticipation that its promises to pay can be fulfilled, it generates only uncertainty and mistrust.

Legally, America suffers from the abusive procedure violently at odds with any rational conception of the obligation of contracts—that the government or its clients can discharge pre-existing debts merely by substituting for them new promises to pay and declaring the original promises "paid" thereby. This shell-game disguises the gradual real abrogation of all debts by calling a privileged category of bank-debts "money" and "legal tender" for all other debts.

Morally, America suffers from the elevation of deceit to the level of acceptable—indeed, routine—"public policy." The monetary and banking *apparat* of the Department of the Treasury and the Federal Reserve System systematically gulls individuals into a false sense of security, implementing policies the consequences of which the authorities know or expect to be quite different from what they announce to the general public—in particular, diminishing the objective exchange-value of currency while pretending to fight "inflation."

Socially, America suffers from massive redistributions of wealth—primarily from households to the national government—as a result of manipulations of legal-tender currency and credit by the government and its client-banks.[3]

Economically, America suffers from hypervolatile markets in which recurrent speculative raids are the response to the realization that "the value [of American currency] has been separated to an unknown degree from market forces and is being influenced by government operations whose standards and

[3] *See, eg.,* Bach, "The Economic Effects of Inflation," in *Inflation: Long- Term Problems,* 31 Proc. Acad. Pol. Sci. (No. 4, 1975), at 20, 2528 (from $500 billion to $1.6 trillion in creditors' claims wiped out by inflation from 1946 to 1974).

objectives have never been made public and whose continuation for more than a few months at a time cannot be counted on."[4]

Politically, America suffers from a thoroughgoing default of the government on its responsibility to maintain a sound and honest monetary and banking order, and its decision instead to employ the old "money-illusion" of inflation as a hidden tax and to connive with special-interest groups to subvert monetary laws for their own predatory purposes.

And developmentally, America suffers from an historical devolution and degeneration in which the national medium of exchange has been radically *primitivized and politicized,* through the transformation from commodity money (silver and gold coins) to fictitious "credit money" (irredeemable Federal Reserve Notes). A true "credit" (or *fiduciary)* money functions as an honest surrogate for an ultimate, real medium of payment: typically, specie coinage which the holder of the fiduciary money can demand by legal right in redemption thereof. What is the "payment" the holder of contemporary fiat Federal Reserve Notes can (at least for the moment) demand by legal right "dollar" for "dollar"? Other than token, base-metallic ("clad") coinage, only the set-off of a nominally equal "dollar"-denominated tax liability he owes to the national government.[5] And this set-off is possible only because Federal Reserve Notes are statutory "obligations of the United States."[6] Thus, contemporary American currency amounts to a "credit" against governmental exactions, and that alone.

Contrast this to the situation when silver and gold coins were the legally mandated media of payment of debts and redemption of fiduciary currencies. At that time, money was distinct from, and

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[4] Stein, "Don't Be Spooked by the Market's Moves," *Wall Street Journal,* 22 November 1988, Editorial Page.

[5] *Compare* 31 U.S.C. § 5103 *with* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76-77 (1869). Other than regulated public utilities, no one is required by law to offer for sale any fixed amount of goods or services at predetermined prices in Federal Reserve Notes.

[6] 12 U.S.C. § 411.

superior to, "credit.” "Credit" could not be money, because ultimately money gave credit to "credit.” To be sure, a holder of specie money enjoyed no guarantee that market prices in that money would not fluctuate from day to day. However, he already had *in his possession* a real and valuable commodity—a known weight of precious metal—not a mere, perhaps unenforceable, promise to deliver.

Today, a holder of Federal Reserve Notes also remains uncertain about the course of market prices in that currency (although he may be fairly confident that they will continue to rise). But, unlike the holder of specie coinage, the holder of fiat paper currency possesses no valuable commodity and has no statutory right to obtain any known, fixed amount of any commodity in exchange for that currency—only a power to set off a liability the government unilaterally assesses against him in overt taxes. One must emphasize "overt" taxes, because the instrument of set-off (the Federal Reserve Note) is also—perhaps, even predominantly these days—an instrument of *hidden* taxation through managed depreciation of its purchasing power.[7]

Thus, by reducing money to central-bank "credit,” and central-bank "credit" to the license to set off the substanceless "money units" against tax liabilities, money has been primitivized—in the sense of being stripped of much of its usefulness and value as a medium of exchange for *all* transactions within society. And money has been politicized in the sense of serving first and foremost as the means of locking the individual into a relationship with his government that smacks of economic serfdom.

However, simply cataloging these (or other) serious defects in America's present monetary and banking arrangements leaves unanswered the most important question: Do these defects reflect an institutional problem of inadequacy of the *Constitution*—

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[7] The Federal Reserve Note is a depreciating asset *both* in its role as money and in its role as a medium of tax set-off. By holding Federal Reserve Notes in anticipation of future market exchanges, the holder loses purchasing power. And by holding those notes in anticipation of paying taxes, the holder is surreptitiously taxed!

namely, that the *Constitution* itself, correctly construed, allows, encourages, or even compels these outcomes? Or do they mirror an operational problem of failure of political personnel—namely, that legislators or judges are not implementing or enforcing the *Constitution*? The importance of determining whether the very design of the machinery, or simply the unreliability of the particular men temporarily at the controls, is at fault cannot be over-emphasized. For, as a practical political matter, analysis of the malfunction will dictate the likely repair.

Yet, notwithstanding the importance of ascertaining whether the United States is the victim of a basic institutional breakdown or merely adventitious operational errors, vanishingly few people exhibit any even apparent concern with ferreting out the answer by first—and logically foremost—establishing the true content of this country's "monetary constitution."

II. Certainly profound ignorance of the basic principles of money and banking among the general public and the political establishment explains, in part, this disinterest. Those academically trained in economics may flatter themselves that they understand, along with Professor James Buchanan, why no one can "intellectually defend" America's present monetary and banking systems, why "we could not conceivably have a worse regime," or why no one could "dream up a worse situation than we have now" in terms of monetary unpredictability.[8] But such people are a distinct minority.

A. The average man-in-the-street or in the public service has no conception of the crucial difference between a "dollar bill" that is merely *exchangeable* in the marketplace for *unpredictably varying* amounts of goods and services (generally less and less, as time goes on), and a "dollar bill" that is *redeemable by law* for a *fixed* amount of precious metal (that is, in fact, a *note* that must be paid on demand with a *dollar).* Neither does he suspect that what he

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[8] "Prospects for a Monetary Constitution," *Proceedings of the 1988 Progress Foundation International Conference* (27 May 1988), American Institute for Economic Research Econ. Educ. Bull., Vol. XXVIII, No. 6 (June, 1988), at 34.

considers his money in *his* bank-"deposit" is, in contemplation of law, really a *loan* he has made to the bank and *the bank's* money.[9]

Nor does he fathom the operations and complexities, if he even realizes the existence, of the "fractional-reserve" system on the basis of which his misnamed "deposits" are manipulatively managed.[10] Rather than pondering such matters, or their economic and especially their political implications, the average man naively swallows the propaganda-line of the Treasury Department and the Federal Reserve that money and banking are "technical" areas "too complicated" for voters and politicians to understand, better left to the "experts" for management in accordance with the arcane theories of contemporary mathematical economics, and certainly "too important" to become issues in the superficiality and buffoonery of electoral campaigns.

The depth of popular ignorance in this field satisfactorily explains recent monetary history. The last fifty or so years have witnessed three major monetary and banking collapses in this country: in 1933, with the seizure of the people's gold and termination of redemption of Federal Reserve Notes in gold domestically; in 1968, with the termination of redemption of all United States paper currency in silver; and in 1971, with the termination of redemption of Federal Reserve Notes in gold internationally.

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[9] This has long been recognized. *See, eg.,* Davis v. Elmira Savings Bank, 161 U.S. 275, 288 (1896); Scammon v. Kimball, 92 U.S. 362, 36971 (1875); Society for Savings v. Coite, 73 U.S. (6 Wall.) 594, 609 (1867); Thompson v. Riggs, 72 U.S. (5 Wall.) 663, 678 (1866); Bank of the United States v. Bank of Georgia, 23 U.S. (10 Wheat.) 333, 340-42 (1825). However, the courts have not addressed the problems that the vast majority of "depositors" in banks have no inkling of this legal rule, and that the banks generally avoid informing them of the true state of affairs.

[10] For a classical historical example, when President Franklin Roosevelt declared a "bank holiday" in 1933, he felt it politically necessary to use his very first "Fireside Chat" radio-address to inform the American people about "the mechanics of banking, and why the banks could not lay their hands on cash to meet runs [on their 'demand deposits']." S.E. Kennedy, *The Banking Crisis of 1933* (1973), at 180. Self-evidently, Roosevelt had no illusions about the ignorance of the public in this area.

Yet notwithstanding how radically destructive of the monetary system each one of these events (and, certainly, their cumulative effect) has been, neither any one of them nor all of them together triggered a constitutional, or even a political, or electoral, crisis over money and banking comparable to those that occurred, with massive participation by the general public, in the late 1700s (over ratification of the *Constitution* and its "hard-money" provisions), in the 1830s (over the recharter of the Second Bank of the United States), in the 1870s (over resumption of specie payments for the Civil-War "greenbacks"), or in the 1880s and 1890s (over the so-called "gold standard" and "bimetallism"). But if few people now understand money and banking at all, the majority can hardly be faulted for not being conversant with and demanding enforcement of America's "monetary constitution."

B. In fairness to the general populus, one should recall that print-media pundits such as Alfred Malabre, author of the best-seller *Beyond Our Means,* show little-greater appreciation of the problem—not, to be sure, because they are ignorant of basic economics, but precisely because they know so much about the peculiarities of *economic* theory that they crowd out of consideration the special realities of America's uniquely *political* economy.

Although, by any competent evaluation, the United States now faces a monetary and banking crisis as serious as any that convulsed the polity to its constitutional roots in the 1800s, in the chapter of his book entitled, ominously, "Nothing Works," Malabre surveys every possible solution but the *Constitution,* in concluding that "today's -predicament is beyond the means of any economic theory".[11] Malabre may be correct to dismiss Keynesianism, monetarism, and "supply-side" theory as solutions to contemporary problems. But he is hardly justified in despairing that *"nothing* works," without having first closely scrutinized the reforms that would arise out of consistent application of the monetary powers and disabilities of the *Constitution*.

[11] A.L. Malabre, Jr., *Beyond Our Means. How America's Long Years of Debt, Deficits and Reckless Borrowing Now Threaten to Overwhelm Us* 1(1987), at 83.

C. If disinterest in "monetary constitutionalism" can be explained in the case of the general public by ignorance and in the case of pundits by tunnel vision, in the case of high-level public officials a more sinister reason is not without evidentiary support. For a prime example, Professor Buchanan recounts how in 1980 President-elect Reagan's staff solicited suggestions as to what Reagan could do "to give an indication that [his] was going to be an administration with a policy thrust." Buchanan advised Reagan to

> appoint a presidential commission that would look into the whole structure of our monetary authority, the whole structure of the Federal Reserve authority * * *. And it seemed to me high time that that might be looked into.
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> What we have now is a monetary authority that essentially has a monopoly on the issue of fiat money, with no guidelines to amount to anything; an authority that never would have been legislatively approved, that never would have been constitutionally approved, on any kind of rational calculus, no matter what the political system. * * * So I thought it would be a good idea * * * to get a discussion going about the legitimacy of this authority.

In response to further inquiries from Reagan's staff, Professor Buchanan delivered "a short position paper" to Reagan. But, described Buchanan,

> [n]othing happened. Absolutely nothing happened. I never heard a word, not one word, from them. I found out months later, that they did seriously consider the idea, but Arthur Burns shot it down. Arthur Burns totally and completely rejected it, and would not have anything to do with any proposal that would challenge the authority of the central banking structure—you don't even * * * raise it as an issue to be discussed.

From this experience, Buchanan concluded that "the barrier of bureaucratic interest in maintaining [the present monetary and banking system] * * * is * * * extremely strong."[12] The perhaps more telling lesson on the state of the Republic is that, in the secrecy of the highest councils of an administration that openly prided itself on its commitment to the "original intent" of the *Constitution*, the filibustering of an agent of the Federal Reserve System stifled even a *discussion* "about the legitimacy" of the corporativistic central bank and its decaying fiat currency.

III. Those who do ponder this problem, however, are not (one can hope) the victims of economic ignorance, tunnel-vision, or narrow self-interest. Yet, for the most part, even such people have not been serious students, let alone zealous advocates, of America's special "monetary constitution," either. Not, of course, because they reject "monetary constitutionalism" in the abstract. They all generally concur that a "monetary constitution" is necessary, whatever their differences as to its precise content. They all agree that constitutionalism with respect to money and banking is as obviously important as—perhaps in the long run more important than—constitutionalism with respect to speech, criminal procedure, property-rights, and so on. And even those who propose a radical "de-governmentalization" of money and "free banking" as solutions to today's problems recognize the unavoidability of a controlling *governmental* role in the creation of such new arrangements, a role that must be *constitutionally* constrained if such changes are to achieve political permanence.[13]

Nevertheless, discussions of "monetary constitutionalism" among such people—be they economists, political scientists, historians, or even lawyers by training—almost invariably neglect any careful consideration of what the United States' "monetary constitution" specifically provides and how it can be implemented or enforced.

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[12] "Prospects for a Monetary Constitution," *ante* note 7, at 32-34.

[13] *See, eg.,* Rothbard, "The Case for a Genuine Gold Dollar," in *The Gold Standard.- An Austrian Perspective* (1985), at 7-9. Rothbard's case for "degovernmentalization" of money should be carefully distinguished from the untenable theories of "private money" now gaining favor in certain circles.

This state of affairs would be generally acknowledged as peculiar, perverse—indeed, intellectually improper and indefensible were the debate on "constitutionalism" to focus on such matters as speech, criminal procedure, or property-rights. In those domains, no one would ever presume to address the question of "constitutionalism" in America without first or at least very quickly consulting the *Constitution* itself. Yet where "monetary constitutionalism" is the subject of inquiry, the *Constitution* is conspicuous by its absence.

Why?! The answer, apparently, is that far too many of the erstwhile friends of sound money and honest banking are unconsciously ruled by an unwarranted assumption engendered by the undesirable state of present-day monetary and banking arrangements and encouraged by their unfamiliarity with the particulars of constitutional law and history and their unwillingness to fight an unpleasant political battle on uncommon terrain. So, unthinkingly, they act as if *no* United States "monetary constitution" now exists.

IV. Baldly stated, the notion that no United States "monetary constitution" now exists contradicts itself—If there is no "monetary constitution"—that is, no ultimate source of *legal* power over money and banking—under exactly what authority are Congress, the Treasury, and the Federal Reserve System now operating? Can America's monetary and banking systems be the products of mere anarchy or blatant usurpation? No; the assumption that no "monetary constitution" rules this country today really implies that the *Constitution* affirmatively grants the government (or the private parties behind the Federal Reserve System) *unlimited* power over money and banking.

A. Certainly this is the consensus implicit in the contemporary literature. For one example, Brennan and Buchanan report that

> [m]ost national governments * * * possess monopoly franchises in the creation of money * * *. To our knowledge, no country allows a totally free market in money, and none limits the governmental role to the definition of value of a monetary unit in support of a

> pure commodity standard. * * * Almost universally, national governments hold the authority to issue paper or fiat currency, either directly through governmental treasuries * * * or indirectly through governmentally-controlled central banks.[14]

Murray Rothbard affirms that

> each nation-state, since 1933, and especially since the end of all gold redemption in 1971, has had the unlimited right and power to create paper currency that will be legal tender in its own geographic area.[15]

And, under the heading "the chaotic state of monetary law," James Dorn tells us that

> [p]resent U.S. monetary law incorporates neither the "convertibility theory" of monetary control nor the "responsibility theory" * * * there is no constitutional limit binding the central bank to a noninflationary path of money growth; there is no legislative mandate to achieve a stable value of money. * * * [T]here is no firm commitment to achieve long-run price stability.
>
> Current law specifies no single objective for monetary policy and lacks an enforcement mechanism to achieve monetary stability * * *.
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> The lack of any effective constraint on the discretionary powers of the central bank reflects Congress's failure to safeguard the value of money, as intended in Article I, section 8 of the *Constitution*, and

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[14] "Monopoly in Money and Inflation: The Case for a Constitution to Discipline Government," Institute for Economic Affairs, *Hobart Paper No. 88* (1981), at 29.

[15] "The Case for a Genuine Gold Dollar," *ante* note 12, at 1. Of course, Rothbard is correct if by the phrase "has had the unlimited right" he means "has *claimed* the unlimited right." Laymen often incorrectly assume that governmental *claims* of rights or powers evidence the constitutional existence of those rights or powers.

> has led to a monetary system characterized by significant uncertainty about the future value of money.[16]

Observations of this kind—that the fundamental law of the United States permits no free market in money, does not confine the "governmental role [over money] to the definition of a monetary unit in support of a pure commodity standard," extends to the government "the unlimited right and power to create paper currency which will be legal tender," incorporates no intelligible principle of monetary control or responsibility, specifies no objective for monetary policy, leaves the Federal Reserve System unrestrained, and lacks "an enforcement mechanism to achieve monetary stability"—are shocking indictments. For, if true, they describe a literally *totalitarian money monopoly* exercised by a legally uncontrollable corporative-state banking cartel: a species of fascistic dictatorship over money run amok!

But should one seriously entertain the pernicious thesis implicit in these and similar statements that the ultimate collective effect of the numerous, precisely worded monetary provisions of the *Constitution* is simply to delegate all conceivable power to a "monetary soviet" of self-interested private bankers? And, if one is willing to suffer that strange supposition for purposes of argument, should he meekly accept it as fact, without the very clearest proof possible?

B. The current literature also abounds with descriptions of various hypothetical "monetary constitutions" to "discipline unconstrained monetary monopoly." For example, Brennan and Buchanan offer four possible regimes: First,

> a totally free market in money, with no direct money-creating government role at all. * * * The government would not define the medium of exchange; it would not print money; it would not regulate private printing of money or bank notes; it would not regulate banking or

[16] "Introduction: Reform the Monetary Regime," *Cato Journal*, Volume 5, No. 3 (Winter, 1986), at 675-76.

> credit. Money would emerge * * * with no government guarantees or repurchase arrangements. Government could choose to collect taxes in the money of its choice * * *.

Second,

> government may be empowered to issue domestic money, in whatever quantities it may choose. In this sense it would possess a monopoly franchise and it may be totally restrained in size of issue. The restraints present here, however, would emerge from the guarantee of free entry. The *Constitution* would guarantee that individuals could hold balances, make private contracts, including the incurring of debts, and conduct ordinary transactions in any money of their choosing. * * * The forces of competition would act as the restraint on the government money-issue monopoly * * *.

Third,

> [t]he government role is limited to the definition of the monetary value of a physical unit of a * * * commodity * * *. [The government] does not create money on its own account; and if there is paper money it is convertible at a fixed price into the base commodity at the governmental money window.

And fourth,

> [g]overnment may be empowered to issue money, and allowed a monopoly in it. But the *Constitution* may subject the grant of the monopoly to specially-defined rules that limit the powers of the money-creation authority.

All of these, say Brennan and Buchanan, are "monetary arrangements to meet constitutional tests"—"constitutional tests," impliedly, that are not being met now.[17]

Should one blithely assume, though, that the Framers of the *Constitution* were not concerned with and successful in meeting stringent "constitutional tests" of this kind through the painstakingly precise language in which they framed our country's "monetary arrangements"—language such as

- "The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin";[18]
- "No State shall * * * emit Bills of Credit; [or] make any Thing but gold and silver Coin a Payment in Tender of Debts";[19]
- "The Congress shall have Power to borrow Money on the credit of the United States",[20] which deletes the power to "emit bills" (issue paper money) that appeared among the cognate powers of the Continental Congress under the Articles of Confederation;[21] and
- the explicit references to the "dollar" as the unit of monetary valuation?[22]

Surely, such an assumption would be without legal historical support—indeed, would fly in the face of a proper construction of the *Constitution*'s monetary powers and disabilities. For such a construction shows conclusively that the Founders did embrace the principles of Brennan and Buchanan that "[t]he government would not define the medium of exchange," but would instead

[17] "Monopoly in Money and Inflation," *ante* note 13, at 58-62.
[18] U.S. Const., art. I, § 8, cl. 5.

[19] U.S. Const., art. I, § 10, cl. 1.

[20] U.S. Const., art. I, § 8, cl. 2.

[21] Arts. of Confed'n, art. IX.

[22] U.S. Const., art. I, § 9; amend. VII.

adopt "a physical unit of a designated commodity" as its monetary unit; "would not print money"; "would not regulate private printing of money or bank notes" and "would not regulate banking or credit" (except, presumably, to prohibit and punish fraud); and would allow individuals to "hold balances, make private contracts and conduct ordinary transactions in any money of their choosing."

And, even if one does entertain, for the purposes of argument, the hypothesis that the Founders might have failed in some respects to construct what contemporary economists argue is a proper set of constitutional boundaries to monetary and banking power, should he accept as fact, without the clearest proof possible, that the relevant constitutional provisions the Founders did enact exercise no meaningful constraint whatsoever on the alleged powers of today's government to define the medium of exchange, to emit redeemable or irredeemable paper currency, to prohibit competition in money, to delegate discretionary monetary authority to a private banking-cartel, and so on?

V. These questions, of course, are rhetorical only. The answers, self-evidently, are "No." Unfortunately, many people have never posed the questions to themselves, let alone thought about the answers. For that reason, a lack of basic knowledge about the "monetary constitution" and even about the monetary statutes and judicial decisions—of the United States is altogether too common. For pertinent examples:

Numberless are those, especially including economists and others among the noisy new claque touting "private money" as a panacea for all monetary ills, who erroneously believe that the legal-tender act *requires* individuals to use Federal Reserve Notes as their medium of exchange and, in conjunction with the Supreme Court's decision in *Norman v. Baltimore & Ohio Railroad Company,*[23]

[23] 294 U.S. 240 (1935).

prohibits so-called "gold-clause contracts." Such, of course, is not the law.[24]

Equally large is the number of individuals who erroneously fear that disestablishment of the Federal Reserve System would be prohibitively costly, because of the purported requirement that the government "buy back" the System's gold certificates or otherwise compensate the private banks in the cartel for dispossession of their "vested property rights." People who frighten themselves with this hobgoblin are obviously unaware of Congress' sweeping reservation of power in section 30 of the original Federal Reserve Act of 1913, and how this obviates any serious problem with liquidating the Federal Reserve System.[25]

And again, essentially no one with whom the present author has discussed the matter was initially aware that, in *Perry v. United States,*[26] the Supreme Court held unconstitutional Congress'

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[24] 31 U.S.C. § 5118(d)(2). Equally naif and uninformed is the assumption of these advocates of private "alternative currencies" that, were the legal-tender act repealed and "gold-clause contracts" allowed, people would rapidly choose forms of money other than Federal Reserve Notes in which to conduct their transactions. In fact, "gold-clause contracts" were statutorily legalized *in 1977*. Act of 28 October 1977, Pub. L. 95-147, § 4(c), 91 Stat. 1227, 1229. In the supervening years, however, the public has evidenced next to no interest in such contracts. Evidently, something more than the mere legal availability of an "alternative currency" is necessary to render its use economically expedient to a significant degree.

[25] *Compare* Act of 23 December 1913, ch. 6, § 30, 38 Stat. 251, 275 (congressional reservation of "[t]he right to amend, alter, or repeal" the statute), with Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627-31 (opinion of the Court), 712 (opinion of Story, J.)(1819); Sinking-Fund Cases, 99 U.S. 700, 720 (1879); Meriwhether v. Garrett, 102 U.S. 472, 511 (1880); Covington v. Kentucky, 173 U.S. 231, 238-40 (1899); and National Passenger Railroad Corp. v. Atchison, T. & S.F. Ry., 470 U.S. 451, 456-57 (1985). *Cf.* the analogous interpretation of Congress' reserved "right to alter, amend, or repeal any provision" of the Social Security Act. Fleming v. Nestor, 363 U.S. 603, 608-12 (1960).

[26] 294 U.S. 330, 348-58 (1935).

attempt to repudiate the promise of the United States to pay its obligations in gold coin or an amount of other currency equivalent in purchasing power to such coin. It remains to be seen how this highly significant, but generally unappreciated decision may apply to Federal Reserve Notes—which are "obligations of the United States"[27] that on their faces at least implicitly (if duplicitously) promise to pay certain sums in "dollars," but have been repudiated in terms of redemption in gold or silver coin, and certainly provide to their holders purchasing power far lower than an equivalent nominal value of such coin.

But the most telling example of "lost knowledge" in the area of our "monetary constitution" is the definition of the "dollar"' itself. Everyone talks about the "dollar," usually referring to the Federal-Reserve-Note "dollar bill." But this very implicit reference proves that the speakers know not what they say. The Federal-Reserve-Note "dollar bill" is not, has never been, and could not be a "dollar." Historically it originated as, and even in its present fraudulent form continues to mimic, a *promise to pay a "dollar,"* not the "dollar" that is the subject of the promise. And no statute of the United States has ever even purported to declare, in Orwellian fashion, that a Federal Reserve Note *is* a "dollar." But, then, precisely what is a "dollar"'?

People sophisticated enough to recognize that a Federal Reserve Note statutorily redeemable "in lawful money"[28]—that is, "dollars"—cannot be that money as well, generally describe the "dollar" as a fictional unit of account without any fixed content that, from time to time through American history, has been reified in silver, gold, base-metallic ("clad") coins, and paper United States Notes of widely varying purchasing powers.[29] People with

[27] 12 U.S.C. § 411.

[28] 12 U.S.C. § 411.

[29] This description is as pernicious as it is erroneous, because it assumes that the "dollar" (in the form of a United States Note or token coin) is or may be a "bill of credit," or mere promise to pay some amount of specie—thereby conceding that a "dollar" inherently suffers from all the liabilities attaching

greater historical acumen, such as Richard Hofstadter, may describe the "dollar" as "[t]he original monetary unit" of the United States, authorized by the Coinage Act of 1792 and "circulated in a variety of pieces of both gold and silver. The dollar was defined as having a certain weight of silver and a certain weight of gold."[30] But definitions of this kind are easily proven wrong.

The *Constitution*—which preceded the Coinage Act of 1792 and every other monetary statute of Congress—explicitly refers twice to the "dollar": in the so-called "slave tax provision" of Article 1, Section 9, Clause 1; and in the guarantee of jury trial in the Seventh Amendment.[31] When the *Constitution* and the Bill of Rights were ratified (1788 and 1791, respectively), the word "dollar" had a *single* meaning: not a paper currency (and surely not an irredeemable note of a central bank!), not a fictional unit of monetary account, not a gold coin, *not* a base-metallic coin—but a *silver* coin, the "Spanish milled dollar," which the Continental Congress had earlier adopted as "the money unit of the United States" in 1785.[32]

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to politicians' promises and all the dangers deriving from their greed. The advocacy of a "dollar" that is "redeemable in" or "backed by" silver or gold may sound laudable where the alternative is the irredeemable Federal Reserve Note. But such a "dollar" remains a form of "debt money" that is, as history shows, a long distance removed from payment of the specie coins that "back" it and a short distance away from the repudiation of payment that converts it into a fiat currency.

[30] Introduction to W.H. Harvey, *Coin's Financial School* (1894, reprinted.), at 37 (footnote omitted).

[31] Article I, Section 9, Clause 1: " * * * but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." Seventh Amendment: where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserver.

[32] *See* E. Vieira, Jr., *Pieces of Eight. The Monetary Powers and Disabilities of the United States Constitution* (1983). at 16-17, 66-70.

In the Coinage Act of 1792, Congress *statutorily implemented the constitutional adoption* of the "dollar": (i) by finding as an historical fact that a Spanish milled dollar “as the same is now current" contained 371-1/4 grains (troy) of fine silver; (ii) by fixing—or, perhaps more properly, *recognizing*—the constitutional "dollar" as of [that] “value"; and (iii) by creating a new, theretofore unknown gold coin, called the "eagle,” that was to have a "value of ten dollars,” which Congress regulate[d] or computed on the basis of the coin's weight (247-1/4 grains troy of fine gold) and the then-prevailing market exchange ratio between silver and gold (15:1).[33]

In short, the silver "dollar" of 371-1/4 grains is the *constitutional* standard. The construction given the constitutional term "dollar" by the first Congress in 1792 *fixed* this definition of the "dollar"

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33 Act of 2 April 1792, ch. XVI, §§ 9, 11, 1 Stat. 246, 247-28.

The Act defined "DOLLARS OR UNITS" as "of the value of a Spanish milled dollar *as the same is now current,* and to contain [3711/4 grains] silver.” Thus, the Act construed the noun "dollar,” as used in the *Constitution* to refer to the monetary unit of the United States, in terms of an *historically fixed fact* ascertained by Congress: viz., the fine-silver content, or "value,” of the Spanish milled dollar *"as the same is now current,*” that is, as it actually existed in 1792.

The Act also defined *this, and only this,* United States "DOLLAR" as the "UNIT" of the monetary system. The Act did define the "eagle" as "of the value of ten dollars or units.” The Act did not say, though, that the "eagle" *is* "ten dollars or units,” but that it is *"of the value of* ten dollars,” calculated according to the market exchange-ratio of 15:1. That is, the Act set the *price* of an "eagle" (or the price of the weight of pure gold struck in an "eagle") at "ten dollars,” because that was the market price of so much gold, calculated in silver, at that time. The “eagle" was thus priced in units of silver. This did not mean, however, that the "eagle" *was itself* ten units, any more than a statute setting the price of (say) bread at "one dollar per pound" could be construed impliedly to define the "dollar" as a pound of bread, or a pound of bread as the monetary "unit"!

In short, the Act clearly recognized the (silver) "dollar" as the unique "unit,” and the gold coinage as "valued" in terms of this "unit.” And as late as the Civil War, no one seriously doubted this statutory structure. *See, eg.,* Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 247-48 (1869).

beyond the power of Congress to alter it thereafter by any statute.[34] All gold coinage, base metallic coinage, and paper currency of any kind are, at best, mere *statutory* creations of Congress, *the legitimacies of which as constitutional "Money" rests on their relationships to the "dollar."* Furthermore, there can be no *constitutional "gold* dollars," no *"base-metallic* dollars," and least of all no *"paper* dollars," in the sense of a monetary unit different from the silver "dollar."

Consider now two further examples of "lost constitutional knowledge" that address very contemporary concerns.

First, the emerging cult of "private money," which has advanced into the public view as far as such magazines as *Forbes*.[35] In the contemporary world in which money performs not only an economic but also a *legal* function in relation to government, advocacy of "private money" is of doubtful coherence—because it begs the painfully obvious question of whether a form of money can be truly "private" if a government adopts that money as its medium of taxation and spending (and, presumably therefore, its unit of account), which the exponents of "private money" assume not only will but *must* occur. (Indeed, this assumption alone would seem to render the "private-money" thesis self-contradictory.)

Advocates of "private money" also leave unaddressed the issue of whether any government adopting a "private money" would not impose some regulations on its character—such as, for instance, accepting for taxes a "private money" only to the extent it consisted of coins containing known amounts of silver or gold, remained redeemable in so much specie, maintained a certain purchasing power as against a "basket of commodities," and so on. These and other glaring weaknesses of the theory of "private money" aside, the question here remains: "May Congress

[34] *Compare* Myers v. United States, 272 U.S. 52, 150-52, 174-76 (1935), *with* Eisner v. Macomber, 252 U.S. 189, 206 (1920).

[35] Brimelow, "Do you want to be paid in Rockefellers? In Wristons? Or how about a Hayek?," *Forbes* (30 May 1988), at 243.

constitutionally adopt a 'private money' as the United States' unit of account?"

Article 1, Section 10, Clause 1 and Article I, Section 8, Clause 5 answer that question in the negative. In Article 1, Section 10, Clause 1, the States absolutely surrendered their pre-constitutional powers to "coin Money," to "emit Bills of Credit" (what Americans today would call "redeemable paper currency"), and to "make any Thing but gold and silver Coin a Tender in Payment of Debts." Thus, the States subjected themselves to a strict gold-and-silver-coin economy, in which they could not be the source of the only coinage that could function as "a Tender in Payment of Debts."

Article I, Section 8, Clause 5 transferred the coinage-power to Congress alone.[36] The surrender of the States' primordial sovereign power to "coin Money," coupled with the exclusive grant of that power to Congress, implies a *right* on the part of the States to demand that *Congress* affirmatively exercise the coinage-power and a *duty* on the part of Congress to do so. This constitutional duty arising from a fundamental structural element in the federal separation of powers—may never be delegated, especially to private parties.[37] For that reason, the adoption of a "private money" as the unit of account of the United States is unconstitutional.

The second example relates to budget deficits of the national government. The ease with which deficits accrue traces to the ability of Congress to "monetize debt"—that is, to borrow into

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[36] Congress also received in this clause the power "to regulate the Value * * * of foreign Coin," a power that the States did not explicitly surrender. Apparently, the States retain a power concurrent with that of Congress to "regulate the Value * * * of foreign Coin"—and thereby create a pool of "gold and silver Coin" that they can declare "a Tender in Payment of Debts," except insofar as their "regulat[ions]" conflict with "regulat[ions]" *in pari materia* made by Congress. *See U.S*. Const., art. VI, cl. 2.

[37] *See* A.L. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). *Accord,* Carter v. Carter Coal Co., 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring)(1936).

existence through the Federal Reserve System repudiated "bills of credit" in the form of irredeemable, legal-tender Federal Reserve Notes or deposit-credits denominated therein. Now Article I, Section 8, Clause 2 empowers Congress to "borrow Money on the credit of the United States" only. However, when Congress borrows even a "bill of credit" fully redeemable in silver or gold money from some other entity (say, a bank), it "borrow[s] Money" not only on the "credit of the United States" (as to repayment of the loan itself) but also on the credit of the lender (as to redemption of the "bill of credit").

How is this to be constitutionally justified? Even more legally problematic is how Congress can borrow an *already repudiated*—and therefore discredited—"bill of credit" the issuer of which (as in the case of the Federal Reserve System) *refuses* to redeem it in precious metal, and has historically followed a policy of diminishing the purchasing power of the bill as against all commodities.

No: Congress can borrow *solely* "on the credit *of the United States" only* by borrowing "Money"—in the constitutional sense of *coin, the medium of payment*—and never by borrowing "credit instruments" of some other entity, even if those promise to pay "Money" on demand. This construction of Article I, Section 8, Clause 2, though, would as a practical matter strikingly circumscribe if not curtail altogether deficit-spending—by confining to silver and gold coin all borrowing, and therefore all repayment and the taxation necessary to generate the means of repayment.

VI. The loss of this and other knowledge of America's true "monetary constitution" has confused and corrupted contemporary discussion about monetary and banking reform. For examples,

Many people advocate that the "dollar"—by which they mean the Federal Reserve Note—be permanently tied to a fixed weight of gold, and redeemable at that weight. This wrongly assumes that the "dollar" is a monetary unit without historical definition, that it may exist as a gold coin or as a "bill of credit" (a paper currency redeemable in gold), and that the Federal Reserve Note is a legitimate form of this disembodied "dollar."

Other people contend that no legal or moral obligation supervenes in defining the "dollar" in whatever way best suits the monetary system reformers deem most desirable. This wrongly assumes that the "dollar" lacks a fixed legal definition, or at most is the empty name the statutes of the United States give to the medium of exchange that serves as the government's unit of account, whatever that may be from time to time.

With these and similar attitudes as widespread as they are warrantless, it is no wonder that the present-day debate over monetary and banking reform is a literal Tower of Babel, with no common linguistic ground even as to the supposed main subject of discussion: the "dollar." With alleged "dollars" of silver, gold, base-metal, paper, and even electronic computer-entries available for purposes of argument, all of supposedly equivalent legal status in the minds of the disputants, but of widely disparate economic values in the marketplace, it is also no wonder that there are as many mutually incompatible suggestions for reform as aspiring monetary *gurus*.

The basic problem here, of course, is that too many otherwise well-intentioned people are thinking *empirically, not normatively*. They are, perhaps naturally, tempted to ask: "What *now functions* as the monetary system?," "What *do* the people use as money?," or "Who *in fact* issues the money?"—uncritically assuming that what *is, is right*. They do not ask: "What *should* be," or "What *ought* to be," or "What *by right* is the monetary system of this country?" They fail to pose these questions—ultimately, the only ones worth answering—because they too-often forget that an "unconstitutional law" is a legal impossibility, not simply an inconvenience.

For "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties * * * ; it is, in legal contemplation, *as* *inoperative as though it had never been passed.*"[38] Thus, people may colloquially call a Federal Reserve Note a "dollar." But it has never been and cannot be legally such. And people may be unaware that a "dollar" is a coin containing 371-1/4 grains fine silver. But it has been so determined since 1792, and can never be anything else under the outstanding law.

In a similar vein, too many friends of sound money tend to think *economically,* and not *legally.* They tend to ask: "Is monetary system X better than monetary system Y?," without bothering to ask: "Does our legal system permit us to exchange monetary system X for monetary system Y.?" For they tend to assume—in harmony with Justice Holmes' fallacious quip in *Lochner v. New York* that "a constitution is not intended to embody a particular economic theory,"[39]—that the *Constitution* is sufficiently "elastic" to tolerate any monetary arrangements with which a political elite may want to experiment.

This assumption forgets, however, that the *Constitution* embodies a highly structured legal system incorporating defined and limited powers, specific disabilities, guarantees for individual rights, a complex separation of powers, "checks and balances," and so on. This kind of system cannot plausibly be "neutral" with regard to competing economic theories, in the monetary field or any other at least insofar as the various legal powers, disabilities, and individual rights have *economically* operational consequences.

Certainly the *Constitution* is not effectively "neutral" with regard to money. To the contrary, it defines a monetary system that relies on market principles as much as any governmentally based system could. First, pursuant to Article 1, Section 8, Clause 5 and Article 1, Section 10, Clause 1, the *Constitution* adopted the *type* of money the world market historically favored in the late 1700s

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[38] Norton v. Shelby County, 118 U.S. 425, 442 (1886)(emphasis supplied). Accord, Huntington v. Worthen, 120 U.S. 97,101-02 (1887); Fay v. Noia, 372 U.S. 391, 408-09 (1963).

[39] 198 U.S. 45, 75 (1905)(dissenting opinion).

(and still ultimately favors today): *commodity* money, money capable of being "coin[ed]" or tendered as "Coin."

Second, as made clear in Article I, Section 10, Clause 1, the *Constitution* adopted as money the commodities the *quality* of which the international market historically recognized (and still recognizes today) as pre-eminent: *silver and gold*, with base metals such as copper in a strictly subsidiary role. Third, as explicitly indicated in Article 1, Section 9, Clause 1 and the Seventh Amendment, the *Constitution* adopted the very *unit of* money the American market had found most convenient during the 1700s: the *dollar* of 371-1/4 grains fine silver. And fourth, through the system of *"free coinage"* implicit in Article 1, Section 8, Clause 5, the *Constitution* left the ultimate *supply* of money to the market, too.[40]

[40] This final point requires some elaboration. Under the system of "free coinage," individuals are privileged to increase the money-supply by bringing silver or gold bullion (or foreign coins) to the mints to be coined into "Money" of the United States at cost. And individuals may also decrease the money-supply by reducing coined specie in their possession to bullion (in order to employ it in industrial arts, for example). In these instances, the market obviously determines the supply of money extant. Of course, the government as well may coin bullion it has collected through taxation or amassed through the operation of silver or gold mines owned by the public, or may reduce coin in its possession to bullion for legitimate-purposes. But the market-system as traditionally understood in this country presupposes a government capable of taxing the citizenry and owning and managing property on behalf of the public. Therefore, governmentally initiated increases or decreases in the supply of coinage of this sort—undertaken, presumably, "to pay the Debts and provide for the common Defence and General Welfare of the United States," as authorized in Article I, Section 8, Clause 1—would constitute changes in the supply of money no more incompatible with market-determination of that supply than taxation is incompatible with market-determination of the distribution of income, or than a fully compensated governmental taking of land is incompatible with market-determination of the distribution of real property. Under Article 1, Section 8, Clause 5, Congress also has authority to "regulate the Value * * * of foreign Coin," either increasing the supply of money by declaring such coins officially "Money" of the United States at their intrinsic values in silver or gold, or decreasing that supply by removing the official status previously granted. Although legally distinct from the power to strike domestic coin, this power to

Moreover, even while denying certain monetary powers to the States (in Article 1, Section 10, Clause 1), and investing such powers in Congress (in Article 1, Section 8, Clause 5), the *Constitution* left unchanged and guaranteed (in Amendments V, IX, and X) the traditional right of the people of the United States to adopt whatever media of exchange they desire in their own private commercial transactions. Thus, Congress may adopt a national money-system; but except when individuals come to the courts for redress of non-contractual injuries, or pay their taxes, or enter into contracts with the government, or receive "just compensation" for property taken through eminent domain, Congress may not require them to recognize or employ that money system in their private affairs. Or, in practical effect, the *Constitution* imposes on the people a governmental monetary system only to the extent that they interact with the government in the exercise of its other constitutional powers.

In short, to the extent compatible with the existence of any government at all, *the Constitution "degovernmentalized" money in its most important particulars*. Thus, one could without exaggeration describe the *Constitution* as profoundly *Austrian* in its necessary economic effect.[41] However, this apparent constitutional support in practice for one economic theory over

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adopt foreign coin exhibits the same economic effect. Under the system of "free coinage," after all, all foreign coins not "regulate[d]" constitute potential domestic coins, even if the market were not already using them as media of exchange without any congressional declaration to that effect. (A congressional declaration "regulat[ing] the Value of foreign Coin" is necessary only to render that coin *officially* part of the money-system *employed by the government*, not to allow private parties to use it for their own purposes.) And "regulate[d]" coins can be reduced to bullion as easily as domestic coinage. Any congressional "regulat[ion] * * * of foreign Coin," then, would amount merely to coinage of domestic money from the mass of bullion the foreign coins contained (without the minting-cost, however); or, where Congress denied certain foreign coins an official status, to reduction of those coins to bullion.

[41] *Compare* the description of the constitutional money-system given above to the recommendations in L. von Mises, *The Theory of Money and Credit* (new ed., H.E. Batson trans., 1971), at 413-57.

another—for Austrian monetary freedom as against a "state theory" of money—rests, not on the particular *economic* merits of the Austrian view (which, in any event, was unknown as such in the late 1700s), but on the *Constitution*'s political presuppositions in favor of personal liberty and private property.

In sum, both the empirical and the economic approaches fail because they excise from consideration the centrality of law to monetary and banking reform. *There can be no reform of the monetary and banking systems without enactment of new laws and the amendment and repeal of old laws and statutes.* However, in this country, the *Constitution* controls all such enactments, and even the validity of existing statutes, regulations, and judicial decisions. Therefore, the unavoidably first step in reform is to determine precisely what the *Constitution* commands, allows, and prohibits in the fields of money and banking.

VII. Curious is the absence of any widespread realization among monetary reformers that, by first historically and legally defining the "dollar" and the other salient features of America's "monetary constitution," the debate over monetary and banking reform can be immensely simplified, in at least three ways:

First, by impressing on the academic and political communities that there is an uniquely American "monetary constitution" which constrains governmental authority in a very specific manner, particularly in terms of the unit of account (the "dollar") and the permissible governmental media of exchange and legal tender (silver and gold coin).

Second, the debate over reform can be simplified by invoking this "monetary constitution" to determine which monetary and banking statutes enacted since 1792, and which statutes proposed for enactment tomorrow, are lawful *vel non*. No rational change in the present monetary and banking systems is possible without changes in the nation's laws. But before they can be changed, the laws themselves must be identified *strictissimi juris*—and separated from mere congressional enactments (and judicial "precedents" that many people mistakenly identify as "laws") that fail the test of constitutionality.

Surely there are both profound intellectual and practical differences between reforms based on the *assumed* constitutionality of the Federal Reserve System and reforms based on its proven unconstitutionality *ab initio*—in terms, for example, of the status of Federal Reserve Notes as "obligations of the United States" subject to redemption "in lawful money," of the legal-tender character of Federal Reserve Notes, of the ownership of the gold title to which is evidenced by the gold certificates held by the Federal Reserve, of the enforceability of loans based on the monetization of governmental debt, and so on.

Third, recourse to America's "monetary constitution" can narrow the debate over monetary and banking reform by immediately ruling out of order the vast majority of proposals that are themselves unconstitutional—such as schemes to generate fiat United States Notes to replace Federal Reserve Notes.

Indeed, systematic constitutional analysis of the present monetary and banking systems results in two specific agendas for action. Under *destructive reformation,* the *Constitution* requires that the government:

- declare unconstitutional the Federal Reserve Act of 1913, the seizure of gold coin and outlawry of "gold clause contracts" in 1933, and such parts of decisions of the Supreme Court that erroneously license Congress to emit legal-tender paper currency and otherwise depart from its true constitutional powers and disabilities;

- disestablish the Federal Reserve System and "privatize" its legitimate functions under section 30 of the Federal Reserve Act of 1913;

- decry Federal Reserve Notes as "obligations of the United States" under 12 U.S.C. section 411;

- terminate the "legal-tender" status of Federal Reserve Notes and base-metallic ("clad") coinage under 31 U.S.C. section 5103;[42]

- cancel all gold certificates held by the Federal Reserve System, in favor of a trusteeship over the gold to be executed by the United States on behalf of the people;

- hypothecate to restoration of the constitutional money system all unclaimed gold unconstitutionally seized in 1933 and now in the custody of the United States;

- declare voidable all contracts between member banks of the Federal Reserve System and any other parties, where the consideration for the contracts on the part of the banks was unconstitutional "monetization" of debt;[43]

- revalue all innocent private contracts denominated in Federal-Reserve-Note "dollars" and not involving member-banks of the Federal Reserve System under the rule of the *Confederate Note Cases;*[44] and

- conduct searching and scrupulously impartial civil and criminal investigations and prosecutions of the Federal Reserve System and its operations, domestic and international.

Under *constructive reformation* the *Constitution* requires that the government:

- begin the coinage of silver "dollars" and fractional "dollar" coins, with a unit of 371-1/4 grains (troy) fine silver;

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[42] *See* especially as to use of Federal Reserve Notes for payments of taxes, Taylor v. Thomas, 89 U.S. (22 Wall.) 479 (1875).

[43] *See* Craig v. Missouri, 29 U.S. (4 Pet.) 410, 436-37 (1830).

[44] Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11-14 (1868); Confederate Note Case, 86 U.S. (19 Wall.) 548, 555-58 (1873); Wilmington & W.R.R. v. King, 91 U.S. 3,3-4 (1875); Stewart v. Salamon, 94 U.S. 434, 435-36 (1876); Cook v. Lillo, 103 U.S. 792, 792-93 (1880); Rives v. Duke, 105 U.S. 132, 140-41 (1881); Effinger v. Kenney, 115 U.S. 566, 571-74 (1885).

- begin the coinage of gold "eagles" and fractional “eagle" coins, denominated only in troy ounces of fine gold;
- establish a system of "free coinage" for "dollars,” "eagles,” and fractional silver and gold coins;
- adopt all monetarily viable foreign silver and gold coins as "Money" of the United States;
- "regulate the Value" of domestic and foreign silver and gold coins relative to the "dollar,” with the silver-to-gold exchange-ratio set by the free market;
- redeem outstanding United States token coinage "dollar" for "dollar"; and,
- outlaw undisclosed or otherwise fraudulent "fractional-reserve" banking and cognate improper commercial practices.

VIII. The advocates of sound money and honest banking have already won the intellectual battle in terms of economics. They have proven that: (i) governmental money must be based on a *commodity standard;* (ii) there must be a "free market in money,” in which each individual is entitled to choose for himself—through *"gold-clause contracts"* and other devices—what form of money he will use in exchange, unfettered by abusive legal-tender laws; and (iii) the government must not interfere with nonfraudulent "free banking.”

And the friends of sound money have also won the intellectual battle in political science. They have proven that an economically sound system of money and banking is impossible in the long term without an enforceable "monetary constitution" legally constraining the "rent-seeking" actions of public authorities and their predatory special-interest-group clients.

In addition, circumstances are now suddenly propitious for the success of these proposals. For, in the last decade, conditions of deepening monetary and banking crises have developed, in which the economic and political-scientific critique of the proponents of sound money and honest banking has gained a new credibility, urgency, and even prophetic character. Two situations of crisis are distinguishable, as a result of both of which meaningful monetary reform could occur.

In the first possible case, looming governmental debt and chronic budget deficits play a crucial role. The hard fact is that the present generation must finance the governmental budget and pay the governmental debt by ordinary taxes, by voluntary lending, or by the extraordinary, hidden tax and forced loan of inflation through the emission of fiat currency.[45] Assume—as seems not unlikely—that over the next several years Congress finds the "inflation tax" the most politically palatable means to transfer real wealth from society to the government and other politically privileged drones. Also assume inflation accelerates enough to *increase the* real budget deficit. Then, as Bernholz points out,

> it can easily happen that the real budget deficit cannot be maintained once it has, at least partly, to be financed with the inflation tax and if the rate of inflation has crossed a certain threshold. The tendency towards higher real budget deficits is strengthened by the fact that the real demand for money decreases with the rate of inflation. This means that the base of the inflation tax shrinks so that the government has to increase the tax rate, namely the rate of inflation, by issuing more money to obtain the same real revenue from the inflation tax.
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> What happens in such circumstances? * * * [C]urrency substitution takes place, i.e., * * * good money drives out bad money in spite of all governmental regulations trying to prevent this. The lower real demand for the inflating money is compensated for by a rising real demand for good money * * *. It follows that under conditions of advanced or hyperinflation, the

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[45] See Knox v. Lee, 79 U.S. (12 Wall.) 457, 560-1 (1871) (Bradley, J., concurring) (Civil-War "greenbacks" are constitutional exercise of the Borrowing Power as "forced loans").

> government has either strongly to cut back inflation or even to erase it with a monetary reform. Otherwise the increasing rate of inflation would not only lower real revenues from ordinary taxes but also from the inflation tax to insignificant amounts. Since the "good money" is nowadays foreign exchange or indexed domestic money, and has often been in former times gold and silver coins, the government would also lose its control of the money supply.
>
> If the government is politically unable to undertake the necessary reforms or if the reforms falter, it can happen, and has happened that the bad national money is driven out totally by the good money * * *. Then the government has finally to legalize the good money to receive tax revenues again.[46]

Thus, one can predict that *constitutional* monetary reform could come about during a period of rapidly accelerating inflation in which "currency substitution" involving silver and gold coins has become widespread in the private economy. Emphasis on constitutional reform and silver and gold coinage as the new media of exchange is necessary because, under the conditions Bernholz hypothesizes, the "currency substitution" could involve *foreign* exchange or a new *supra*national currency use of which by the populus would mean, not only that the government lost control of the money supply (which it would in any event under the constitutional monetary system) but also that the United States lost her monetary sovereignty to the entity issuing the substituted currency.

In the second case, the economic unsustainability of the total public and private debt assumes the key role in promoting—or, perhaps more descriptively, forcing—monetary reform. If the government and the Federal Reserve System are unable to support the ballooning domestic "debt pyramid" through inflation,

[46] "Prospects for a Monetary Constitution," *ante* note 7, at 28.

because interest rates rise to prohibitive levels,[47] an international "run" on the Federal Reserve Note may occur, ultimately leading to "a worldwide rush out of paper currencies into the most liquid asset of all—gold."[48] Self-evidently, a "run" of this kind would amount to a thoroughgoing "currency substitution," again pressuring the authorities to reform the monetary and banking systems in a constitutional direction.

But if conditions are potentially ripe for monetary reform, much work remains to be done. To congratulate one's self for having won the intellectual battles in economics and political science is not enough. Now is the time to fight the war of the markets: to educate people on the possibility, practicality, and desirability of re-ordering their daily economic affairs around "gold-clause contracts" and similar devices that can drive the anticipated process of "currency substitution" in the direction of real constitutional money, silver and gold coin—or at least offer them significant personal protection against the financial storms to come. And now is the time to fight the war of constitutional politics: to convince people and honest public officials that the *Constitution* provides the only legally sound foundation on which to erect the monetary and banking reforms necessary for America's economic rehabilitation.

To accomplish the latter task, proponents of sound money and honest banking must overcome public attitudes towards constitutional reform as strongly negative and widely held as they are substanceless:

First, the self-styled "worldly wise" will scoff that constitutional reform is a hopeless delusion, inasmuch as present-day politicians, legislators, judges, and bureaucrats have supposedly "set aside" the *Constitution* entirely for all practical purposes. The only delusion here rests in the minds of the cynics. Contemporary

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[47] *See* Sperandeo, "The U.S. Government 'Whoppers'," *The Sound Money Investor* (May/June 1989), at 39.

[48] Interview of John Exter in *Blakely's Gold Investment Review*, Vol. I, No. 1 (1989), at 9.

government functions, for the most part, according to defined procedures, in the service of supposedly knowable public and private rights, powers, privileges, and immunities. Public officials *act* according to "constitutional" rules, and *say* that they are performing "constitutional" duties. Observers who understand the *Constitution* may deny that these rules or duties are what the *Constitution* actually prescribes—but no one, office-holder or critic, openly gainsays the controlling nature of the *Constitution*, whatever their ostensible disagreements about its meaning or application.

Moreover, if (as the cynics allege) the political establishment *has* permanently "set aside" the *Constitution* (except as a ritualistic talisman rhetorically trotted out to rationalize this or that imposition of arbitrary power on the country), what rational hope have advocates of "competing currencies," "private money," "free banking," or other market-driven paths to reform of the monetary and banking systems that any of these plans can succeed? Each of these alternatives depends for its very existence on the *legal* sanctity of private contracts and private property—that is, ultimately, on *constitutional* restraints on the power of government to annul contracts through "legal-tender" (actually, forced currency-substitution) laws, or to confiscate property such as gold or silver coin from innocent individuals.

If a political oligarchy has emasculated the *Constitution*; and *if* the oligarchy has done this (at least in part) precisely to institutionalize the present corrupt system of fiat currency, inherently fraudulent "fractional-reserve" central banking through the Federal Reserve cartel, "monetization" of governmental debt, and so on; and if an electorate with proper education, motivation, and leadership cannot restore, *through constitutional* political channels, a return to *constitutional* money and banking—*then precisely how, other than through political revolution or economic collapse followed by political revolution, can sound money and honest banking ever be restored?.'*

More specifically, how can sound money and honest banking be *imposed on the government* (which, after all, the proponents of "alternative currencies" and "private monies" somewhat naively castigate as the unique source of contemporary monetary and banking problems) without creating *and enforcing* some kind of clear constitutional limitation on governmental discretion in the monetary field? How, in what every sophisticated observer must admit is a *political* economy, can meaningful and lasting economic reforms be implemented without accompanying *political* reforms? But these questions answer themselves.

Second, some people will object that a new constitution is necessary to overcome the unwillingness of officeholders and judges to enforce the present *Constitution*. But a new constitution cannot by itself guarantee a return to constitutionalism. Public officials and judges who knowingly refuse to obey the monetary commands of the original *Constitution* are not likely to honor similar commands in a new one. A return to constitutionalism requires replacement of those officials and judges with individuals of higher moral character.

Third, other people will object that the present *Constitution* does not embody certain particular powers and especially disabilities crucial to reform, and that therefore a new constitution is needed after all. Correct construction of the *Constitution* and an understanding of American monetary and banking history answer this objection decisively.

Fourth, still other people will object that the constitutional monetary and banking systems are not the very best regimes imaginable, economically. Although perhaps true, this contention is irrelevant to the fundamental issue of which is to rule: law or politics, the *Constitution* (whatever its faults may prove to be) or politicians and bureaucrats (the faults of whom are already all too obvious, and apparently ineradicable).

Fifth, other people will complain that the constitutional monetary and banking systems are too "inflexible" for modern times, and provide little leeway for "experimentation”. The short answer to this lament of the pragmatists is that the Framers adopted the monetary powers and disabilities as legal guarantees they thought essential for the protection of private property and individual liberty, guarantees with which the government "is not entitled to dispense in the interest of experiments.”[49]

Sixth, yet other people will predict the political impracticality or futility of trying to implement America's highly idealistic "monetary constitution" through a corrupt and cynical Congress or the State legislatures, or to enforce it through the kangaroo courts these bodies have created. Yet the history of the United States is replete with examples of proper implementation of the monetary powers and disabilities by less-than-perfect legislatures, even in the face of terrific political pressures and after episodes of unconstitutional actions—for examples, the coinage acts of 1792 and 1843, the refusal to recharter the Second Bank of the United States in the 1830s, the resumption of redeemability in gold coin for the Civil-War "greenbacks" in 1875, and the restoration of individuals' rights to own gold and to make “gold-clause contracts" in 1973 and 1977, respectively. And American history also records important judicial decisions favorable to the "monetary

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[49] New State Ice Co. v. Liebman, 285 U.S. 262, 280 (1932). *Accord*, Truax v. Corrigan, 257 U.S. 312, 338 (1921); Pointer v. Texas, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring). The somewhat longer answer from historical experience is that governmental "experimentation" in the monetary and banking field has almost invariably exacerbated the very problems it claimed to cure. For example, after the panic of 1907, Kansas, Nebraska, and Oklahoma enacted acts "guaranteeing" private bank-deposits. In the face of serious criticisms of the workability of the acts, the Supreme Court sustained them against constitutional challenge. Noble State Bank v. Haskell, 219 U.S. 104, 575 (1911); Shallenberger v. First State Bank, 219 U.S. 114 (1911); Assaria State Bank v. Dollery, 219 U.S. 121 (1911). In the event, the acts proved worthless. *See, eg.*, Robb, "Guarantee of Bank Deposits,” in 2 *Encyclopaedia Soc. Sci.* 417 (1930). However, because no *constitutional* prohibition existed in Supreme-Court precedents, in 1933 Congress created the Federal Deposit Insurance Corporation, foisting the unsound deposit-"guarantee" scheme on the nation as a whole, with predictably disastrous consequences. See Sen. Rep. No. 77, 73d Cong., lst Sess. 9-13; H.R. Rep. No. 150, 73d Cong., lst Sess. 5-7.

constitution"—such as *Lane County v. Oregon,*[50] *Bronson v. Rodes,*[51] *and Perry v. United States,*[52] to name but three.

Moreover, if it is naif to hope that Congress, the States, or the courts will obey the *Constitution* in service of the public interest in the rule of law, sound money, and honest banking, can it be even minimally rational to expect the Federal Reserve System to serve the general welfare in preference to the special interests of its constituent banks?!

And seventh, many other people will characterize today's monetary and banking problems as simply "insoluble," whatever the purely theoretical adequacy of the monetary powers and disabilities of the *Constitution* and the presumed willingness of virtuous and competent public officials to exercise those powers. This is the final counsel of despair. *No* problems can be deemed "insoluble" by the application of constitutional power *until that power has actually been applied without success.*

Defeatists should remember that at every major negative turning-point in America's monetary history, from the emission of the first legal-tender paper currency in 1862, through the establishment of the Federal Reserve System in 1913, to the purported "demonetization" of gold in 1933 (domestically) and 1971 (internationally) and of silver in 1968—at every major point at which the degenerate seeds of the noxious weeds of fiat currency and oligarchical central banking were sown in America's monetary soil, politicians unwisely turned *away* from the *Constitution*. Whereas, at every major positive turning-point in the chronicle of American money and banking, the *Constitution* has (more or less) provided the inspiration, the command, and the blueprint for governmental action. In the light of this experience, an assumed impotence is not only unbecoming but unhistorical.

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[50] 50 74 U.S. (7 Wall.) 71 (1869).

[51] 74 U.S. (7 Wall.) 229 (1869).

[52] 294 U.S. 330 (1935).

If the past provides any guidance, the *Constitution* remains the most powerful legal, political, and moral device available at present to accomplish the goal of sound monetary and banking reform—if Americans have the knowledge, and the courage, to use it. Until the friends of sound money at least try to enforce the *Constitution*, in good faith to the very best of their abilities, they should recall the old adage that "It is a poor workman who blames his tools!”

Conclusion

Current events cannot fail to impress on the cautiously reflective that the United States—indeed, the developed nations of the entire world—are on the brink of a perhaps terrible monetary and banking crisis. Theory teaches the utter unworkability of fiat paper currency in the long run. And history is now openly recording what may be the final, fatal chapter in the dolorous worldwide experiment with "fractional-reserve" central banking among sovereign nation-states—and the commencement of a new, and perhaps darker chapter of "fractional-reserve" banking under the auspices of a supranational cartel of private bankers exercising political power without political accountability. Yet most Americans, in public office or private station, are either deluding themselves that no danger threatens, or hoping that the very institutions and persons which and who created the conditions conducive to catastrophe can somehow muddle through to safety.

Old habits of belief and behavior die hard, especially the alchemists' dream of transmuting base-metal into gold, or (in the modern-day formulation) the bankers' fantasy of creating real capital out of deposit-"credits" and real wealth out of paper currency. Those who profit from "fractional reserve" banking, "monetization" of debt, and the other paraphernalia of modern monetary manipulation are unlikely to concern themselves with the long-term injuries the rest of society suffers to underwrite their short-term benefits or to be at a loss for rationalizations of the status quo, for denials of the dangers the advocates of sound money predict, and for personal disparagements of the exponents of constitutional monetary reform. Others perhaps not as keenly self-interested nevertheless may believe the "fractional-reserve," paper-currency system to be as essential to successful commerce as it has become ensconced as a political-economic institution. To them, the government and its client banks are the only conceivable sources of "money," without which the country would be bereft of wealth. And even those who understand the evils inherent in contemporary "credit"-money often resign themselves to suffer these evils in silence and inaction, despairing of a remedy for the cancer that has so long and so thoroughly ravaged the economic and political body of the nation.

However, neither the self-interest of some, nor the ignorance of others, nor even the defeatism of others still will, in the final analysis, be responsible for the perpetuation of America's contemporary monetary and banking systems until their inevitable collapse. That responsibility lies with the blindness of the American people. The potential tragedy of our situation is that what many pretend cannot happen, and what many others perceive as an inescapable disaster, may be largely avoidable, if Americans timely employed the means so obvious it goes unnoticed: the *Constitution*.

"Fractional-reserve" banking and paper "credit"-currency have insinuated themselves into every important economic and political relationship in American life, creating a *quasi*feudal system of distinct classes—some even specially privileged by law—and impressing upon society a peculiarly corrupt system of materialistic (anti)morals that elevates pursuit of a "quick buck" above love of family or duty to country. Yet, for all that, the new economic feudalism of "fractional-reserve" banking and "credit"-currency is no more ineradicable than the original feudal parasitism of openly titled nobility, which the *Constitution* swept away in two short, but complete and unequivocal prohibitions.[53]

In those prohibitions, the *Constitution* abolished a well entrenched political, economic, and social system designed to commandeer the first places in the state, that the history of centuries had proven

[53] U.S. Const., art. 1, § 9, cl. 8 and art. I, § 10.

pernicious. In as few words, the *Constitution* outlawed a newer system designed to commandeer the real wealth of the state, and the dangers of which the Founding Fathers themselves experienced firsthand, foresaw, and sought to forefend. The history of almost two centuries has, not surprisingly, proven their fears prophetic—and given the monetary powers and disabilities they fashioned an urgent relevance and unprecedented potential to establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[54]

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[54] U.S. Const., preamble.