GOVERNMENT'S MONEY MONOPOLY

Second Edition

Ten-billion mark note, Germany, 1923

HENRY MARK HOLZER

Government's Money Monopoly

Second edition, 2014.

www.henrymarkholzer.com
hank@henrymarkholzer.com
www.henrymarkholzer.blogspot.com
https://www.facebook.com/HenryMarkHolzer
https://twitter.com/HenryMarkHolzer

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Dedication, First Edition

To Rose Cherner Holzer and Herbert Holzer

Dedication, Second Edition

To my late friend Henry Hazlitt

The history of the law of money evidences a constant struggle between the customs of trade and the doctrine of freedom of contract, on the one hand, and on the other, the exercise of the political power for the needs of the government or the relief of private debtors.—Phanor J. Eder, "*Legal Theories of Money*."[1]

We insist that the only safe rule is the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed, in the 10th Amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people.—Luther Martin, Attorney of the State of Maryland in *M'Culloch* v. *Maryland*.[2]

A positive law may render a shilling a legal tender for a guinea; because it may direct the courts of justice to discharge the debtor who made the tender. But no positive law can oblige a person who sells goods, and who is at liberty to sell or not to sell, as he pleases, to accept of a shilling as equivalent to a guinea in the price of them.—Adam Smith *Wealth of Nations*[3]

In general, the art of government consists in taking as much money as possible from one class of citizens to give to another.
—Francois-Marie Arouet (Voltaire)[4]

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Foreword, (1st ed.), Professor Murray N. Rothbard

Inflation is recognized by everyone as our number one economic problem. Most economists now realize, after decades of Keynesian obfuscation, that the cause of inflation is a chronic increase in the supply of money, and that money is totally under the control of the federal government and its Federal Reserve System. The public, too, is beginning to wake up to this vital fact.

Unfortunately, most economists have trained themselves, for over a century, to be technicians who cannot question the fundamental political institutions of our society. Hence, their proposed cure for inflation is to exhort the Federal Reserve to use its power wisely and to refrain from printing money beyond the point that they feel to be viable. In this way, economists avoid facing the next crucial question: How did government get to be the sole issuer and regulator of money and banking? Is this part of the natural or divine order, or has the world once been different? Has there ever been a free monetary system?

As a constitutional lawyer, Henry Mark Holzer is free from the self-imposed blinders of the economics profession. In this highly valuable book, he gathers together the fundamental documents of American monetary history to show how we got into our present monetary mess. He shows conclusively that government dictation over our money, far from being a natural state of affairs, violated the basic principles on which Americans fought their Revolution against Great Britain. Holzer demonstrates that shortly after America was established, the government takeover of money was engineered by Alexander Hamilton and ensconced into our law by his disciple, Chief Justice John Marshall. And that this take-over trampled upon the principle of individual rights which had been enshrined in the Declaration of Independence and on which America had been founded. He also shows strikingly that the Hamilton-Marshall doctrine was extra-constitutional, and was based squarely on the Old World doctrine of absolute State sovereignty which had been so repugnant to the American revolutionaries. To Americans, the *people*, in their individual capacities, and not the government were supposed to be "sovereign."

From then on, it was all downhill, and the accelerating seizure of power by government and the suppression of rights proceeded with little fundamental opposition until the culminating nationalization of gold and the dollar by Franklin Roosevelt in 1933.

Economics, politics, and moral principles are interrelated, and this connection is neglected at our peril. As Holzer points out, inflation cannot ultimately be cured unless government is at last completely separated from the issuance of money and from the business of banking, and this will not be done until we renew our original reverence for the rights of each individual. Holzer's suggested constitutional amendment to separate money and state is a rousing standard for all lovers of liberty and sound money, and for all opponents of inflation, to rally around.

Professor Holzer has performed an inestimable service to scholarship and to everyone who wishes to learn how we got into the mire of permanent inflation. If he is heeded by enough people, he will have performed an important service to us all.

MURRAY N. ROTHBARD
New York, N. Y.
June, 1981

Preface

In 1981 I wrote/edited the first edition of *Government's Money Monopoly*. Among the many endorsements and favorable reviews, one was especially gratifying: Professor Murray N. Rothbard's because of his relentless war against fiat money and for a true gold standard. It is reproduced here, written some thirty-five years ago.

> **Professor Murray Rothbard**: "In this excellent, scholarly volume, Henry Mark Holzer brings us the key documents in the government's takeover of money, engineered by Alexander Hamilton and Chief Justice John Marshall. He traces the takeover back to Old World theories of absolute "sovereignty" that we had fought a Revolution to overthrow, and shows the consequences in the Age of Inflation [1981]. Holzer is also outstanding in linking government control of money and issue of paper with a trampling of individual rights and liberties. Anyone who wants to know how we got into our monetary mess will find Holzer's book indispensable. And his concluding proposal for a constitutional amendment to prohibit all federal state coinage or paper money, legal tender laws, or regulation of banking is something that all lovers of liberty or sound money and all opponents of inflation should rally around."

When recently I reread the first edition of *Government's Money Monopoly* I was stunned to realize that it could have been written in 2014 because of how the federal government—Congress and the President, abetted by the Supreme Court—has engorged the federal government's power over money and, by extrapolation, taken over the fields of finance and economics in the United States of America. Here are my prescient words of **1981**, written for the hardcover edition's jacket.

> The consequences of our government's monetary policies are all around us—widespread joblessness, crushing taxation, record inflation. Most Americans are profoundly affected by these policies, and eager to see them changed. Yet nothing happens—and won't—until more of us learn to ask certain questions: What are we up against? How, and why, did it happen? What can we do about it once and for all? This book has the [historical] answers.
>
> Throughout history most societies have been despotisms of one kind or another. Not surprisingly, the rulers had complete control over monetary affairs—for a distinct correlation exists between how free a society is and how much power its government has over money. Because the United States of America was supposed to be a free country, its government was granted comparatively few monetary powers—[essentially,] only to borrow and coin money, and regulate its value.
>
> Yet today, that same government possesses total power over every aspect of America's monetary system. With an octopus-like stranglehold, Washington's control extends to gold, money, credit, banking, and much more.
>
> How and why the Founders' limited intention was converted into omnipotent government monetary power is the subject of this book—a collection of basic materials which, if properly understood, explains what happened.

When I reread the first edition (written while I was a professor of law at Brooklyn Law School), I realized that parts of the book were overly long and, truth be told, too scholarly for the audience I wanted to reach.

Accordingly, in this second edition of *Government's Money Monopoly* I've cut the text unmercifully so as to better tell the story that government's debasement of money is thousands of years old, that monarchs and governments used various means to rob their citizens, and that debasement of money relentlessly continues today in the United States. Most important, I want laypersons to understand the underlying reason *why* politicians from Solon to Franklyn Delano Roosevelt sought to control money and, with it, entire financial systems.

1.
Overview

Of the many questions surrounding money, the most basic is what should be the relationship of government to monetary affairs, if any. Although there has never been any doubt that money is some form of property, a constant battle has been waged over by what right, and to what extent, money can be created and controlled by government.

Putting aside history for the moment, virtually every day in the Twenty-First Century the news media report another example of the United States government's intimate and extensive involvement in the nation's monetary system.

As Americans have experienced ever deepening financial and economic difficulties—underwater mortgages, unapproved consumer loans, an alleged "jobless" recovery, fraudulent cost-of-living statistics, major unemployment touching almost every family, unaffordable medical insurance premiums because of ObamaCare—many of the victims are finally beginning to realize that there is a connection between government monetary power and their personal financial problems.

Some of the victims, as they become increasingly aware of government manipulation of the monetary system, have been groping for answers.

They've been looking in the wrong places.

The answer to what has been happening to an uncountable number of Americans is not to be found in the empty rhetoric of politicians, the machinations of government bureaucrats, or the ramblings of intellectually impotent academics, but rather in the recognition of a fundamental principle: *The nature and extent of government power over monetary (and economic) affairs depends entirely on the underlying political relationship between government and the individual.* As this book demonstrates, the cause of the monetary problems that America faces today has long been rooted in beliefs about the power and function of government that is the antithesis of individual rights and limited government.[5]

Those statist beliefs had their genesis in other lands, but they gradually took root in American soil, and nurtured by the Supreme Court of the United States finally brought forth today's bitter monetary fruit.

We can go back to at least 594 *B.C.* for an early example of monetary debasement. The Athenian statesman Solon, though a lawmaker and poet, still had no difficulty in devaluating coinage in order to alleviate the burden of those day's debtor class. Does this sound familiar? *594 B.C.*!

When the Punic Wars drained the Roman republic of money and bankruptcy loomed, what was an easy way out for the Emperors? Simple. Reduce debt by paying creditors, including the army, in debased coinage.

The Gracchi Brothers were Roman tribunes, often thought of as "reformers" even though Tiberius tried to redistribute public land to the poor. For his trouble, riots ensued and the reformer was murdered. Brother Gaius fared no better when he tried his hand at land reform: He, too, was killed in the ensuing violence. I mention this because at the time of the unfortunate Gracchis the recurring problem of money arose yet again.

There were essentially two camps. One—which we can call the hard money crowd—insisted that if the government had to make expenditures there should be no debasement of coinage. Pay-as-you-go. Taxes, spending capital. The others—which we can call the ancient Keynesians—wanted inflation through debasement of coinage.

How would the Keynesians of antiquity, with no Federal Reserve System let alone printing presses, debase their money? One simple way was to degrade silver coinage by corrupting its content with base metals like copper and lead.

Centuries after Rome, in the Dark Ages feudalism embodied the idea that monetary affairs were the exclusive province of the rulers—an idea that proved to be popular with Europe's absolute monarchs years later. European feudalism took its toll on sound money, in a battle between the pro-debasement monarchs and the anti-debasement church, the latter representing the people. The rulers won.

I could not remove the space at the end of the previous page.

But not so in England, at least for a while, where a strong sentiment had developed against a sovereign prerogative to debase money.

Nevertheless, in the year 1604, a landmark English case proved once again that there is a direct, and often unhealthy, correlation between the nature of a political system and its government's manipulation of money. The 1604 *Case of Mixed Money* arose during the heyday of the English monarchy. The court ruled that:

> [A]s the king by his prerogative may make money of what matter and form he pleaseth, and establish the standard of it, so may he change his money in substance and impression, and enhance or debase the value of it, or entirely decry and annul it....
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> * * *
>
> And so it is manifest, that the kings of England have always had and exercised this prerogative of coining and changing the form, and when they found it expedient of enhancing and abasing the value of money within their dominions: and this prerogative is allowed and approved not only by the common law, but also by the rules of the imperial law.
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> * * *
>
> [A]lthough at the time of the contract and obligation made in the present case, pure money of gold and silver was current within this kingdom, where the place of payment was assigned; yet the mixed money being established in this kingdom before the date of payment, may well be tendered in discharge of the said obligation, and the obligee [creditor] is bound to accept it; and if he refuses it, and waits until the money be changed again, the obligor is not bound

> to pay other money of better substance, but it is sufficient if he be always ready to pay the mixed money according to the rate for which they were current at the time of the tender.[6]

The case's "royal prerogative" rhetoric speaks volumes about the statist nature of the English government at that time. And while there was some disagreement in England about the *extent* to which the sovereign could debase money, the basic premise was accepted: *some* debasement was permissible.

This background leads us to the British colonies in America.

The principle of royal prerogative relating to control over money crossed the Atlantic from the mother country to the American colonies. We'll see in Chapter 2, as the author notes, that England "followed a definitely negative and prohibitive policy toward the monetary evolution of the American colonies." As in earlier times, there was still a direct correlation between repressive political attitudes and the monetary system: England controlled its American colonies in virtually every important respect, and the Americans had little or no say in the enactment of laws which vitally affected them.

Chapter 2 goes on to explain how the ingenious colonists attempted to free themselves from English monetary control. It also discusses their early experiences with paper money. The author contends that "monetary disputes proved a powerful factor in the revolutionary movement." The colonial experience with paper money that grew out of those disputes had an important consequence: it substantially affected the monetary powers that would be granted to the new government, and withheld from the states, by the Constitutional Convention of 1787.

In the same century that the *Case of Mixed Money* approved Queen Elizabeth's debasement of her coinage, England's colonies in America began their experience with paper money and almost immediately the colonists began to encounter difficulties with it. Probably the first significant example of paper money in all western civilization were the bills of credit which were made "legal tender" by Massachusetts Colony as early as 1692—meaning that if the paper was offered in payment of debt, it had to be accepted by the creditor; if rejected, the debt was considered satisfied.

The problems continued into the next century as various other monetary experiments followed. The consequences were, to put it mildly, disastrous. James Madison would later characterize pre-Constitution paper money as "a pestilence which inflicted nothing but destruction."[7]

The Constitutional Convention debates, examined in part in Chapter 3, are revealing on two counts. They show that among the many issues that divided the delegates, federal monetary powers were among the most important. Indeed, monetary discord beset the Constitutional Convention even before it had begun.

The passionate exchanges that flew back and forth across the Convention chamber reveal the biases, pro and con, regarding paper

money. Rhode Island, a paper money stronghold, scented monetary reform in the air and refused to participate.[8] The Convention's keynote speaker, Edmund Randolph, "inveighed against the 'havoc of paper money' in his indictment of the Articles of Confederation."[9]

Once the Convention was under way, proposals that the Federal Government be given the power to coin money and to fix its value, and that both the Federal and State Governments be vested with authority to emit bills of credit, triggered heated debate over the appropriate limits of governmental monetary power.[10]

But when the smoke cleared, one side in the age-old battle between the individual and the government could claim a great, albeit partial, victory. *The finest charter of human liberty ever struck by man had expressly provided for a minimum of government power over monetary affairs*.[11]

When the work of the delegates was finished, Congress's money powers were not extensive:

> "The Congress shall have Power. . .
>
> - To borrow Money on the credit of the United States…
> - To coin Money, regulate the Value thereof, and of foreign Coin, and fix the standard of weights and measures . . .
> - To provide for the Punishment of counterfeiting the securities and current Coin of the United States. . . ."
> - And "No state shall…coin Money; emit bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of debts. . . ."

These few express powers delegated to the federal government by the Constitutional Convention of 1787, together with the power expressly denied to the states in Article I, Section 10, constitute the aggregate "money powers" expressly delegated to Congress by the Constitution of the United States of America. Only these. No other. As such, they are the root of government power over monetary power in the United States.

Less than four years after the Convention, the Constitution's monetary powers once again divided the new nation's leaders. This time, the result would be different, and Chapter 4 explains how the seeds of broad federal monetary power were sown, to grow steadily for the next two hundred years. Congress wanted to charter a bank. Washington was President; Randolph, his Attorney General; Jefferson was Secretary of State; and Hamilton, Secretary of the Treasury.

The President had doubts about whether Congress's constitutionally delegated Article I monetary powers extended to chartering a bank. Among the opinions he sought and received from cabinet officials, two stand out as classic political statements. In both Jefferson's and Hamilton's conflicting opinions can be found the essence of the statist view of government monetary power which would come to dominate future legislative and judicial thinking.

What Jefferson and Hamilton disagreed about was not *whether* government possessed the power to enter the banking business, but rather *what level of government*—state or federal—possessed that

power. Their dispute was not over the *principle*, but over its *application*. Moreover, essential to Hamilton's conclusion that Congress had the power to charter the bank was his contention that the legislature possessed powers *beyond* those specifically delegated to it in the Constitution. Even though Congress lacked the constitutional power to charter a bank, and even though the argument in support of the power's existence relied in part on the notion of extra-constitutional powers, Hamilton's opinion prevailed. Washington signed the bank bill into law, and the first Bank of the United States came into being. It operated without incident, and for nearly three decades there was little significant discussion about the broadened monetary powers of Congress.

By 1819, arch federalist John Marshall had been Chief Justice of the United States for nearly twenty years. Like Hamilton, Marshall was an exponent of broad federal power in general, extensive government monetary power in particular, and "loose" construction of the Constitution above all. Thus, when the constitutionality of the second Bank of the United States came before Marshall's Court in 1819, the idea that Congress had the power to charter that bank could not have had a more dedicated champion.

The case, *M'Culloch* v. *Maryland*, discussed in Chapter 5 and excerpted in Chapter 6, is without doubt among the most important ever decided by the Supreme Court of the United States, at least in two respects.

First, the Court adopted Hamilton's approach to "loose" interpretation of the Constitution. Second, it upheld the constitutionality of the bank, and thus of Congress's power to charter it. The Court did so, however, by going outside the delegated powers themselves into the realm of the powers possessed by "sovereigns."

The net result of the *M'Culloch* decision was that the powers of Congress, at least in monetary affairs, were not limited by the Constitutional grant of power to that branch of government. The actual monetary power that the federal government possessed, according to the Court, could be ascertained by reference not only to the instrument that created this nation, but also by recourse to notions of "sovereignty." Yet sovereignty, presumably, was exactly what the Founding Fathers had left behind when they took their first step down the road to independence on July 4, 1776. If Congress did possess such extra-constitutional powers, rooted in the concept of sovereignty, what had become of the "unalienable rights" of the Declaration of Independence? That question would be answered many years later by the next test of the government's monetary powers to reach the Supreme Court—the *Legal Tender Cases*.

Earlier in this chapter I observed that the nature and extent of government power over monetary affairs depends entirely on the underlying political relationship between government and the individual. And throughout history there has been a clear correlation

between government's involvement in the monetary system and the extent of a society's freedom. To repeat: The cause of the monetary problems that America faces today has been the statist philosophy about the omnipotent nature of government held by its leaders of both the left and the right.

At no time was this phenomenon more apparent than in the Civil War period.

While the North was fighting a moral war to destroy the blight of slavery and keep the United States of America intact, the federal government was seriously curtailing the freedom of its own citizens.

In 1861, the first federal income tax was imposed. In 1863, the first draft law was enacted, forcing conscripts into the Union army and onto the blood-soaked battlefields of Chancellorsville, Gettysburg, Chickamauga. If the government believed it had the power to seize the money and take the lives of its citizens, it's small wonder that the same government enacted the Legal Tender Acts.

Chapter 7 describes how, ultimately, $450 million in paper "greenbacks" were forced on an unwilling public, who were compelled by law to accept them "in payment of all debts, public and private" even at their low of thirty-eight cents on the gold dollar. As usual, the Supreme Court of the United States was a willing accomplice to Congress's usurpation of extra-constitutional monetary power.

In the first important legal tender case to reach the Court, *Hepburn* v. *Griswold*, while a bare majority held that the act could not be applied to a debt contracted *before* legal tender became law, all the Justices agreed on the underlying principle of broad monetary power enunciated by Chief Justice Marshall in *M'Culloch* v. *Maryland*.

It took less than eighteen months for *Hepburn* to be reversed by *Knox* v. *Lee*. The reasons make interesting reading, especially those which advert to the Court's attitude toward sovereignty, and to the government's view of what is "necessary."

The legal tender fight continued into the next decade, the last significant case coming before the Court in 1884. *Juilliard* v. *Greenman* put the finishing touches not only on the constitutionality of legal tender, but on the acceptance of Hamilton's theory concerning the interpretation of the Constitution and the monetary powers of Congress. *Hepburn, Knox,* and *Juilliard* are excerpted in Chapters 8, 9 and 10 respectively.

After the *Legal Tender Cases* had firmly established the monetary philosophy of the *Mixed Money-Hamiltonian-M'Culloch* axis, all that remained were extensions of what those cases had held. An important one came in 1911, with the Supreme Court's decision in *Ling Su Fan* v. *United States*, excerpted in Chapter 11. The Court held that Ling Su Fan's privately owned silver Philippine pesos did belong to him, but only for certain purposes. The coins, it seemed, were of concern to the "sovereign," so Ling Su Fan was guilty of criminal conduct by "illegally" exporting them from the Islands.

In a later case, *Noble State Bank* v. *Haskell*, excerpted in Chapter 12, the Court asserted "sovereign rights" not over the coins of just one individual, but over the entire banking business. In compelling a state bank to help insure its competitors' depositors against insolvency, the Supreme Court strongly implied that private individuals operate banks at the sufferance of government. In a unanimous opinion written by Justice Oliver Wendell Holmes, Jr., the Court stated: ". . . the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." In other words—the "public" being other individuals and organizations—the government's determination of what others need for their welfare trumped individual rights.

In light of what preceded them, the legendary *Gold Clause Cases* can be viewed as the culmination of a political philosophy and its necessary consequences that spanned three centuries. The cases are discussed in Chapter 13. All the ghosts are there: the *Case of Mixed Money*, the Bank Controversy, *M'Culloch* v. *Maryland*, the *Legal Tender Cases*. Again, statist doctrine carried the day. Chief Justice Hughes put the point thus in his concluding paragraph in the *Norman* case:

> The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties . . . may make and enforce contracts which may limit [Congress's] authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.

In other words, it was untenable for anyone to believe that individuals or organizations could sustain valid monetary contracts if Congress chose to override them in the name of others' needs, including the government's, conveniently labeled and invoked as the "public interest."

The story of how the American government has come to possess its enormous power over our entire monetary system is not an uplifting one. It is sad to realize how the basic intention of our Founding Fathers at the Constitutional Convention was subverted by ideas foreign to the principles of individual rights, limited government, liberty, and justice which animated this nation's formation. Even sadder is that the subversion was done by the Supreme Court—the one institution of our government whose principle task is to uphold the Constitution of the United States of America.

What can be done?

There are basically two courses of action, both of which are explained in the book's conclusion.

But first we must examine in considerably more detail the story summarized above.

2.
Money in Colonial America

The task of identifying the nature of the correlation between a nation's political and monetary systems is a central part of *Government's Money Monopoly*. In the United States, the story begins in colonial times, and a clear picture of the early difficulties with paper money is essential to understanding how government's power over monetary affairs evolved from then until now.[12]

I. *Basic Factors*

The monetary history of the American colonies was to a great extent determined by a permanent scarcity of coin. This fact operated to depress prices of colonial goods, to enhance the rate of interest, and generally to obstruct the economic development of the country. * * *[13] The dearth of coin operated in this sense and generally enhanced the dependency of the colonies. However, the colonies retaliated by developing an extraordinary ingenuity in contriving money substitutes.

Another factor determining the course of colonial monetary history and related to the scarcity of money was the colonial indebtedness to the mother country. * * * Therefore, the colonists, as a whole, became a debtor class and soon developed an inflationary tendency which was strengthened by the underlying political antagonism. Indeed, monetary disputes proved a powerful factor in the revolutionary movement. [As we have seen before, debased money is, at least in one sense, a boon to debtors and curse to creditors.][14]

II. *Commodity Money*

The earliest money substitutes invented by the colonists consisted of certain important products of colonial agriculture and industry, such as tobacco (Maryland, Virginia), rice (South Carolina), wheat, beef, pork (Northern colonies). These were made receivable in payment of taxes and other public dues at rates fixed by the respective legislatures. Frequently this so-called "country-pay" was by custom or statute, legal tender. By these qualities, "country-pay", although not real money, was distinguished from mere objects of barter.

III. Metallic Circulation

Only a little English coin entered the colonies, remittances from England being usually made through bills of exchange, and such coin usually did not remain long on American soil because of the adverse trade balance with England.

Instead, foreign coins circulated. Among silver coins, Spanish and Mexican pesos, or "dollars", were by far the most numerous. * * *

Foreign coins were obtained chiefly from the flourishing trade with the Spanish West Indies; and not unimportant was the fact that, until their activities were suppressed early in the eighteenth century, the pirates used to spend their loot in American ports.

* * * * *

IV. Colonial Paper Money

Issuance of colonial paper money began in 1690 when Massachusetts, under the pressure of an extreme emergency situation, issued bills of credit in order to pay the soldiers engaged in the unfortunate expedition against Canada. The bills . . . were made legal tender in 1692.

A new type of "current lawful money" was thereby created which spread rapidly over the American colonies.

The bills depreciated because of over issuance, lawful and counterfeited, because of the extension of periods of redemption and the reissuing of bills redeemed, because of the neglect to raise taxes which would have secured payment, and because of the violation of promises to reform which accompanied "new tenors."

It is true that to colonial paper money is to be attributed much of the successful development of colonial economic potentialities. The abuses and injuries inflicted upon the general public, however, gradually assumed such importance as to cause the English Parliament, in 1751, to forbid the issuance of new bills of credit except for current expenses of the colonies and extraordinary emergencies such as war and invasion. Circulating bills of credit were required to be called in immediately and to be discharged according to their terms, all acts and resolutions to the contrary being declared null and void in advance. To the extent that new issues were allowed, they were not to be legal tender. * * *

These measures were efficiently enforced throughout the colonies. It is true that the exemptions provided by the Parliamentary Acts were utilized on a large scale so that, in 1774, between one-half and three-fifths of the circulating currency, estimated in face value at 12 million dollars or, *in silver value*, at 10 million dollars, consisted of paper money. New issues were, however, no longer made legal tender, and even the term "bills of credit" was avoided. This tradition was reflected in the Federal Constitution which prohibits the several states from issuing bills of credit.

Alongside the bills of credit which were government paper money, there was a growth in private paper money, although much more limited in extent. A historically notable instance is the Land Bank of Massachusetts, established in 1740, which used rather crude methods to issue circulating media on the security of land. * * *

The amazing diversity and anomalies of colonial currency, despite their great legal and economic interest, illustrate the imperfection of colonial monetary conditions. This state of things tended to disappear when the colonies became an independent and unified nation, although the protracted experiences of the colonial period have left their marks in the national psychology. *The persistent inclination to experiment and to handle in a political and haphazard manner monetary matters which by their very nature require the use of scientific methods is certainly an unfortunate colonial heritage.*[15]

3.
The Constitutional Convention

The Declaration of Independence was a statement of guiding principles for the new nation, but those principles had to be implemented in a charter of government. The Constitution of the United States of America was that charter, and in the Convention from which it came one can see the conflicting forces that shaped it.[16]

Because the foundation for the relationship between government and monetary affairs in America was laid at the Constitutional Convention, it is there that our story begins in earnest. * * *

With the memory of the experiences connected with the continental currency and the paper-money issues of the States fresh in their minds, the members of the constitutional convention assembled at Philadelphia in May, 1787. Very soon after the organization had been completed, two propositions were submitted to the convention as bases for deliberation: the one a set of resolutions referring chiefly to alterations which should be made in the Articles of Confederation, by Randolph, of Virginia; the other a draft of a constitution to be substituted for the articles, submitted by Charles Pinckney, of South Carolina.

Randolph's propositions did not refer to the specific powers to be granted to the departments of government under the system proposed by him, and consequently no mention of the coinage power is found in his resolutions. In the sixth article of Pinckney's draft, however, dealing with the powers to be conferred upon the legislature of the new government, are found the following clauses:

> Art. VI. The legislature of the United States shall have power to . . . (3) Borrow money and emit bills of credit. . . . (9) Coin money, and to regulate the value of all coins, and fix the standard of weights and measures. . . . (18) Declare the law and punishment of counterfeiting coin . . . , etc.
>
> Art. XI. No state shall without the consent of the legislature of the United States . . . emit bills of credit or make anything but gold, silver, or copper a tender in payment of debts.

These two proposals were referred to the convention sitting as committee of the whole, and there debated until July 24, when the proceedings of the convention up to that time, together with Pinckney's draft, were referred to a committee of detail consisting of five members selected from the convention by ballot.

In the meantime, though there had been no discussion of the coinage or money powers of the proposed government, there had been one or two interesting allusions to the general subject in connection with other powers under discussion; for example, on Friday, June 8, in discussing the advisability of giving to the federal legislature the power to negative state legislation, Mr. Gerry, of Massachusetts, who was somewhat doubtful as to the general power, said he had no objection to restraining the laws (on the part of the states) which might be made for issuing paper money.

On June 15, Patterson, of New Jersey, had submitted still another set

of resolutions as a proposal for the new government, and on the 18th this plan was under discussion. In this connection Mr. Madison said: "The rights of individuals are infringed by many of the state laws, such as issuing paper money, and instituting a mode to discharge debts differing from the form of contract." Since the "Jersey" plan provided no means of preventing this he opposed the plan.

On August 6, the committee of five reported to the convention the draft of a constitution, in which article VII dealt with the powers to be conferred upon the legislature very much in the form of Pinckney's draft.

> Art. VII. Sec. 1. The legislature of the United States shall have power (4) To coin money (5) To regulate the value of foreign coin (8) To borrow money and emit bills on the credit of the United States (12) To declare the law and punishment of . . . counterfeiting the coin of the United States. . . .

Article XII contains the prohibition on the states introduced by the committee: "No state shall coin money," etc.

> Art. XIII. No state, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts, etc.

On August 16 these provisions came up for discussion. The debate as reported by Mr. Madison may be given in full:

> *Mr. Gouverneur Morris* [Pa.] moved to strike out "and emit bills on the credit of the United States." If the United States had credit such bills would be unnecessary; if they had not, unjust and useless.
>
> *Mr. Butler* [S.C.] seconds the motion.
>
> *Mr. Madison* [Va.]: Will it now be sufficient to prohibit making them a tender? This will remove the temptation to emit them with unjust views; and promissory notes in that shape may in some emergencies be best.
>
> *Mr. Gouverneur Morris:* Striking out the words will still leave room for the notes of a *responsible* minister, which will do all the good without the mischief. The moneyed interests will oppose the plan of government if paper emissions be not prohibited.
>
> *Mr. Gorham* [Mass.] was for striking out without inserting any prohibition. If the words stand, they may suggest and lead to the measure.
>
> *Mr. Mason* [Va.] had doubts on the subject. Congress, he thought, would not have the power unless it was expressed. Though he had a mortal hatred to paper money, yet, as he could not foresee all emergencies, he was unwilling to tie the hands of the legislature. He observed that the late war could not have been carried on had such a prohibition existed.
>
> *Mr. Gorham*: The power, as far as it will be necessary or safe, is involved in that of borrowing.
>
> *Mr. Mercer* [Md.] was a friend to paper money, though in the present state and temper of America he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the government to deny it discretion on this point. It was impolitic also to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of citizens.
>
> *Mr. Ellsworth* [Conn.] thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made were now fresh in the public mind, and had excited the disgust of all the respectable part of America. By

withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good.

Mr. Randolph [Va.], notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions that might arise.

Mr. Wilson [Pa.]: It will have a most salutary influence on the credit of the United States, to remove the possibility of paper money. This expedient can never succeed while its mischiefs are remembered; and, as long as it can be resorted to, it will be a bar to other resources.

Mr. Butler [S.C.] remarked that paper was a legal tender in no country in Europe. He was urgent for disarming the government of such a power.

Mr. Mason [Va.] was still averse to tying the hands of the legislature *altogether*. If there was no example in Europe, as just remarked, it might be observed on the other side, that there was none in which the government was restrained on this head.

Mr. Read [Del.] thought the words, if not struck out, could be as alarming as the mark of the beast in Revelation.

Mr. Langdon [N.H.] had rather reject the whole plan than retain the three words, "and emit bills."

On the motion for striking out the vote stood nine yeas to two noes. The clause as amended was then adopted.

On the next day the twelfth clause of the same section was a- mended so as to secure securities, as well as coin, of the United States against counterfeiting, and so adopted.

On August 28, article XII was taken up. As proposed by the committee of five it read: "No state shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility."

Article XIII read: "No state, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; lay imposts, or duties on imports. . . ."

Mr. Wilson [Pa.] and *Mr. Sherman* [Conn.] moved to insert after "coin money" in article XII the words, "nor emit bills of credit, nor make anything but gold and silver a tender in payment of debts," making the prohibition absolute, instead of making the measures allowable as in the thirteenth article, with the *consent of the legislature of the United States*.

Mr. Gorham [Mass.] thought the purpose would be as well secured by the provision of article XIII, which makes the consent of the general legislature necessary; and that in that mode no opposition would be excited, whereas an absolute prohibition of paper money would rouse the most desperate opposition from its partisans.

Mr. Sherman thought this a favorable crisis for crushing paper money. If the consent of the legislature could authorize emissions of it, the friends of paper money would make every exertion to get into the legislature in order to license it.

The question being divided on the first part, "nor emit bills of credit," eight states voted aye, one state voted no, and one was divided.

The second part of the amendment, "nor make anything but gold and silver a tender in payment of debts," was unanimously agreed to, eleven states being present. The various clauses of the twelfth and thirteenth articles, as announced, were then adopted.

On September 8, a committee of revision consisting of five members of the convention was appointed to revise the style of and arrange the articles agreed to by the house. This committee consisted of Mr. Johnston, Mr. Hamilton, Mr. Gouverneur Morris, Mr. Madison, and Mr. King—and reported on the 12th a revised draft of the constitution. In this draft, the clauses referring to the coinage power are found in the form and order finally adopted, that is, as the second, fifth, and sixth clauses of section 8, under article I. The prohibition on the states is found as in the final form in section 10 of article.

The form as finally adopted then read as follows:

> Art. I, Sec. 8. The Congress . . . shall have power (2) To borrow money on the credit of the United States (5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. (6) To provide for the punishment of counterfeiting the securities and current coin of the United States.
>
> Art. II, Sec. 10. No state shall coin money nor emit bills of credit nor make anything but gold and silver coin a tender in payment of debts, nor . . . etc.

Such was the action of the convention.

A review of the proceedings in the federal convention leads at once to an inquiry as to those in the conventions of the several states in which the constitution thus drawn up and submitted to the people through congress was, in accordance with Article VII, and with the resolution of Congress finally ratified. Little information as to the grant of power to the federal legislature, however, can be obtained from their discussion. The prohibition on the states attracted all the attention given to the question of the currency under the proposed government.

*****

Certain inferences can be drawn from the debate itself. It may be noticed that there were three classes of speakers: first, those who wished to shut out all possibility of a resort to paper money under the proposed constitution; second, those who were the friends of paper money, but recognized the necessity in the existing state of public sentiment of placing under control the power to resort to its use; third, those who realized the danger of conferring such power, but feared the alternative of cramping the new government.

It will be noticed, too, that no definitions of the terms used are given. The only hint of a definition or classification is found in Mr. Gorham's words: "The power [*i. e.,* to emit bills on the credit of the United States], so far as it is necessary or safe, is involved in that of borrowing." Just what was the distinction between safe "borrowing" and unnecessary and unsafe bills of credit will have to be discussed in another connection. Attention is simply called now to Mr. Gorham's classification.

Notice may also be given to certain differences of opinion as to the effect of their action on the part of the speakers. *It will be remembered that the theory upon which the government was established was that of a government of limited powers.*[17] Those powers only were to be possessed which were by express grant or necessary implication conferred.

Mr. Mason, therefore, thought the power would not be possessed unless expressly granted; Mr. Morris thought that if the words were stricken out there would still be room for the notes of a responsible minister; while Madison, in the note cited, expresses the opinion, which led him to cast the decisive vote in the Virginia delegation, that by striking out the clause the pretext of a paper currency would be cut off, while the government would still have the power to issue government notes so far as they would be safe and proper.

Indeed, "nothing very definite can be inferred from this record" as to the views of the members of the convention. Certainly it is not fair to say, as Mr. Bancroft says," that "each and all [the speakers] understood the vote to be a denial to the legislature of the United States of the power to emit paper money," although this was indeed the view of some members other than those who shared the debate.

Luther Martin, for example, in his address to the House of Delegates of the Maryland legislature, expresses the following views: "By the original articles of confederation the Congress have power to borrow money and emit bills on the credit of the United States, agreeable to which was the report upon this system as made by the committee of detail. When we came to this part of the report a motion was made to strike out the words 'emit bills of credit.' Against this motion we urged that it would be improper to deprive the Congress of that power; that it would be a novelty unprecedented to establish a government which should not have such authority, that it would be impossible to look forward into futurity so far as to decide that events might not happen that should render the exercise of such a power absolutely necessary; and that we doubted whether if a war should take place it would be possible for this country to defend itself without resort to paper credit, in which case there would be a necessity of becoming a prey to our enemies of violating the constitution of our government; and that, considering that our government would be principally in the hands of the wealthy, there could be little reason to fear an abuse of the power by an unnecessary or injurious exercise of it. But . . . a majority of the convention, being wise beyond every event, and being willing to risk any political evil rather *than admit the idea of a paper emission in any possible case,* refused to trust the authority to a government to which they were lavishing the most unlimited powers of taxation, and to the mercy of which they were willing blindly to trust the liberty and property of the citizens of every state in the Union; and they erased that clause from the system."[18]

Hamilton, on the other hand, says in his "Letter to Congress," December 14, 1790: "The emitting of paper money by authority of the government is wisely prohibited to the individual states by the national constitution; and the spirit of that prohibition ought not to be disregarded by the government of the United States"—showing that he believed the power to be in Congress.

The interesting feature about the discussion is the absence of emphasis laid upon the legal-tender question; and this seems the more

remarkable when a prohibition in that regard had been twice used by Parliament as a remedy for difficulties growing out of excessive resort to paper issues, difficulties identical with those through which the states had just passed.

There was no question about the states; all power in this direction was to be surrendered by them; but, as to the federal legislature, the reasoning seems to have amounted to this: to prohibit the legal-tender quality being attached to bills of credit implies that such bills will be emitted; but it is not desirable that such bills be emitted; nor is it expedient to go to the extreme of saying that they never shall be put forth. Silence on the subject is, therefore, the safest policy.

Thus, the clause granting to Congress the power to emit bills was stricken out, and no prohibition was laid. Silence as to that was maintained; and all that can be said as to the interpretation of that silence is that, although there was a strong and well-nigh universal dread of paper issues, there was a stronger dread of too narrowly limiting the powers of the new legislature; and that there was neither a very definite nor a unanimous opinion as to the effect of striking out the clause, or as to the extent of the power granted.

4.
The Bank Controversy

The Constitutional Convention finished its work in mid-September, 1787, and by June of 1788 the Constitution had been ratified.

In April, 1789, the First Congress convened, and George Washington was inaugurated as President. In September, Alexander Hamilton became Secretary of the Treasury. Later that year, the federal court system was organized, and two more major appointments were made: Edmund Randolph as Attorney General, and John Jay as Chief Justice of the Supreme Court of the United States.

In March, 1790, Thomas Jefferson took office as Secretary of State, and by the end of that year the new government was well under way.

Early the next year, the government confronted a major constitutional issue, the resolution of which would reverberate from that time to this.

In his classic study, *A Legal History of Money in the United States, 1774-1970*, James Willard Hurst observed that "[d]eliberation and the pull and haul of views and interests in Congress under the Confederation and in the federal [Constitutional] convention provided some base lines for public policy about the money supply. But the net of this experience from about 1774 to 1789 was to leave the bulk of policy to grow out of later events. The two most abiding legacies from this first period of national life were a fear of government's likely excesses in issuing paper money and the laying of foundations for ultimate control of monetary policy in the central [federal] government. Beyond these matters, the early record left ill-defined and unresolved as many important questions as it answered."[19]

The first of those questions to confront the new American government arose early in 1791. Congress had in the hopper a bill to incorporate the first Bank of the United States, and opinion was divided about whether the government possessed the constitutional power to organize a corporation to engage in the banking business.

Randolph, the Attorney General, counselled Washington that the proposed bank was unconstitutional. Three days later, the President received another opinion, this one from his Secretary of State, Thomas Jefferson. Like Randolph, Jefferson concluded that the proposed bank was unconstitutional. The next day, Washington solicited still another opinion, this time from his Secretary of the Treasury, Alexander Hamilton:

> Philadelphia Feby. 16th: 1791
>
> Sir,
>
> "An Act to incorporate the Subscribers to the Bank of the United States" is now before me for consideration.
>
> The constitutionality of it is objected to. It therefore becomes more particularly my duty to examine the ground on wch. the objection is built. As a mean of investigation I have called upon the Attorney General of the United States in whose line it seemed more particularly to be for his official examination and opinion. His report is, that the Constitution does not warrant the Act. I then applied to the

> Secretary of State for his sentiments on this subject. These coincide with the Attorney General's; and the reasons for their opinions having been submitted in writing, I now require, in like manner, yours on the validity & propriety of the above recited Act: and that you may know the points on which the Secretary of State and the Attorney-General dispute the constitutionality of the Act; and that I may be fully possessed of the Arguments *for* and *against* the measure before I express any opinion of my own, I give you an opportunity of examining & answering the objections contained in the enclosed papers. I require the return of them when your own sentiments are handed to me (which I wish may be as soon as is convenient); and further, that no copies of them be taken, as it is for my own satisfaction they have been called for.
>
> Go: Washington
>
> The Secretary of the Treasury.

Jefferson's and Hamilton's opinions to Washington concerning the constitutionality of the proposed Bank of the United States are among the most fundamental American state papers ever written. They come from two of the principal Founders of the Nation, one the author of the Declaration of Independence, the other a guiding force at the Constitutional Convention. Both served in the first Cabinet, heading departments concerned with the very survival of the country: external affairs and finance. Jefferson was later to become President, and many believe that Hamilton would have, had he not been cut down in his prime in a losing duel with Aaron Burr. These men held very different views about the monetary powers of Congress.

Jefferson's comparatively brief opinion makes clear his view that the federal government is one of strictly delegated powers, with all other powers (whatever they are) reserved to the states or to the people. He reaches this conclusion by two routes: an analysis of those constitutional powers possessed by Congress which arguably could allow it to organize a bank; an assessment of the purpose of the federal government, as conceived and created by the Constitutional Convention.

Hamilton's opinion is quite different. In both form and content it reads like a legal brief, its obvious intention. Hamilton was an advocate in this matter, as in many others, and a brilliant one. His opinion to President Washington attempts to rebut every idea and argument advanced by Randolph and Jefferson. It examines conceptually and practically what a bank is, and what one does. He discusses the theory and nature of government, addressing broad issues of policy and of how the Constitution ought to be interpreted.

The polarization reflected in these two opinions, nominally concerned with the Constitutional power of Congress to charter a bank, set the stage for every monetary battle that would follow during two hundred years of American history. For all those years, whatever the time, the forum, or the issue, virtually all discussion about the monetary powers of Congress has been rooted in either the Jeffersonian (state power) or Hamiltonian (federal power) position on the constitutionality of the first Bank of the United States.

From the beginning, Hamilton's views prevailed.

Two days after receiving Hamilton's opinion, Washington signed the

"Act to incorporate the Subscribers to the Bank of the United States." Hamilton's views, firmly anchored in the federalist dogma of a strong central government possessing broad powers, had carried the day. Congress, with support from the President and Treasury Secretary, had successfully exercised a broad money power that many considered at best dubious, and at worst unconstitutional.

While Congress had passed the Act and Washington had approved it, however, there was a coordinate branch of the government which still had a right to have its say about the constitutional aspects of the matter. From the day the Bank of the United States was first authorized, the question of its right to exist was headed for the Supreme Court of the United States.

As we will see in the next chapter, when the issue finally reached that Tribunal in 1819, its Chief Justice was the legendary John Marshall. Like Washington and Hamilton, Marshall was a federalist, a believer in a strong central government. The case before him was *M'Culloch* v. *Maryland.*

Those who would struggle to understand our government's monetary policies today, in an effort to cope with its consequences for their own financial affairs, would do well to look back—to trace a discernible causal chain:

- Money debasement from ancient times, justified by the notion of "sovereign rights" inherent in feudal lords and absolute monarchs;
- The influence of that notion on English monarchs;
- The notion of sovereign rights over money transplanted to the American colonies;
- The delegates to the Constitutional Convention, only *partly* succeeding in separating government from money;
- The skilled advocate and federalist, Alexander Hamilton, stepping into the breach while his opponent, Thomas Jefferson, undermined his own principled argument with stress on states' power regarding monetary affairs at the expense of individual rights.

The direct descendant of these connected events, and of the fact that individual rights have never been considered absolute in any system of government—not even in Philadelphia in 1787—is Chief Justice John Marshall's decision in *M'Culloch* v. *Maryland,* which we will examine in the next chapter.

Because *M'Culloch* is the fountainhead of federal monetary power, and of every case decided since which applies, advances or enlarges the monetary powers of Congress, it is useful first to review major portions of the Jefferson and Hamilton opinions which led to it.

It is not a little ironic that from the pens of two giants of the American Revolution came ideas that became the bedrock for the government's power over monetary affairs. But it is not easy to admit that those ideas are fundamentally statist, as the following two excerpts make painfully clear.

Jefferson's Opinion against the Constitutionality of a National Bank, February 15, 1791[20]

The bill for establishing a National Bank undertakes among other things:—

1. To form the subscribers into a corporation.
2. To enable them in their corporate capacities to receive grants of land; and so far is against the laws of *Mortmain*.
3. To make alien subscribers capable of holding lands; and so far is against the laws of *alienage*.
4. To transmit these lands, on the death of a proprietor, to a certain line of successors; and so far changes the course of *Descents*.
5. To put the lands out of the reach of forfeiture or escheat; and so far is against the laws of *Forfeiture and Escheat*.
6. To transmit personal chattels to successors in a certain line; and so far is against the laws of *Distribution*.
7. To give them the sole and exclusive right of banking under the national authority; and so far is against the laws of Monopoly.
8. To communicate to them a power to make laws paramount to the laws of the States; for so they must be construed, to protect the institution from the control of the State legislatures; and so, probably, they will be construed.

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." [10th amendment.] To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution.

I. They are not among the powers specially enumerated: for these are: 1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its origination in the Senate would condemn it by the Constitution.

2d. "To borrow money." But this bill neither borrows money nor ensures the borrowing it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first, to lend them two millions, and then to borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3d. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce

thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this was an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the com¬merce of a State, (that is to say of the commerce between citizen and citizen,) which remain exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantages to trade." Still less are these powers covered by any other of the special enumerations.

II. Nor are they within either of the general phrases, which are the two following:—

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for the purpose of providing for the general welfare." For the laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. They are not to lay taxes ad libitum for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.

It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed *as a means* was rejected as *an end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.

It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "**necessary**," not those which are merely "convenient" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to every one, for there is not one which ingenuity may not torture into a convenience in some instance ***or* other**, to **some one** of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the **necessary** means, that is to say, to those means without which the grant of power would be nugatory.

But let us examine this convenience and see what it is. The report on this subject, page 3, states the only **general** convenience to be, the preventing the transportation and re-transportation of money be-tween the States and the treasury (for I pass over the increase of circulating medium, ascribed to it as a want, and which, according to my ideas of paper money, is clearly a demerit).

Every State will have to pay a sum of tax money into the treasury; and the treasury will have to pay, in every State, a part of the interest on the public debt, and salaries to the officers of government resident in that State. In most of the States there will still be a surplus of tax money to come up to the seat of government for the officers residing there. The payments of interest and salary in each State may be made by treasury orders on the State collector. This will take up the great export of the money he has collected in his State, and consequently prevent the great mass of it from being drawn out of the State. If there be a balance of commerce in favor of that State against the one in which the government resides, the surplus of taxes will be remitted by the bills of exchange drawn for that commercial balance.

And so it must be if there was a bank. But if there be no balance of commerce, either direct or circuitous, all the banks in the world could not bring up the surplus of taxes, but in the form of money. Treasury orders then, and bills of exchange may prevent the displacement of the main mass of the money collected, without the aid of any bank; and where these fail, it cannot be prevented even with that aid.

Perhaps, indeed, bank bills may be a more **convenient** vehicle than treasury orders. But a little **difference** in the degree of **convenience**, cannot constitute the necessity which the constitution makes the ground for assuming any non-enumerated power.

Besides; the existing banks will, without a doubt, enter into arrangements for lending their agency, and the more favorable, as there will be a competition among them for it; whereas the bill delivers us up bound to the national bank, who are free to refuse all arrangement, but on their own terms, and the public not free, on such refusal, to employ any other bank. That of Philadelphia, I believe, now does this business, by their post-notes, which, by an arrangement with the treasury, are paid by any State

collector to whom they are presented. This expedient alone suffices to prevent the existence of that *necessity* which may justify the assumption of a non-enumerated power as a means for carrying into effect an enumerated one. The thing may be done, and has been done, and well done, without this assumption; therefore, it does not stand on that degree of *necessity* which can honestly justify it.

It may be said that a bank whose bills would have a currency all over the States, would be more convenient than one whose currency is limited to a single State. So it would be still more convenient that there should be a bank, whose bills should have a currency all over the world. But it does not follow from this superior conveniency, that there exists anywhere a power to establish such a bank; or that the world may not go on very well without it.

Can it be thought that the Constitution intended that for a shade or two of *convenience*, more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several States; such as those against Mortmain, the laws of Alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly? Nothing but a necessity invincible by any other means, can justify such a prostitution of laws, which constitute the pillars of our whole system of jurisprudence. Will Congress be too straitlaced to carry the Constitution into honest effect, unless they may pass over the foundation-laws of the State government for the slightest convenience of theirs?

The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature: 1. The right of the Executive. 2. Of the Judiciary. 3. Of the States and State legislatures. The present is the case of a right remaining exclusively with the States, and consequently one of those intended by the Constitution to be placed under its protection.

It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hang so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President.

Hamilton's Opinion in favor of the Constitutionality of a National Bank, February 23, 1791[21]

The Secretary of the Treasury having perused with attention the papers containing the opinions of the Secretary of State and Attorney General concerning the constitutionality of the bill for establishing a National Bank proceeds according to the order of the President to submit the reasons which have induced him to entertain a different opinion.

It will naturally have been anticipated that, in performing this task he would feel uncommon solicitude. * * * But the chief solicitude arises from

a firm persuasion, that principles of construction like those espoused by the Secretary of State and the Attorney General would be fatal to the just & indispensable authority of the United States.

In entering upon the argument it ought to be premised, that the objections of the Secretary of State and Attorney General are founded on a general denial of the authority of the United States to erect corporations. The latter indeed expressly admits, that if there be any thing in the bill which is not warranted by the constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury, that this *general principle* is *inherent* in the very *definition* of *Government* and *essential* to every step of the progress to be made by that of the United States; namely—that every power vested in a Government is in its nature *sovereign*, and includes by *force* of the *term*, a right to employ all the *means* requisite, and fairly *applicable* to the attainment of the *ends* of such power; *and which are not precluded by restrictions & exceptions specified in the constitution* [editor's emphasis, and of crucial importance]; or not immoral, or not contrary to the essential ends of political society. * * *

The circumstances that the powers of sovereignty are in this country divided between the National and State Governments, does not afford the distinction required. It does not follow from this, that each of the portions of powers delegated to the one or to the other is not sovereign with regard to its proper objects. It will only follow from it, that each has sovereign power as to certain things, and not as to other things. To deny that the Government of the United States has sovereign power as to its declared purposes & trusts, because its power does not extend to all cases, would be equally to deny, that the State Governments have sovereign power in any case; because their power does not extend to every case. The tenth section of the first article of the constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a *political society* without *sovereignty*, or of a people *governed* without *government*.

If it would be necessary to bring proof to a proposition so clear as that which affirms that the powers of the federal government, *as to its objects*, are sovereign, there is a clause of its constitution which would be decisive. It is that which declares, that the constitution and the laws of the United States made in pursuance of it, and all treaties made or which shall be made under their authority shall be the supreme law of the land. The power which can create the *Supreme law* of the land, in any case, is doubtless sovereign *as to such case*.

This general & indisputable principle puts at once an end to the *abstract* question—Whether the United States have power to *erect a corporation*? that is to say, to give a *legal* or *artificial capacity* to one or more persons, distinct from the natural. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation to the objects* entrusted to the management of the government. The difference is this—where the authority of the government

is general, it can create corporations in *all cases*; where it is confined to certain branches of legislation, it can create corporations only in those cases.

Here then as far as concerns the reasonings of the Secretary of State & the Attorney General, the affirmative of the constitutionality of the bill might be permitted to rest. It will occur to the President that the principle here advanced has been untouched by either of them.

For a more complete elucidation of the point nevertheless, the arguments which they have used against the power of the government to erect corporations, however foreign they are to the great & fundamental rule which has been stated, shall be particularly examined. And after showing that they do not tend to impair its force, it shall also be shown, that the power of incorporation incident to the government in certain cases, does fairly extend to the particular case which is the object of the bill.

The first of these arguments is, that the foundation of the constitution is laid on this ground "that all powers not delegated to the United States by the Constitution nor prohibited to it by the States are reserved to the States or to the people," whence it is meant to be inferred, that congress can in no case exercise any power not included in those enumerated in the constitution. And it is affirmed that the power of erecting a corporation is not included in any of the enumerated powers.

The main proposition here laid down, in its true signification is not to be questioned. It is nothing more than a consequence of this republican maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact to be made out by fair reasoning & construction upon the particular provisions of the constitution—taking as guides the general principles & general ends of government.

It is not denied, that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter. And for the sake of accuracy it shall be mentioned, that there is another class of powers, which may be properly denominated *resulting* powers.

But be this as it may, it furnishes a striking illustration of the general doctrine contended for. It shows an extensive case, in which a power of erecting corporations is either implied in, or would result from some or all of the powers, vested in the National Government. * * *

To return—It is conceded, that implied powers are to be considered as delegated equally with express ones.

Then it follows, that as a power of erecting a corporation may as well be *implied* as any other thing; it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other *instrument* or *mean* whatever. The only question must be, in this as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government.

Thus a corporation may not be erected by congress, for superintending the police of the city of Philadelphia because they are not authorized to *regulate* the *police* of that city; but one may be erected in

relation to the collection of the taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian Tribes, because it is the province of the federal government to regulate those objects & because it is incident to a general *sovereign* or *legislative power* to *regulate* a thing, to employ all the means which relate to its regulation to the *best & greatest advantage*.

A strange fallacy seems to have crept into the manner of thinking & reasoning upon the subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent, substantive thing—as a political end of peculiar magnitude & moment; whereas it is truly to be considered as a *quality, capacity*, or *mean* to an end. Thus a mercantile company is formed with a certain capital for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the *end*; the association in order to form the requisite capital is the primary mean. Suppose that an incorporation were added to this; it would only be to add a new *quality* to that association; to give it an artificial capacity by which it would be enabled to prosecute the business with more safety & convenience. * * *

To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the Government, it is objected that none but *necessary* & proper means are to be employed, & the Secretary of State maintains, that no means are to be considered as *necessary*, but those without which the grant of the power would be *nugatory*. Nay so far does he go in his restrictive interpretation of the word, as even to make the case of *necessity* which shall warrant the constitutional exercise of the power to depend on *casual* & *temporary* circumstances, an idea which alone refutes the construction. The *expediency* of exercising a particular power, at a particular time, must indeed depend on circumstances; but the constitutional right of exercising it must be uniform & invariable—the same today, as tomorrow.

All the arguments therefore against the constitutionality of the bill derived from the accidental existence of certain State-banks: institutions which *happen* to exist today, & for ought that concerns the government of the United States, may disappear tomorrow, must not only be rejected as fallacious, but must be viewed as demonstrative, that there is a *radical* source of error in the reasoning.

It is essential to the being of the National government, that so erroneous a conception of the meaning of the word necessary, should be exploded.

It is certain, that neither the grammatical, nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful, requisite, incidental, useful*, or *conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted, by the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense.

And it is the true one in which it is to be understood as used in the constitution. The whole turn of the clause containing it, indicates, that it was the intent of the convention, by that clause to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are—"to make *all laws*, necessary & proper for *carrying into execution* the foregoing powers & all *other powers* vested by the constitution in the *government* of the United States, or in any *department* or *officer* thereof." To understand the word as the Secretary of State does, would be to depart from its obvious & popular sense, and to give it a *restrictive* operation; an idea never before entertained. It would be to give it the same force as if the word *absolutely* or *indispensably* had been prefixed to it.

Such a construction would beget endless uncertainty & embarrassment. The cases must be palpable & extreme in which it could be pronounced with certainty, that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government, which would stand so severe a test. To insist upon it, would be to make the criterion of the exercise of any implied power a *case of extreme necessity*; which is rather a rule to justify the overleaping of the bounds of constitutional authority, than to govern the ordinary exercise of it.

It may be truly said of every government, as well as of that of the United States, that it has only a right, to pass such laws as are necessary & proper to accomplish the objects entrusted to it. For no government has a right to do *merely what it pleases*. Hence by a process of reasoning similar to that of the Secretary of State, it might be proved, that neither of the State governments has a right to incorporate a bank. It might be shown, that all the public business of the State, could be performed without a bank, and inferring thence that it was unnecessary it might be argued that it could not be done, because it is against the rule which has been just mentioned. A like mode of reasoning would prove, that there was no power to incorporate the Inhabitants of a town, with a view to a more perfect police: For it is certain, that an incorporation may be dispensed with, though it is better to have one. It is to be remembered, that there is no *express* power in any State constitution to erect corporations.

The *degree* in which a measure is necessary, can never be a test of the *legal* right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency. The *relation* between the *measure* and the *end*, between the *nature* of *the mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of *necessity* or *utility*.

The practice of the government is against the rule of construction advocated by the Secretary of State. Of this the act concerning light houses, beacons, buoys & public piers, is a decisive example. This doubtless must be referred to the power of regulating trade, and is fairly relative to it. But it cannot be affirmed, that the exercise of that power, in

this instance, was strictly necessary; or that the power itself would be *nugatory* without that of regulating establishments of this nature.

This restrictive interpretation of the word *necessary* is also contrary to this sound maxim of construction namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defence & ought to be construed liberally, in advancement of the public good. This rule does not depend on the particular form of a government or on the particular demarcation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniencies obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must, of necessity, be great latitude of discretion in the selection & application of those means. Hence consequently, the necessity & propriety of exercising the authorities entrusted to a government on principles of liberal construction.

The Attorney General admits the *rule*, but takes a distinction between a State, and the federal constitution. The latter, he thinks, ought to be construed with greater strictness, because there is more danger of error in defining partial than general powers.

But the reason of the *rule* forbids such a distinction. This reason is— the variety & extent of public exigencies, a far greater proportion of which and of a far more critical kind, are objects of National than of State administration. The greater danger of error, as far as it is supposeable, may be a prudential reason for caution in practice, but it cannot be a rule of restrictive interpretation.

In regard to the clause of the constitution immediately under consideration, it is admitted by the Attorney General, that no *restrictive* effect can be ascribed to it. He defines the word necessary thus. "To be necessary is to be *incidental*, and may be denominated the natural means of executing a power."

But while, on the one hand, the construction of the Secretary of State is deemed inadmissible, it will not be contended on the other, that the clause in question gives any *new* or *independent* power. But it gives an explicit sanction to the doctrine of *implied* powers, and is equivalent to an admission of the proposition, that the government, *as to its specified powers and objects*, has plenary & sovereign authority, in some cases paramount to that of the States, in others coordinate with it. For such is the plain import of the declaration, that it may pass *all laws* necessary & proper to carry into execution those powers.

It is no valid objection to the doctrine to say, that it is calculated to extend the powers of the general government throughout the entire sphere of State legislation. The same thing has been said, and may be said with regard to every exercise of power by *implication* or *construction*. The moment the literal meaning is departed from, there is a chance of error and abuse. And yet an adherence to the letter of its powers would at once arrest the motions of the government. It is not only agreed, on all hands, that the

exercise of constructive powers is indispensable, but every act which has been passed is more or less an exemplification of it. One has been already mentioned, that relating to light houses &c. That which declares the power of the President to remove officers at pleasure, acknowledges the same truth in another, and a signal instance.

The truth is that difficulties on this point are inherent in the nature of the federal constitution. They result inevitably from a division of the legislative power. The consequence of this division is, that there will be cases clearly within the power of the National Government; others clearly without its power; and a third class, which will leave room for controversy & difference of opinion, & concerning which a reasonable latitude of judgment must be allowed.

But the doctrine which is contended for is not chargeable with the consequence imputed to it. It does not affirm that the National government is sovereign in all respects, but that it is sovereign to a certain extent: that is, to the extent of the objects of its specified powers.

It leaves therefore a criterion of what is constitutional, and of what is not so. This criterion is the *end* to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, & if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision. Does the proposed measure abridge a preexisting right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality; & slighter relations to any declared object of the constitution may be permitted to turn the scale.

The general objections which are to be inferred from the reasonings of the Secretary of State and of the Attorney General to the doctrine which has been advanced, have been stated and it is hoped satisfactorily answered.

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5.
John Marshall and Monetary Power

Although the author of this chapter quite obviously has unbridled respect for Chief Justice John Marshall, Albert J. Beveridge's analysis of *M'Culloch*, without some of the adjectives, is nevertheless objective. In the overview of *M'Culloch* that this chapter provides (and later in the excerpts from the case itself), the reader should note especially not only what Marshall's political philosophy was (with which Beveridge was in complete agreement), and its specific application to the relationship between government and monetary affairs, but also the basis for those ideas.

Former United States Senator Albert J. Beveridge began with this statement[22]: Since *M'Culloch* is one of the longest of Marshall's opinions and, by general agreement, considered to be his ablest and most carefully prepared exposition of the Constitution, it seems not unlikely that much of it had been written before the argument. The court was occupied every day of the session and there was little, if any, time then for Marshall to write this elaborate document. The suit against *M'Culloch* had been brought nearly a year before the Supreme Court convened; Marshall undoubtedly learned of it through the newspapers; he was intimately familiar with the basic issue presented by the litigation; and he had ample time to formulate and even to write out his views before the ensuing session of the court. He had, in the opinions of Hamilton and Jefferson, the reasoning on both sides of this fundamental controversy. It appears to be reasonably probable that at least the framework of the opinion in *M'Culloch* vs. *Maryland* was prepared by Marshall when in Richmond during the summer, autumn, and winter of 1818-19.

The opening words of Marshall are majestic: "A sovereign state denies the obligation of a law ... of the Union. ... The constitution of our country, in its most. . . vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, ... are to be discussed; and an opinion given, which may essentially influence the great operations of the government." He cannot "approach such a question without a deep sense of . . . the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature." In these solemn words the Chief Justice reveals the fateful issue which *M'Culloch* vs. *Maryland* foreboded.

That Congress has power to charter a bank is not "an open question. . . . The principle . . . was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department . . . as a law of undoubted obligation. . . . An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."

The first Congress passed the act to incorporate a National bank. The whole subject was at the time debated exhaustively. "The bill for incorporating the bank of the United States did not steal upon an

unsuspecting legislature, & pass unobserved," says Marshall. Moreover, it had been carefully examined with "persevering talent" in Washington's Cabinet. When that act expired, "a short experience of the embarrassments" suffered by the country "induced the passage of the present law." He must be intrepid, indeed, who asserts that "a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance."

But Marshall examines the question as though it were "entirely new"; and gives an historical account of the Constitution which, for clearness and brevity, never has been surpassed. Thus he proves that "the government proceeds directly from the people; . . . their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution when thus adopted . . . bound the state sovereignties." The States could and did establish "a league, such as was the confederation. . . . But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government . . . acting directly on the people," it was the people themselves who acted and established a fundamental law for their government.

The Government of the American Nation is, then, "emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit"—a statement, the grandeur of which was to be enhanced forty-four years later, when, standing on the battle-field of Gettysburg, Abraham Lincoln said that "a government of the people, by the people, for the people, shall not perish from the earth."

To be sure, the States, as well as the Nation, have certain powers, and therefore "the supremacy of their respective laws, when they are in opposition, must be settled." Marshall proceeds to settle that basic question. The National Government, he begins, "is supreme within its sphere of action. This would seem to result necessarily from its nature." For "it is the government of all; its powers are delegated by all; it represents all, and acts for all.

Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts." Plain as this truth is, the people have not left the demonstration of it to "mere reason"—for they have, "in express terms, decided it by saying" that the Constitution, and the laws of the United States which shall be made in pursuance thereof, "shall be the supreme law of the land," and by requiring all State officers and legislators to "take the oath of fidelity to it."

The fact that the powers of the National Government enumerated in the Constitution do not include that of creating corporations does not prevent Congress from doing so. "There is no phrase in the instrument which, like the articles of confederation, *excludes* incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means

by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public."

The very "nature" of a constitution, "therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose t*hose objects be deduced from the nature of the objects themselves*." In deciding such questions "we must never forget," reiterates Marshall, "that it is a *constitution* we are expounding."

This being true, the power of Congress to establish a bank is undeniable—it flows from "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." Consider, he continues, the scope of the duties of the National Government: "The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. . . . A government, entrusted with such ample powers, on the due execution. The power being given, it is the interest of the nation to vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means."

At this point Marshall's language becomes as exalted as that of the prophets [Note the editor's comment above that Beveridge was an ardent supporter of Marshall and his federalism]: "Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed." Here Marshall the soldier is speaking. There is in his words the blast of the bugle of Valley Forge. Indeed, the pen with which Marshall wrote *M'Culloch* vs. *Maryland* was fashioned in the army of the Revolution.

The Chief Justice continues: "Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive?" Did the framers of the Constitution "when granting these powers for the public good" intend to impede "their exercise by withholding a choice of means?" No! The Constitution "does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers."

Resorting to his favorite method in argument, that of repetition, Marshall again asserts that the fact that "the power of creating a corporation is one appertaining to sovereignty and is not expressly conferred on Congress," does not take that power from Congress. If it does, Congress, by the same reasoning, would be denied the power to pass most laws; since "all legislative powers appertain to sovereignty." They who say that Congress

may not select "any appropriate means" to carry out its admitted powers, "take upon themselves the burden of establishing that exception."

The establishment of the National Bank was a means to an end; the power to incorporate it is "as incidental" to the great, substantive, and independent powers expressly conferred on Congress as that of making war, levying taxes, or regulating commerce. This is not only the plain conclusion of reason, but the clear language of the Constitution itself as expressed in the "necessary and proper" clause of that instrument. Marshall treats with something like contempt the argument that this clause does not mean what it says, but is "really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers"—a denial, in short, that, without this clause, Congress is authorized to make laws. After conferring on Congress all legislative power, "after allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind . . . of the convention that an express power to make laws was necessary to enable the legislature to make them?"

In answering the old Jeffersonian argument that, under the "necessary and proper" clause, Congress can adopt only those means absolutely "necessary" to the execution of express powers, Marshall devotes an amount of space which now seems extravagant. But in 1819 the question was unsettled and acute; indeed, the Republicans had again made it a political issue. The Chief Justice repeats the arguments made by Hamilton in his opinion to Washington on the first Bank Bill.

Some words have various shades of meaning, of which courts must select that justified by "common usage." "The word 'necessary' is of this description. . . . It admits of all degrees of comparison. . . . A thing may be necessary, very necessary, absolutely or indispensably necessary." For instance, the Constitution itself prohibits a State from "laying 'imposts or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws'"; whereas it authorizes Congress to '"make all laws which shall be necessary and proper'" for the execution of powers expressly conferred.

Did the framers of the Constitution intend to forbid Congress to employ "*any*" means "which might be appropriate, and which were conducive to the end"? Most assuredly not! "The subject is the execution of those great powers on which the welfare of a nation essentially depends." The "necessary and proper" clause is found "in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."

The contrary conclusion is tinged with "insanity." Whence comes the power of Congress to prescribe punishment for violations of National laws? No such general power is expressly given by the Constitution. Yet nobody

denies that Congress has this general power, although "it is expressly given in some cases," such as counterfeiting, piracy, and "offenses against the law of nations." Nevertheless, the specific authorization to provide for the punishment of these crimes does not prevent Congress from doing the same as to crimes not specified.

Now comes an example of Marshall's reasoning when at his best—and briefest.

"Take, for example, the power 'to establish post-offices and post-roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

"The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

To attempt to prove that Congress *might* execute its powers without the use of other means than those absolutely necessary would be "to waste time and argument," and "not much less idle than to hold a lighted taper to the sun." It is futile to speculate upon imaginary reasons for the "necessary and proper" clause, since its purpose is obvious. It "is placed among the powers of Congress, not among the limitations on those powers. Its terms purport to enlarge, not to diminish the powers vested in the government. . . . If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on the vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble."

Marshall thus reaches the conclusion that Congress may "perform the high duties assigned to it, in the manner most beneficial to the people." Then comes that celebrated passage—one of the most famous ever delivered by a jurist: "Let the end be legitimate, let it be within the scope of the

constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited*,[23] but consist with the letter and spirit of the constitution, are constitutional."

Further on the Chief Justice restates this fundamental principle, without which the Constitution would be a lifeless thing: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. The court disclaims all pretensions to such a power."

The fact that there were State banks with whose business the National Bank might interfere, had nothing to do with the question of the power of Congress to establish the latter. The National Government does not depend on State Governments "for the execution of the great powers assigned to it. Its means are adequate to its ends." It can choose a National bank rather than State banks as an agency for the transaction of its business; "and Congress alone can make the election."

It is, then, "the unanimous and decided opinion" of the court that the Bank Act is Constitutional.

6.
M'Culloch v. *Maryland*

The facts of the *M'Culloch* case are straightforward.[24] The federal charter of the first Bank of the United States had expired. Eventually, Congress authorized incorporation of the second Bank of the United States, which opened a branch in Baltimore, Maryland.

The Maryland legislature passed a law requiring all banks which had been organized "without authority from the state" (i.e., the second Bank of the United States) either to comply with certain rules or pay an annual tax. The Baltimore branch of the bank deliberately violated the law, and the state sued to recover very substantial penalties established by the Maryland statute.

Superficially, the question to be decided was whether the Maryland law taxing the federally established bank was constitutional. But implied in that question were more basic ones: the relationship between the states and the federal government, and the scope of the latter's powers.

In Chief Justice Marshall's opinion for the Supreme Court of the United States one can readily see the enunciation of the federalist ideology in which he so fervently believed, and which had been so forcefully expressed by Hamilton at the time of the Nation's birth nearly three decades earlier. No Supreme Court opinion has done more than *M'Culloch* v. *Maryland* to advance the monetary power of Congress.

Here is the core of Marshall's opinion.

Marshall, Ch. J., delivered the opinion of the court:

The first question . . . is, has Congress power to incorporate a bank?

* * *

The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability.

After being resisted, in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. . . .

* * * * *

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the

people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.

Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great power will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor

ingredients which compose those objects be deduced from the nature of the objects themselves.

That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations found in the ninth section of the 1st article introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

Although, among the enumerated powers of the 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 entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced.

But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with the ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.

It is, then, the subject of fair inquiry, how far such means may be employed. It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied

that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date.

Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government.

The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created

to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed.

The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

* * * * *

[T]he arguments on which most reliance is placed, are drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies.

The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the

impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

* * ***

Take, for example, the power "to establish post-offices and post roads." This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive

when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?"

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning, to present to the mind the idea of some choice of means of legislation not straightened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause ....

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that

discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited*, but consist with the letter and spirit of the constitution, are constitutional.

7.
Legal Tender: The Acts and the Cases[25]

What the Constitution had *said* about the monetary powers of the federal government, and about monetary restrictions on the states, was clear. What it *meant*, however, was not so clear. None of the open questions were more important than the meaning of "legal tender." The words are defined by *Black's Law Dictionary* as "that kind of coin, money, or circulating medium which the law *compels* a creditor to accept in payment of his debt, when tendered in the right amount."[26] In short, legal tender is government created money which must be accepted by individuals regardless of how much they think it is worth or whether they want it or not.

The Constitution did not expressly prohibit the federal government from creating legal tender. But because the Constitution was a *delegation of power* from the people to the federal government, and because the legal tender power had not been delegated, it followed that Congress lacked the ability to create legal tender. Indeed, that was the view of even the legendary Daniel Webster, who, when he had appeared as counsel for the Bank of the United States in *M'Culloch* v. *Maryland*, argued for a broad construction of federal monetary power. Even though Webster "belonged to the class who advocated the largest exercise of powers by the General Government," as to legal tender he argued that:

> if we understand by currency the legal money of the country, and that which constitutes a lawful tender for debts, and is the statute 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 very highest importance. The States are expressly prohibited from making anything but gold and silver a 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 .... The legal tender, therefore, the constitutional standard of value is established and cannot be overthrown. To overthrow it would shake the whole system.[27]

Not everyone shared Webster's view. Although prior to the Civil War the federal government had never made paper money legal tender, some people did believe the federal government possessed the power.

What settled the legal tender dispute—if not morally, then at least legislatively and constitutionally—was the War Between the States. Since the explanation which immediately follows describes in detail the considerations which caused the federal government to create legal tender paper money, suffice to say that the age-old tug-of-war had started again: the power of the sovereign, motivated by pressing financial needs, was once more pitted against individual rights.

In a situation more than vaguely reminiscent of Queen Elizabeth's need for money to fight the Irish rebellion, the Union government of President Lincoln created legal tender and forced individuals to accept it, quite apart from their judgment as to its worth.

The Civil War Legal Tender Acts became law, and no less than three times the Supreme Court of the United States ruled on them.

They were eventually upheld, and the causal chain grew longer. Just as previously described events had led to *M'Culloch*, Marshall's opinion in that case led to the *Legal Tender Cases*. Thus, just as understanding monetary events from antiquity to *M'Culloch* was essential to comprehending the nature and scope of federal monetary powers today, also essential is America's experience with legal tender during the Civil War period. To that end, the following material contains a thorough explanation of the factual basis for the legal tender legislation, and an analytical discussion of the *Legal Tender Cases*. Excerpts from the three principal cases in the next Chapter.

First will be *Hepburn* v. *Griswold*, which for reasons that may surprise the reader, held legal tender to be unconstitutional.

Next is *Knox* v. *Lee*, the fundamental legal tender decision, in which the Supreme Court upheld the constitutionality of the "greenbacks."

Finally, *Juilliard* v. *Greenman* merely applied the underlying principle enunciated in *Knox*.

Together, the legal tender acts and the three cases, Chapters 8, 9, and 10, constitute a giant step further in our inquiry concerning the government's money power today.

Usually, when the legal tender story is told, the major emphasis is placed on how the Supreme Court dealt with questions concerning the Acts and their constitutionality. Insufficient attention is given to the Acts themselves, and to the underlying political and financial factors that caused the legislation to be enacted. Only if those factors are understood, can the Court's three *Legal Tender Cases* be understood.

* * * * *

When Congress reassembled in special session on July 4, 1861, the condition of [Civil] war had supervened. Mr. Chase had assumed the Treasury portfolio and transmitted his report to Congress on the opening day of its session. * * *

With the issue of the legal-tender notes . . . [to finance] the war is reached the point at which interest in the whole subject culminates. No precedent for such notes could be found during the life of the United States under the constitution. Their issue brought immediately to the front serious questions of constitutional power, as well as of policy, expediency, and national honor. * * * For the sake of completeness . . . , the various acts under which legal-tender notes were authorized will be described.

In his report to Congress at the opening of the session in 1861 Secretary Chase submitted estimates for the continuance of the war, which he hoped might be terminated the following summer. Various plans were

proposed, but no hint of the possibility of resorting to government issues which would be made a tender in private transactions was found in this report.

Of the issues authorized by the act of the previous July 17, $21,165,220 had been put out in denominations of $5, $10, and $20, which the secretary characterized as "a loan from the people, payable on demand, without interest."

These notes, with some exceptions, circulated freely with gold, and were redeemed in gold at the treasury until the suspension of specie payments.

This event occurred on December 28, 1861, and on the 30th Mr. Spaulding introduced into the House of Representatives a bill authorizing the issue of demand notes which should be a full legal tender.

This was done under the plea of the absolute necessity of the measure. It was claimed that neither a banking system such as the secretary proposed nor the system of taxation which had to be developed to meet the emergency of war could be created without great delay; and the extreme measure of a legal-tender paper money was declared by its advocates the only adequate provision for the exigency then facing the government. * * *

In answer to the argument of necessity was advanced the argument of lack of power. This had, of course, been anticipated, and the opinion of the attorney-general had been sought and was quoted by Mr. Spaulding in his exposition of the measure. This opinion must be admitted to be a feeble support, amounting merely to the statement *that there was no prohibition in the constitution*, which all knew, and *the inference that a failure to prohibit amounted to a permission which was contrary to all canons of interpretations*.[28]

The opinion of Secretary Chase was also sought and obtained, sustaining the constitutionality of the measure.

The measure was pressed as a war measure, a "measure of necessity, not of choice," to meet the extraordinary needs of extraordinary times—the only remaining resource after all others had been exhausted. The power to issue such notes was claimed to be authorized first as an implied power because it furnished a means toward the exercise of the powers "to raise and *support* an army," "to provide and *maintain* a navy," and to regulate the value of coin, expressly conferred.

But in addition to the argument drawn from the clause granting the implied powers, this was claimed to be justified by the simple fact of sovereignty, the broad claim which afterward proved so effective being now put forth. "I am here," argued Mr. Bingham, "to assert the rightful authority of the American people as a nationality, a sovereignty under and by virtue of the constitution. By that sovereignty, which is known by the name of 'We, the people of the United States,' the government of the United States has been invested with the attribute of sovereignty, which is inseparable from every sovereignty beneath the sun—the power to determine what shall be money—that is to say, what shall be the standard of value, what shall be the medium of exchange for the purpose of regulating exchange and facilitating

all commercial transactions of the country and among the people. If the government of the United States had not this power, it would be poor indeed; it would be no government at all."

Mr. Pike, however, went so far on the other side as to admit that the exercise of this power was plainly an excess of power under the constitution; but he contended that it was justified by the existing emergency, which he found analogous to a case of fire rendering lawful a destruction of property under ordinary circumstances wholly illegal.

The argument against the legitimacy of the exercise of the power thus attempted for the first time was perhaps best set forth in the House by Pendleton. He referred first to the uninterrupted and consistent interpretation put upon the constitution by Congress in never even considering the exercise of such a power: "Not only was such a law never passed, but such a law was never voted on, never proposed, never introduced, never recommended by any department of the government; the measure was never seriously considered in either branch of government." Not only was there no grant of such power, but the omission was a deliberate and purposeful omission, because it was intended that neither in the states nor in the federal government should such a power reside.

The bill passed the House on February 6, and was introduced with amendments in the Senate the following day, when Mr. Fessenden, chairman of the Finance Committee, presented the measure, with a letter from the secretary of the treasury urging immediate action. * * *

The Finance Committee did not recommend an amendment striking out the legal-tender clause, but this was soon introduced on the floor of the Senate. After a debate similar to that in the House, however, the amendment was lost by a vote of 17 to 22 on February 13.

Both Mr. Sherman and Mr. Bayard referred to the probability of interpretation by the Supreme Court. "When I feel so strongly the necessity of this measure, I am constrained to assume the power and refer our authority to exercise it to the court," said Mr. Sherman. "The thing is to my mind so palpable a violation of the federal constitution," said Mr. Bayard, "that I doubt whether in any court of justice in the country having a decent regard for its own respectability you can possibly expect that this bill. . . will not receive its condemnation as unconstitutional and void as to this clause."

The bill became a law February 25, 1862. By it the secretary was authorized to issue on the credit of the United States $150,000,000 in non-interest-bearing notes, of such denominations, not less than $5 . . . . These notes were to be "receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest on bonds and notes, which shall be paid in coin, *and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States*,[29] except duties on imports and interest as aforesaid." * * *

The legislation of February 25, 1862, was distinguished from all measures previously enacted for the purpose of authorizing government

notes by the words "shall be lawful money, and a legal tender in all debts, public and private, within the United States." * * *

But not only was the policy inaugurated by this act with regard to creditors of the government wholly novel; never had the government ventured to include transactions between private individuals in the list of those in which its notes were to pass. As has been seen, coin had been made a legal tender, and Congress had been given express power to pass bankruptcy laws; with these exceptions control over contracts had been held to lie wholly within the realm of state jurisdiction.

The question arose as to the effect of the act on so-called specie contracts, i. e., contracts in terms not simply of money units, but of specific kinds of coin. This question, together with that of the power of Congress in the whole matter, came before the state courts within a short time after the passage of the act, but was brought before the Supreme Court and there settled only in 1868, when again, not the power of Congress, but the application of the act, was limited.

It was then decided that such contracts were not within the meaning of the act, and contracts for coin were treated as contracts for bullion, which might be enforced in the terms of the contract, the money terms being taken as descriptive of weight and fineness simply.

By these two important decisions the application of the act of February 25, 1862, had been successively limited in application. *The question of constitutional power within its scope had not, however, been determined by the final tribunal.*[30] A large majority of the commonwealth courts had upheld it within the narrow limits within which the Supreme Court decisions had confined its operations, as well as sustained its application to a larger range of transactions. A decision adverse to the validity of the act arrived at by the Kentucky court of appeals had brought the question before the Supreme Court of the United States, and, after argument and re-argument, the court finally handed down its opinion in February of 1870, in a decision adverse to the power claimed by Congress.

In arriving at this conclusion, the distinction was drawn between contracts entered into before the passage of the act and those of a subsequent date, and the question arose in this case as to the application of the act to the former of these two classes. The court held that the clear intent of the act was manifested to include prior contracts, and, so far, was an excess of power under the constitution, and therefore void. * * *

The argument of the majority may be briefly stated as follows: Every contract for money units made before the passage of the act was, in legal import, a contract for coin. These notes were liable to depreciation, and in proportion to their depreciation their enforced receipt was an impairment of the contract and contrary to justice and equity, and could be accomplished only if the power was plain.

It was not claimed that the power was expressly granted, and so the definition of the implied powers given in *McCulloch* v. *Maryland* was drawn upon: "Appropriate, plainly adapted to the end sought; not prohibited, but consistent with the letter and spirit of the constitution."

The court held that the power to bestow the legal-tender quality upon notes was not incident to the coinage power, nor identical with the power to issue notes. To sustain this contention, reference was made to the power to issue notes possessed by the Continental Congress, which had never claimed the power to make those notes a legal tender. The power was declared to be no more incident to the power to carry on war than to any other power involving the expenditure of money. It was asserted that the legal-tender quality had not as a matter of fact affected the value of the notes, as was shown by the circulation of notes not possessing that quality; and, since it impaired the obligation of contracts, it was contrary to the spirit of the constitution, as manifested in the prohibition laid on the states and in that contained in the fifth amendment.

It is interesting to note that the minority did not deny that the effect of the act was to impair the obligation of contracts, which they held, not being prohibited to Congress, was within its competence. They maintained that this power to bestow the legal-tender quality upon notes was clearly incident to the power to borrow money, to raise and support armies, etc.; and disputed the truth of the history of the legal-tender notes as stated in the majority opinion.

The failure of the minority to advance the argument that the obligation of the contract was an obligation to pay in what was lawful money at the time of payment, and so was not impaired, is striking, because this had been advanced with great force in the state courts, and was afterwards advanced and approved by the majority in overruling the decision now being considered. At this time not even those who sustained the power were willing to base it, even indirectly, on the ancient doctrine of prerogative.

The act was thus held to be void as to contracts entered into before the date of its passage.[31]

The decision, however, failed to receive general acquiescence. The material and corporate interests involved were, of course, enormous; there was, too, a certain patriotic sentiment for the paper money with which the war had been fought out; the administration, Congress, and popular prejudice, all were opposed to the court; and its position was one peculiarly adapted to obtaining a reconsideration.

The court had consisted, when the decision in *Hepburn* v. *Griswold* had been reached, of eight members, a chief justice and seven associate justices. Before the opinion was handed down Justice Grier had been forced to resign.

In 1866 an act had gone into effect providing that no vacancies in the Supreme bench should be filled until the number of associate justices was reduced to six. This was repealed in 1869, and the number of justices increased to nine. To the two vacancies thus created Justice Strong and Justice Bradley were appointed. Justice Strong had had opportunity on the bench of Pennsylvania to express his views on this question, so that his position in support of the act was well known. Of Justice Bradley it is said that all that was known of his views was the fact that as counselor for a corporation he had advised the payment of their obligations in gold as a

matter of honor. In case of a reconsideration, the decisive vote would of course be cast by him.

On motion of the attorney general a reconsideration of the legal-tender question was ordered immediately upon the completion of the court in two cases, which were afterward dismissed.

Not until the following year was *Hepburn* vs. *Griswold* formally overruled as to prior contracts; but the country had understood from the previous action of the court that the question was entirely open, and the act was then held to apply to contracts entered into both before and after its passage.

This reversal of a decision so recently announced by so slight a change of relative numbers in the majority and minority of the court, with the change of personnel so prominent a factor in the situation, constitutes a unique feature in the history of the American Supreme Court. All considerations of judicial dignity, of regard for precedent, of desire for the stability of the law, would have led to acquiescence in the decision, or at least such a decent delay in its reconsideration as would have allowed new arguments to be advanced, new elements in the general condition of affairs to appear; or, it might have been allowed to stand as to prior contracts, and the application of the act to subsequent contracts might have been sustained. Those considerations of a political and material character which demanded its reconsideration, however, prevailed. Whether the result of the reconsideration be accepted as good law or not, the fact of such a change under such circumstances must be universally regarded as a deplorable incident in the history of the United State judiciary.

In this decision, as in the former arguments, appeal was had to considerations of public policy. The idea of resulting powers—that is, such as were not expressly conferred by the constitution, but were incident to a group of those so bestowed—was developed, and the power to bestow the legal-tender quality upon bills of the government was classed among such powers.

The argument that the obligation of contracts had not been impaired, because that obligation consisted in the duty to pay such money as was lawful at the time of payment, that is, the principle of the Case of Mixt Monies, which had been on the former occasion rejected by the minority, was now advanced; but, as before, it was maintained that, even if this was not the law, Congress had the power to impair such obligations.

The distinction between contracts entered into before and after the date of the passage of the act was denied, and the act was held to apply to both classes and to be a legitimate exercise of power. Stress was laid upon the exigency existing at the time, and upon the necessity of full power over sword and purse; and, finally, the power was held to exist as a war power.[32]

Justice Field's contribution to the argument of the minority is a masterly analysis of the true nature of the contract of borrowing, which should not be omitted:

> The terms "power to borrow money" . . . have not one meaning when used by individuals and another when granted to corporations, and still a different one when possessed by Congress. They mean only a power to contract for a loan of money upon consideration to be agreed between the parties. The amount of the loan, the time of payment, the interest it shall bear, and the form in which the obligation shall be expressed are simply matters of arrangement between the par-ties. As to the loan and security for its repayment, the borrower may of course pledge such property as revenues, and annex to his promises such privileges, as he may possess. His stipulations in this respect are necessarily limited to his own property rights and privileges, and cannot extend to those of other persons.

According to the decision, then, the power exercised by Congress in authorizing the issue of legal-tender notes was a legitimate power in time of war, and such notes could be employed to cancel obligations growing out of contracts entered into both before and after the passage of that act, provided that such obligations assumed the form neither of involuntary obligations to commonwealth governments nor of contracts in terms of specific forms of coins.

The act of May 31, 1878, brought up the question whether or not it was a power to be exercised in time of peace. * * * *The question came before the Supreme Court in 1883, and by a vote almost unanimous* (8 to 1) *it was decided that Congress had the power in time of peace to bestow this quality on the issues of the government*.[33]

The power was declared by the court to be incident to that of borrowing, "the power to raise money for the public use on a pledge of the public credit" including the power to "issue, in return for the money borrowed, the obligation of the United States in any appropriate form of stock, bonds, bills, nor notes . . . adapted to circulation from hand to hand in the ordinary transactions of business."

The general power of Congress over the currency of the country is then adduced. Congress has the power, argues the court, to incorporate national banks, with the capacity for their own profit as well as for the use of the government in its money transactions of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender.

The constitutional authority of Congress to provide a currency for the whole country, in the form either of a coin circulation or by the emission of bills of credit, is now fully established.

These powers over the currency, to coin, to emit bills, and to make anything other than gold and silver a legal tender, are prohibited to the states.

From this it follows that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency as accord with the use of sovereign governments. And, as a third argument, resort is had to the doctrine of sovereignty:

> The power as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of

> impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty in Europe and America at the time of framing and adopting the constitution of the United States.
>
> Under the power to borrow money on the credit of the United States and to issue circulating notes for the money borrowed, its [Congress's] power to define the quality and force of those notes as currency is as broad as the like power over the metallic currency under the power to coin money and to regulate the value thereof.
>
> 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 defense 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*, 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 power 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."[34]

Of the dissenting opinion by Justice Field, two important points should be noticed.

> Objection is raised by him to "the rule of construction adopted by the court to reach its conclusions, a rule which, fully carried out, would change the whole nature of our constitution and break down the barriers which separate a government of limited from one of unlimited powers."

The second is the denial of the argument from sovereignty:

> Of what purpose, in the light of the tenth amendment, is it, then, to refer to the exercise of the power by the absolute or the limited government of Europe or by the states previous to the constitution? Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community. The power to commit violence, perpetrate injustice, take private property by force without compensation to the owner, and compel the receipt of promise to pay in place of money, may be exercised, as it often has been, by irresponsible authority, but it cannot be considered as belonging to a government founded upon law.

This objection from this minority of one gains force when it is realized that for an analogous act on the part of the English government,

from which American ideas of sovereign power are drawn we should have to go back to the reign of Henry VIII.

It is evident, however, that the bases for a decision either favorable or adverse to the exercise of this power are large considerations of public policy, of constitutional interpretations, of judicial policy, rather than strictly legal considerations. The substratum of law, in the principle of the Case of Mixt Monies, was at first distinctly, if not expressly, rejected in the admission that such legislation, applied to pre-existing agreements, did impair the obligation of contracts. And while men differ on these questions of public policy and constitutional interpretation, they will disagree as to the legal-tender decisions; but there has been a general acquiescence in them and there is apparently no prospect of their being reopened. *The whole question has become one within the discretion,* since within the power, *of Congress*.[35]

From this inquiry into the extent to which the quality of being current, using that word in the older sense of the English proclamation, has been bestowed upon government issues, the following results emerge: (1) On no notes issued during the period prior to 1862 was the quality of being a tender in private transactions bestowed. (2) On all the notes issued during that period was bestowed the quality of being receivable for all public dues. (3) Upon the notes authorized in 1890, and upon them alone, was bestowed the quality of being both a tender in private transactions and receivable in all payments to the government. (4) The power to bestow the quality of being a tender in private transactions has been adjudged an incident to sovereign powers vested in Congress similar to the ancient prerogative money power of the English Crown.

8.
Hepburn v. Griswold (Legal Tender I)[36]

In 1860 a promissory note was signed, payable on February 20, 1862. In both years, the only lawful money in the United States was gold and silver coin. Five days after the promissory note matured, the Legal Tender Act became law.

Two years later, the holder of the then-unpaid note sued to collect. The debtor tried to pay in recently-created paper money ("greenbacks"), by then depreciated to roughly half their face value.

The issue was joined: Did the creditor have to accept the greenbacks as "legal tender?" More fundamentally, however, *the question for the Supreme Court of the United States was whether the Legal Tender Act was constitutional.*

A closely divided Supreme Court ruled narrowly *only* that the Legal Tender Act could not be applied to the promissory note (a contract of debt) which had been made *prior* to the law's enactment.

Though the Court did discuss the underlying question of the Legal Tender Act's constitutionality, it was not decided. The majority believed the legal tender law to be unconstitutional; the minority thought otherwise. Significantly, the Justices' disagreement was only on the facts, each side agreeing that Chief Justice Marshall's *M'Culloch* v. *Maryland* "necessary and proper" decision established the test to be applied.

In *Hepburn* v. *Griswold* the justices' only disagreement concerned how "necessary" legal tender was to the war effort.[37]

* * * * *

Mr. Chief Justice Chase delivered the opinion of the court:

The question presented for our determination by the record in this case is: whether or not the payee or assignee of a note, made before the 25th of February, 1862, is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it. And this requires, in the first place, a construction of that clause of the 1st section of the Act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts.

The entire clause is in these words: "And such notes, herein authorized, shall be receivable in payment of all taxes, internal duties, excises, debts and demands of any kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public and private with the United States, except duties on imports and interest as aforesaid." * * *

Contracts for the payment of money, made before the Act of 1862, had reference to *coined* money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such

contract, therefore, was, in legal import, a contract for the payment of coin.* * *

It has not been maintained in argument, nor, indeed, would anyone, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts.

We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCulloch* v. *The State of Maryland* . . . and the statement then made has ever since been accepted as a correct exposition of the Constitution.

His words were these: "*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional*."

And in another part of the same opinion the practical application of this rule was thus illustrated: "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an Act was not the law of the land. But where the law is *not prohibited*, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and tread on legislative ground."

It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects entrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States Notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when

offered in discharge of pre-existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency; and yet that Congress was not clothed with the power to make these bills a legal tender in payment.

And this court has recently held that the Congress, under the Constitution, possesses, as incidental to other powers, the same power as the old Congress to emit bills or notes; but it was expressly declared at the same time that this decision concluded nothing on the question of legal tender.

Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of Congress, for the purpose of establishing and securing a national currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other.

But it has been maintained in argument that the power to make United States notes a legal tender in payment of all debts is a means appropriate and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited, or inconsistent with the letter or spirit of the Constitution, then the Act which makes them such legal tender must be held to be constitutional.

Let us, then, first inquire whether it is an appropriate and plainly adapted means for carrying on war. The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war; Congress has also power to emit bills of credit, or circulating notes receivable for government dues and payable, so far at least as parties are willing to receive them, in discharge of government obligations; it will facilitate the use of such notes in disbursements to make them a legal tender

in payment of existing debts; therefore Congress may make such notes a legal tender.

It is difficult to say to what express power the authority to make notes a legal tender in payment of pre-existing debts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? And is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post offices and post roads, for example, involves the collection and disbursement of a great revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power?

The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.

Can this proposition be maintained?

It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is, that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government.

It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative Acts are constitutional or unconstitutional.

Undoubtedly, among means appropriate, plainly adapted, really calculated, the Legislature has unrestricted choice. But there can be no implied power to use means not within the description.* * *

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts.

The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted; but that the making of them a legal tender to the extent mentioned was such a means.

Now, we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount.

It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes. But this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for government dues. All modern history testifies that, in time of war especially, when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the government, and made receivable for dues of the government, always obtain at first a ready circulation; and even when not redeemable in coin, on demand, are as little and usually less subject to depreciation than any other description of notes, for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon this quality of receivability, and not upon the quality of legal tender, that reliance for circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender clause seems to have been introduced at a later stage of its progress.

These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts.

It is denied, indeed, by eminent writers, that the quality of legal tender adds anything at all to the credit or usefulness of government notes. They insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be attained by the action of the government, that the implied power of making notes a legal tender in all payments is claimed under the Constitution. Now, how far is the government helped by this means? Certainly it cannot obtain new supplies or services at a cheaper rate, for no one will take the notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender.

But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place; if, on the other hand, the quantity is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely, whether made a legal tender or not.

But if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that

these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it, as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts.* * *

Mr. Justice Miller, dissenting:

* * *. . . Congress is expressly authorized to coin money and to regulate the value thereof, and of foreign coins, and to punish the counterfeiting of such coin and of the securities of the United States. It has been strongly argued by many able jurists that these latter clauses, fairly construed, confer the power to make the securities of the United States a lawful tender in payment of debts.

While I am not able to see in them standing alone a sufficient war¬rant for the exercise of this power, they are not without decided weight when we come to consider the question of the existence of this power, as one necessary and proper for carrying into execution other admitted powers of the government. For they show that so far as the framers of the Constitution did go in granting express power over the lawful money of the country, it was confided to Congress and forbidden to the States; and it is no unreasonable inference, that if it should be found necessary in carrying into effect some of the powers of the government essential to its successful operation, to make its securities perform the office of money in the payment of debts, such legislation would be in harmony with the power over money granted in express terms.

It being conceded, then, that the power under consideration would not, if exercised by Congress, be an invasion of any right reserved to the States, but one which they are forbidden to employ, and that it is not one in terms either granted or denied to Congress, can it be sustained as a law necessary and proper, at the time it was enacted, for carrying into execution any of these powers that are expressly granted either to Congress, or to the government, or to any department thereof?

From the organization of the government under the present Constitution, there have been from time to time attempts to limit the powers granted by that instrument, by a narrow and literal rule of construction, and these have been specially directed to the general clause which we have cited as the foundation of the auxiliary powers of the

government. It has been said that this clause, so far from authorizing the use of any means which could not have been used without it, is a restriction upon the powers necessarily implied by an instrument so general in its language.

The doctrine is, that when an Act of Congress is brought to the test of this clause of the Constitution, its necessity must be absolute, and its adaption to the conceded purpose unquestionable.

Nowhere has this principle been met with more emphatic denial and more satisfactory refutation, than in this court. That eminent jurist and statesman, whose official career of over thirty years as Chief Justice commenced very soon after the Constitution was adopted, and whose opinions have done as much to fix its meaning as those of any man living or dead, has given this particular clause the benefit of his fullest consideration.
* * *

I have cited at unusual length these remarks of Chief Justice Marshall, because though made half a century ago, their applicability to the circumstances under which Congress called to its aid the power of making the securities of the government a legal tender, as a means of successfully prosecuting a war, which without such aid seemed likely to terminate its existence, and to borrow money which could in no other manner be borrowed, and to pay the debt of millions due to its soldiers in the field, which could by no other means be paid, seems to be almost prophetic.

If he had had clearly before his mind the future history of his country, he could not have better characterized a principle which would in this very case have rendered the power to carry on war nugatory, which would have deprived Congress of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances, by the use of the most appropriate means of supporting the government in the crisis of its fate.

But it is said that the clause under consideration is admonitory as to the use of implied powers, and adds nothing to what would have been authorized without it.

The idea is not new, and is probably intended for the same which was urged in the case of *McCulloch* v. *The State of Maryland*, namely: that instead of enlarging the powers conferred on Congress, or providing for a more liberal use of them, it was designed as a restriction upon the ancillary powers incidental to every express grant of power in general terms. I have already cited so fully from that case, that I can only refer to it to say that this proposition is there clearly stated and refuted.

Does there exist, then, any power in Congress or in the government, by express grant, in the execution of which this Legal Tender Act was necessary and proper, in the sense here defined, and under the circumstances of its passage?

The power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for

the common defense and general welfare, are each and all distinctly and specifically granted in separate clauses of the Constitution.

We were in the midst of a war which called all these powers into exercise and taxed them severely. A war which, if we take into account the increased capacity for destruction introduced by modern science, and the corresponding increase of its costs, brought into operation powers of belligerency more potent and more expensive than any that the world has ever known.

All the ordinary means of rendering efficient the several powers of Congress above mentioned had been employed to their utmost capacity, and with the spirit of the rebellion unbroken, with large armies in the field unpaid, with a current expenditure of over a million of dollars per day, the credit of the government nearly exhausted, and the resources of taxation inadequate to pay even the interest on the public debt, Congress was called on to devise some new means of borrowing money on the credit of the nation; for the result of the war was conceded by all thoughtful men to depend on the capacity of the government to raise money in amounts previously unknown.

The banks had already loaned their means to the treasury. They had been compelled to suspend the payment of specie on their own notes. The coin in the country, if it could all have been placed within the control of the Secretary of the Treasury, would not have made a circulation sufficient to answer army purchases and army payments, to say nothing of the ordinary business of the country.

A general collapse of credit, of payment, and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the rebellion would have triumphed, the States would have been left divided, and the people impoverished. The National Government would have perished, and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy.

That the Legal Tender Act prevented these disastrous results, and that the tender clause was necessary to prevent them, I entertain no doubt.

It furnished instantly a means of paying the soldiers in the field, and filled the coffers of the commissary and quartermaster. It furnished a medium for the payment of private debts, as well as public, at a time when gold was being rapidly withdrawn from circulation, and the state bank currency was becoming worthless. It furnished the means to the capitalist of buying the bonds of the government. It stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind.

The results which followed the adoption of this measure are beyond dispute. No other adequate cause has ever been assigned for the revival of government credit, the renewed activity of trade, and the facility with which the government borrowed, in two or three years, at reasonable rates of interest, mainly from its own citizens, double the amount of money there was in the country, including coin, bank notes, and the notes issued under the Legal Tender Acts.

It is now said, however, in the calm retrospect of these events, that Treasury Notes suitable for circulation as money, bearing on their face the pledge of the United States for their ultimate payment in coin, would, if not equally efficient, have answered the requirement of the occasion without being made a lawful tender for debts.

But what was needed was something more than the credit of the government. That had been stretched to its utmost tension, and was clearly no longer sufficient in the simple form of borrowing money. Is there any reason to believe that the mere change in the form of the security given would have revived this sinking credit? On the contrary, all experience shows that a currency not redeemable promptly in coin, but dependent on the credit of a promisor whose resources are rapidly diminishing, while his liabilities are increasing, soon sinks to the dead level of worthless paper. As no man would have been compelled to take it in payment of debts, as it bore no interest, as its period of redemption would have been remote and uncertain, this must have been the inevitable fate of any extensive issue of such notes.

But when by law they were made to discharge the function of paying debts, they had a perpetual credit or value, equal to the amount of all the debts, public and private, in the country. If they were never redeemed, as they never have been, they still paid debts at their par value, and for this purpose were then, and always have been, eagerly sought by the people. To say then, that this quality of legal tender was not necessary to their usefulness, seems to be unsupported by any sound view of the situation. * * *

The legal tender clauses of the statutes under consideration were placed emphatically by those who enacted them, upon their necessity to the further borrowing of money and maintaining the army and navy. It was done reluctantly and with hesitation, and only after the necessity had been demonstrated and had become imperative. Our statesmen had been trained in a school which looked upon such legislation with something more than disgust. The debates of the two Houses of Congress show, that on this necessity alone could this clause of the bill have been carried, and they also prove, as I think very clearly, the existence of that necessity. The history of that gloomy time, not to be readily forgotten by the lover of his country, will forever remain, the full, clear, and ample vindication of the exercise of this power of Congress, as its results have demonstrated the sagacity of those who originated and carried through this measure.

Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But if we adopt the construction of Chief Justice Marshall and the full court over which he presided, a construction which has never to this day been overruled or questioned in this court, how can we avoid this conclusion? Can it be said that this provision did not conduce towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? Or that it was not calculated to effect these objects? Or that it was not useful and essential to that end? Can it be said

that this was not among the choice of means, if not the only means, which were left to Congress to carry on this war for national existence? * * *

9.
Knox v. Lee (Legal Tender I)[38]

The ink was hardly dry on the Hepburn opinion when slightly more than a year later the Supreme Court revisited the constitutionality of the Legal Tender Acts. By then, two of the *Hepburn* v. *Griswold* justices had been replaced by two new members of the Court. They teamed up with the three *Hepburn* dissenters and reversed the earlier decision. The Legal Tender Acts, they held, *did* apply to debt contracts made *prior* to their passage.

For good measure, the five majority justices then ruled that the Acts *were* constitutional and *did* apply to debt contracts made after the law was enacted.

Basically, the new majority asserted, and the new minority denied, that the Legal Tender Acts were indeed "necessary" for the North to fight the Civil War, and thus violated no one's rights.

In addition, the majority concluded that since every other nation in the civilized world had the power to create legal tender, so must the United States. Especially, the Supreme Court found, because the American Constitution not only did not prohibit the power, but actually granted it. If Justice Strong's elaboration of this theme for the Court's majority sounds familiar, as an echo of Chief Justice Marshall in *M'Culloch* v. *Maryland*, no one should be surprised.

Justice Bradley's concurring opinion and the three dissents (by Justices Chase, Clifford, and Field) similarly elaborated earlier ideas. *More than any other modern case,* Knox *is the linchpin of the federal government's contemporary monetary powers.* After *M'Culloch* v. *Maryland*, *Knox* is the most important monetary powers case in Supreme Court history. Its opinions are a veritable textbook of the source of those powers.

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Mr. Justice Strong delivered the opinion of the court:

The controlling questions in these cases are the following: Are the acts of Congress, known as the Legal Tender Acts, constitutional when applied to contracts made before their passage? And, secondly, are they valid as applicable to debts contracted since their enactment?

These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make Treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in

certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted.

It is also clear that if we held the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring Treasury notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender Treasury notes have become the universal measure of values.

If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question, and there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring Treasury notes a legal tender for the payment of debts contracted after its passage, and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment.

There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to Treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfil all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the Legal Tender Acts unconstitutional when applied to contracts made before February 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

* * *

Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court.

This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one fifth of the stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the 1st article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government.

Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *McCulloch* v. *Maryland*, 416 unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by acts of Congress entitled to priority of payment over debts due to other creditors, and this court had held such acts warranted by the Constitution. ***

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in question. Happily, the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. ***

It was . . . in *McCulloch* v. *Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to

perform the high duties assigned to it in the manner most beneficial to the people. ***

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us.

Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. ***

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the Legal Tender Acts, could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the Treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their workshops, and their business, with families and debts to be provided for. The government could not pay them with ordinary Treasury notes, nor could they discharge their debts with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common Treasury notes in payments of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tender gave them a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied. ***

Concluding, then, that the provision which made Treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. ***

We assert . . . that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

* * *

Mr. Chief Justice Chase, dissenting:

We dissent from the argument and conclusion in the opinion just announced.

The rule, by which the constitutionality of an act of Congress passed in the alleged exercise of an implied power is to be tried is no longer, in this court, open to question. It was laid down in the case of *McCulloch* v. *Maryland*, 4 Wheat. 421, by Chief Justice Marshall, in these words: "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

* * *

We agree, then, that the question whether a law is a necessary and proper means to execution of an express power, within the meaning of these words as defined by the rule—that is to say, a means appropriate, plainly adapted, not prohibited but consistent with the letter and the spirit of the Constitution—is a judicial question. Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt. It must be a necessary and proper means within the fair meaning of the rule. If not such it cannot be employed consistently with the Constitution. Whether the means actually employed in a given case are such or not the court must decide. The court must judge of the fact, Congress of the degree of necessity.

* * *

The sense of the Convention which framed the Constitution is clear, from the account given by Mr. Madison of what took place when the power to emit bills of credit was stricken from the reported draft. He says distinctly that he acquiesced in the motion to strike out, because the government would not be disabled thereby from the use of public notes, so far as they would be safe and proper, while it cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts. 3 Mad. Papers, 1346. The whole discussion upon bills of credit proves, beyond all possible question, that the Convention regarded the power to make notes a legal tender as absolutely excluded from the Constitution.

The papers of the Federalist, widely circulated in favor of the ratification of the Constitution, discuss briefly the power to coin money, as a power to fabricate metallic money, without a hint that any power to fabricate money of any other description was given to Congress (Dawson's Federalist, 294), and the views which it promulgated may be fairly regarded as the views of those who voted for adoption.

Acting upon the same views, Congress took measures for the establishment of a mint, exercising thereby the power to coin money, and has continued to exercise the same power, in the same way, until the present day. It established the dollar as the money unit, determined the quantity and quality of gold and silver of which each coin should consist, and prescribed the denominations and forms of all coins to be issued. 1 Stat. at L. 225, 246, and subsequent acts.

Until recently no one in Congress ever suggested that that body possessed power to make anything else a standard of value.

Statesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of Congress.

Mr. Webster expressed not only his opinion but the universal and settled conviction of the country when he said: "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 mints or foreign coin at rates regulated by Congress. This is a constitutional principle perfectly plain and of the very highest importance. The states are prohibited from making anything but gold and silver a 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 regulate the value of foreign coin, 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."

And this court, in *Gwin* v. *Breedlove* said: "By the Constitution of the United States gold and silver coin made current by law can only be tendered in payment of debts." And in *The United States* v. *Marigold* this court, speaking of the trust and duty of maintaining a uniform and pure metallic standard of uniform value throughout the Union, said: "The power of coining money and 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."

The present majority of the court say that legal tender notes "have become the universal measure of values," and they hold that the legislation of Congress substituting such measures for coin by making the notes a legal tender in payment, is warranted by the Constitution.

But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard, by making notes a legal tender, is conferred upon Congress by the Constitution.

Mr. Justice Clifford, dissenting:

Money, in the constitutional sense, means coins of gold and silver fabricated and stamped by authority of law as a measure of value, pursuant to the power vested in Congress by the Constitution.

Coins of copper may also be minted for small fractional circulation, as authorized by law and the usage of the government for eighty years, but it is not necessary to discuss that topic at large in this investigation.

Even the authority of Congress upon the general subject does not extend beyond the power to coin money, regulate the value thereof and of foreign coin. Const., art. 8, clause 5.

Express power is also conferred upon Congress to fix the standard of weights and measures, and of course that standard, as applied to future

transactions, may be varied or changed to promote the public interest, but the grant of power in respect to the standard of value is expressed in more guarded language, and the grant is much more restricted.

Power to fix the standard of weights and measures is evidently a power of comparatively wide discretion, but the power to regulate the value of the money authorized by the Constitution to be coined is a definite and precise grant of power, admitting of very little discretion in its exercise, and is not equivalent, except to a very limited extent, to the power to fix the standard of weights and measures, as the money authorized by that clause of the Constitution is coined money, and as a necessary consequence must be money of actual value, fabricated from the precious metals generally used for that purpose at the period when the Constitution was framed.

Coined money, such as is authorized by that clause of the instrument, consists only of the coins of the United States fabricated and stamped by authority of law, and is the same money as that described in the next clause of the same section as the current coins of the United States, and is the same money also as "the gold and silver coins" described in the 10th section of the same article, which prohibits the states from coining money, emitting bills of credit, or making "anything but gold and silver coin a tender in payment of debts."

Intrinsic value exists in gold and silver, as well before as after it is fabricated and stamped as coin, which shows conclusively that the principal discretion vested in Congress under that clause of the Constitution consists in the power to determine the denomination, fineness, or value and description of the coins to be struck, and the relative proportion of gold or silver, whether standard or pure, and the proportion of alloy to be used in minting the coins, and to prescribe the mode in which the intended object of the grant shall be accomplished and carried into practical effect.

Discretion, to some extent, in prescribing the value of the coins minted, is, beyond doubt, vested in Congress, but the plain intent of the Constitution is that Congress, in determining that matter, shall be governed chiefly by the weight and intrinsic value of the coins, as it is clear that if the stamped value of the same should much exceed the real value of gold and silver not coined, the minted coins would immediately cease to be either current coins or a standard of value as contemplated by the Constitution. Commercial transactions imperiously require a standard of value, and the commercial world, at a very early period in civilization, adopted gold and silver as the true standard for that purpose, and the standard originally adopted has ever since continued to be so regarded by universal consent to the present time.

Paper emissions have, at one time or another, been authorized and employed as currency by most commercial nations, and by no government, past or present, more extensively than by the United States, and yet it is safe to affirm that all experience in its use as a circulating medium has demonstrated the proposition that it cannot by any legislation, however stringent, be made a standard of value or the just equivalent of gold or silver. Attempts of the kind have always failed, and no body of men, whether

in public or private stations, ever had more instructive teachings of the truth of that remark than the patriotic men who framed the Federal Constitution, as they had seen the power to emit bills of credit freely exercised during the war of the Revolution, not only by the Confederation, but also by the states, and knew from bitter experience its calamitous effects and the utter worthlessness of such a circulating medium as a standard of value. Such men so instructed could not have done otherwise than they did do, which was to provide an irrepealable standard of value, to be coined from gold and silver, leaving as little upon the subject to the discretion of Congress as was consistent with a wise forecast and an invincible determination that the essential principles of the Constitution should be perpetual as the means to secure the blessings of liberty to themselves and their posterity.

Constitutional powers, of the kind last mentioned, that is, the power to ordain a standard of value and to provide a circulating medium for a legal tender, are subject to no mutations of any kind. They are the same in peace and in war. What the grants of power meant when the Constitution was adopted and ratified they mean still, and their meaning can never be changed except as described in the fifth article providing for amendments, as the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men and under all circumstances." *Ex parte Milligan*.

Delegated power ought never to be enlarged beyond the fair scope of its terms, and that rule is emphatically applicable in the construction of the Constitution. Restrictions may at times be inconvenient, or even embarrassing; but the power to remove the difficulty by amendment is vested in the people, and if they do not exercise it the presumption is that the inconvenience is a less evil than the mischief to be apprehended if the restriction should be removed and the power extended, or that the existing inconvenience is the least of the two evils; and it should never be forgotten that the government ordained and established by the Constitution is a government "of limited and enumerated powers," and that to depart from the true import and meaning of those powers is to establish a new Constitution or to do for the people what they have not chosen to do for themselves, and to usurp the functions of a legislator and desert those of an expounder of the law. Arguments drawn from impolicy or inconvenience, says Judge Story, ought here to be of no weight, as "the only sound principle is to declare *ita lex scripta est*, to follow and to obey."

* * *

Mr. Justice Field, dissenting:

Nothing has been heard from counsel in these cases, and nothing from the present majority of the court, which has created a doubt in my mind of the correctness of the judgment rendered in the case of *Hepburn* v. *Griswold*, or of the conclusions expressed in the opinion of the majority of the court as then constituted. That judgment was reached only after repeated arguments were heard from able and eminent counsel, and after every point was raised on either side had been the subject of extended deliberation.

I have thus dwelt at length upon the clause of the Constitution investing Congress with the power to borrow money on the credit of the United States, because it is under that power that the notes of the United States were issued, and it is upon the supposed enhanced value which the quality of legal tender gives to such notes, as the means of borrowing, that the validity and constitutionality of the provision annexing this quality are founded.

It is true that, in the arguments of counsel, and in the several opinions of different state courts, to which our attention has been called, and in the dissenting opinion in *Hepburn* v. *Griswold*, reference is also made to other powers possessed by Congress, particularly to declare war, to suppress insurrection, to raise and support armies, and to provide and maintain a navy; all of which were called into exercise and severely taxed at the time the Legal Tender Act was passed.

But it is evident that the notes have no relation to these powers, or to any other powers of Congress, except as they furnish a convenient means for raising money for their execution. The existence of the war only increased the urgency of the government for funds. It did not add to its powers to raise such funds, or change, in any respect, the nature of those powers or the transactions which they authorized. If the power to engraft the quality of legal tender upon the notes existed at all with Congress, the occasion, the extent, and the purpose of its exercise were mere matters of legislative discretion; and the power may be equally exerted when a loan is made to meet the ordinary expenses of government in time of peace, as when vast sums are needed to raise armies and provide navies in time of war. The wants of the government can never be the measure of its powers.

The Constitution has specifically designated the means by which funds can be raised for the uses of the government, either in war or peace. These are taxation, borrowing, coining, and the sale of its public property. Congress is empowered to levy and collect taxes, duties, imposts and excises to any extent which the public necessities may require. Its power to borrow is equally unlimited. It can convert any bullion it may possess into coin, and it can dispose of the public lands and other property of the United States, or any part of such property. The designation of these means exhausts the powers of Congress on the subject of raising money. The designation of the means is a negation of all others, for the designation would be unnecessary and absurd if the use of any and all means were permissible without it. These means exclude a resort to forced loans, and to any compulsory interference with the property of third persons, except by regular taxation in one of the forms mentioned.

But this is not all. The power “to coin money” is, in my judgment, inconsistent with and repugnant to the existence of a power to make anything but coin a legal tender. To coin money is to mold metallic substance having intrinsic value into certain forms convenient for commerce, and to impress them with the stamp of the government indicating their value. Coins are pieces of metal, of definite weight and value, thus stamped by national authority. Such is the natural import of the

terms “to coin money” and “coin;” and if there were any doubt that this is their meaning in the Constitution, it would be removed by the language which immediately follows the grant of the “power to coin” authorizing Congress to regulate the value of the money thus coined, and also “of foreign coin,” and by the distinction made in other clauses between coin and the obligations of the general government and of the several states.

The power of regulation conferred is the power to determine the weight and purity of the several coins struck, and their consequent relation to the monetary unit which might be established by the authority of the government—a power which can be exercised with reference to the metallic coins of foreign countries, but which is incapable of execution with reference to their obligations or securities.

Then, in the clause of the Constitution immediately following, authorizing Congress “to provide for the punishment of counterfeiting the securities and current coin of the United States,” a distinction between the obligations and coins of the general government is clearly made. And in the 10th section, which forbids the states to “coin money, emit bills of credit, and make anything but gold and silver coin a tender in payment of debts,” a like distinction is made between coin and the obligations of the several states. The terms “gold and silver,” as applied to the coin, exclude the possibility of any other conclusion.

Now, money in the true sense of the term is not only a medium of exchange, but it is a standard of value by which all other values are measured. Blackstone says, and Story repeats his language, “Money is a universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities.”

Money being such standard, its coins or pieces are necessarily a legal tender to the amount of their respective values for all contracts or judgments payable in money, without any legislative enactment to make them so. The provisions in the different coinage acts, that the coins to be struck shall be such legal tender, are merely declaratory of their effect when offered in payment, and are not essential to give them that character.

The power to coin money is, therefore, a power to fabricate coins out of metal as money, and thus make them a legal tender for their declared values as indicated by their stamp. If this be the true import and meaning of the language used it is difficult to see how Congress can make the paper of the government a legal tender. When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject.

Besides this, there cannot well be two different standards of value and, consequently, two kinds of legal tender for the discharge of obligations arising from the same transactions. The standard or tender of the lower actual value would in such case inevitably exclude and supersede the other, for no one would use the standard or tender of higher value when his purpose could be equally well accomplished by the use of the other. A

practical illustration of the truth of this principle we have all seen in the effect upon coin of the act of Congress making the notes of the United States a legal tender. It drove coin from general circulation, and made it, like bullion, the subject of sale and barter in the market.

The inhibition upon the states to coin money and yet to make anything but gold and silver coin a tender in payment of debts, must be read in connection with the grant of the coinage power to Congress. The two provisions taken together indicate beyond question that the coins which the national government was to fabricate, and the foreign coins, the valuation of which it was to regulate, were to consist principally, if not entirely, of gold and silver.

The framers of the Constitution were considering the subject of money to be used throughout the entire Union when these provisions were inserted, and it is plain that they intended by them that metallic coins fabricated by the national government, or adopted from abroad by its authority, composed of the precious metals, should everywhere be the standard and the only standard of value by which exchanges could be regulated and payments made.

At that time gold and silver molded into forms convenient for use, and stamped with their value by public authority, constituted, with the exception of pieces of copper for small values, the money of the entire civilized world. Indeed, these metals divided up and thus stamped, always have constituted money with all people having any civilization, from the earliest periods in the history of the world down to the present time. It was with "four hundred shekels of silver, current money with the merchant," that Abraham bought the field of Machpelah, nearly four thousand years ago. This adoption of the precious metals as the subject of coinage—the material of money by all peoples in all ages of the world—has not been the result of any vagaries of fancy, but is attributable to the fact that they of all metals alone possess the properties which are essential to a circulating medium of uniform value.

"The circulating medium of a commercial community," says Mr. Webster, "must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative and capable of being turned into them at will. So long as bank paper retains this quality it is a substitute for money. Divested of this, nothing can give it that character."

The statesmen who framed the Constitution understood this principle as well as it is understood in our day. They had seen in the experience of the Revolutionary period the demoralizing tendency, the cruel

injustice, and the intolerable oppression of a paper currency not convertible on demand into money, and forced into circulation by legal tender provisions and penal enactments. When they, therefore, were constructing a government for a country, which they could not fail to see was destined to be a mighty empire, and have commercial relations with all nations, a government which they believed was to endure for ages, they determined to recognize in the fundamental law as the standard of value, that which ever has been and always must be recognized by the world as the true standard, and thus facilitate commerce, protect industry, establish justice and prevent the possibility of a recurrence of the evils which they had experienced and the perpetration of the injustice which they had witnessed. "We all know," says Mr. Webster, "that the establishment of a sound and uniform currency was one of the greatest ends contemplated in the adoption of the present Constitution. If we could now fully explore all the motives of those who framed and those who supported that Constitution, perhaps we should hardly find a more powerful one than this."

* * *

If, now, we consider the history of the times when the Constitution was adopted; the intentions of the framers of that instrument, as shown in their debates; the contemporaneous exposition of the coinage power in the state conventions assembled to consider the Constitution, and in the public discussions before the people; the natural meaning of the terms used; the nature of the Constitution itself as creating a government of enumerated powers; the legislative exposition of nearly three quarters of a century; the opinions of judicial tribunals, and the recorded utterances of statesmen, jurists and commentators, it would seem impossible to doubt that the only standard of value authorized by the Constitution was to consist of metallic coins struck or regulated by the direction of Congress, and that the power to establish any other standard was denied by that instrument.

* * *

For the reasons which I have endeavored to unfold, I am compelled to dissent from the judgment of the majority of the court. I know that the measure, the validity of which I have called in question, was passed in the midst of a gigantic rebellion, when even the bravest hearts sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the government to obtain funds and supplies, and thus advance the national cause.

Were I to be governed by my appreciation of the character of those men, instead of my views of the requirements of the Constitution, I should readily assent to the view of the majority of the court. But, sitting as a judicial officer and bound to compare every law enacted by Congress and the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, I cannot hesitate to pronounce it as being, in my judgment, unconstitutional and void.

In the discussions which have attended this subject of legal tender, there has been at times what seemed to me to be a covert intimation, that

opposition to the measure in question was the expression of a spirit not altogether favorable to the cause, in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to anyone in honoring and reverencing the noble and patriotic men who were in the councils of the nation during the terrible struggle with the Rebellion. To them belong the greatest of all glories in our history—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind approval of every measure which they may have thought essential to put down the Rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master when he said to his disciples: "If ye love me, keep my commandments."

10.
Juilliard v. Greenman (Legal Tender III)[39]

Justice Field had fought bravely against legal tender in both *Hepburn* v. *Griswold* and *Knox* v. *Lee*, but his losing battle against paper money did not end with his comprehensive and eloquent dissent in Knox. Thirteen years later the justice was back at the barricades, all alone this time, in his continuing but futile dissent against legal tender.

In 1878 a federal statute had been enacted which, in effect, amounted to a *peacetime* issuance of legal tender. A creditor sued and the question eventually to be decided by the Supreme Court was ". . . whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts."

In other words, was it constitutional for the federal government to issue legal tender paper money not as a "necessary" adjunct to fighting a civil war, but during peacetime when the exigency of national survival didn't exist?

Although the answer to the question was a foregone conclusion, how the Supreme Court reached it, and what it was based on, was somewhat surprising.

The reader will recall that a strong emphasis of the Court in *Hepburn* was the *emergency* nature of the legal tender issuance. The war, the Court stressed, made the legal tender "necessary." In *Knox* v. *Lee*, certainly the war had not been far from the minds of the majority justices.

In *Juilliard*, the plaintiff himself agreed that during time of war Congress could create legal tender currency. Having thus conceded the principle that Congress did, after all, possess the legal tender power, at least sometimes, the plaintiff was very nearly inviting the Court to apply that principle to peacetime, thereby erasing the always tenuous war-peace distinction.

The Court accepted the invitation. With ease.

With *Juilliard*, legal tender had become a permanent feature of the American monetary system. The Supreme Court had effectively rewritten the constitutional monetary powers of Congress, and from then on events followed each other just as surely as a grant of power is followed by an abuse of power. After the Legal Tender Cases, America possessed a brand new monetary system. To that extent, it also had a different kind of government.

*****

Gray, J., delivered the opinion of the Court.

* * *

The elaborate printed briefs submitted by counsel in this case, and the opinions delivered in the *Legal Tender Cases*, and in the earlier case of *Hepburn* v. *Griswold*, which those cases overruled, forcibly present the

arguments on either side of the question of the power of Congress to make the notes of the United States a legal tender in payment of private debts.

* * *

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 defense 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; 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."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts.

To quote once more from the judgment in *McCulloch* v. *Maryland*: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

It follows that the act of May 31, 1878, is constitutional and valid, and that the circuit court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff.

* * *

Field, J., dissenting.

* * *

From the decision of the court I see only evil likely to follow. There have been times within the memory of all of us when the legal-tender notes of the Unites States were not exchangeable for more than one-half of their nominal value. The possibility of such depreciation will always attend paper money. This inborn infirmity no mere legislative declaration can cure. If

congress has the power to make the notes a legal tender and to pass as money or its equivalent, why should not a sufficient amount be issued to pay the bonds of the United States as they mature? Why pay interest on the millions of dollars of bonds now due when congress can in one day make the money to pay the principal? And why should there be any restraint upon unlimited appropriations by the government for all imaginary schemes of public improvement, *if the printing-press can furnish the money that is needed for them?*[40]

11.
Ling Su Fan v. United States[41]

As we've seen, by the time of the *Juilliard* decision, nearly three centuries had passed since the *Case of Mixed Money* had approved Queen Elizabeth's sovereign power to debase her coinage. Years later, England's American colonies revolted, renouncing the idea of royal sovereignty: "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The reader will recall that Hamilton's version of broad monetary powers prevailed in the Bank Controversy, and nearly three decades later formed the basis for Marshall's seminal opinion in *M'Culloch* v. *Maryland*. In turn, *M'Culloch* was the predicate for passage of the Legal Tender Acts fifty years later. When they were upheld against constitutional challenge, it was clear who the real fathers and grandfathers of the opinions were, and clearer still that the decisions rested on a notion of sovereignty and the nature of government not very different from that extolled in the earlier *Case of Mixed Money*.

The engorgement of federal monetary power through the Legal Tender Acts had not occurred in the Seventeenth Century, but at the dawn of the Twentieth. It happened not in Elizabethan England, but in the freest nation ever to exist. Yet in the *Legal Tender Cases* its Supreme Court sounded like the courts of royalty.

If the idea was conceived in Europe that monetary powers belong to the sovereign, if it was born in the United States in Chief Justice John Marshall's *M'Culloch* decision (midwifed by Hamilton's opinion in the Bank Controversy), and if it reached its majority in the *Legal Tender Cases*, then its maturity came in the next case and the two that follow it.

As a major consequence of the Spanish-American War, the United States ruled the Philippine Islands from the late 1800s to just before World War II. During that time, Congress enacted laws for the governance of the Islands, and under certain circumstances decisions of the Supreme Court of the Philippine Islands could be reviewed by the Supreme Court of the United States.

In 1902 Congress authorized the Philippine government to establish a mint, to enact laws for the facility's operation, and to strike certain coins.

In 1903 Congress provided that the Philippine gold peso, consisting of 12.9 grains of gold, nine-tenths fine, should be the unit of value in the Islands. The federal statute also provided that "the government of the Philippine Islands is authorized to coin to an amount not exceeding seventy-five million pesos, for use in said Islands, a silver coin of the denomination of one peso, and of the weight of four hundred and sixteen grains, and the standard of said silver coins shall be such that of one

thousand parts, by weight, nine hundred shall be of pure metal and one hundred of alloy, and the alloy shall be of copper."

Most important was a portion of Section 6: "the government of the Philippine Islands may adopt such measures as it may deem proper ... *to maintain the value of the silver Philippine peso at the rate of one gold peso.*"[42] Another part of Section 6 authorized the Philippine government's issuance of certificates of indebtedness, bearing interest, as a specific measure for maintaining the parity between the silver and gold peso.

One of the measures adopted by the Philippine government, in accordance with Section 6, was the following:

The *exportation* from the Philippine Islands of Philippine silver coins . . . or the bullion made by melting or otherwise mutilating such coins, is hereby *prohibited*, and any of the aforementioned silver coins or bullion which is exported, or of which the exportation is attempted subsequent to the passage of this act, and contrary to its provisions, shall be liable to forfeiture, under due process of law, and one third of the sum or value of the bullion so forfeited shall be payable to the person upon whose information, given to the proper authorities, the seizure of the money or bullion so forfeited is made, and the other two thirds shall be payable to the Philippine government, and accrue to the gold standard fund. Provided, that the prohibition herein contained shall not apply to sums of P. 25 or less, carried by passengers leaving the Philippine Islands.

The *exportation* or attempt to export Philippine silver coin or bullion made from such coins from the Philippine Islands, contrary to law, is hereby declared to be a *criminal offense*, punishable, in addition to the forfeiture of the said coins or bullion, as above provided, by a fine not to exceed P. 10,000, or by imprisonment for a period not to exceed one year, or both, in the discretion of the court.

Ling Su Fan was convicted in a Manila court of the offense of exporting Philippine silver coins from the Islands. He appealed to the Supreme Court of the Philippine Islands, and lost. The conviction was affirmed, and Ling Su Fan persuaded the Supreme Court of the United States to review his case. Apparently, by taking the case, the Court in 1910 wanted to stretch federal monetary power beyond the territorial jurisdiction of the United States.

Although it's inconceivable that Ling Su Fan had ever heard of the *Case of Mixed Money*, the Constitutional Convention, the Bank Controversy, Jefferson, Hamilton, Marshall, *M'Culloch* v. *Maryland*, or the *Legal Tender Cases*, his fate was sealed by them.

***Mr. Justice Lurton* delivered the opinion of the Court.**

* * *

The law . . . under which the conviction of [Ling Su Fan] was secured, must rest upon the provision of §6 . . . as a means of maintaining "the value of the silver peso at the rate of one gold peso." Passing by any consideration of the wisdom of such a law prohibiting the exportation of the Philippine Islands silver pesos as not relevant to the question of power, a substantial reason for such a law is indicated by the fact that the bullion value of such

coin in Hong Kong was some 9 per cent greater than its face value. The law was therefore adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage.

The power to "coin money and regulate the value thereof, and of foreign coin," is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress. Along with the power to strike gold and silver pesos for local circulation in the islands was granted the power to provide such measures as that government should "deem proper" . . . to maintain the parity between the gold and silver pesos. Although the Philippine act cannot, therefore, be said to overstep the wide legislative discretion in respect of measures to preserve a parity between the gold and silver pesos, yet it is said that if the particular measure resorted to be one which operates to deprive the owner of silver pesos of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.

Conceding the title of the owner of such coins, yet *there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange*.[43]

These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. *They bear, therefore, the impress of sovereign power* [44] which fixes value and authorizes their use in exchange. As an incident, government may punish defacement and mutilation, and constitute any such act, when fraudulently done, a misdemeanor....

However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin.

To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right, forbidden by the organic law. . . .

12.
Noble State Bank v. Haskell[45]

The Supreme Court's conclusion in *Ling Su Fan*—that attached to one's ownership of silver coins (even in the Philippine Islands!) were "limitations which public policy may require," and that the coins themselves "bear, therefore, the impress of sovereign power"—was far-reaching. Two months later, the Court went even further.

An Oklahoma statute had created a Depositor's Guaranty Fund to insure depositors of insolvent banks against losses. The Noble State Bank, in the words of the Court, "[argued] that it [was] solvent and [did] not want the help of the Guaranty Fund and that it [could not] be called upon to contribute toward securing or paying the depositors in other banks. . . ."

The bank lost; there was nothing new in that. What was new, however, was how far the notion of sovereign power over monetary affairs had come.

* * *

Justice Holmes delivered the opinion of the Court.

* * *

The substance of the [bank's] argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up . . . still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business.

Nevertheless, notwithstanding the logical form of the objection, *there are more powerful considerations on the other side*. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. . . . And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. . . . At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to *all the great public needs*. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be *greatly and immediately necessary to the public welfare*. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.

Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way.

The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. . . . The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. . . . So far is that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. . . .

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. . . .

[I]n our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. . . .

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. *We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe.*

In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong. . . .[46]

13.
Gold Clause Cases[47]

Justice Holmes's dictum in Noble State Bank—that government (there, the states) could take "the whole business of banking under its control"—very nearly became a reality in the early days of Franklin Delano Roosevelt's "New Deal." The banks were closed, the private ownership of gold was illegalized, the dollar was devalued against gold, and gold clauses[48] were nullified.

Of all FDR's monetary machinations, only nullification of the gold clauses reached the Supreme Court, and the *Gold Clause Cases* stand as the most comprehensive modern judicial statement of the monetary powers of the federal government.

Most people alive today never hear of a "gold clause." Here's an example, found in a "[o]ne thousand dollar, forty year, 5%, first mortgage gold bond of the Elgin & Chicago Railway Company, principal due April 15th A.D."

The bond stipulates, in unambiguous words, that principal and interest will be paid "in gold coin of the United States of America."

That is a gold clause.

Here's the background.

In Franklin Roosevelt's first week in office, he closed the banks, had Congress promptly enact the Emergency Banking Act. He then requisitioned gold coins, bullion, and certificates—and paid $20.67 on the paper dollar.

FDR's compliant Congress passed a joint resolution nullifying all gold clauses in not only public contracts, but private ones as well. The rationale advanced was that such hitherto valid contracts interfered with the government's power to control United States monetary affairs.

When the *Gold Clause Cases* came before the Court, no one should have doubted either what result the Court would reach, or by what route it would get there. The dead hand of the *Case of Mixed Money* and its progeny was upon the Court. In little more than three hundred years, the round trip had been completed from a monarchy's unlimited power over monetary affairs to identical power in the hands of a representative democracy. The trip had begun in 1604 in the *Case of Mixed Money*, with an English judge's decision that:

> although at the time of the contract . . . pure money of gold and silver was current within this kingdom ... yet the mixed money being established . . . before the date of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it.
> . . .

The trip ended in 1935 with Chief Justice Hughes's statement in the *Gold Clause Cases* that "parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

An ocean had been crossed, a revolution fought and won, a Constitution debated, promulgated, and approved, and still the sovereign power over monetary affairs persisted.

The Supreme Court split 5-4 in the *Gold Clause Cases*, upholding as the exercise of a plenary power what the government had done. Abrogation of the otherwise valid contractual gold clauses was justified as eliminating a threat to Congress's control of the monetary system.

Here is just a flavor of how the Chief Justice of the United States and four of his colleagues justified the federal government's control over money.

* * *

Mr. Chief Justice Hughes delivered the opinion of the Court.[49]

* * *

We have not attempted to summarize all the provisions of these measures. *We are not concerned with their wisdom*. The question before the Court is one of power, not of policy. And that question touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to "gold clauses" in existing contracts. . . .

* * *

The power of the Congress to establish a monetary system. It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. * * *

The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide "a sound and uniform currency for the country," and to "secure the benefit of it to the people by appropriate legislation."

Moreover, by virtue of this national power, *there attach to the ownership of gold and silver those limitations which public policy may require* by reason of their quality as legal tender and as a medium of exchange. * * *

Dealing with the specific question as to the effect of the legal tender acts upon contracts made before their passage, that is, those for the payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts,—in rendering them "fruitless or partially fruitless." The Court pointed out that the exercise of the powers of Congress may affect "apparent obligations" of contracts in many ways. . . .

* * *

The effect of the gold clauses in suit in relation to the monetary policy adopted by the Congress. Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these conten¬tions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether

the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. * * *

It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority.

The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, that facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed.

* * *

Mr. Justice McReynolds, Mr. Justice Van Devanter, Mr. Justice Sutherland, and Mr. Justice Butler dissent in *Perry* v. *United States*[50]

* * *

Mr. Justice McReynolds, dissenting:

Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and I conclude that, if given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations. Acquiescence in the decisions just announced is impossible; the circumstances demand statement of our views. "To let oneself slide down the easy slope offered by the course of events and to dull one's mind against the extent of the danger . . . is precisely to fail in one's obligation or responsibility."

Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both. *No definite delegation of such a power exists*; and we cannot believe the farseeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the expected

government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect. Not only is there no permission for such actions; they are inhibited. And no plenitude of words can conform them to our charter.

The Federal government is one of delegated and limited powers which derive from the Constitution. "It can exercise only the powers granted to it." Powers claimed must be denied unless granted; and, as with other writings, the whole of the Constitution is for consideration when one seeks to ascertain the meaning of any part.

* * *

There is no challenge here of the power of Congress to adopt such proper "Monetary Policy" as it may deem necessary in order to provide for national obligations and furnish an adequate medium of exchange for public use. The plan under review in the *Legal Tender Cases* was declared within the limits of the Constitution, but not without a strong dissent. The conclusions there announced are not now questioned; and any abstract discussion of Congressional power over money would only tend to befog the real issue.

The fundamental problem now presented is whether recent statutes passed by Congress in respect of money and credits, were designed to attain a legitimate end. Or whether, under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to destroy private obligations, repudiate national debts and drive into the Treasury all gold within the country, in exchange for inconvertible promises to pay, of much less value.

Considering all the circumstances, we must conclude they show that the plan disclosed is of the latter description and its enforcement would deprive the parties before us of their rights under the Constitution. * * *

Conclusion

In her seminal essay, "Man's Rights," author-philosopher Ayn Rand has observed that:

> Every political system is based on some code of ethics. The dominant ethics of mankind's history were variants of the altruist-collectivist doctrine which subordinated the individual to some higher authority, either mystical or social. Consequently, most political systems were variants of the same statist tyranny, differing only in degree, not in basic principle. . . .[51]

Although altruism-collectivism was responsible for the statist[52] political systems which existed from the time of Solon to the pre-Constitutional colonial period, the United States of America was conceived differently.

> . . . the basic premise of the Founding Fathers was man's right to his own life, to his own liberty, to the pursuit of his own happiness—which means: man's right to exist for his own sake, neither sacrificing himself to others nor sacrificing others to himself; and . . . the political implementation of this right is a society where men deal with one another as *traders*, by voluntary exchange to mutual benefit. [53]

But even though the Framers' political premises were rooted in the concept of individual rights, they were undercut by the altruist morality. As a result, America caught the virus of European statism. Examples abound at crucial points in our history.

Concerning the Constitutional Convention's proposal to prohibit the states from making anything but gold and silver coin a tender in payment of debts, Maryland's Luther Martin observed that:

> I considered, sir, that there might be times of such great public calamities and distress, and of such extreme scarcity of specie, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor, by passing laws totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments [sic], or by delivering up his property to his creditors at a reasonable and honest valuation. *The times have been such as to render regulation of this kind necessary in most or all of the States, to prevent the wealthy creditor and moneyed man from totally destroying the poor, though even industrious debtor.*[54]

The Constitution itself contains three related sections which bear eloquent witness to the contradictory, perhaps unavoidable, compromises of some of the Founders: the "three fifths of all 'other persons'" rule for apportioning taxes and Congressional representation (Art. I, §2); the twenty-year bar before Congress could prohibit the "migration or importation of 'such persons' as any of the States . . . shall think proper to admit...(Art. I., §9); and, the provision that "[n]o person 'held to service or labour' in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due" (Art. IV., §2).

These sections of the Constitution recognized and assured the perpetuation, at least for some time, of an institution which was the epitome of statist tyranny: slavery.

That altruist-collectivist doctrines infected the American political system from the beginning is also clear from the tenor of early Supreme Court decisions. For example, *Calder* v. *Bull* reveals a surprising attitude of some justices toward individual rights. Justice Chase had this to say:

> It seems to me, that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, the right, as well as the mode, or manner, *of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society*. . . . [55]

In the same case, Justice Iredell recognized that:

> *Some of the most necessary and important acts of legislation are ... founded upon the principle, that private rights must yield to public exigencies.* Highways are run through private grounds. . . . In such, and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require; and justice is done, by allowing them a reasonable equivalent. Without the possession of this power the operations of government would often be obstructed, and society itself would be endangered. [56]

The collectivist notion that property rights are "conferred by society," and the statist idea that "private rights must yield to public exigencies," exemplify the clash that shook America's political foundation from the start. Nowhere was that clash more apparent than over government's monetary power. Hamilton's views adopted by Chief Justice John Marshall in *M'Culloch* v. *Maryland*, rested on a concept of monetary power far exceeding what the Constitution had delegated to Congress. Even Hamilton's adversary in the Bank Controversy, Thomas Jefferson, had not based his opposition on individual rights. On the contrary, Jefferson believed that the power to charter a bank belonged not to the federal government, but to the states. His view merely substituted the power of the state for that of the federal government.[57]

Even in the arguments of some of the lawyers who fought the bank in *M'Culloch*, legal tender in *Hepburn, Knox* and *Juilliard*, and nullification in the *Gold Clause Cases*, one perceives little or no emphasis on individual rights.

On the contrary, their objections were usually based on Jefferson's view, or on the belief that although the federal government did possess broad monetary power, in their case it had simply gone "too far." In adopting these views, they necessarily conceded that government *did* possess substantial power over monetary affairs. A fascinating example is found in one of the *Gold Clause Cases*, where counsel for the holder of a nullified Treasury gold certificate actually admitted "that Congress had authority to compel all residents on this country to deliver to the Government all gold bullion, gold coin and gold certificates in their possession."[58]

Perhaps the classic example of the victim explicitly sanctioning the statism that had been his undoing, is found in *Hepburn* v. *Griswold* (Legal Tender I).

Near the conclusion of an attorney's eloquent argument in the Supreme Court attacking the constitutionality of the Legal Tender Acts, he made the following concession:

> I can conceive that there may be exigencies when the object for which the Constitution was made could not be secured by the Constitution, but only [outside] the Constitution; not by constitutional means, but only by extra-constitutional means. When such a crisis should arrive, I can well understand how anyone connected with the executive branch of the government, might not hesitate as to the course duty urged him to pursue. *The end is better than the means*.[59]

Ironically, these kinds of concessions about the power of government can be found in another very unlikely place: the opinions of some Justices who actually believed they were opposing the idea of broad government monetary power.

The reader will recall that the Supreme Court dissenters in *Hepburn* believed the Legal Tender Acts were *constitutional*. Although they lost, soon after, the tables turned in *Knox*: The *Hepburn* dissent became the majority, legal tender was upheld, and the *Hepburn* majority became the *Knox* dissent.

In that dissent, Chief Justice Chase did not really oppose the *principle* of legal tender, but only whether the legislation was "necessary." Indeed, though he dissented in one of the three most important monetary powers decisions ever rendered by the Supreme Court, Chief Justice Chase is in total agreement with the majority as to the extent of government monetary power and how it is to be tested:

> We agree that much of what was said in the dissenting opinion in [*Hepburn*], which has become the opinion of a majority of the court as now constituted, was correctly said. We fully agree in all that was quoted from Chief Justice Marshall. We had, indeed, accepted, without reserve, the definition of implied powers in which that great judge summed up his argument. . . .[60]

In the *Gold Clause Cases*, even the passionate dissent of Justice McReynolds shows this same acceptance of broad Congressional monetary power:

> There is no challenge here of the power of Congress to adopt such proper "Monetary Policy" as it may deem necessary in order to provide for national obligations and furnish an adequate medium of exchange for public use. The plan under review in the *Legal Tender Cases* was declared within the limits of the Constitution, but not without a strong dissent. The conclusions there announced are not now questioned; and any abstract discussion of Congressional power over money would only tend to befog the real issue.[61]

From Justice McReynolds's less-than-satisfactory dissent in the *Gold Clause Cases*, backward through *Noble State Bank, Ling Su Fan*, the *Legal Tender Cases*, *M'Culloch*, the Bank Controversy, the Constitutional Convention, the colonial period, Eighteenth Century England, and into ancient times, there has been example upon example of the principle identified by Ayn Rand: *that when a society's dominant ethics flow from altruist-collectivist doctrine, the individual is subordinated to the tyranny of the state*. As these examples demonstrate, Rand's principle, applied to monetary affairs, results in omnipotent government control of banking, gold and silver, legal tender, credit, and much more.

The usefulness of Rand's principle does not end simply with its identification and application to monetary affairs. Implicit in that principle

are two ways of dealing with the American government's insatiable appetite for monetary power.

One way is by *expressly* restraining the government from possessing any monetary role at all. Understandably, this may seem like a difficult assignment, especially in light of how the government's monetary power has developed. However, it is in that development itself that the clue to restraint can be found.

The reader will recall that the Constitution delegated power only to the federal government. All other power (whatever it was) remained with the people, unless exercised by the states under the Tenth Amendment. This meant that the only *expressly delegated* monetary powers *Congress* received were

- to borrow money . . .
- to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures . . .
- to provide for the punishment of counterfeiting. . . .

It was Hamilton's arguments about extra-constitutional powers and the elasticity of the "necessary and proper" clause, which enabled Marshall, in *M'Culloch*, subtly to shift the scope of Congress' power from what had been *delegated* to what had been *not prohibited*. "Among the enumerated powers," Marshall conceded, "we do not find that of establishing a bank. . . . But there is no phrase in the [Constitution] which . . . *excludes* incidental or implied powers. . . ."[62] In these words Marshall seemed to be saying that even though the Constitution specifically delegated powers to Congress, it might possess other powers not delegated. Recall that he became more specific near the end of his *M'Culloch* opinion:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited*, but consistent] with the letter and spirit of the constitution, are constitutional.[63]

Although "not prohibited" was never intended to be the constitutional measure of Congress's power, by means of his equivocal use of the "ends-means" concept and his appeal to the Constitution's "spirit," Marshall was able to extend that power to virtually anywhere Congress wanted to go. Since the Constitution contained no express prohibitions on the monetary power of Congress, presumably it could do whatever it wished about money.

With *M'Culloch* as the thin edge, the wedge of "not prohibited" government monetary power was pushed even further in the *Legal Tender Cases*, and further still in *Ling Su Fan, Noble* and the *Gold Clause Cases*—until any notion of government restraint in monetary affairs had disappeared.

It is possible, however, that even Marshall, and the justices who obligingly followed him, might not have been able to construct and apply the "not prohibited" theory of Congress' monetary power if there *had* been a specific, clear-cut constitutional restraint on it.

There is some support for this hypothesis in America's experience with the free speech/press guarantee of the First and Fourteenth Amendments.[64]

The First Amendment provides that "Congress shall make *no*[65] law . . . abridging the freedom of speech, or of the press"; the Fourteenth Amendment's prohibition against states depriving "any person of life, liberty, or property without due process of law" has been interpreted to mean basically the same thing.

However, despite the use of this categorical language, countless times the government has threatened free speech/press. When it has been suppressed, it has usually been in the name of an allegedly overriding "public interest."

In other cases, free speech/press *has* been protected—thanks basically to the First Amendment's express constitutional restraint on government power. In those cases, the Court was unable to get past the "no law" prohibition. An excellent example is *Thomas* v. *Collins*, where Justice Rutledge clearly recognized the bulwark that the First Amendment could be against government power:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.
>
> * * *
>
> That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. . . . For these reasons any attempt to restrict those liberties must be justified by clear public interest. . . .[66]

In *The Pentagon Papers Case*,[67] Justice Douglas expressed the principle more succinctly: the First Amendment "leaves ... no room for government restraint on the press."

Although many of their colleagues have not shared Rutledge's and Douglas's view of how absolute the First Amendment is, one fact is indisputable: whatever protection that speech/press has received is attributable solely to the express constitutional mandate that Congress shall make "no law." Without that prohibition, the government would long ago have successfully exerted its power over a multitude of speech/press areas—exactly as it has done over monetary affairs.

The speech/press lesson for monetary affairs is clear: *Politically*,[68] *the best way to attempt a total separation of government and money is through a constitutional amendment*.[69]

To accomplish its purpose, that amendment cannot be a half-way measure. Either the government can possess monetary power, or it cannot—and if it cannot, the constitutional amendment must sweep clean.

The few monetary powers delegated to Congress in the Constitution must be abolished, any reserved state monetary powers must be eliminated, and an express prohibition must be erected against any monetary role for government. *Strong medicine, perhaps, but the disease has very nearly killed the patient.*

There are various forms such a constitutional amendment's fundamental principles could take. For example, *Neither the United States nor any state shall*:

- coin, print, or otherwise emit money or any other medium of exchange or measure of value, or regulate the value thereof;
- establish by law or otherwise what shall or shall not be legal tender;
- restrain, prohibit, or deny in any manner the right of any natural or legal person to own, possess, transfer, transport, or otherwise deal in or concerning with gold, silver, coin, currency, money or any other medium of exchange or measure of value, whether domestic or foreign;
- directly or indirectly engage in, or in any manner regulate, the banking business, or the entry into said business of any natural or legal person.
- Any provision of this Constitution or the Constitution of any state, and any law, rule, or regulation of the United States or of any state, contrary to this Amendment is hereby repealed.
- The Congress shall have the power, and duty, to enforce this amendment by appropriate legislation.

At the same time, in an excess of caution, it would be useful to enact one further amendment—"Article I, Section 8 (18) is hereby amended to read as follows: The Congress shall have power 'To make only such laws which shall be absolutely and indispensably necessary and proper, and consistent with this Constitution, for carrying into execution the forgoing powers, and all other powers vested by this Constitution in the government of the United States, and in any department and officer thereof'."

Although this proposal is clear and comprehensive, without more it is not enough to assure an end to government monetary power— just as the First Amendment's guarantee has been unable to completely protect free speech/press. The reason lies in what Justice Rutledge confessed in the Supreme Court case of *Thomas* v. *Collins*. Even though there is a "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," and even though "[t]hat priority gives these liberties a sanctity and a sanction not permitting dubious intrusions," those liberties can still be restricted in favor of a "clear public interest."

So long as the doctrine of "public interest"—the euphemism for altruism and collectivism—motivates government in matters of speech/press, monetary affairs or anything else, citizens of the United States of America shall bear the burden of statism. Not until our political system rests on the ethical base of inalienable individual rights (and the corollaries of limited government and free markets), will any of our freedoms be secure.

Those who would keep government out of monetary affairs must fight for the wider principle, for the recognition of inalienable individual rights. Only when that battle is won—not in the legislatures and courts, but more important, in the schools and in the work of America's intellectuals—will Americans have no more to fear from their government, in monetary affairs or in any other aspect of their lives.

NOTES

[1] 20 *Cornell Law Quarterly* 52, 53 (1934).

[2] 17. U.S. (4 Wheat.) 316, 374 (1819).

[3] The *Harvard Classics* edition (P.F. Collier & Sons Company, 1909), p. 266.

[4] *Dictionnaire Philosophique* (Money).

[5] The reader should note the striking historical parallels to today's world: military adventures draining treasuries; threats of national bankruptcy; inflation; massive liquidations of debt; debasement of money; disputes over sovereign prerogatives concerning it.

[6] It would be getting ahead of our story to pursue the *Case of Mixed Money* through the corridors of history. The reader may be tantalized to know, however, that the case shows up about 250 years later in America's *Legal Tender Cases* and roughly a century after that in the *Gold Clause Cases*.

[7] *Federalist*, No. 44.

[8] See Dunne, Gerald., *Monetary Decisions of the Supreme Court*, p. 11 (1960).

[9] *Documents Illustrative of the Formation of the Union of American States,* H.R.Doc.No.398, 69th Cong., 1st Sess. 115 (1927).

[10] Getman, Robert, "The Right to Use Gold Clauses in Contracts," XLII *Brooklyn Law Review* 479 (1976).

[11] Regrettably, the Constitution contained some major contradictions. Towering above all others was its recognition of slavery, an obscene institution which should have been abolished on the Convention floor, no matter what the cost to the emerging nation. The existence of slavery side-by-side with the founding of this country substantially undermines the achievement of the Founding Fathers.

[12] Subject to considerable editing, the remaining material in this chapter is drawn from Chapter III, Section 15, Parts 1-IV (pp. 162-172) of *Money in the Law* by Arthur Nussbaum (The Foundation Press, Inc., Chicago, 1939). In *Money in the Law*, Chapter III was entitled "The Monetary System," and Section 15 (part of subchapter B., "The American Monetary System") was subtitled "Colonial Antecedents." In the interest of economy, the author's copious notes have been deleted. Reprinted with thanks to, and permission from, the publisher, and in recognition of the 1939 and 1950 copyright by The Foundation Press, Inc.

[13] A series of three asterisks (***) either at the end of a sentence or elsewhere indicates that for editorial reasons the editor has removed at least one sentence,

sometimes entire paragraphs or more. Ellipses (. . .) indicate that a portion of one sentence has been deleted.

[14] Throughout, text in brackets has been added by the editor.

[15] Editor's emphasis.

[16] Subject to considerable editing, the remaining material in this chapter is quoted from Chapter VIII (pp. 74-85 of *Legal Tender, A Study in English and American Monetary History*, by S.P. Breckinbridge (University of Chicago Press, 1903). In the interest of economy, the author's copious notes have been deleted. Reprinted with thanks to, and permission from, the publisher, and in recognition of the 1903 copyright by the University of Chicago Press.

[17] Editor's emphasis.

[18] Emphasis in original.

[19] Hurst, J. W., *A Legal History of Money in the United States*, 1774-1970 (University of Nebraska Press, 1973), p. 18.

[20] Jefferson's entire opinion in the Bank Controversy can be found in the various collections of his papers. See, for example. Vol. Ill, The Writings of Thomas Jefferson (The Thomas Jefferson Memorial Association of the United States, 1904) p. 145-153.

[21] In the first edition of *Government's Money Monopoly*, Hamilton's lengthy opinion in the Bank Controversy was substantially shortened to 29 printed pages. The editor has shortened it further for this second edition, though it remains the longest document in this book. There's a good reason for that: Hamilton's opinion in the Bank Controversy was the seed from which grew not only the federal government's money monopoly, but, as we shall soon see, the Supreme Court's role in, and methodology for, constitutional interpretation. Hamilton's complete opinion can be found in the various collections of his papers. See, for example, Vol. VIII, *The Papers of Alexander Hamilton* (Columbia University Press, 1965), p. 97-134. Emphasis is as it appears in the original. The editor has slightly modified the archaic or foreign spelling of certain, but not all, words (e.g., show for shew, authorize for authorise, endure for indure, indispensable for indispensible).

[22] Subject to considerable editing, the remaining material in this chapter is quoted from a portion (pages 290-308) of Chapter VI (pages 290-339) in Volume IV of Albert J. Beveridge's four volume authoritative biography entitled *The Life of John Marshall* (Houghton Mifflin Company, 1919). There, Chapter VI was entitled "Vitalizing the Constitution." Reprinted with thanks to, and permission from, the publisher, and in recognition of the 1919 copyright by Houghton Mifflin Company.

[23] Editor's emphasis.

[24] The case has been edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The complete opinion in *M'Culloch* v. *Maryland* appears at 17 U.S. (4 Wheat.) 316 (1819).

[25] The text appearing below the asterisks, subject to considerable editing, appeared as the major portion (pages 112-137) of Chapter X (pages 101-137) of *Legal Tender, A Study in English and American Monetary History, by S.P. Breckinbridge (University of Chicago Press*, 1903). Chapter X was entitled "Government Issues." In the interest of economy, the author's copious notes have been deleted. Reprinted with thanks to, and permission from, the publisher, and in recognition of the 1903 copyright by the University of Chicago Press.

[26] Editor's emphasis.

[27] The quotation is from an 1836 speech by Webster in the United States Senate. It is quoted in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 659 (1871).

[28] Editor's emphasis. Echoes of Alexander Hamilton and John Marshall.

[29] Editor's emphasis.

[30] Editor's emphasis.

[31] Editor's emphasis.

[32] Editor's emphasis.

[33] Editor's emphasis.

[34] Editor's emphasis.

[35] Editor's emphasis. As a result of this decision we have come a long, very long, way from the Constitution's Article I delegation of specific powers to Congress.

[36] The case has been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full opinion in *Hepburn* v. *Griswold* appears at 75 U.S. (8 Wall.) 603 (1870). The text appearing below the asterisks is from the opinion of the Supreme Court of the United States.

[37] All emphases, except those noted otherwise, are by the editor.

[38] The case, covering approximately 124 pages in the Wallace edition of the Supreme Court opinions and 224 in another edition, has been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full report of *Knox* v. *Lee* appears at 79 U.S. (12 Wall.) 457 (1871).

[39] The case has been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full report of *Juilliard* v. *Greenman* appears at 110 U.S. 421 (1884).

[40] Editor's emphasis.

[41] The case has been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full report of *Ling Su Fan* v. *United States* appears at 218 U.S. 302 (1910).

[42] Editor's emphasis.

[43] Editor's emphasis.

[44] Editor's emphasis.

[45] The case has been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full report of *Noble State Bank* v. *Haskell* appears at 219 U.S. 104 (1911).

[46] Editor's emphasis throughout the Holmes quotation.

[47] There were three principal *Cold Clause Cases*, covering about 140 pages in the official Supreme Court reports. The cases have been extensively edited in order to exclude the discussion of issues which are irrelevant to our present purposes. The full report of the Cases begins at 294 U.S. 240 (1935). The following opinion is from *Norman* v. *Baltimore & Ohio Railroad Company*.

[48] See *The Gold Clause*, by Henry Mark Holzer, available through Amazon and other book sellers.

[49] All non-bold face emphases are the editor's.

[50] For the corrected version of Justice McReynolds's dissent, see Henry Mark Holzer, *The Gold Clause* (Books in Focus, 1980) p. 9.

[51] Rand, Ayn, *The Virtue of Selfishness* (The New American Library, 1963), p. 123.

[52] "Statism" is defined *by Webster's New World Dictionary of the American Language* (1970 ed.) as "the doctrine or practice of vesting economic control, economic planning, etc. in a centralized state government." More precisely, *Dictionary.com* defines "statism" as: "the principle or policy of concentrating extensive economic, political, and related controls in the state at the cost of individual liberty."

[53] Rand, Ayn, *For the New Intellectual* (Random House, 1961), p. 62.

[54] Farrand, M., *III The Records of the Federal Convention of 1787* (Yale University Press, 1911), pp. 214-15. Emphasis in original deleted and new emphasis added by editor.

[55] 3 U.S. 386, 394 (1798). Emphasis in original deleted and new emphasis added by editor.

[56] 3 U.S. 386 (1798). Editor's emphasis.

[57] Jefferson's preference for state rather than federal power, each at the expense of individual rights, was not limited to banking. For example, in a letter to Abagail Adams Jefferson explained that his condemnation of the 1798 federal Sedition Act did not stem from his belief in the right to unrestrained comment in political affairs. Rather, he argued, "[t]he First Amendment reflected a limitation upon federal power, leaving the right to enforce restrictions on speech to the states" (*Dennis* v. *United States*, 341 U.S. 494, 521-22 (1951)).

[58] *Nortz* v. *United States*, 294. U.S. 317, 319 (1935).

[59] *Knox* v. *Lee*, 79 U.S. (12 Wall.) 287,300 (1871). Editor's emphasis.

[60] *Knox* v. *Lee*, 79 U.S. (12 Wall.) 457, 573 (1871).

[61] *Gold Clause Cases*, 394 U.S. 240 (369 (1935). It is interesting that in one of the Cases, *Nortz* v. *United States*, the owner of treasury gold certificates did "not deny that Congress had authority to compel all residents of this country to deliver to the Government all gold bullion, gold coins, and gold certificates in their possession." See Note 59.

[62] *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). Editor's emphasis.

[63] *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). (Emphasis added).

[64] I have chosen this constitutional guarantee as an example rather than any other because of all our rights speech/press seems to have received the most consistent, properly grounded protection from government. As to our other constitutional rights, it should be noted that to the extent Americans enjoy any protection at all from the exercise of government power, it is because there are specific amendments dealing with religion, assembly, petition, search and seizure, "double" jeopardy, self-incrimination, confrontation, compulsory process, cruel and unusual punishments, due process, etc.

[65] Editor's emphasis.

[66] 323 U.S. 516, 529-30 (1945).

[67] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

[68] "Politically" is used here in the sense of acting via existing constitutional, legal, and social institutions.

[69] It is beyond the scope of this book to address the many questions of how the implementation of such an amendment would be accomplished. Implementation is best left to those who understand and can employ our political processes.

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ABOUT THE AUTHOR

Henry Mark Holzer received his B.A. degree from New York University, where he studied Russian and political science.

After graduation, he served in Korea with United States Army intelligence, holding top secret security clearance, and was Chief Order of Battle Analyst (Chinese Communist Forces) at Eighth Army Headquarters in and near Seoul.

Following Holzer's military service, he received his Juris Doctor degree from New York University School of Law. Since December 7, 1959, he practiced constitutional and appellate law. (His clients have included owners of pre-legalized gold, veterans seeking medical benefits, Soviet dissidents and defectors, and the author Ayn Rand.)

In addition to Holzer's law practice, for two decades he was a tenured professor of law at Brooklyn Law School, where he is now professor emeritus. Professor Holzer's courses included Constitutional Law, First Amendment, National Security, Jurisprudence, and Appellate Advocacy.

Professor Holzer is the author of approximately three hundred articles, essays, and reviews. He has frequently published commentary on current legal and political issues in print and electronic media. He has often been invited to provide his commentary on, and be interviewed by, broadcast media.

Several of Professor Holzer's out-of-print books—The Gold Clause; Government's Money Monopoly (first edition); Sweet Land of Liberty? The Supreme Court and Individual Rights; Speaking Freely: The Case Against Speech Codes; and Why Not Call It Treason? Korea, Vietnam, Afghanistan and Today—are available from various Internet booksellers, including Amazon. Some are available in eBook editions.

With his wife, lawyer and novelist Erika Holzer, Professor Holzer is co-author of "Aid and Comfort": Jane Fonda in North Vietnam, a book definitively answering the question of whether Fonda's trip to Hanoi during the Vietnam War, and her activities there, constituted constitutional treason. With Erika Holzer, Professor Holzer also co-authored the first and second editions of Fake Warriors:

Identifying, Exposing, and Punishing Those Who Falsify Their Military Service. Both books are available at Amazon and elsewhere.

Professor Holzer's judicial biography, *The Supreme Court Opinions of Justice Clarence Thomas, 1991–2006: A Conservative's Perspective*, was published in January 2007 by McFarland & Company, a noted publisher of scholarly, reference, and academic books. The second edition, covering the years 1991–2011, was published by McFarland in 2012.

Also in 2012, Holzer published as an eBook Best Supreme Court Opinions of the Supreme Court of the United States, Vol. I (Race). It is available on Kindle.

That year saw the publication also of Professor Holzer's The American Constitution and Ayn Rand's "Inner Contradiction." The print edition is available at www.amazon.com, and the eBook edition is available on Kindle.

Professor Holzer's website is www.henrymarkholzer.com, he blogs at www.henrymarkholzer.blogspot.com, and he can be contacted via email at hank@henrymarkholzer.com.