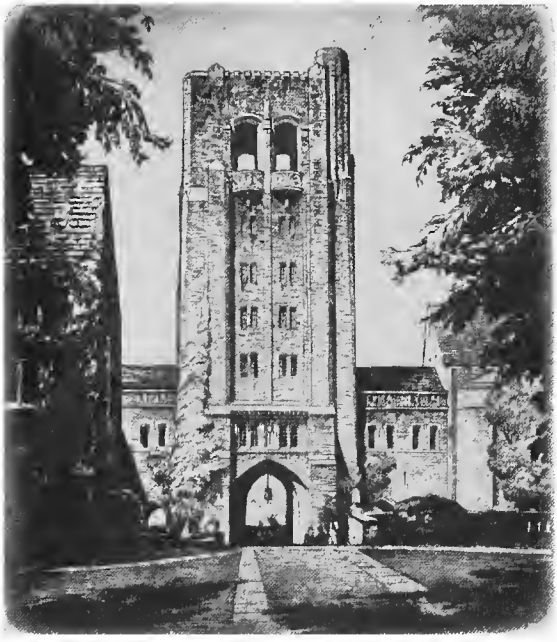

THE LEGAL-TENDER ACTS,

CONSIDERED

IN RELATION TO THEIR CONSTITUTIONALITY

AND

THEIR POLITICAL ECONOMY.

BY

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PREFACE.

THE contents of this pamphlet were originally prepared as a series of articles for publication in "The Independent." Each article, with the exception of the second, was thus published in the order in which the whole now appears. The Chicago *Legal News*, the Albany *Law Journal*, and some of the daily papers, occasionally referred to the articles, when in course of publication, in such terms as to suggest to the author the expediency of publishing the series, when completed, in pamphlet form. In accordance with that suggestion, the whole is now submitted to the public in its present shape.

The first and principal question considered is, whether Congress has the power, under the Constitution of the United States, to declare that the debt obligations of the Government shall be "lawful money and a legal tender" in payment of debts and discharge of contracts. The Supreme Court of the United States has, in two successive decisions rendered about one year apart, answered this question both negatively and affirmatively, in each instance by a majority of one. The object of the first seven articles is to ascertain which of these decisions is the one that best accords with the Constitution. There certainly is no presumption in raising such an inquiry when the Supreme Court so emphatically contradicts itself by answering the question both ways in the space of a single year.

The articles numbered eight and nine give the construction which has been placed upon the Legal-tender Acts, and also a concise history of the legal-tender debt.

The tenth, eleventh and twelfth articles are devoted to a question of political economy—namely, whether, altogether aside from the constitutionality of the Legal-tender Acts, there was any imperative *necessity* for making the notes of the United States "lawful money and a legal tender," in order to carry on the war.

The question is not whether it was necessary to resort to the issue of Treasury notes in such form as to make them convenient for circulation among the people, but whether it was wise to annex the legal-tender quality to the notes. This question is considered and answered in the negative.

The object of the thirteenth and last article is to examine the merits of that monetary scheme, which, arising from the legal-tender policy adopted during the war, proposes that the Government should be the direct source of all the paper circulation of the country, that bank notes should be withdrawn, that the present legal-tender notes should be continued unpaid, and that additional issues of such notes should be made from time to time as Congress shall judge expedient. Would this legal-tender-note scheme give the country a good monetary system? This question is also answered in the negative, for reasons presented in the article itself.

The reader will, in this prefatory synopsis, find a clew to the general character of this pamphlet. The author trusts that his investigation of the subject may be of some service to students of our financial legislation.

BROOKLYN, N. Y., November, 1875.

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CONSIDERED IN RELATION TO THEIR CONSTITUTIONALITY AND THEIR POLITICAL ECONOMY.

I.

PAPER MONEY AND THE FEDERAL CONVENTION.

The Legal-tender Acts of 1862 and 1863, providing for the issue of "United States notes, not bearing interest, payable to bearer at the Treasury of the United States," declare that these notes "shall 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 demands and claims 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, within the United States, except duties on imports and interest as aforesaid." To these acts the present legal-tender notes of the United States owe their legal origin. The notes are debt obligations against the Government, promising to pay a dollar or dollars to the bearer, and by the force of a statutory provision made a legal-tender in payment of all debts, public and private, with the exceptions specified. There can be no question that by the dollar or dollars stipulated to be paid the established coin of the United States was intended. The Supreme Court of the United States, in the case of the Bank of New York *v.* The Supervisors (7 *Wallace*, p. 26), decided that the dollars referred to in these notes are the coined dollars of the United States.

Two decisions have been rendered by the Supreme Court of the United States in respect to the constitutional validity of these legal tender provisions. The first decision, given at the December term of 1869, in the case of Hepburn *v.* Griswold (8 *Wallace*, p. 603), declared as follows:

"1. The clause in the acts of 1862 and 1863 which makes United States notes a legal tender in payment of all debts, public and private, is, so far as it applies to debts contracted before the passage of those acts, unwarranted by the Constitution.

"2. Prior to the 25th of February, 1862, all contracts for the payment of money, not expressly stipulating otherwise, were in legal effect and universal understanding contracts for the payment of coin, and under the Constitution the parties to such contracts are respectively entitled to demand and bound to pay the sums due according to their terms, not-

withstanding the clause in that act and the subsequent acts of like tenor which makes United States notes a legal tender in payment of such debts."

The second decision, rendered at the December term of 1870, in the cases of Knox *v.* Lee, and Parker *v.* Davis (12 *Wallace*, p. 457), reverses the first and states the following ground:

"1. The acts of Congress known as the Legal-tender are constitutional when applied to contracts made before their passage.

"2. They are also valid as applicable to contracts made since."

The first of these decisions was made by a majority of four judges against three in a bench of seven judges, and the second by a majority of five judges against four in a bench of nine judges. This change was effected not by any change in the views of the judges who participated in the first decision, but by the addition of two new members to the Court. Though the second decision is, of course, the one that rules, being final until it shall be reversed, if ever, the weight of authority which supports each decision is, nevertheless, nearly equal. The Supreme Court is thus placed in the unfortunate position of direct self-contradiction in the space of a single year—a fact certainly not creditable to the stability of its judgment.

Considering the great importance of the question involved and the present conflict of public thought in regard to it, we propose in a series of consecutive articles to ascertain, if possible, which of the two decisions is the one that best corresponds with the requirements of the Constitution. The question for discussion in this article is this: Did the framers of the Constitution and the people in adopting it intend to give to Congress the power to authorize the issue of a legal-tender paper currency on the credit of the United States?

The Madison Papers inform us that on the 29th of May, 1787, Mr. Charles Pinckney laid before the Federal Convention the plan of a Constitution, in which, among other things, it was provided that Congress shall have power "to borrow money and *emit bills of credit*." These "bills of credit" were at the time understood to be evidences of debt directly issued by governmental authority, payable by the Government at a future time, and designed to circulate among the people as money. Usage had given them this import. Such bills had been authorized by the States, and to them in most instances had been attached the legal-tender property in payment of debts. In the plan of Mr. Pinckney it was proposed expressly to confer on Congress the power of emitting "bills of credit," in addition to its power of borrowing money.

This proposition was repeated in the draft of the Constitution made by the Committee of Detail, which, being reported to the Convention on

the 6th of August, 1787, authorized Congress "to borrow money and *emit bills* on the credit of the United States." On the 16th of August the Convention took up this clause for discussion, and Gouverneur Morris at once moved to strike out the words "and emit bills on the credit of the United States." The debate on this motion shows that the Convention understood these "bills" to be paper money, such as had been previously issued, and was well known under the title of "bills of credit." Mr. Madison suggested whether it would not "be sufficient to prohibit the making them a *tender*." Mr. Ellsworth said that he "thought this a favorable moment to shut and bar the door against paper money." Mr. Mason said that he "had a mortal hatred to paper money." Mr. Mercer, who opposed the motion, avowed himself to be "a friend to paper money," and thought it impolitic "to excite the opposition of those who were friends to paper money." Mr. Wilson said that "it will have a most salutary influence on the credit of the United States to remove the possibility of paper money." These and similar utterances clearly show that the members of the Convention understood themselves to be discussing the question of paper money with reference to the propriety of granting the power to Congress to issue it, as was proposed in the report of the Committee of Detail (*Madison Papers*, pp. 1343–1346).

The result of the debate was a vote of nine States for striking out the words "and emit bills on the credit of the United States," and of two States for retaining them. The words being stricken out, the part of the clause which granted the power "to borrow money" was then unanimously adopted. Mr. Madison appends a note to his account of the debate, in which he says: "The striking out the words would not disable the Government from the use of public notes, so far as they could be safe and proper, and would only cut off the pretext for a *paper currency*, and particularly for making the bills a *tender*, either for public or private debts."

The entire plan of the Constitution having been agreed to by the Convention, the whole was then referred to a committee to revise its style and properly arrange its articles. This committee reported the revised form of the Constitution on the 12th of September, 1787; and in this report Congress was authorized "to borrow money on the credit of the United States." The words "on the credit of the United States" were restored without the words "and emit bills," and in this form the clause was adopted by the Convention and subsequently ratified by the people.

Nothing in the light of this history can be clearer than the intention of the framers of the Constitution in respect to the question of paper money. They did not mean to grant to Congress the power to authorize the issue

of such money; and that they did not is proved not only by the debate on the subject, but by the fact that by a vote of nine States against two they struck out the words which they regarded as giving the power. There were, indeed, some members of the Convention who were in favor of retaining the words; yet the vote shows a large majority on the opposite side. Mr. Madison, who was a member of the Convention, says that the striking out of the words which granted the power, and which were certainly debated in the Convention upon this supposition, would "cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." Luther Martin, who was in favor of giving to Congress the power to issue paper money, is a good witness to show what the majority intended and did. In his address to the Legislature of Maryland relative to the proceedings of the Convention, he says:

"When we came to this part of the report a motion was made to strike out the words '*to emit bills of credit.*' Against the motion we urged that it would be improper to deprive Congress of that power; that it would be a novelty unprecedented to establish a government which should not have such authority; that it was 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 having recourse to paper credit, in which case there would be a necessity of becoming a prey to our enemies or violating the Constitution of our Government; and that, considering the administration of the Government would be principally in the hands of the wealthy, there would be little reason to fear an abuse of the power by an unnecessary or injurious exercise of it. But, sir, 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 this 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." (*Elliott's Debates*, vol. 1, pp. 369–370.)

Whether Mr. Martin had the best or the worst of the argument on the general question of paper money is not here the point. We cite his words to show what he thought of the action of the Federal Convention, in striking out the words that related to "bills of credit." He wanted the words retained, and because they were not retained he speaks sharply of the Convention. His view was that the exclusion of these words would render the emission of "bills of credit" by Congress impossible in any case, except by "violating the Constitution." Madison had the same view, and the Convention had the same view, and this was the rea-

son why the words were stricken out. In the language of Mr. Ellsworth, the intention was "to shut and bar the door against paper money." If, nevertheless, the power of issuing such money was granted, as affirmed by a majority of the Supreme Court in its second legal-tender decision, then the Federal Convention did what a large majority of its members intended *not* to do.

It may, however, be said that the Constitution, while prohibiting the States to "emit bills of credit," contains no such express prohibition in respect to Congress. Why this difference if the power was meant to be equally excluded from both? The answer is a very simple one. The States were already in existence with their governmental powers and had exercised the power of emiting "bills of credit;" and unless this power was denied to them or exclusively vested in Congress they would still retain it. It, therefore, required a formal denial or an exclusive grant to Congress to dispossess them of the power. The Government of the United States, on the other hand, even under the Articles of Confederation, had never attached the legal-tender property to paper issues, and, as intended to be organized under the Constitution, it was to be a government of powers limited to *positive* grants, either expressly made or made by necessary implication. There was, hence, no necessity for denying to it the power to "emit bills of credit." It was sufficient not to grant the power; and this, as has been already shown, is precisely what the Federal Convention meant by striking out the words which contained such a grant. No sane interpreter of the Constitution has ever supposed that Congress is authorized to do everything which it is not forbidden to do. Its powers of action are matters of positive grant, and beyond these it has no power. The absence of a prohibition surely confers no power.

So also the discussions in the State conventions that adopted the Constitution, as given in Elliott's "Debates," show the general understanding at the time, that if the Constitution was ratified it would put an end to any further issue of "bills of credit." The fact that the States were prohibited to emit such bills and that no power was expressly granted to Congress to issue them, naturally led the people to conclude that the Constitution would close the career of the paper-money system. It is well known that the sad experience of the country had created a strong public sentiment against paper money, and this sentiment found expression in the refusal of the Federal Convention to grant the power of such issues to Congress, as it did in the prohibition of these issues by the States. It would be easy to transcribe page after page from the writings and speeches of the public men of that age showing that the general mind of the country was adverse to paper money.

It is also a matter of history, both in Congress and out of it, that

from the adoption of the Constitution down to the period of the Legal-tender Acts, nobody ever pretended that Congress had the power to make the promises of the United States to pay money a legal tender in payment of debts. No one has ever doubted its power to borrow money, and issue therefor evidences of debt against the United States; but the power to authorize a legal-tender paper currency was never claimed for Congress until the period above referred to. Daniel Webster is acknowledged to be a very respectable authority as to the meaning of the Constitution. Expressing not only his own views, but the standard view of the country at the time, he used, in his speech on the "Specie Circular," delivered in the Senate of the United States, in 1836, the following language:

"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. Congress has exercised this power fully in both its branches. It has coined money and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown." (*Webster's Works*, vol. 4, p. 271.)

The view of Mr. Webster corresponds exactly with the intention of the Federal Convention and with the entire interpretation of the Constitution for about three-quarters of a century. Prior to 1862, there is not an act of Congress or a decision of the Supreme Court of the United States that assumes the reverse. The last decision of this Court, declaring the Legal-tender Acts of 1862 and 1863 to be constitutional, makes the Constitution read as the Federal Convention intended that it should not read, as Daniel Webster said that it did not read, and as the same Court only a year before also said that it did not read. This change in reading the Constitution began in 1862, and was transferred to the Supreme Court by adding two new judges, who believed in the constitutionality of the Legal-tender Acts, and were known so to believe before they became members of the Court. There can hardly be a doubt that their opinions on this subject formed at least one of the reasons for their appointment. The decision secured by their votes, reversing a former

decision made only a year before, is greatly weakened in its judicial respectability not only by its contradiction of the past, but by the circumstances under which it was given. It was a great mistake for the country that the first decision was reversed.

II.

NATIONAL BILLS OF CREDIT.

The meaning of the phrase "bills of credit," in the sense of that clause of the Constitution which forbids the States to emit such bills, has been authoritatively settled by the Supreme Court of the United States. The first case involving this question was that of Craig *v.* The State of Missouri (4 *Peters*, p. 410), decided in 1830. Chief Justice Marshall, in stating the opinion of the Court, said:

"To emit bills of credit conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. * * * The term has acquired an appropriate meaning, and bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. * * * If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium by a State government for the purpose of common circulation."

This definition, as the Court held, does not include "those contracts in which a State binds itself to pay money at a future day for services actually rendered, or for money borrowed for present use;" yet it does apply to all paper-issues by a State government designed for ordinary circulation as a medium of exchange, and that, too, whether "made a legal tender" or not. The certificates of indebtedness issued by the State of Missouri were regarded as having this character, and hence the act of the legislature authorizing them was pronounced unconstitutional.

The same question was involved in the case of Briscoe *v.* The Bank of the Commonwealth of Kentucky (11 *Peters*, p. 257). The definition given of a bill of credit in this case was as follows:

"To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life. The individual or committee who issue the bill must have the power to bind the State; they must act as agents, and, of course, do not incur any responsibility, nor impart as individuals, any credit to the paper. These

The Court decided in this case, that the notes of a bank created by State law, "having a capital which the holders of the notes could resort to for payment, containing no promise by the State, are not bills of credit within the Constitution, although the State was the sole stockholder of the bank," and also that, "when a State becomes a stockholder in a banking corporation, it imparts none of its attributes of sovereignty to the latter, and can, as a stockholder, exercise no other power than any other stockholder to the same amount." This decision, rendered in 1837, was, in its principles, re-affirmed in 1851, in the case of Darrington *v.* The State Bank of Alabama (13 *Howard*, p. 12). The result of these judicial determinations is that "bills of credit," in the sense of the Constitution, are paper promises to pay money issued directly by a State, on the credit of the State, pledging its faith, and designed to circulate as money, whether made a legal tender or not.

The clause of the Constitution forbidding the emission of such bills was suggested by a well-known practice of the Colonies prior to the Revolution, and of the States after the Declaration of Independence, as well as of Congress during the Revolutionary War. Paper money, in the shape of "bills of credit," sometimes declared a legal tender and sometimes without this property, had been a common resort. The people were familiar with the system, and when the Constitution was framed and adopted, they had become strongly impressed with its evils. To guarantee the future against the recurrence of these evils, or, in the language of Chief Justice Marshall, "to cut up this mischief by the roots," express provision was made that no State should "emit bills of credit." Mr. Curtis, in his History of the Constitution (vol. 2, p. 364), says: "Fears were entertained that an absolute prohibition of paper money would excite the strenuous opposition of its partisans against the Constitution; but it was thought best to take this opportunity to *crush* it entirely, and accordingly the votes of all the States but two were given to a proposition to prohibit absolutely the issuing of bills of credit." Mr. Sherman, a member of the Federal Convention, said that he "thought this a favorable crisis for crushing paper money."

The same general purpose which determined the Convention to place this restraint upon the States, also determined it to strike out from the first draft of the Constitution the words which, in addition to the power of borrowing money, gave to Congress the power to emit "bills of credit." The Convention refused to place the latter power among the enumerated powers of Congress, understanding, as the debate clearly shows, the phrase "bills of credit" to mean precisely what it means in the clause which forbids the States to emit such bills. What was done was to deny the power to the States and refuse to grant it to Congress;

and in this way it was supposed that the mischief of paper money would be "cut up" by the roots. Mr. Madison, in a note appended to his history of the debate, says, that the refusal would "cut off the pretext for a *paper currency*, and particularly for making the bills a *tender*, either for public or private debts." Considering then the action of the Federal Convention, as well as the general views of that period, we must conclude that the framers of the Constitution did not contemplate "bills of credit," in the form of Treasury notes designed to circulate for the ordinary purposes of exchange, as coming within the limits of the borrowing power or any other power granted to Congress. The borrowing power was not in their view a power to create a *paper currency* of any kind. It was not a power to *create* money. They distinguished between the two things, as is shown by their grant of the one and their refusal to grant the other. In denying the bill power to the States and not granting it to Congress, and, still further, in making provision for a *metallic* currency in the coining power, they indicated their purpose to supersede and prevent a paper medium of exchange in the form of Government issues, and to secure only a metallic one. Whether right or wrong as political economists and financiers, their theory as Constitution-makers was that the money of the country should be that of coinage, and for this they made ample provision. They did so when this view represented the general sentiment of the people. It is difficult to see how there can reasonably be any doubt on this point.

Congress has at different times construed the borrowing power as authorizing the issue of Treasury notes, never made a legal tender until the acts of 1862 and 1863. There were five acts of this character during the war with Great Britain, the first approved June 30th, 1812, and the last approved February 24th, 1815. Between October 12th, 1837, and January 28th, 1847, there were twelve other acts authorizing the issue of Treasury notes. The act of December 23d, 1857, gave authority for the issue of twenty millions of dollars in such notes, with denominations not less than one hundred dollars for each note. The notes were made payable in one year after date, and receivable for all dues to the Government, and also by creditors of the Government who might "*choose* to receive such notes in payment at par." The act of March 3d, 1859, "revived and continued" this act in force until July 1st, 1860. So, also, in the early stages of the Rebellion, and prior to the Legal-tender Acts, Congress resorted again to the issue of Treasury notes as a means of borrowing money. By the act of December 17th, 1860, ten millions of dollars in such notes were authorized, the denominations to be not less than fifty dollars; and in other respects the notes were to be like those authorized by the act of December 23d, 1857. The act of

July 17th, 1861, authorized the Secretary of the Treasury to issue "Treasury notes of a less denomination than fifty dollars," not bearing interest, but payable on demand by the assistant treasurers of the United States at Philadelphia, New York, or Boston; and by the act of August 5th, 1861, these notes "of a less denomination than fifty dollars, payable on demand without interest, and not exceeding in amount the sum of fifty millions of dollars," were made receivable in payment of all dues to the Government.

We thus see that at different periods, prior to the Legal-tender Acts, Congress has regarded the borrowing power as authorizing the issue of Treasury notes in obtaining supplies, and paying the debts of the Government, while leaving the acceptance of the notes to the voluntary action of the people. The notes were not intended to become, and, with the exception of those authorized by the act of July 17th, 1861, never did become a part of the general paper circulation of the country. They were temporary expedients, and with the subsidence of the exigency calling for them, they were withdrawn by being either funded or paid. They did not establish a paper money system on the credit of the United States. The most of them can hardly be called "bills of credit," in the sense in which this phrase has been defined by the Supreme Court. Whatever may have been the character of these notes, the practice of the Government extending over so long a period, and acquiesced in by the country, would seem to settle the question, that Congress has the power in borrowing money to issue Treasury notes in such form, and of such denominations, as will make their transfer from to hand convenient. The Government, as a contracting and debtor party, may stipulate with the receivers and holders of these notes to pay them on demand or at a fixed time, or to fund them into interest-bearing bonds, or to make them receivable for taxes or other dues to the Government. Undisputed practice says that Congress has the same power to borrow money by a ten, twenty, fifty, or a hundred dollar note, that it has to borrow money by a thousand dollar bond, although the former may be a bill of credit, and hence the very thing in kind which the Federal Convention refused to give Congress the express power to issue. The constitutional right to issue such notes is not now an open question. It has been settled by more then twenty undisputed precedents in the legislative practice of Congress.

Moreover, whether any of these issues prior to 1862 were or were not "bills of credit," there can be no doubt that those authorized by the Legal-tender Acts of 1862 and 1863 are such bills in the fullest sense. Such they would have been without the legal-tender property, and if they had been destitute of this property it is not probable that any question as

to their constitutionality would have been raised. They were meant to circulate among the people as money, and, by reason of their denominations as well as their quantity, to establish, at least for the time being, a paper money system, which is the very thing that the framers of the Constitution meant to prevent. They are issued upon the credit of the United States, not bearing interest, and not payable on demand or at any specified time. They are declared to be receivable in payment "of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes," and also to be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." These attributes fix their character as national "bills of credit," as forming a paper money system in the most complete sense. Being paid out by the Government as "lawful money," and in effect legally forced upon its creditors, they entered into general circulation as the money of the country, except for comparatively limited purposes, entirely superseding and displacing the money of coinage. They are exactly the thing in kind not only forbidden to the States, but for the issue of which the Federal Convention, by a vote of nine States to two, refused to give any express authority to Congress.

Now, the question to be considered in the sequel of this discussion is not whether Congress can contract obligations in the name of the United States, authorize appropriate evidences thereof, and give them such form as it may think expedient; not whether it may agree to receive these evidences of debt in payment of taxes and other dues to the Government, or to pay them in a specified way and at a specified time, or to pay them in its discretion as to time; not whether it may issue "bills of credit" not made a legal tender; but whether it can constitutionally attach to the debt obligations of the Government, whether they be bonds or "bills of credit," whatever be their form or amounts, the compulsory properties of a legal tender in payment of the debts of the Government and of all public and private debts, and thus, so far as the payment of debts and the legal discharge of contracts are concerned, make them act as the equivalent of the money of coinage as expressly provided for in the Constitution. Can Congress, under the Constitution of the United States, and limited to the authority bestowed upon it by that Constitution, make a debt evidence of the Government, a mere contract to pay money, the lawful substitute for the money agreed to be paid? Can it say to the people that the promises of the Government, shall be "lawful money and a legal tender," and that this principle shall reach to all the debtor and creditor relations of individuals? There is no dispute now as to the right of Congress to authorize the making of these credit promises, and

in such form and to such amounts as it may judge best. The whole question respects the added quality of "lawful money and a legal tender." Where is the authority for this? Where is the authority for actually creating any money except that of coinage? To what power granted to Congress is it to be traced?

The issue of a Treasury note in such form as to be a "bill of credit" is simply an act of borrowing money, like the issue of a thousand dollar bond for the same purpose. The note is used to pay a debt or to purchase supplies, and in either case it is used as a substitute for money. Precisely the same is true in the issue of a bond bearing interest. The Government lacking actual money thus employs its credit to meet present necessities. This is entirely distinct from turning the evidence of that credit into money itself by the mere force of a legal statute. It is borrowing in the natural, the legitimate, the well understood sense, while the other act is not borrowing money, but *creating* it at the time of the professed borrowing. Can the creating act thus accompany the borrowing act and really form a part of it? There are no precedents in the history of the Government antecedent to the Legal-tender Acts of 1862 and 1863 that even suggest this possibility. All the precedents for about three-quarters of a century lead directly to the opposite view. We are then to go to the Constitution itself with the inquiry whether the legal tender provision of these acts rests upon its authority; and for this investigation the way is now prepared.

III.

THE QUESTION OF IMPLIED POWER.

No one claims any *express* power in the Constitution by which Congress is authorized to attach the legal-tender quality to the debt obligations of the Government. If the authority exists at all, it exists in the form of an *implied* power. The clause of the Constitution relating to the implied powers of Congress reads as follows:

"The Congress shall have power . . . to make 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 or officer thereof."

The "foregoing powers" here referred to are the seventeen express grants previously specified in the same section. The "other powers"

are those elsewhere delegated to the Government, or to some department or officer thereof. The authority to pass laws "necessary and proper" to carry these powers into effect is implied in the powers themselves, and would have been implied if the Constitution had been silent on the point; yet, to preclude all debate on the question, it was thought expedient to place the authority in express words. In regard to the terms "necessary and proper," Justice Story, in his Commentaries on the Constitution (vol. 2, p. 141), says that the word "proper," especially, "has a sense at once admonitory and directory," and "requires that the means should be *bona fide* appropriate to the end." Chief Justice Marshall, in the case of McCulloch *v.* The State of Maryland (4 *Wheaton*, p. 316), gave the rule, ever since recognized as correct, by which to decide whether a law of Congress claimed to rest on an implied power comes within the limits of the grant. His words are as follows:

"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."

A law enacted on the basis of an implied power, if it fails in any one or all of these characteristics, is, hence, not constitutional; and, whether it does so fail or not, is a proper question for a court, with a case before it involving the point, to consider and determine. Congress clearly has the right of choice among constitutional means for the attainment of constitutional ends; but it has no choice among means not constitutional.

The question, then, to be considered is, whether, as the result of powers expressly delegated to the General Government, Congress has the implied power to declare the note obligations of the United States a legal tender in payment of debts, whether contracted before or after the declaration? Those who claim for Congress such a power are not agreed among themselves as to the precise ground upon which they rest the claim. Some base it upon the coining power of Congress; others upon its commercial power; others upon its borrowing power; others upon what are designated as the war powers of the Government; others upon the aggregate of the powers delegated to the United States; and still others upon the utility of the Legal-tender Acts as a means of strengthening the Government. Let us, then, in the order above indicated, test the soundness of these several theories offered in support of the legal tender legislation of Congress.

1. The Constitution expressly authorizes Congress "to coin money," and "regulate the value thereof and of foreign coin." The established

use of the word "coin," as well as of the word "money," when spoken of as coined, is sufficient to show that the power "to coin money" is not a power to issue Government notes, and certainly not one to make them a legal tender in payment of debts. Laws for the establishment of mints, for striking coins, for determining their respective weights and fineness, and giving them suitable denominations, come within the obvious scope of this power, as "appropriate" and "plainly adapted" means to the end; but, as Mr. Pomeroy, in his "Constitutional Law" (p. 263), well says: "No amount of reasoning can show that executing a promissory note, and ordering it to be taken in payment of public and private debts, is a species of coining money." Such a construction, upon its face, perverts the language of the Constitution.

Legal-tender notes, whether issued by the authority of Congress or by that of the States, are inconsistent with the end sought by the coining power, and to secure which the power was exclusively vested in Congress, while the States are expressly forbidden to coin money, to emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. This end, as the Supreme Court of the United States has repeatedly said, was to establish "a uniform and pure metallic standard of value throughout the Union," and cut up the mischiefs of paper money "by the roots." This object is as effectually defeated and practically nullified by the legal-tender notes authorized by Congress, as it would be if they were issued by the States. Such notes, by a well-known law, drive the money of coinage into disuse, and take its place, and themselves become standards of value. The coinage power, as an express grant, while not implying the issue of such notes as an "appropriate" means of its exercise, is, hence, by reason of this inconsistency, a virtual negative upon their issue.

2. The Constitution bestows upon Congress the express power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Judge Marvin, one of the *ex officio* Judges of the Court of Appeals of the State of New York, in expressing, in 1863, his concurrence with the majority of the Court sustaining the validity of the Legal-tender Acts, in the case of the Metropolitan Bank *v.* Van Dyck (27 *New York Reports*, 400), rested his argument mainly upon this power. The logic of the judge may be summarized as follows: Congress has the express power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and *therefore* it has the implied power to issue United States notes, and make them "lawful money and a legal tender in payment of all debts, public and private, within the United States." The link by which the inference is sought to be connected with the premise we have

in the fact that money, as the standard of value and the instrument of exchange, has, as means to an end, a very important relation to commerce. The legal-tender notes, being declared to be "lawful money," hold this relation, and hence they are constitutional in virtue of an implied power. Such is the argument in the compass of a nutshell.

This argument, if good at all, is not peculiar to the *commercial* power of Congress, but equally good to show that Congress may issue legal-tender notes to carry into execution any *other* express power, since money, as the means of paying the expenses of the Government, holds an important relation to the exercise of all the express powers delegated to the General Government. It would be no stretch of the principles of the argument to derive the legal-tender power from the express power of the President to make treaties. Moreover the same reasoning could be equally employed to prove that Congress can embark in the general business of raising and getting out timber for ship building, of running saw-mills and iron foundries, of manufacturing nails, and building steam engines, &c., for the purpose of promoting commerce. These and the like things hold an important relation to commerce as really as does money. It so happens also that the Constitution itself, in the express power "to coin money," has made provision for this necessity of commerce. There is no occasion for resorting to an implied power to find authority for the creation of money, since the authority is fully given in an express power. The coining power covers the case of money. To infer, as Judge Marvin does, from one express power an implied power to do what is already provided for by another express power, is a singular way of interpreting the Constitution.

The slightest comparison of the Legal-tender Acts with the commercial power granted to Congress, shows that they entirely exceed the limits of this power. The power, as Chief Justice Marshall said, in the case of Gibbons *v.* Ogden (9 *Wheaton*, p. 1), has nothing to do with that "commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same State." It must be foreign commerce, or commerce that goes from one State to another, or commerce with the Indian tribes, in order to bring it under the jurisdiction of Congress at all. Now, are the Legal-tender Acts confined to these forms of commerce? By no means. So far as the payment of debts is concerned, they extend to *all* monetary obligations, "whether these debts," in the language of Judge Denio, "had any connection with a commercial transaction, or were wholly foreign to and independent of it." They apply to a case in which one man has borrowed money of another and given his note therefor, as really as to a case of strictly commercial exchange. If it were conceded that the argument is

valid so far as it relates to foreign or inter-state commerce, or to commerce with the Indian tribes, it manifestly falls to the ground the moment we apply it to trade and other transactions between citizens, which are limited to a single State, and to which the commercial power of Congress by the very terms of the grant does not extend at all. These form far the larger part of the business transactions of society, and in respect to them Congress has no power of any kind under its power to regulate commerce.

What, moreover, is this power to regulate commerce? Chief Justice Marshall, in the case above referred to, said that it is the power "to prescribe the rule by which commerce is to be governed," including transportation, whether by land or water, as well as traffic or trading intercourse. Laws prescribing such rules in respect to foreign or inter-state commerce, or commerce with the Indian tribes, clearly come within the scope of the power; and these laws are committed to the discretion of Congress. Yet what has such regulation, the only one authorized by the Constitution, to do with determining the medium in which debts shall be paid and private contracts discharged? What has it to do with declaring what shall be a legal tender? What has it to do with the sundry contracts and exchanges of individuals in the same State? Absolutely nothing, unless under the power to regulate commerce as delegated to Congress we include the power to take charge of the internal government of the several States. Regulating commerce by prescribing rules therefor within the limits of the Constitution is one thing, and declaring that United States notes shall be a legal tender in payment of all debts, no matter whether those debts have or have not any relation to the forms of commerce over which Congress has jurisdiction, or to any commerce at all, is entirely a different thing. There is no natural or "appropriate" or "plainly adapted" relation between the power of such regulation and declaring these notes to be a legal tender. The power does not authorize the issue of notes at all, this being provided for in the borrowing power, and much less does it authorize making them a legal tender in payment of debts. The inference of Judge Marvin not only extends the power entirely beyond its proper scope into a region foreign to itself, but also confounds the distinction between different express powers, and in effect "breaks down all distinction between the National and State Governments."

3. The Constitution also expressly authorizes Congress "to borrow money on the credit of the United States." Laws providing for loans, for fixing the amount, the rate of interest, and time of payment, and for determining the forms of the debt obligations to be issued, are means "plainly adapted" to carry this power into effect. The power granted

is the power to *borrow* money, and when the Government exercises the power, it provides for making a contract with the lender not essentially different from similar contracts made by individuals or private corporations. Its borrowing power is simply its power to make a contract for this purpose, with the natural incidents and ways that belong to such a transaction; and with these elements the power is exhausted, unless we so expand the import of the word as to make it mean something more, and thus change the Constitution in interpreting it.

Those who claim that this power includes, as one method of its exercise, the implied power to declare that the notes of the United States shall be a legal tender in payment of debts as between other parties who, prior to the issue of the notes, have made their contracts on the basis of the gold dollar, must hold that the Government, because it is a borrower, and when it acts as a borrower, has a right to interfere with the lawful private contracts of these parties, and determine that they shall be satisfied in a manner different from the well understood stipulation contained in the contracts themselves. This certainly gives a new meaning to the word borrowing. The power thus claimed means more than borrowing, since it is a power to change essentially the import of contracts, and directly interfere with the rights of private property vested in this form. If Congress may do this, under its power to borrow money, then it is difficult to see what it may not do under the same power. It has only to stretch the word to meet any exigency. As suggested by Justice Field, in his argument against such a construction, Congress may say that the notes of the Government shall "serve as a free ticket in the public conveyances of the country, or for ingress into places of public amusement" (12 *Wallace*, p. 643). Why not annex these advantages to the notes, as well as the advantage of using them as a legal tender in payment of debts previously contracted? Why has not Congress as much right to do the one as it has to do the other? The direct result in both cases is an invasion of the rights of private property? And is this an "appropriate" and "plainly adapted" means of borrowing money? Because the Government is a borrower, has it the right, under the Constitution of the United States, to disturb and change contracts that are entirely independent of its borrowing, and, in effect, deprive one of the parties of a portion of his rights, and enable the other to repudiate a part of his debts? Can the Government—a party that no one can sue—compel its creditors to accept its notes in payment of claims against the Government, and also compel other creditors to accept the same notes in settlement of money contracts between them and their debtors, and that, too, whether the contracts stipulate differently or not? Is this borrowing money, within

the fair and natural meaning of the term? If so, then the borrowing power, when exercised by the Government, is a power to repudiate debt obligations, and authorize others to do the same thing. Almost all contracts, especially in modern times, are computed and expressed in money; and, hence, there is a fundamental connection between these contracts and money which it is not the province of the borrowing power to destroy or change.

Justice Bradley, in expressing his concurrence with the majority in the last legal-tender decision of the Supreme Court, says that "the power to make Treasury notes a legal tender" is "a mere incidental one to that of issuing the notes themselves, and to one of the forms of borrowing money" (12 *Wallace*, p. 567). If the learned Justice had established this proposition, then the implied legal-tender power would, of course, attach to the express borrowing power. This, however, is the very point to be proved and not assumed. It is not true that the authority to make a contract for borrowing money and to issue an evidence of debt therefor, is also an authority to make that evidence of debt a legal tender. The first proposition does not, in its nature, embrace the second.

The fact that Congress saw fit to annex the legal-tender property to the notes of the Government does not prove that the annexation was a "necessary and proper," or an "appropriate" and "plainly adapted" means of borrowing money. Daniel Webster once said that "a strong impression that something must be done is the origin of many bad measures;" and this may have been true of the action of Congress in 1862 and 1863. The legal-tender quality of Treasury notes, surely, was not a means of adding to the certainty of their payment, since this rested upon the ability and good faith of the Government, and not at all upon their legal-tender character. The quality was not necessary, as the means of guarding against the depreciation of the notes, since the facts prove that it did not so operate, and the history of all such paper issues clearly proves that the legal-tender quality has absolutely no power to prevent depreciation. The notes circulate in the channels of trade for what they are deemed to be worth, independently of this quality. Nor, again, was the quality necessary as a means to secure the acceptance of the notes by, and their circulation among, the people, since this result would have been effectually gained by their receivability for taxes and other dues to the Government, and, especially, their exchangeableness for interest-bearing bonds. It was not necessary to enable the Government to sell its bonds, since the receivability of the notes in payment for the bonds would, without the legal-tender quality, have just as well answered this purpose and kept the notes at par with the bonds, that is to say, at par with the actual state of the Government credit. It

was not necessary to furnish a currency for the people, since they already had a currency; and, moreover, the notes without the legal-tender property and with the qualities above specified would have entered into general circulation.

Let it be conceded, that it was wise and necessary to issue Treasury notes as evidences of debt, and that such an issue is constitutional, as one way of borrowing money; yet the question is, whether it was "necessary and proper," in the sense of the Constitution, to attach to these notes the legal-tender property; whether this property is really ancillary to the power of borrowing money, and whether the Government, in the exercise of this power, can invade and change the vested rights of private contracts, compelling creditors to accept less and authorizing debtors to pay less than the stipulations of the contracts require. This was the effect provided for, and this was the chief, if not the whole value which the legal-tender quality gave to the notes. The Government has some twenty times issued Treasury notes, as a means of borrowing, and never found any difficulty in their acceptance and circulation; and yet never, until 1862, has it made such notes a legal tender, or even intimated that it had the power under the Constitution to do so.

The truth is, borrowing money is one thing, and declaring that the obligations of the Government to pay money shall be a legal tender is wholly a different thing. The two, to quote the words of Henry Clay are not "congenial to each other," and do not "partake of a common nature." The latter, to quote the words of Mr. Sedgwick, is not "the known and usual means" of the former; or, in the language of Mr. Giles, the exercise of "a subaltern authority, necessarily connected" with the borrowing power; or, in that of Mr. Ames, "fairly relative and necessarily incident" to the power; or, in that of Alexander Hamilton, "a measure having an obvious relation to the end." That the framers of the Constitution did not design to bestow such an implied power in the express power to borrow money, is proved by the fact that they struck out the words in the clause referring to the borrowing of money, which, had they been retained, would have expressly granted the power. They certainly did not mean to grant a power as implied, which they refused to grant as express by a vote of nine States to two.

4. The Constitution expressly authorizes Congress "to declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government of the land and naval forces," and "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." These express powers are sometimes called war powers. They are powers that relate to military and naval action, and are to be exercised by their "appropriate" and

"plainly adapted" means. Their exercise calls for the expenditure of money no more really than does the exercise of any and every other express power granted by the Constitution. Moreover, the four methods, as expressly provided in this Constitution, for procuring the funds necessary to pay the expenses of the Government, whether in peace or in war, are taxation, coining money, borrowing money, and the sale of the public lands or other property belonging to the United States. These methods are the same at all times, and for all purposes, being neither increased nor diminished by war.

Now, the only possible relation that the legal-tender property annexed to Treasury notes can have to the above express war powers is simply that of aiding in furnishing the funds to pay the expenses of their exercise; and this is precisely the relation which it has to every other express power. If the right to annex this property to Treasury notes exists at all, it is not peculiar to the war powers, but is incidental to the whole circle of express powers, in peace as well as in war. Does it exist at all? Clearly not, unless as the means of raising money to pay the expenses of the Government; and it so happens that the Constitution rules out this idea by its express provisions for placing funds in the Treasury to meet all public expenses. There is the taxing power, the coining power, the borrowing power, and the power to sell the public lands or other property of the United States, as the constitutional sources of funds; and if the issuing of legal-tender notes is not incidental to one or more of these powers, then surely it is not incidental to the so-called war powers, unless we have a new Constitution during the state of war. That the right of issuing such notes is not incidental to the coining power or to the borrowing power has been already shown; and no one pretends that it is implied in the taxing power or the power to dispose of the property of the United States.

War does not change the Constitution, or add anything to the powers of Congress in respect to raising funds, or alter the nature and scope of these powers, or the nature of the transactions which they authorize. The Supreme Court of the United States, in the case of *ex parte* Milligan, said that "the Constitution of the United States is a law for rulers and people, equally in war and in peace;" that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great emergencies of Government;" and that the "Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence" (4 *Wallace*, pp. 120, 121). The necessities of the Government are, by no means, the criterion of its constitutional powers. The Constitution itself is that criterion, and there is no other.

The emission of legal-tender notes, as a war measure, if it is anything, within the limits of the Constitution, is such simply as a means of borrowing money to pay the cost of war. It is only through the borrowing power that the legal-tender property can have any relation to the war powers of the Government; and if it does not hold the relation of an "appropriate" and "plainly adapted" means for exercising the borrowing power, then it holds no relation to these war powers. The question is not whether Congress has the authority to issue Treasury notes as the means of borrowing money, but whether it has the authority to attach the legal-tender property to these notes as a means of borrowing, and thereby change the import of pre-existing contracts. There being no such authority in the borrowing power, the conclusion is that there is none in the war powers of the Government. These powers, in their "appropriate" exercise, have no relation to providing funds for the Treasury to pay the expenses incident to their exercise that would not equally apply to the express power "to establish post offices and post roads," or the express power "to constitute tribunals inferior to the Supreme Court," or to any other power expressly delegated by the Constitution. All the express powers, in their exercise, involve expense, and hence the legal-tender property, as attached to Treasury notes, is no more authorized by those that relate to war than by those that relate to peace.

5. Justice Strong, in delivering the opinion of the Supreme Court of the United States in the second legal-tender decision, said that Congress has powers which are "neither expressly specified nor deducible from any specified power, or ancillary to it alone," but which grow "out of the aggregate of powers conferred upon the Government, or out of the sovereignty instituted" (12 *Wallace*, p. 535). In regard to this doctrine Chief Justice Chase, while pronouncing it a novelty, "advanced for the first time" in the Supreme Court, said: "If this proposition be admitted, and it be also admitted that the Legislature is the sole judge of the necessity for the exercise of such powers, the Government becomes practically absolute and unlimited" (12 *Wallace*, p. 582). It is certainly a singular theory with which to justify the Legal-tender Acts, or any other legislative action of Congress. Powers, as bestowed by the Constitution, are special grants to do specific things, as the power to levy taxes, the power to coin money, the power to borrow money, the power to establish uniform rules on the subject of bankruptcies, &c., and surely the number of things which can be done in virtue of these grants is not to be increased by adding them together. The addition is not a source of power beyond what the grants themselves contain. The aggregate is not greater than all the parts. If the Legal-tender Acts are not authorized as

incidental to any one or several of the distinct powers expressly granted, taking each by itself, then plainly they are not incidental to the whole of them, taking them altogether. The framers of the Constitution chose to specify, in classes and by definite terms, the several things which Congress may do; and what is not included in this class description is not within the constitutional competency of Congress. The theory of another class of powers resulting from "the aggregate of powers," but not contained in the grants of power themselves, taken separately, in effect changes the Constitution. What are these powers? Who can tell what they are, or what they authorize? How are they made up, and in what do they consist? How are they to be recognized, and who shall fix their limits? The doctrine of express powers and of implied powers as incidental thereto is in the letter of the Constitution; but the doctrine of deriving *another* and distinct class of powers from "the aggregate of powers" is simply making a new Constitution in the process of interpreting it. It would be a very dangerous doctrine to put into practice.

What, moreover, is this "sovereignty instituted," to which Justice Strong refers? Plainly, not a sovereignty to do anything which any government can do, but a sovereignty confined to the exercise of such powers as are expressly granted or clearly implied. This is the only sovereignty possessed by the Government of the United States. The fact that other governments have the power to issue a legal-tender paper currency, or the fact, if it be admitted, that all governments ought to have this power, proves nothing in respect to this Government, since its powers are not measured by those of other governments, or by what ought to be, but by a written Constitution. If the power to issue such a currency is not in the Constitution, that is the end of the question. The want of authority to pass a law makes it unconstitutional as really as if it were positively prohibited. Either it lacks the constitutional end, or it is not an "appropriate" and "plainly adapted" means for the attainment of such an end; and in either case it is not warranted by the Constitution.

6. Some supporters of the Legal-tender Acts have taken the ground that any measure is constitutional which will strengthen the Government or aid it in carrying on a war, and that making United States notes a legal-tender was a measure of this character, and was therefore constitutional. This doctrine entirely overlooks the fundamental fact that the Government of the United States is one of *enumerated* powers, either expressly granted or necessarily implied in those thus granted. It makes the utility of a measure the test of its constitutionality, and if Congress is the final judge of this utility, then its power is unlimited. The Constitution, according to this theory, ought to contain a section or clause

providing that Congress, in addition to its enumerated powers, shall have power to do whatever it may judge useful and necessary to strengthen and support the Government in any emergency which may arise. Nothing of this character is either expressed or implied in the fundamental law of the land. The Government of the United States is a constitutional government, based upon a written Constitution, existing for certain ends clearly indicated by specific grants, and endowed with powers by no means embracing the whole circle of governmental powers. It is built upon the principle of such special grants of power, and, consequently, of limitation thereby. The Supreme Court of the United States, in the case of the Pacific Insurance Company *v.* Soule (*7 Wallace* p. 433), said: "The National Government, though supreme in its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void."

The question, therefore, whether a law of Congress is constitutional or not is not to be determined by finding out whether it is a good or a bad law, useful or useless, wise or unwise; but by ascertaining whether, as to its end, it comes within the limits of an expressly delegated power or powers; and if so, then whether, as to its means, it comes within the limits of a power implied in such express power or powers. If it has the first but not the second characteristic, or if it has neither, then it is not constitutional, no matter what may be its effects. There are many things that would be useful, yet which Congress has no power to do. A great National University, like that of Oxford or Cambridge in England, would be highly useful; but nobody pretends that the General Government has any power to establish such universities, or undertake the work of popular education. The utility of the Legal-tender Acts is really a question of political economy, and not of constitutional law at all. Whether they are constitutional or not depends upon the question whether they come within the grants of power made to Congress. This is the whole question, and not how much or how little good they did. The wisdom of the legislation is entirely distinct from its constitutionality. Its necessity and propriety, if they exist at all, exist only in relation to the powers expressly granted to Congress; and if these powers do not comprehend it as an "appropriate" or "plainly adapted" means to their exercise, then it is not warranted by the Constitution, whether it did or did not aid the Government in conquering the late Rebellion.

In considering the simple question of constitutionality, the Supreme Court of the United States, in the case of Hepburn *v.* Griswold (*8 Wal-*

lace, p. 603), took the ground that the Legal-tender Acts were not "necessary and proper," not "appropriate" or "plainly adapted" means for the exercise of the powers granted to Congress, and that they are not "consistent with the letter and spirit of the Constitution;" and for this reason the Court decided the acts to be unconstitutional in application to prior contracts, which was the only question before the Court. In the subsequent cases of Knox *v.* Lee, and Parker *v.* Davis (12 *Wallace*, p. 457), involving the same question, the Court reversed its previous decision, now taking the ground that these acts were "necessary and proper," that they were "appropriate" and "plainly adapted" means to a constitutional end, and that they are "consistent with the letter and spirit of the Constitution," and hence constitutional. In both decisions the rule laid down by Chief Justice Marshall is acknowledged; and the difference in the two arises from a different construction of the rule.

The construction adopted by the Court in the last decision proceeds upon and in effect asserts this general principle: That any measure which will in any way, to any extent, or under any circumstances, facilitate the exercise of the powers expressly delegated to the General Government, or promote their operation, no matter how distant its relation to these powers, or how foreign to their natural scope, is constitutional. On this question of fact Congress is the judge, and not the courts. Anything, for example, that will aid Congress in the exercise of the power to borrow money, may be enacted into law as means to this end. The term borrowing comprehends *any* means that will promote the end, no matter how wide apart the two things may be. Congress, under this rule of interpretation, might establish by law a low rate of interest in all the States, as the means of facilitating its own borrowing of money, by offering a higher rate. There is no doubt that such a law would act as a means to this end; yet nobody believes that it would be a constitutional method of exercising the borrowing power. So, also, as suggested by Justice Field in his argument against the Legal-tender Acts, Congress under this rule might have provided that the holder of legal tender notes should be entitled to "a percentage out of the revenues of private corporations," and that his entire property should be exempt "from State and municipal taxation" (12 *Wallace*, p. 643). Such a law would make the notes very profitable to the holders, and serve to secure their ready acceptance from the Government; and yet it would be a very strange way of exercising the power to borrow money.

The serious difficulty with the rule of interpretation adopted by the Supreme Court in its last legal tender decision is, that it so expands the sphere of implied powers as virtually to make the Government one of unlimited power. There is scarcely anything that, under this con-

struction, Congress may not do in the exercise of expressly delegated powers. Things that are essentially foreign to each other, and hence hold no "appropriate" or "plainly adapted" relation to each other, may, nevertheless, be so related in the order of events that one will be the means of the other. And if Congress, in the exercise of its delegated powers, may reach to all *possible* means, whether naturally "appropriate" or not, "plainly adapted" or not, and if the courts may not review its decision on this question, then Congress is legally omnipotent and can do whatever it shall regard as means to a constitutional end. It can not only declare the note obligations of the Government to be "lawful money and a legal tender," as the means of borrowing money, and thus *create* money in the very act of borrowing it, but it can do anything else that will aid the Government in borrowing money. Anything is constitutional that has *any* relation of means to the result. Whatever will in any way promote the result Congress can do. It might even make it a penal offense not to lend money to the Government when it asks for a loan. The implied powers of Congress, according to this rule of construction, sweep over an immense field, far greater than had hitherto been recognized as coming within its jurisdiction.

This judicial enlargement of legislative power was logically necessary in order to sustain the Legal-tender Acts. On the question of creating and establishing money, those who drafted the Constitution gave to Congress all the power they thought needful in the power "to coin money," and "regulate the value thereof, and of foreign coin," and to make laws "necessary and proper" to carry this power into execution. They bestowed on Congress no express power to declare anything a legal tender in payment of debts, and no implied power to this effect except as it is incidentally involved in the power to coin money and regulate the value thereof. Now if, under a Constitution thus constructed on the subject of money, we are to have "lawful money" manufactured out of mere promises to pay money, then it is manifest that the implications arising from some other parts of it must undergo a sufficient stretching to gain the end. This is precisely what was done; and it is only by this process that the Legal-tender Acts can be sustained. The borrowing power has been stretched until it has become a *money creating* power, and practically assumed and performed the functions of the coining power. In this way the Constitution has been made to read as no one prior to 1862 supposed that it did read. When, if ever, it will be necessary to stretch the Constitution for some other purpose, time only can determine; yet it is by such methods that constitutions lose their original character and are virtually changed in interpreting them.

IV.

LEGAL-TENDER REPUDIATION.

THE purpose of this article is to state and establish the following proposition: The Legal-tender Acts of 1862 and 1863, so far as they relate to pre-existing contracts for the payment of money, are, in form and in substance, a legalized method for repudiation and robbery, inconsistent "with the letter and spirit of the Constitution."

That contracts made prior to 1862, and stipulating for payment in dollars, referred to the *coined* dollars of the United States, is beyond a question, since there was then no other dollar known to the law, and hence no other to enter into the language of contracts. It follows that the legislation which made the notes of the United States the equivalent of these dollars for the payment of pre-existing debts, without the consent and against the will of the parties to whom the debts were due under lawful contracts, did directly and most essentially change the contracts on which the debts were founded. The change thus effected invaded and to the full extent of the depreciation of United States notes when tendered in payment of pre-existing debts, destroyed the *vested* rights of the creditor parties, who, having contracted for payment in dollars, were compelled to receive these notes at their face value. It legislatively transferred from the creditor to the debtor class an amount of property equal to the difference between the two modes of payment, as really as if the law had reduced the nominal amount of dollars to be paid. A large aggregate of property existed at the time in the shape of prior contracts or obligations to pay money; and this property, with its vested rights, was as real and ought to have been held as sacred in the eye of the law as that which had a more tangible and visible form.

No irredeemable note circulation was ever protected against depreciation by being made a legal tender. The quantity of the circulation, the prospect of ultimate payment in coin or its equivalent, the time of such payment, and especially its receivability at par by the Government for debts due to it and in exchange for interest-bearing bonds are the controlling circumstances that will regulate its value. As a matter of history, it is well known that the notes of the United States, though a legal tender for the payment of debts, sunk in value with the increase of their issue, till, in July, 1864, they reached the rate of two dollars and eighty-five cents in notes for a dollar in gold. Chief Justice Chase,

in delivering the opinion of the Supreme Court in the case of Hepburn *v.* Griswold (8 *Wallace*, p. 603), thus states this point:

"Admitting, then, that prior contracts are within the intention of the act, and assuming that the act is warranted by the Constitution, it follows that the holder of a promissory note made before the act for a thousand dollars, payable, as we have just seen, according to the law and according to the intent of the parties in coin, was required, when depreciation reached its lowest point, to accept in payment a thousand note dollars, although with the thousand *coined* dollars due under the contract, he could have purchased on that day two thousand eight hundred and fifty such dollars. Every payment since the passage of the act of a note of earlier date has presented similar though less striking features."

Debtors, as they were authorized by law to do, and as was expected they would do, availed themselves of the privilege thus furnished, and paid their previously contracted debts in a depreciated paper currency, thus repudiating not the whole amount due, but that part represented by the depreciation of legal-tender notes. This result was not incidental, coming to pass in the way of a remote consequence; but direct and immediate, following as the sure effect of the legal-tender legislation, and indeed actually provided for in the terms of that legislation. Should Congress, in the exercise of its power "to fix the standard of weights and measures," declare by law that a contract for the delivery of a hundred bushels of wheat shall be satisfied by the delivery of one-half of the stipulated amount, as the direct consequence of changing the meaning of the word "bushel," as it occurs in the contract, the legislation would be identical in principle and identical in result with the Legal-tender Acts, considered in application to debts contracted before their passage.

Or should Congress, in the exercise of its power "to coin money," double the amount of gold represented by the term *dollar*, or reduce the amount one-half, and then declare that the new dollar thus created shall, in the payment of debts previously contracted, be the exact equivalent of the old dollar, no one would hesitate to characterize this law as an outrageous system for cheating the debtor class in the one instance or the creditor class in the other. The thing to be paid would be so altered and so different from the contracts as to involve and provide for all the practical effects of a fraud, not the less real because legalized. Slight changes to adjust the varying values of gold and silver coins to each other are regarded as allowable; but Congress cannot debase these coins, and then make them the legal equivalent of former coins in the settlement of prior contracts for the payment of money, without perpetrating the grossest injustice and violating its constitu-

tional duty, as well as giving a false certificate. And if not, how can it make a paper currency the legal equivalent of coin in the discharge of contracts previously made, without involving the same consequences? The effect upon these contracts is precisely like that of debasing the coins of a country, and yet giving them the same names and the same nominal value.

Bearing in mind this statement of the case, we now proceed to the inquiry whether legislation having the character previously described, and directly involving the results referred to, is "consistent with the letter and spirit of the Constitution," which is one of the criteria laid down by Chief Justice Marshall for determining whether a law is constitutional or not. No one claims that the Constitution contains any *express* authority for giving to the note obligations of the Government the legal-tender quality in payment of debts; and in a previous article we endeavored to show that it contains no *implied* authority to this effect under the general title of means "necessary and proper," or, in the language of Chief Justice Marshall, "appropriate" and "plainly adapted" to carry into execution powers expressly granted. We now go further, and raise the question whether a law authorizing the issue of such notes, and making them a legal tender in payment of debts previously contracted, is "consistent with the letter and spirit of the Constitution."

Take, first, the *spirit* of the Constitution. One of its objects, as set forth in its preamble, is to "establish justice." Justice as between the Government and the people, and as between individuals, is one of the great ends which it seeks. This spirit pervades the representative system which it establishes, and also the various restraints which it imposes on governmental power. Special provisions in the Constitution refer to the idea of securing justice and preventing injustice. Those that relate to the privilege of the writ of *habeas corpus*, to bills of attainder, to *ex post facto* laws, to impairing the obligation of contracts by State authority, to freedom of speech and of the press, to the free exercise of religion, to the right of peaceably assembling and petitioning for a redress of grievances, to the right of trial by jury, to the processes of criminal procedure, to excessive bail and excessive fines, to the sacredness of private property as against being taken for public use without just compensation—these and the like are among the many evidences that the spirit of the Constitution is one of justice, and that it means to protect the people against governmental injustice through the agency of law. Now, does any man in his sober senses believe that a law which, in direct violation of a contract, and to the damage of the creditor, provides for the payment of a debt that represents property previously received by the debtor from the creditor, realizes the idea of

justice as between that debtor and creditor? It is enough to ask the question, since no argument can make the answer clearer. Such a law is in this respect legalized injustice, and this surely does not conform to the spirit of the Constitution.

Take, secondly, the *letter* of the Constitution. The Fifth Amendment addresses itself to the General Government, and expressly says that no person shall be "deprived of life, liberty, or *property, without due process of law.*" Here are three rights protected against any deprivation by the Government, except by "due process of law." What is this "due process of law?" Daniel Webster, in the Dartmouth College case, said that the phrase means "that every citizen shall hold his life, liberty, property, and immunities under the protection of the *general* rules which govern society." Judge Cooley says that it means that "life, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specially, either by courts or by executive officers, or by legislators themselves." "Due process of law," he adds, "in each particular case means such an exertion of the powers of Government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Justice Johnson, one of the early justices of the Supreme Court of the United States, says that the words "were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of *private* rights and distributive justice."

Here, then, is a law which says that A., who, in the intent of the parties and according to the law at the time of the contract, agreed to pay to B. one thousand coined dollars, may discharge this contract by paying him Government notes to the same nominal amount, whether they are worth anything or not. The law acts directly upon the contract by changing the meaning of one of its fundamental terms. Is this according to "the general rules which govern society;" according to the "known and established principles which cannot be dispensed with;" according to "the established principles of private rights and distributive justice;" or according to "the settled maxims of law" and "the safeguards" of law "for the protection of individual rights?" Is there any "due process of law" in such a law? Is it one of the settled maxims of law that the legislative power can directly change the meaning of lawful private contracts? "Due process of law" clearly forms no part of the Legal-tender Acts. They fly squarely in the face of the general maxims of law in reference to private contracts.

Now, did this legal-tender legislation, as the direct result of its in-

fringement upon contracts and change of their terms, deprive anybody of his property? It certainly did deprive hundreds and thousands of their property to the full extent of the difference between the value of the payment stipulated for and the value of the payment authorized by it. It compelled creditors to accept less, and authorized debtors to pay less, than their contracts demanded; and what is this but taking property from the one class and giving it to the other by the naked force of a legal statute, without consideration and without judicial proceedings, and contrary to the contracts between them? In regard to this legislation Chief Justice Chase stated the truth when he said: "It violates that fundamental principle of all just legislation that the Legislature shall not take the property of A. and give it to B. It says that B., who has purchased a farm of A. for a certain price, may keep the farm without paying for it, if he will only tender certain notes, which may bear some proportion to the price, or be even worthless" (12 *Wallace*, p. 580). The law operates directly not upon what is called the remedy as between debtor and creditor, but upon one of the most vital terms of the debt obligation itself, and impairs that obligation, by changing it, to the damage of the creditor and to the benefit of the debtor. In this way it as really deprived the former of a portion of his property as it would have done if it had authorized the latter to pay half of the nominal amount, or to take any other property of the former without his consent; and for this reason the law does what is contrary to the spirit of the Constitution, and also what the Constitution expressly says shall not be done.

Justice Chase (not the late Chief Justice, but a much earlier member of the Supreme Court of the United States), in stating his opinion in the case of Calder *v.* Bull (3 *Dallas*, p. 386), said that "there are acts which the Federal or State Legislature cannot do without exceeding their authority;" and among the illustrations of such acts he specified "a law that destroys or impairs the lawful private contracts of citizens," and also "a law that takes property from A. and gives it to B." He further said: "To maintain that our Federal or State Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free Republican Governments." So also Justice Miller, in delivering the opinion of the Supreme Court of the United States, in the recent case of the Loan Association *v.* Topeka (20 *Wallace*, p. 655), held the following language:

"The theory of our Governments, State and national, is opposed to the deposit of unlimited powers anywhere. The executive, the legislative, and the judicial branches of these Governments are all of limited and defined powers. There are limitations on such power which grow

out of the essential nature of all free Governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all Governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D.; or which should enact that the homestead now owned by A. should be no longer his, but should henceforth be the property of B."

The latter of these illustrations just fits the Legal-tender Acts, since they directly, and not as a remote consequence, dispossessed the creditor of a portion of his legal rights, as arising from contracts previously made in respect to the payment of money, and to this extent robbed him of his property, to the advantage of the debtor. Legal claims are property as really as a "homestead."

But we are told that Congress, unlike the States, is not expressly forbidden to impair the obligation of contracts. This is not in substance true, if we have correctly expounded the previously quoted clause in the Fifth Amendment; yet, if it were true, the absence of such an express prohibition clearly does not imply a general power in Congress to impair the obligation of contracts. Congress can act only on the basis of positive grants of power, either expressly made or necessarily implied.

We are told, again, that Congress is expressly authorized to pass "uniform laws on the subject of bankruptcies throughout the United States," and, hence, that in the exercise of this power it may impair the obligation of contracts so far as the result arises from the exercise. This is true, and what is the inference? Surely, not that Congress has a general power to impair such obligations; but that it must do so, so far as it does so at all, in the way provided—namely, by the passage of a uniform bankrupt law. Still further, the bankruptcy power was granted for the benefit of creditors as really as for that of debtors, and especially to protect the rights of the former throughout the Union against the injustice that might otherwise be perpetrated by the insolvent laws of the States. It contemplates the discharge of the debtor from his contracts only upon his ascertained inability to pay and the surrender of all his property for the benefit of his creditors. A just bankrupt law is as really in the interest of the creditor as it is in that of the debtor. This is a very different thing from a law that directly authorizes the debtor to satisfy his contracts, as Chief Justice Chase well says, "without payment" according to contract, "without pretense of inability, and without any judicial proceeding." The two cases are not by any means analogous.

It is also said that Congress may, in the exercise of its express power to declare war, impair the obligation of contracts by suspending all commercial intercourse between the citizens of the belligerent nations during the state of war. So also Congress, in the exercise of its commercial power, may, by an embargo, render the fulfillment of contracts impossible. In levying taxes, it may so change the duty on imports as to affect the prices of goods and very materially affect the value of prior contracts in relation to those goods. It may, in the exercise of the borrowing power, so impair the credit of the United States as seriously to injure the holders of securities already issued. All this is true; but it is difficult to see how it bears upon the question, whether Congress has the *implied* power to annex the legal-tender quality to the notes of the Government, or how it answers the objection founded on the direct interference of such legislation with the relations subsisting between debtor and creditor. Let these two things be noted: 1. That there is no pretense of any express power for this legislation, and that the cases above referred to arise from the action of clearly express powers. 2. That the results in these cases, in affecting contracts and property valuations, are purely incidental, while the Legal-tender Acts directly, in the very essence of their operation, attack money contracts already made, and change one of their fundamental terms. They formally declare that A., who has agreed to pay *dollars* to B., may pay him with Government *promises* to pay dollars, and thus change the contract between the parties. The result is not incidental, but direct. In legal effect, a new contract is made by the force of law. Between such a law and the cases referred to there is no analogy. A tariff law, for example, affects no rights and impairs no obligations; but such a law directly affects the vested rights of private property as founded on money contracts previously made. It directly and formally legalizes a breach of those contracts, and practically confiscates the property of one class in the interests of another class. This, in respect to hundreds of millions of dollars in the form of debt obligations, was done on the very day that the first Legal-tender Act was enacted.

The Supreme Court of the United States, speaking through its Chief Justice, in the case of Hepburn *v.* Griswold (8 *Wallace*, p. 603), said:

"No one probably could be found to contend that an act enforcing the acceptance of fifty or seventy-five acres of land, in satisfaction of a contract to convey a hundred, would not come within the prohibition against arbitrary privation of property. We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money,

half, or three-quarters, or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without due process of law, if such an act would not."

We are aware that the decision of the Court in this case, after the addition of two new judges, was subsequently reversed; yet this reversal does not impair the force of the reasons on which the decision rested. Concede that Congress may, at its pleasure, and to any extent, change the *medium* of paying debts, without any reference to contracts previously made, and then it is in its power, by simply changing this medium, to repudiate the debt of the United States, and authorize a universal system of repudiation. The concession sweeps the whole deck, and leaves Congress without any restraint in the fundamental law of the land as to *what* shall be money. Whether this is the actual condition of things, we shall seek to ascertain in the next article, on the Money of the Constitution.

V.

THE MONEY OF THE CONSTITUTION.

The Constitution of the United States expressly authorizes Congress "to coin money" and "regulate the value thereof and of foreign coin." It also forbids the States to "coin money," to "emit bills of credit," or to "make anything but gold and silver coin a tender in payment of debts." This grant of power and these prohibitions relate to a common subject, and it is by taking them in their connection with each other and in their object that we are to ascertain what is the money of the Constitution—the money which its framers had in view and meant to authorize Congress to establish. The just reading of the Constitution on this subject, as observed by Daniel Webster, is the following:

"Congress shall have power to coin money, regulate the value thereof and of foreign coin; but no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts." (*Webster's Works*, vol. 6, p. 36.)

Alluding to the prohibitions in respect to the States, Justice Washington, of the Supreme Court of the United States, in delivering the opinion of the Court in the case of Ogden *v.* Saunders (12 *Wheaton*, p. 213), said:

"These prohibitions, associated with the powers granted to Congress to coin money, and to regulate the value thereof and of foreign coin, most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy was to provide a *fixed and uniform standard of value* throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the Government, should be regulated."

Justice Daniel, in delivering the opinion of the Supreme Court in the case of the United States *v.* Marigold (9 *Howard*, p. 560), referred to the coining power as "an important trust invested by the Constitution," and also "to the obligation to fulfill that trust on the part of the Government—namely, the trust and the duty of creating and maintaining a *uniform and pure metallic standard of value* throughout the Union." He then proceeded to say:

"The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the *uniformity and purity of such a standard of value.*"

To secure the result thus aimed at, as stated by the Supreme Court in the above cases, we have the provisions of the Constitution in respect to the creation of money and the regulation of its value, with the restrictions upon the States in reference to the same subject. The matter is not left to the States, and is not committed to Congress except in these provisions.

The money authorized is the product of *coinage*, which consists in fabricating monetary coins and stamping them with the authority of the Government. This money is distinguished from the obligations of the Government to pay money in that clause of the Constitution which says that Congress shall have power "to provide for the punishment of counterfeiting the securities and current coin of the United States." The word "coin," when the Constitution was proposed and adopted, was understood to mean a piece of *metal*, bearing a legal stamp and made current as money. This is still its meaning. It has no other meaning when used in connection with money. The power "to coin money," as delegated to Congress, is the power to strike *metallic* coins and to pass all laws "necessary and proper" for this purpose. That the metals to be thus coined were, in the contemplation of the Constitution, to be gold and silver, one or both, is evident from the following considerations: 1. They were then and ever since have been the metals in established use for this purpose. 2. The States are prohibited from making anything but *gold* and *silver* coin a tender in payment of debts,

which clearly implies that what the Constitution calls "the current coin of the United States" was to be composed of gold or silver or of both. If it was to be any other kind of coin, the States would be constitutionally incompetent to make it a tender in payment of debts. Their power in this respect is confined to gold and silver coin, showing this to be the coin intended in the grant of the coining power. 3. The "foreign coin," whose value Congress is authorized to regulate, was composed of gold and silver, which suggests that the power to coin money refers to the same metals of which this "foreign coin" was composed.

It is true that, under this power, Congress has authorized the striking of *minor* coins, as the five-cent piece, the three cent piece, and the one-cent piece, for the convenience of small change. These coins, however, are not a legal tender at their nominal value for any amount exceeding twenty-five cents in one payment; and Congress, moreover, has provided for their redemption in "lawful money" when presented in sums of not less than twenty-five dollars. They have never been treated as standards of value or as having any significance in the coinage system beyond that of exchanging minimum values that could not be conveniently exchanged by gold or silver coins on account of the extreme smallness of the coins. They are mere appendages to the coinage system.

Congress has by statute declared the gold and silver coins of the United States to be a legal tender in the payment of debts—the former for all sums and the latter for any amount not exceeding five dollars in any one payment. The power to do this, though not expressly granted, has been inferred as a natural and proper incident of the coining power —as, indeed, a part of the power itself. It has been exercised unquestioned ever since the formation of the Government. The very idea of real money existing under the authority of law is that it should have the legal power of discharging debts, since it is the means of computing and expressing debts. It is worthy of notice that, in declaring the coins of the United States to be a legal tender at their nominal value, Congress has not done so arbitrarily; but in conformity with their *real* value—namely, according to the weight of the coins or the actual value of the metal. Hence, if these coins have lost by abrasion more than one-half of one per cent. of their standard weight, they are to be recoined and made of full weight; and so if gold coins, made a legal tender for all amounts, are reduced in weight below the standard and tolerance allowed by law, they are then a legal tender only at valuation in proportion to their actual weight. A slight and fixed alloy is provided for in both classes of coins, for the purpose of increasing their hardness.

The word "dollar," which figures so largely as the unit of value in the exchanges of the people, occurs twice in the Constitution in the plural

form, as in the phrase "ten dollars for each person" and that of "twenty dollars" in the Seventh Amendment. This "dollar" was established by the Congress of the Confederation, on the 6th July, 1785; and it was not until April 2d, 1792, that Congress exercised its coining power under the Constitution by establishing a mint and making provision for gold and silver coins having a certain weight and fineness and bearing certain denominations and devices. The Government in the outset accepted the doctrine of the *metallic* dollar as established by the Congress of the Confederation and used that dollar as the money of account; and the moment it began to legislate under the coining power it reaffirmed the same doctrine.

The substance of the interpretation placed upon the coining power by the legislation of Congress since the adoption of the Constitution may be summed up in the following propositions: 1. That up to the Legal-tender Acts of 1862 and 1863 Congress has uniformly regarded gold and silver as the materials composing the money authorized by the Constitution. 2. That it has established one or the other, or both, with a certain denomination, weight, and fineness, as the monetary unit or standard of value. 3. That, in regulating the value of the coins authorized to be struck, it has done so by determining their weight and fineness, and in this way made their mint or nominal value as nearly as possible identical with their real value as metals. 4. That in coining the two metals—namely, gold and silver—it has compensated for their difference in value as metals by making a corresponding difference in the relative weight of the respective coins, and thus adjusted the two classes of coins to each other. 5. That in providing that these coins shall be a legal tender at their nominal value it has always had respect to their real value. 6. That it has never given to these coins the character of a debt obligation, representing something else in which they are to be paid. 7. That the minor coins, composed of other metals than gold or silver, have never been regarded as money in the strict sense; that they are made redeemable in "lawful money;" and that they are not a legal tender for a larger sum than twenty-five cents in one payment.

The third, fourth, and fifth of the above propositions are the ones that relate to the exercise of that power which the Constitution designates as *regulating* the value of money. There is but one way in which this can be done, and this consists in determining the weight and fineness of the coins to be struck—in other words, the actual amount of gold or silver in each coin. This is the only regulation that Congress has ever attempted, and it is the only one possible. It is, in fact, simply a reliable certificate of the Government assuring the public that a given coin called a dollar, for example, contains so much gold or silver. The value of the

gold or silver is not created by the certificate, but simply expressed. Real value is antecedent to all statutory law and all coining processes, and depends in this case on the character of the metals and their uses for other purposes. Were Congress to place the stamped value of coins above or below their real value as metals, the coins would in the one case disappear from circulation and go into the melting-pot as bullion, and in the other they would not circulate at their stamped value. The discretion of Congress in regulating the value of monetary coins is restricted within very narrow limits by the law of real value, which cannot be disregarded without defeating the whole purpose of coinage.

The Constitution does not say anything about a *standard or measure* of value in connection with the coining power, for the obvious reason that the idea is implied in the term money itself. The elementary use of money is to compute and express other values by a comparison with its own. It is the one thing which the people, by common consent, or by law, or by both, use for this purpose. It is not possible to coin money without coining a standard of value, or to use money without using such a standard. All values must be expressed in money, unless we go back to the system of direct barter; and hence money is and must be the standard of these values. We quote as follows the language of Justice Clifford, of the Supreme Court of the United States, in regard to money as the standard of value:

"Values cannot be measured without a standard, any more than time or duration, or length, surface or solidity, or weight, gravity, or quantity. Something in every such case must be adopted as a unit which bears a known relation to that which is to be measured—as the dollar for values, the hour for time or duration, the foot of twelve inches for length, the yard for cloth measure, the square foot or yard for surface, the cubic foot for solidity, the gallon for liquids, and the pound for weight." (12 *Wallace*, p. 601).

Commercial transactions require a standard or measure of value just as really as they require a standard of weights and measures. And Congress is authorized to supply both—the one in its power to coin money and regulate the value thereof, and the other in its power to fix the standard of weights and measures. The one standard furnishes the language for expressing the specific *quantities* of the things involved in exchange transactions, and the other furnishes the language for expressing in money the *value* of these quantities. The two in combination enable the people to make intelligible and definite contracts in respect to both quantity and value.

The conclusion that we now derive from this examination of the coinage power is that money, in the constitutional sense—in the sense clearly intended in and fully provided for by the Constitution—is the

money of *coinage, and nothing else*, composed chiefly of gold or silver and established and stamped under the authority of the United States. All the express power delegated to Congress, with its necessarily implied power that refers to the creation of money, looks directly to such money and such only. The grant upon its face is exhaustive of the power of Congress upon this subject, and by obvious inference implies a negative of all other power upon the same subject. The question of creating and establishing money is constitutionally finished when the Constitution says that Congress shall have power "to coin money" and "regulate the value thereof and of foreign coin," and to pass all laws "necessary and proper" to carry this power into effect; and further says that no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. The money of *coinage*, and nothing else, was meant by these provisions. The provisions themselves exclude everything else. Daniel Webster was right when he said that, "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." So, also, the Supreme Court of the United States was right when, in the case of Gwin *v.* Breedlove (2 *Howard*, p. 29), it said: "By the Constitution of the United States, gold or silver coin, made current by law, can only be tendered in payment of debts." It was right when, in the case of Sturges *v.* Crowninshield (4 *Wheaton*, p. 122), it said that "nothing but gold and silver coin can be made a tender in payment of debts." If this proposition was true when Mr. Webster uttered it, and the Supreme Court uttered it, years ago, then it is just as true to-day.

The idea that paper obligations, which are simply promises to pay money, whether issued by the authority of Congress or by that of the States, can be invested with the character of "lawful money and a legal tender" in payment of debts, and thus be made to take the place and perform the functions of coined money, runs athwart the constitutional idea in respect to money in two ways.

In the first place, it is wholly a *different* idea. The money of the Constitution is the money of coinage; and the "lawful money" of the Legal-tender Acts is the money of the printing press and of debt obligations. The one is the money of real value and makes no promise; and the other is the money of credit and makes a promise. The one is the money intended in the coining power; and the other is the money not thus intended. The one is in itself a standard of value; and the other has no value in itself, and no value at all except as it is imparted by

credit. The one is the money in respect to which the character and quantity of the constituent material determine the value; and the other is the money which derives all its value from promissory words. The one is the money in which the Government creates no value, but simply certifies to a fact; and the other is the money in which the Government pledges its faith to the payment of value. The one is a metal; and the other is a piece of paper. If the constitutional idea of money, as is clearly the fact, is embodied in the money of coinage, then it cannot also be embodied in the money of the paper-mill and the printing press. The two things are so widely different that they cannot be embraced in the same Constitution without a manifest contradiction. And, as there is no doubt that the money of coinage is in the Constitution, it follows, by the most obvious inference, that the other kind of money is excluded, especially when there is no express grant of power authorizing its issue.

In the second place, these two kinds of money are practically so *incompatible* that the issue of paper money nullifies and renders nugatory the coining power in the end sought by it. Paper money, being the inferior kind of money, and depending wholly on credit for its value, by a well-known law of currency, drives the money of value and of coinage into disuse, and takes its place in computing and expressing the exchanges of trade. The result is that the money expressly provided for in the Constitution disappears from general circulation, and the end sought by the provision is defeated. That to which the Constitution expressly points is not used, and that to which it does not point is used. Credit takes the place of value, and expels value from use. Real money is demonetized in the practice of society; and fictitious money, without any basis except that of credit, performs its functions. The *uniform* standard of value, about which the Supreme Court has so often spoken as the object of the coining power, is superseded by a fluctuating standard of credit, that means one thing to-day and another thing to-morrow. There certainly can be no implied power granted to Congress which in its exercise nullifies the end and object of an express power; and, if not, then there can be no implied power to issue legal-tender notes so long as the coining power remains a part of the Constitution and the only part which expressly deals with the question of creating money. The "lawful money" that does not rest upon this power is not constitutionally "lawful," especially when it is inconsistent with and repugnant to the very end designed to be attained by the power—namely, a *uniform standard* for the computation of values.

In 1814, while the country was at war with Great Britain, and when the exigencies of the Treasury were exceedingly urgent, Mr. Hall, of Georgia, introduced into the House of Representatives a series of five

resolutions, proposing the issue of United States notes as a means of fiscal relief. The second of these resolutions provided "that the Treasury notes which may be issued, as aforesaid, shall be a legal tender in all debts due, or which may hereafter become due, between the citizens of the United States, or between a citizen of the United States and a citizen or subject of any foreign State or kingdom." The other four resolutions were separately considered, but this *legal-tender* resolution the House refused to consider by a vote of ninety-five against forty-two. Daniel Webster was then a member of the House, and voted with the majority (*Benton's Abridgment*, vol. 5, p. 361).

This is the only instance, so far as we have been able to ascertain, during the whole history of the Government, prior to the Legal-tender Acts of 1862 and 1863, in which the proposition to make Treasury notes a legal tender in application to private debts ever came before Congress. The summary manner in which it was met shows what was thought of the expedient. The House refused to consider what on its face bore the stamp of an unconstitutional proposition. The idea that anything but coined money can be made a legal tender in the compulsory payment of debts is a modern idea in the interpretation of the Constitution. With the above exception, we hear nothing of it in Congress until the period of the Legal-tender Acts, and we hear nothing of it in the Supreme Court of the United States until after this period. The whole previous drift of legislative and judicial thought was in exactly the opposite direction; and nothing can be more certain than that the Federal Convention was a hard-money, a gold-and-silver-money Convention, and on this subject nothing else, and that in this respect it represented the views of the great majority of the people by whom the Constitution was ratified. Taking into account the state of public feeling at the time of ratification, arising from the bitter experience of the country in the use of paper money, it is not at all probable that the Constitution would have been ratified with the construction placed upon it by the Legal-tender Acts. Chief Justice Marshall, in the case of Craig *v.* The State Missouri (4 *Peters*, p. 410), said, in reference to paper money:

"Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots—a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all—the people declared in their Constitution that no State should emit bills of credit."

If, however, the new theory of the Constitution be adopted, then the people did not cut up this mischief by the roots at all. They left all

these roots in the power of Congress. True, the only express power which they gave to Congress in respect to the creation of money is in the coining power; yet the possibility of the whole mischief was left rooted in its implied powers. It is very remarkable, if it was really left there, that the fact was not discovered by the Marshalls, the Taneys, the Websters, the Bentons, the Wrights, and the long line of legislative and judicial lights that have graced our public history from the adoption of the Constitution down to 1862. Congress, when in 1812 authorizing the first issue of Treasury notes, provided that the notes might be used "in payment of supplies or debts due by the United States to such public creditors or other persons" as might "*choose to receive such notes in payment at par.*" It is very remarkable that in subsequent resorts to the issue of Treasury notes to meet special exigencies, some twenty in all, Congress never discovered until 1862 that it had the power to make such notes a legal tender in the payment of private debts. If the power exists at all, it has existed during the entire history of the Government; yet that it did exist was not seen by the great thinkers of the country until the above named period. This, we say, is remarkable, provided it be a fact, that, in addition to the coining power and the legal-tender power as an incident thereof, Congress has the power to attach the legal-tender property to the debt obligations of the Government, and thus produce the very mischief which, as Chief Justice Marshall says, the people in their Constitution meant to cut up by the roots.

VI.

THE LEGAL-TENDER POWER OF THE STATES.

The Legislature of the State of New York, on the 22d of March, 1875 (*Laws of* 1875, ch. 73), passed an act providing as follows:

"Every contract or obligation made or implied and payable within this State, and made or implied after January 1st, 1879, and payable in dollars, but not in a specified kind of dollars, shall be payable in United States coin of the standard of weight and fineness established by the laws of the United States at the time the contract or obligation shall have been made or implied."

This upon its face is a legal-tender law, enacted by the authority of a State Legislature, and declaring that the contracts which it describes "shall be payable in United States coin" of the standard weight and fineness established by law when the contracts were made. The Legal-

tender Acts of Congress, enacted in 1862 and 1863, if unrepealed when this statute takes effect, will then, as now, declare that the notes of the United States issued in pursuance thereof shall be "lawful money and a legal tender in payment of *all* debts, public and private, within the United States," except duties on imports and interest on the bonds and notes of the Government. The inconsistency between these acts and the above statute is direct and positive. Both cannot operate together among the same people without a conflict of laws. We, hence, raise the question whether the Legislature of the State of New York—on the supposition that the Legal-tender Acts shall be unrepealed when the above regulation becomes operative—will have exceeded its powers by invading a domain of legislation already constitutionally occupied by Congress.

It is well known, as a matter of history, that prior to the adoption of the Constitution, the States had the power to coin money, to emit bills of credit, to declare what shall be a legal tender in payment of debts, and pass such laws as they saw fit in reference to the manner in which contracts should be made and discharged. The whole subject of private property, involving all exchange transactions between their own citizens and all the instruments and evidences thereof, and all the rights resulting therefrom, and all the questions of law as to acquisition, possession, enjoyment, alienation, and transmission, and all contracts between parties relating thereto, was exclusively in the hands of the States. It is there still, except so far as State jurisdiction has been qualified or limited by powers delegated to the General Government, or by prohibitions and restraints imposed by the Constitution on State authority.

The express power vested in Congress to establish "uniform laws on the subject of bankruptcies throughout the United States" creates one of these exceptions. Such laws operate upon contracts and provide for settling the debt relations between insolvent debtors and their creditors, and take precedence of all State laws upon the same subject. So, also, other resulting exceptions may arise from the power of Congress to declare war, or its powers to regulate commerce with foreign nations and among the several States and with the Indian tribes. It may happen, as an incidental consequence of the exercise of these powers, that contracts lawful when made will become invalid or impossible of fulfillment and enforcement. Still further, the Constitution forbids the States to pass any law impairing the obligation of contracts, to deprive any person of property without due process of law, to coin money, to emit bills of credit, or to make anything but gold and silver coin a tender in payment of debts. These things, which they could have done before the adoption of the Constitution, and some of which they did,

they cannot do under it. Yet, with the exceptions and qualifications thus made, the whole question of private property, and of all the legal incidents pertaining thereto, and of contracts as to the manner of making them, the mode of discharging them, and the parties competent therefor, still belongs exclusively to the province of State legislation. The Tenth Amendment expressly declares that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

The States under the Constitution have no power to "coin money," and hence no power to manufacture the medium of paying debts. This power is exclusively vested in Congress; and it has been generally assumed, as the natural incident thereof, that Congress has the right to make the money of coinage a legal tender. The right, however, attaches to the coining power and the power to regulate the value of coins; and, hence, no inference can be drawn from it as the basis of concluding that Congress can also attach the legal-tender property to the debt obligations of the Government, unless we adopt the manifestly false doctrine that the issuing of such obligations in virtue of the borrowing power is an exercise of the coining power. Mr. Albert Gallatin was of opinion that Congress has no legal-tender power at all in respect to the payment of private debts. His words are as follows: "As Congress has no authority to make anything whatever a tender in payment of private debts, it necessarily follows that nothing but gold and silver can be made a tender for that purpose, and that Congress cannot authorize the payment in any species of paper currency of any other debts but those due to the United States." It is true that no express legal-tender power is given to Congress; yet during the whole history of the Government the power with reference to the money of coinage has been assumed as implied in the coining power. Long and undisputed practice has settled this construction.

Another and, for the purposes of this discussion, more important prohibition we have in that clause of the Constitution which says that "no State shall make anything *but gold and silver coin* a tender in payment of debts." These words, while expressly declaring that no other tender for the payment of debts than that of "gold and silver coin" shall be established by the States, just as clearly imply a complete previous jurisdiction in the States over the whole subject of debts and the method and medium of payment; and this jurisdiction they do not abrogate or take away, but simply qualify in a certain respect. The States still retain their original power to pass legal-tender laws, subject to the condition that they must not make anything but gold and silver coin a tender in payment of debts, just as they retain their power to legislate on the general

subject of contracts, subject to the condition that they must not pass any law impairing the obligation of contracts. What was before an unqualified power now becomes a specific and limited power, by being confined in its action to gold and silver coin; and with reference to such coin it is a complete power, not withdrawn or denied, but distinctly recognized and in effect guaranteed by the Constitution of the United States. The same Constitution that gives to Congress the power to coin money just as clearly establishes the State right to make gold and silver coin a tender in payment of debts. In the very act of limiting the legal-tender power of the States it expressly excepts such coin from the limitation, and this leaves them in full possession of the power in this application. They cannot exceed the limit fixed; but within that limit they have all the power they ever had. It is true, as suggested by the Supreme Court of Michigan, that this clause is not "an enabling act;" yet it is a recognizing and declarative act, and, in the light of the Tenth Amendment, places the legal-tender power among the "reserved" rights of the States, subject to the qualification which it specifies.

The case, then, in respect to money as the legal medium of payment, made by the Constitution, stands thus: Congress has the exclusive power to coin money and regulate the value thereof and of foreign coin, and, as has generally been assumed, the incidental but not exclusive power to make the money of coinage a legal tender. The States, on the other hand, possess no coining power; but they still retain the legal-tender power, subject to the qualification of being forbidden to make anything but gold and silver coin a tender in payment of debts. Congress being thus authorized to coin money, and the States being thus limited to gold and silver coin in providing for a legal tender, the result is that coined money as the legal tender is secured in respect to both Governments.

The Legislature of New York, exercising the power thus reserved to every State, has seen fit to declare by law that all contracts made and payable in that State after January 1st, 1879, and stipulating for payment in dollars, but not specifying the kind of dollars, shall be payable in United States coin. In so doing it does not violate the Constitution of that State, and does no more than the Federal Constitution recognizes its right to do it at any time, and no more than it equally recognizes the right of every other State Legislature to do. Has Congress, then, the power at the same time to say, as against this statute, when it shall go into effect, that all debts in the United States (of course, including those in the State of New York contracted after the date specified) shall be payable in the note obligations of the Government issued in pursuance of the Legal-tender Acts? Has Congress the right to supersede the operation of State laws, when those laws lie within the limits of powers

reserved to the States? Is the Constitution self-contradictory? Does it concede and recognize the legal-tender power of the States in application to gold and silver coin, and at the same time authorize Congress to nullify the exercise of this State power by making Government notes a legal tender in defiance of that exercise?

If Congress, in the exercise of its power to borrow money, and for the sake of borrowing at a cheap rate of interest, should pass a law providing that in all individual contracts for the loan of money four per cent. should be the highest legal rate, no one would hesitate a moment in pronouncing the law a palpable interference with the reserved right of the States to regulate contracts in respect to the rate of interest. Congress may stipulate for whatever rate it chooses on the bonds which it authorizes in the process of borrowing money: but plainly it cannot regulate the interest rate in the several States, as between individuals, without coming into conflict with the reserved rights of the States. So if the States, exercising the power which the Constitution has not withdrawn, but distinctly conceded to them, shall declare that all contracts for the payment of money shall be payable in the gold and silver coin of the United States, can Congress interfere with this legislation by providing that such contracts shall be payable in United States notes? Is not this gold and silver coin constitutional money? Is it not clearly implied in the Constitution that the States have the power to make it a tender in the payment of debts? How then can Congress subvert such legislation, or defeat its operation, any more than it can subvert or defeat State legislation in respect to the rate of interest? It plainly cannot do so under the warrant of the Constitution, without supposing the Constitution to be inconsistent with itself. We have in it a clear recognition of the State right to make gold and siver coin a tender in the payment of debts; we have, still further, the absence of any express power in Congress to make the note obligations of the Government a legal tender; and, this being so, there can be no *implied* power in Congress to bestow the legal-tender property upon these or any other obligations—certainly not as against State legislation, which makes debts payable in gold and silver coin. Congress cannot thus nullify the legal-tender laws of a State without invading its jurisdiction. Its rights within their constitutional sphere are beyond the reach of Federal legislation.

Whether the Legal-tender Acts of 1862 and 1863 will be repealed or not before January 1st, 1879, it is impossible to tell; yet, be this as it may, the legal-tender act of the New York Legislature, unless it shall in the mean time be repealed, will then put an end to their practical operation in respect to all contracts coming within the limits of its description. This act is not based at all upon the supposition that the

legal-tender legislation of Congress will then be out of the way. It hangs upon no contingency. It is positive and absolute, and declares that the contracts described shall be payable in United States coin, and that, too, whether the Legal-tender Acts of Congress are repealed or not. And in taking this position, the Legislature of New York has simply exercised a power which it has under the Constitution, and which equally belongs to every other State.

The States have, then, only to exercise this power in respect to the discharge of contracts, and thereby make them payable in the coin of the United States, and the Legal-tender Acts in legal effect come to an end, unless the courts, and especially the Supreme Court of the United States, should take the ground that no State has the right to make debt contracts payable in gold and silver coin so long as Congress says that they may be paid in the notes of the United States. This, in plain language, would be equivalent to saying that, so long as Congress chooses to make United States notes a legal tender, no State can exercise its reserved right to make contracts within its own jurisdiction payable in gold and silver coin. It would be equivalent to saying that what the Constitution clearly says the States may do Congress has the right to say that they shall not do. It would be equivalent to abrogating a constitutional State right by the legislation of Congress. It would, in short, be equivalent to an alteration of the Constitution by a legislative enactment.

The payment of private debts in the several States is to be enforced by State laws, through the agency of State courts; and the prohibitory mandate against making anything but gold and silver coin a tender in payment of debts, being addressed to the State Governments, including both Legislatures and Courts, clearly implies that such coin, and such only, was to be the medium of compulsory payment. Upon this point we quote, as follows, the deliverance of Judge Denio, of the Court of Appeals of the State of New York, in the case of the Metropolitan Bank *v.* Van Dyck (27 *New York Reports*, 13 *Smith*, p. 543), decided in 1863:

"When the State Legislatures which are to establish the legal principles respecting payments, and the courts which are judicially to determine what shall be payments in any given instance, are forbidden by paramount and supreme authority to make anything but coins struck from the precious metals a payment, the natural and, I think, the inevitable result is that nothing except such coins can be adjudged to be payment in any case whatever. And when, in connection with such inhibition, we find ample provision made by the supreme authority for the supply of such coins by fabrication and by the adoption of those coming from abroad, I cannot doubt that it was the persistent design of

the Constitution, which contains these mandates, to require as a fundamental policy the exclusion of everything else than the coins indicated from the attribute of compulsory payments."

Any different reading of the Constitution makes the instrument self-contradictory.

VII.

LIMITATION OF LEGISLATIVE POWER.

Law, for the purpose of enforcing contracts, claims the right to decide as to the class of persons legally competent to make contracts and as to the subject-matter of the contracts to which it will give its support. A lawful contract is, hence, one in which the parties have the "contractual capacity," and in which the contents of their agreement lie within the scope of legal recognition. To such contracts legal rights attach and out of them legal duties arise, and this is what is meant by the obligation of contracts. The contracting parties are left free to make their own bargain, and what the law does is not to make a new bargain for them or alter the one they have made, but to bind them to good faith with each other according to the terms of their contract. This it does by ascertaining what the contract is and providing a suitable remedy against its non-fulfillment.

Monetary contracts, or those in which money is stipulated to be paid by one party to the other, are embraced in these general principles of law. Money, in some form, is one of the most universal terms of contracts. The connection between contracts and money is, hence, so intimate, so constant, and so important, that law justly assumes and exercises the right of determining what shall be money. It must do so in order to supply a general rule for courts in the enforcement of contracts. That which is the standard for computing and expressing all other values, and is therefore the medium of exchange transactions, and to which courts must refer in enforcing money contracts, ought to have a definite and fixed character, known to the law and established by law. What law can do on this subject is contained in two statements: 1. It can, as its own exclusive right, provide the process of furnishing the money of use within the limits of its own jurisdiction. 2. It can make this money a legal tender in payment of debts. Such money is "lawful money." It has the sanction of law, and hence the general rule is that whatever has this sanction is money.

It would, however, be a very serious mistake to assume that law is omnipotent as the creator and establisher of money, and can, therefore, make one thing serve as money just as well as another. There are some things on this subject which law *cannot* do, and there are others which it *ought not* to do; and both classes are limitations upon its power.

Underlying the exchange transactions of society, we find the two generic elements of *quantity* as determined by a standard of weight or extension, and of *value* as ascertained and fixed by a standard of value. Each must have a standard, and it is the province of law to select and define a suitable standard for each. The Constitution assigns this duty to Congress in the grant of power "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures." In the exercise of this power, Congress is subject to certain limitations which grow out of the nature of things. Take, for example, a standard of weight. What Congress can here do is to establish such a standard by fixing upon something that has weight, and by declaring that as the unit of weight it shall be the means of computing and expressing all other quantities by weight. To this unit and to its multiples or its divisions it can give names that shall be both definite and intelligible, as forming a part of the language of contracts. It can do the same thing in respect to the measures of extension; but in regard to neither can it create the weight or the extension, or make that a standard of weight which has no weight, or that a standard of extension which has no extension. The standard of quantity must have quantity, either by extension or weight; and this necessarily limits the law-making power in fixing "the standard of weights and measures."

Precisely the same necessity applies to money, considered as the standard or measure of *values*. It is only by its own value that it can compute other values. When a specific commodity is selected from all the rest, whether by usage or by law, as *the* commodity which shall perform the functions of money in computing the value of other things, and on this account be exchangeable for them, the very first condition of the selection is that the commodity should have value independently of the selection, founded on the twofold fact that men desire it and use it for other purposes, and that it takes labor to produce it. This fact is not created by the selection. Those who talk about money as having no value in the material of which it is composed, are talking about that which has no exchange power, to which no legal enactment can impart such a power, and which, hence, cannot compute the value of other things. Their kind of money fails in the most elementary function of money. They might as well talk about a standard of weight that has no weight or a standard of extension that has no extension. *Credit* money, so called,

is not money at all in the real sense, but simply a *promise* to pay money. Take from the United States notes the *dollars* which stand behind them as the thing promised, and thus let the question be settled that the promise is never to be fulfilled, and the value of these notes at once sinks to the level of the paper composing them; and nobody pretends that the paper itself has anything to do with their monetary character.

If, for example, Congress should repeal all its coinage and legal-tender laws, and substitute iron coins of the same weight as that of gold and silver coins, and then declare them to be dollars and multiples of dollars, having the same legal value as the present coins; or if it should abandon coinage altogether, and adopt pieces of stamped paper, giving to them the names and legal-tender power of these coins, does any one suppose that such substitutes, though having all the sanction that law can give to money, would or could take the place of gold coins and circulate at the same value? Can Congress by mere law legislate into an ounce of iron or an ounce of paper the value that naturally belongs to an ounce of gold? He who thinks that this can be done by law is beyond the reach of discussion. The laws of value are older and stronger than human statutes, were never made by them, and can never be unmade by them. The very nature of things imposes limitations upon legislative power when exercised in establishing a standard of *quantity* or one of *value*. The exercise is rather declarative than creative.

Now, from these limitations in respect to standards of quantity and value arises another, which, considered in relation to public policy and the claims of justice, is of the utmost consequence to human society. This resulting limitation we state as follows: It is not a legitimate exercise of the law-making power of any Government, whether placed under any express restraints or not, to alter these standards, or substitute new and different ones for them, or add new and different ones to them, when they have once been established and as such have entered into the language and terms of lawful contracts, and at the same time to make these contracts legally solvable, not according to the old standards under which they were made, but according to the new and different standards subsequently adopted. If there is anything settled among nations that have any claim to civilization, then these two principles are settled: 1. That individuals have the right, within the limits of law, to make contracts which the law will recognize and enforce. 2. That the duty of law is to enforce such contracts according to the terms agreed upon by the parties at the time they were made. Chief Justice Chase implied one of these principles and affirmed the other when he said: "It is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties."

Let us then suppose that A. agrees to deliver to B. at a certain date a hundred *yards* of cloth of a specified kind, for which upon delivery B. agrees to pay to A. one hundred *dollars*. The elements of this contract are the kind of cloth, its quantity by *yards*, the time of delivery, and the payment therefor in the stipulated number of *dollars*. The *yard* element and the *dollar* element in the contract were defined by law when the contract was made, and as thus defined they were incorporated by the parties into the contract itself. Congress, however, we will further suppose, sees fit, after the contract is made and before the time of delivery, to exercise its power "to fix the standard of weights and measures," and in doing so changes the meaning of the word "yard," making it a larger or smaller measure of quantity, and then declares that in all contracts, whether made or to be made, in which this word occurs, the term shall be taken in the new sense assigned to it. Is this a legitimate exercise of the power "to fix the standard of weights and measures?" Concede —what is undoubtedly true—that Congress may establish a new yard for future contracts; but plainly it cannot by its power to fix the yard measure change the yard quantity in application to previous contracts. There is a law of eternal propriety and right that lies back of all constitutions and all legal power, which forbids such an invasion of a lawful contract by changing the meaning of one of its fundamental terms. The parties meant the old yard, the one established by law at the time; and Congress, surely, cannot make the new yard the same thing by giving it the same name. The "higher law" says that the old yard shall stand for the purpose of the contract in question, and, hence, limits and qualifies the power of Congress "to fix the standard of weights and measures."

The other element in this contract fixed by law is the *dollar* element. In the contract, as made, B. agreed to pay and A. agreed to receive, on a certain condition, one hundred dollars. There is no difficulty about these dollars as to their number. What were they as to their *kind?* At the time the contract was made, a dollar was the statute denomination of a piece of gold or silver weighing a prescribed number of grains, having a prescribed degree of purity, and stamped by the authority of the United States. Such was the legal definition of a dollar, and there was then no other dollar. This is, of course, the dollar meant by the parties—the dollar that the one agreed to pay and the other agreed to receive. It is the dollar of the contract. Suppose then that before the contract matures, Congress steps into the scene, with the exercise of the coining power, the borrowing power, or any other power, and makes what is called a note dollar, which is simply a promise to pay a coined dollar, the legal equivalent of a coined dollar, for the purpose of settling

this contract between the parties. The case will then stand thus: A. *must* deliver to B. the amount of cloth agreed upon as fixed by the number of yards specified; and B. *may* deliver to A. the dollars stipulated in the contract, or he may deliver the note dollars subsequently authorized by Congress, and either will be a legal tender in fulfilling his part of the bargain, no matter whether these note dollars are worth anything or not. This is the case actually presented by the Legal-tender Acts of 1862 and 1863. These acts created what are called note dollars, paper dollars, promise dollars, and for the purpose of paying debts made them identical with real dollars by giving them the same legal value. Now, the question is not whether Congress has the coining power, and not whether it has the borrowing power; but whether it is a legitimate exercise of the powers of any Government to establish a new medium of payment, and in effect a new standard of value, and make this medium applicable at its legal value to the payment of previously contracted debts. The question is not whether this has sometimes been done; but whether it is a thing which *ought* ever to be done, yea, whether it does not exceed the legitimate powers of Government over money. If a Government, by giving to two different things the same name and the same legal value, could also make them the same in actual value, then the difference of things would not affect the value. This, however, cannot be done. Coins of different weight, though declared to have the same legal value, are not of the same actual value. Coined dollars and note dollars, though by law made equivalents in the payment of debts and discharge of contracts, are not only different things, but are not by this law made actual equivalents. Is it, then, a just exercise of legislative power to make things in legal effect equal to each other that are *not* equal to each other, and cannot be made so by any amount of statutory enactment? Is it a just exercise of this power to say to A., who stipulated for real dollars in a contract with B., that the latter *may* pay and the former *shall* receive note dollars, or mere promises to pay dollars? Does not this violate the fundamental principle that lawful contracts are to be enforced according to the intent and understanding of the parties as indicated by their terms?

Justice Strong, in the last legal-tender decision of the Supreme Court of the United States, disposes of such questions by saying that "the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made." This may do as a general rule for courts, provided the law itself be constitutional; but back of this rule lies the important question whether the money which the law establishes at the time of payment is the money which it did establish at the time of the contract, and which was therefore the money

of the contract. If it be a different thing at the two periods, especially if the difference be a great one, then the money of payment and the money of the contract, when compared together, clearly show that law has outraged the rights of individuals; and this is just what law should never do. The general maxim that whatever the law makes money is money, and that is the end of it, furnishes a very poor apology for such legislation. The powers of law over money are or ought to be qualified and limited by the nature of the transactions involved in the use of money and the nature of the service rendered by money. It will not do in a just estimate of things, to quote the above maxim, and then under this theory debase the coinage of a country twenty-five per cent. or substitute paper promises for real money. This assumes that law has no rule but its own pleasure, and that it can change the standard of value and the medium of payment as often and as much as it pleases, asking no questions and giving no answers. It arms law with the powers of a despot, and leaves to the individual no reserved rights which law may not invade.

The simple truth on this subject is that, while it is the province of law to determine what shall be money, and while it is not beyond its province to revise and change its own action, it should never make such changes *retrospective* in their operation, since it cannot do so without directly perpetrating injustice. Contracts lawfully made and involving the obligation to pay money *ought* to be settled according to the standard of value established by law when they were made, and which, therefore, formed one of the vital conditions of the contracts themselves. Law ought to be limited by this principle of justice, founded on individual rights. It cannot work miracles. It cannot make twelve grains of gold equal in value to twenty-four grains by giving the same name to both. It cannot make the promise to pay a dollar equal to a dollar by declaring that it shall have the same legal value in the payment of debts. And, not being able to do these things, it should never attempt to do that thing which involves gross injustice, as between debtor and creditor, by changing the medium of payment. The injustice is precisely the same as if the law should change the standard of weights and measures, and make the change retrospective in its action, and thus alter the import of all the previous contracts in respect to the question of quantity. The standards of *quantity* and *value*, being once established and incorporated into the language of contracts, are the only just rule of settling those contracts; and hence they are limitations upon legislative power against any changes that violate these contracts. It is quite true that Governments have not always acted upon this principle; and it is just as true that they have not always done right.

It is then a grave objection to the Legal-tender Acts of 1862 and 1863, outside of the Constitution altogether, that they violate the "higher law" of justice, by which all legislation in relation to money should be governed. They do so by giving to United States notes a legal character different from their actual character and different from the standard of value under which lawful contracts were made prior to their issue, and by compelling the acceptance of these notes at their face value in the settlement of such contracts. No ingenuity can relieve this legislation from the charge of injustice. Considered in relation to the medium of payment and in relation to obligations previously assumed, it is an open and undisguised authorization of a breach of faith between contracting parties.

The Supreme Court of the United States, in the cases of Bronson *v.* Rodes, and Butler *v.* Horwitz, (*7 Wallace*, p. 229–262), decided that the Legal-tender Acts have no application to contracts expressly stipulating for payment in coin. If this be sound doctrine, then the acts ought to have no application to contracts which, in the intention and understanding of the parties, are thus payable. The legal significance of express words is to make clear the intention or understanding of the contracting parties; and when this is evident, whether by express words or not, the rule of law is furnished. A standard of value which the law establishes as one of the elements in lawful contracts commits the conscience and integrity of the law, if it has such qualities at all, to the maintenance of that standard in the settlement of those contracts. This principle is admitted by Justice Strong in respect to standards of quantity. Why is it not just as sound a principle in respect to a standard of value? There is really no distinction between the two so far as they impose the limitations of justice upon the action of law in respect to them. When they become elements of lawful contracts they enter into the composition of *vested* individual rights; and these rights it is the duty of law to protect, and not to impair or destroy.

The Legislature of the State of New York has embodied the principle here urged in the statute, referred to in a previous article, which provides that every contract made after January 1st, 1879, "payable in dollars, but not in a specified kind of dollars, shall be payable in United States coin of *the standard of weight and fineness established by the laws of the United States at the time such contract or obligation shall have been made or implied.*" This makes the standard established by law at the time of the contract the standard of the payment, and this is manifestly just. Should Congress see fit to change the gold dollar by increasing or decreasing the quantity of gold contained in it, the Legislature of the State of New York says that all debts contracted prior to this change

and payable in dollars, without any specification of the kind of dollars, shall be payable in the present coined dollars of the United States, and not the new ones created by such a change. Or, should Congress see fit to issue more paper dollars or to continue the present ones in circulation, the Legislature adopts precisely the same principle in respect to the question of payment. The dollar of the contract is to be the dollar of the payment, and when the contract simply specifies dollars generally, the law construes the term to mean the coined dollars of the United States at the time of the contract. This is honest and right.

The plain truth is that money—genuine money, and not the pretense of the thing—is bought and sold by the rule of *quantity*, just as really as wheat or corn or any other commodity. The reason why a bushel of wheat is worth more than a peck of wheat consists in the fact that the bushel contains more wheat than the peck. So the reason why a gold eagle is worth more than a gold dollar consists not in the name of either, but in the fact that the former contains more gold than the latter. What the Government does in respect to real money is to weigh it and certify to its purity beforehand, and thus relieve the people from the necessity of doing these things for themselves. To change the weight or change the purity, and yet compel the people to receive the money at its previous legal value because the same names are used ,is a fraud upon the public.

VIII.

CONSTRUCTION OF THE LEGAL-TENDER ACTS.

Duties on imports and interest on the bonds and notes of the United States are in express terms declared not to be payable in legal-tender notes. There is, hence, no question of construction in respect to these particulars, since the acts authorizing the notes are themselves entirely explicit.

No specific reference, however, is made in these acts to the payment of the principal of the bonded debt of the United States; and this gives the opportunity for raising the question whether the legal-tender notes are applicable to this debt. Not long after the close of the war, the ground was taken by a certain class of politicans that, except where the stipulation expressly provides for payment in coin, the principal of the debt is payable in these notes. This construction was based upon the fact that the law of their issue makes the notes receivable for "all claims and demands *against* the United States, of *every kind* whatsoever," and

also "lawful money and a legal tender in payment of all debts, public and private, within the United States," with the exception of duties on imports and interest on the bonds and notes of the Government. The advocates of this theory insisted that these words, in the absence of any express stipulation to the contrary, apply to the bonded debt of the United States as really as to any other public or any private debt; and it must be confessed that, if such was not the intention of Congress, as is undoubtedly the fact, the acts themselves were in this respect carelessly drawn. The Democratic party, by its National Convention of 1868, declared that "where the obligations of the Government do not expressly state upon their face, or the law under which they were issued does not provide that they shall be paid in coin, they ought in right and in justice to be paid in the lawful money of the United States." The contrast here made between coin and this "lawful money" shows that legal-tender notes were meant by the latter.

On this issue, among others, the Democratic party went into the Presidential election of that year, and both the theory and the party were rejected by the people. The first bill signed by President Grant after his inauguration, known as the Public Credit Act, expressly declares that "the faith of the United States is solemnly pledged to the payment in coin or its equivalent" "of all interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver." This legislative construction undoubtedly represents the understanding of both Government and people when the Legal-tender Acts were passed and when the obligations were negotiated. The Treasury Department of the Government has uniformly acted upon this view. Some of the bonds of the United States stipulate simply for payment in dollars, while others specify the kind of dollars; and the established construction is that all the bonds of the Government are payable in *coined* dollars, unless the law of their issue otherwise provides. Even Mr. Pendleton concedes this since the passage of the Public Credit Act of 1869. The point is now as well settled as anything can be that depends on human action. Any departure from this principle in the practice of the Government would justly render the nation infamous in the eyes of the world.

The different States of the Union, with the exception of California and Massachusetts, have treated the legal-tender notes as applicable to the payment of the interest and principal of State bonds, whether issued before or after the passage of the Legal-tender Acts, unless the stipulation expressly requires payment in coin. Such has been and still con-

tinues to be the general practice of the States. And, although this construction comes within the language of the law, it is not the less true that, in application to all ante-war State debts, it is simply a fraud under the color of law by withholding from creditors a part of what was agreed to be paid. The Legal-tender Acts did not compel the States to take this course, but merely gave them the opportunity of doing so. There is no doubt that State debts previously contracted and made payable in dollars were, as to principal and interest, understood by both borrower and lender to be payable in coin, and not in Government or any other promises; and this understanding was and is the moral law of the contract, as really as if it had been put in express words. Not to comply with this understanding is so far to repudiate the contract.

"It is expected," said Justice McLean of the Supreme Court of the United States, "that the action of a sovereign State will be characterized by a more scrupulous regard to justice and by a higher sense of morality than belong to the ordinary transactions of individuals." A State cannot be sued against its own consent; and, hence, its creditors must rely wholly upon its integrity and sense of honor. If this fails, law affords no coercive remedy. Massachusetts has chosen not to repudiate her obligations, and if all the States had followed her example, they would have dealt honestly and fairly with their creditors. What she did was to keep her faith, and this is just what every Government ought to do. Ex-Secretary McCulloch, in his recent letters published in the New York *Tribune*, alludes to this form of repudiation by the States as among the reasons which have contributed to impair American credit in foreign countries. Many of their bonds were held in Europe; and many of them have been paid in a depreciated paper currency, made "lawful money" by the act of Congress. It is not at all surprising that foreign creditors should look upon such payment as a species of legalized swindling.

In respect to obligations containing an express stipulation for payment in gold, the Supreme Court of Iowa, in the cases of Warnibold *v.* Schlicting, and Troutman *v.* Gowing, took the ground which was subsequently reaffirmed by the court in the case of Hintrager *v.* Bates (18 *Iowa Reports*, p. 174), decided in 1864, "that the payee of a promissory note, *payable in gold*, was compelled to accept legal Treasury notes in payment, and that a party could not make a contract which would compel his debtor to pay one rather than another kind of money which the law-making power has declared equivalent." So also the Court of Appeals of the State of New York, in the case of Bronson *v.* Rodes, held that a contract made before the passage of the Legal-tender Acts, payable expressly "in gold and silver coin, lawful money of the United States,'

might be satisfied by the tender of United States notes. This question came before the Supreme Court of the United States, in 1868, in the cases of Bronson *v.* Rodes and Butler *v.* Horwitz (7 *Wallace*, pp. 229–262); and in both the Court held that contracts expressly stipulating for payment in coin "cannot be discharged by a tender of United States notes issued under the Loan and Currency Acts of 1862 and 1863, and by them declared to be lawful money and a legal tender for the payment of debts." The Court expressed no opinion on the constitutionality of these acts; but simply held that they had no application to contracts whose express terms require payment in coin. Coined dollars are a legal tender, as well as note dollars; and, hence, where the former are specifically named as the medium of payment, the contract is in "substance and legal effect a contract to deliver a certain weight of gold or silver, of a certain fineness, to be ascertained by count." It follows from this decision that the people, or any portion of them, can, whenever they please to do so, practically repeal the operation of the Legal-tender Acts. All they have to do is to stipulate in express words for coin payment. Such has been the practice in California, and hence, business in that State has for the most part been conducted on the basis of the gold dollar.

Another question of construction came before the Supreme Court of the United States in 1868, in the case of Lane County *v.* Oregon (7 *Wallace*, p. 71); and the decision of the Court in this case was that "the clauses in the several acts of Congress of 1862 and 1863, making United States notes a legal tender, have no reference to taxes imposed by State authority." "Debts originating in contract or demands carried into judgment, and only debts of this character," were held to come within the provisions of the act. Taxes imposed by State authority are not such debts—indeed, in their essential characteristics they are are not debts at all, but rather imposts "levied by authority of Government upon its citizens;" and, hence, the acts of Congress making Treasury notes a legal tender have no relation to them. Whether a State shall assess and collect its taxes in coin or in legal-tender notes is, then, a question for its own discretion. It may do either, unaffected by the legislation of Congress. The Last legislature of the State of New York passed a law providing "that all taxes levied and confirmed in this State on and after January 1st, 1879, shall be collected in gold, United States gold certificates, or national bank notes which are redeemable in gold on demand." This law, according to the decision of the Supreme Court in the above case, is not in conflict with the Legal-tender Acts.

One of the questions considered by the Supreme Court of the

United States, in the case of Hepburn *v.* Griswold (8 *Wallace*, p. 603), and a year afterward considered by the same Court, in the cases of Knox *v.* Lee and Parker *v.* Davis (12 *Wallace*, p. 457), was whether the Legal-tender Acts are applicable to contracts for the payment of money made before their passage, as well as to those made afterward. In the first of these cases it was held that the acts apply to both classes of contracts, and that so far as they relate to contracts made before their passage, the acts themselves are unconstitutional. In the other two cases the doctrine of the Court was that the acts comprehend both classes of contracts, and that in respect to both they are constitutional. This reversed so much of the former decision as affirmed the unconstitutionality of the Legal-tender Acts.

Those who favor further issues of legal-tender notes, and propose to make them either the whole or a part of the permanent paper currency of the country, have assumed that the last decision of the Supreme Court has settled the question, that Congress has the constitutional power to authorize such issues at any time and for any purpose, in peace as well as in war. This assumption is not at all justified by the decision itself. What the Court affirmed is that the Legal-tender Acts of 1862 and 1863 were constitutionally valid at the time of their enactment, and in the peculiar emergency created by the late war, by no means committing itself to the general proposition that similar acts would be equally valid at all times and for all purposes. Justice Strong, in stating the opinion of the majority of the Court, held the following language:

"This brings us to the inquiry whether they [the Legal-tender Acts] were, *when* enacted, appropriate instrumentalities for carrying into effect or execution any of the known powers of Congress or of any department of the Government. Plainly, to this inquiry a consideration of the *time* when they were enacted, and of the *circumstances* in which the Government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it in seasons of *exigency*, which would be inappropriate at other times" (12 *Wallace*, p. 540).

The learned Justice then proceeded to describe the war exigency which existed at the time, and based the opinion of the Court in part upon this state of facts. So also Justice Bradley, in expressing his concurrence with the majority of the Court in the last decision, said:

"The power to make Treasury notes a legal tender, while a mere incidental one to that of issuing the notes themselves, and to one of the forms of borrowing money, is, nevertheless, a power not to be resorted to, except upon *extraordinary* and *pressing* occasions, such as war or other public exigencies of *great gravity* and *importance*, and should be

no longer exerted than all the circumstances of the case demand" (12 *Wallace*, p. 567).

These utterances would seem to indicate that the Court, whatever may be said in respect to the logic of its decision, did not mean to declare that Congress may, at any time and under any circumstances, annex the legal-tender quality to the debt obligations of the Government. The Legal-tender Acts were sustained only on the ground of a special emergency; and even on this ground the previous decision of the Court was overruled by a majority of but one. The majority opinion is very far from authorizing the inference of those who, in the state of peace, when the nation is in no peril, propose to continue the issue of legal-tender notes for the ordinary purpose of supplying a paper currency.

Mr. E. G. Spaulding, who introduced the first Legal-tender Act into the House of Representives, in a letter dated December 8th, 1868, alludes to the crisis which in his judgment called for the measure, and then proceeds to say:

"In this great crisis I advocated the bill as a *war* measure—a measure of temporary relief to the Treasury, and on the ground that it was an imperative necessity, to preserve the life of the nation. I conceded that it was a *forced* loan, and could only be justified on the grounds of necessity. * * * I am equally clear that as a peace measure it is unconstitutional. No one would now think of passing a Legal-tender Act making the promises of the Government (a mere form of credit) a legal tender in payment of all debts, public and private. Such a law, passed while the Government is on a peace footing, could not be sustained for one moment."

Whether Mr. Spaulding is correct in assuming that the Government really has greater powers in war than in peace we do not pause to inquire; yet he was certainly mistaken in supposing that no one would claim the legal-tender power for Congress in respect to Treasury notes in the time of peace. Whatever may have been the fact in 1868, the number of persons who now make the claim is by no means inconsiderable; and the probability is that this question will be one of the most prominent issues before the people in the next Presidential election. A better statement in respect to the Legal-tender Acts was made by Secretary Fessenden, in 1865, when he said:

"The right of Congress to borrow money and to issue obligations for loans in such form as may be convenient is unquestionable; but the authority to issue obligations for a circulating medium *as money* and to make these obligations a *legal tender* can only be found in the *unwritten* law, which sanctions whatever the representatives of the people, whose duty is to maintain the Government against its enemies, may consider in a *great emergency* necessary to be done."

This concedes that such a measure does not lie within the limits of the powers granted to Congress by the Constitution; and this admission, with all due respect to the Supreme Court of the United States, contradicting itself in its two decisions on this subject, is according to the fact. The only warrant for the measure, even in war, is an "unwritten law"—a law not in the Constitution; and such a warrant is a very dangerous one for a Government to act upon that derives all its powers from a written Constitution. The precedent furnished by an overwhelming emergency and defensible only by an "unwritten law" certainly will not do for ordinary times. The safety of our political system and of the people under it will be best secured by not trusting to an "unwritten law," but by keeping its operations within the landmarks which it prescribes. Justice Bronson, one of the ablest jurists that ever graced the bench of New York State, in the case of Oakley *v.* Anderson (3 *Coms.* pp. 547, 568), held the following language:

"Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided or some good to be attained by pushing the powers of the Government beyond their legitimate boundary. It is by yielding to such influences that Constitutions are gradually undermined and finally overthrown * * * One step taken by the Legislature or the Judiciary in enlarging the powers of the Government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost and the powers of the Government are just what those in authority please to call them."

IX.

THE LEGAL-TENDER DEBT.

The primary character of the legal-tender notes of the United States is that of a *debt obligation*, contracted during the late war, and pledging the faith of the country to their payment. These notes, as promises to pay money, come under what the Constitution styles the "securities" of the United States. The fact that they are declared to be "lawful money and a legal tender" in payment of debts does not make them any less evidences of debt. Dispossessed of this character by a formal act of repudiation or by an indefinite postponement of payment, practically equivalent to repudiation, they sink at once to the level of stamped paper, and lose all the value imparted to them as Government promises. The Supreme Court of the United States, in the case of The Bank of New York *v.* The Supervisors (7 *Wall.* p. 26), had occasion to define these notes, and in respect to them used the following language:

"These notes are obligations of the United States. Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States—a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the Government. No other dollars had before been recognized by the legislation of the National Government * * * They [the notes] secure the payment stipulated to the holders by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume."

It was on this ground that the notes, unlike gold or silver coin, were held by the Court to be "exempt from taxation by or under State authority." Whether that part of the legislation which makes them "lawful money and a legal tender" be unconstitutional or not, there can be no dispute about their validity as debt obligations or whether they bind the faith of the Government.

The Acts of February 25th and of July 11th, 1862, under which three hundred millions of dollars in these notes were authorized, expressly provided that the notes, in sums not less than fifty dollars or some multiple thereof, may at the option of the holders be converted into United States bonds of equal amount, bearing gold interest at the rate

of six per cent. per annum, payable semi-annually, and redeemable at the pleasure of the Government after five years from their date, and payable in twenty years thereafter. This convertible feature, thus incorporated into the law, formed a part of the contract of the Government with the receivers and holders of these notes. By the Act of March 3d, 1863, authorizing the issue of one hundred and fifty millions more, it was provided that the holders of United States notes issued under the two previous acts "shall present the same, for the purpose of exchanging the same for bonds, as therein provided, on or before the 1st of July, 1863, and thereafter the right so to exchange the same shall cease and determine."

This withdrawal of a right previously guaranteed in the law of issue was, in respect to the first three hundred millions of these notes, a palpable violation of the public faith. So long as Congress saw fit to continue the notes in circulation it was bound in honor to perpetuate the convertible right. This right gave to the notes whatever value there was in a six per cent. gold interest bond, and secured the holders against any depreciation below this mark. The Government, in effect, promised to redeem them on demand, not in gold, but in such a bond; and when Congress passed the Act of March 3d, 1863, limiting the promise to July 1st, 1863, and thereafter withdrawing it altogether, it violated the faith of the nation. The act was also bad, considered as a matter of financial policy; and this Senator Sherman, of Ohio, has repeatedly admitted, and for it expressed his regret, as being a great mistake. The object was to put upon the market a bond at a cheaper rate of interest; and not only did this object, for the most part, fail of success, but the notes themselves suffered a rapid and great depreciation, as shown by the rise of the gold premium and a corresponding inflation of prices, thus subjecting the Government to a large increase in the cost of war material, and thereby adding to the expenses of the war, besides deranging the whole business operations of the community. Moreover, if the original right of conversion had been continued, as was demanded by good faith, legal-tender notes would not only long since have reached par with gold, but would for the most part, if not entirely, have been funded by the spontaneous action of the people, provided the Government had adopted a policy suited to this end. The increase of interest by an increase of the bonded debt, as the result of funding, would have been a trifle in comparison with the evils which have actually ensued from this mistake. The contraction of the circulation would have been by the action of the people; and for any lack of circulation an ample remedy might have been furnished in the system of free banking.

By the second section of the Act of June 30th, 1864, Congress made

another pledge in respect to the legal-tender debt, in the following words: "Nor shall the total amount of United States notes, issued or to be issued, ever exceed four hundred millions of dollars, and such additional sum, not exceeding fifty millions of dollars, as may be temporarily required for the redemption of temporary loan." It was in July of this year that these notes sunk to the point of two dollars and eighty-five cents in notes for a dollar in gold; and, in view of the great depreciation which had occurred, Congress thought it expedient to say to the public that the business of manufacturing paper money in the form of forced loans should go no further. In the space of about twelve months it had authorized the issue of four hundred and fifty millions of dollars in such money; and the consequences in the depreciation of the currency, the inflation of prices, and speculation in gold were then palpable to every thoughtful eye. Confronted by these facts, Congress saw the necessity not only of stopping at the point then reached, but also of assuring the public that no more currency of this character should be issued. It fixed a limit not to be exceeded.

Mr. Hugh McCulloch, becoming the Secretary of the Treasury in 1865, after the war was closed, and believing, and that, too, correctly, that the currency was inflated far beyond the wants of legitimate business, and that the excess was being used to foster dangerous speculation, that would in the end bring disaster, recommended Congress, in his December report of 1865, to adopt measures for the gradual payment and retirement of the legal-tender debt. The House of Representatives promptly and almost unanimously passed the following resolution:

"*Resolved*, That this House cordially concurs in the views of the Secretary in relation to the necessity of a contraction of the currency, with a view to as early a resumption of specie payments as the business interests of the country will permit, and we pledge co-operative action to this end as speedily as practicable."

The sentiment of this resolution found practical expression in the Act of April, 12th, 1866, providing that the Secretary of the Treasury might retire and cancel not more than ten millions of dollars in United States notes within six months from the passage of the act, and thereafter not more than four millions of dollars in any one month. Under this authority, the Secretary did retire forty-four millions of these notes, when Congress, by the Act of February 4th, 1868, withdrew the power of any further reduction, leaving the outstanding legal-tender debt at three hundred and fifty-six millions of dollars.

The next thing that Congress did in respect to this debt we have in a pledge given in the Public Credit Act, approved March 18th, 1869, declaring that "the faith of the United States is solemnly pledged to

the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes," and that "the United States solemnly pledges its faith to make provision at the earliest practicable period for the redemption of the United States notes in coin." The policy of the Government during the whole of President Grant's first term was to use its surplus revenue in buying up its unmatured bonded debt and leaving the legal-tender debt to shift for itself. The "earliest practicable period" to make provision for this debt had not come, and hence, no direct effort of any description was made to restore the currency of the country to a sound condition. Theoretically, the greenbacks were acknowledged to be a debt; yet practically they were treated as money, pure and simple. Secretary Boutwell's entire policy was to buy bonds, and leave the currency of legal-tender due-bills to run on the credit of promises unfulfilled. He declined to grapple with the elementary question of treating these due-bills as a debt and providing for their payment. In respect to this point his theory was to wait for "the earliest practicable period," which did not come during his secretaryship, and under the purely waiting policy would not come in a century.

The session of Congress in 1873–'74, following the September panic of 1873, was a session of earnest and stormy debate, yet with no action that looked toward making any provision for the payment of the greenback debt. "The earliest practical period" had not then come. The twenty-six millions of retired notes which Secretary Richardson had issued, contrary to the plain meaning of the law, were legalized, and thus the aggregate amount outstanding was carried up to three hundred and eighty-two millions of dollars. The only sensible thing done on the subject was the President's veto of the first currency bill passed by the two Houses of Congress.

The first positive step taken by Congress, since April 12th, 1866, that has the slightest show of dealing with legal-tender notes as debts, involving the obligation of payment, we have in the Act of January 14th, 1875. This act specifies January 1st, 1879, as the period on and after which the Government pledges itself to redeem United States notes in specie, and thus to treat them as demand obligations, and also authorizes the Secretary of the Treasury to make provision for carrying the pledge into effect, directing him in the mean time to retire these notes at the rate of eighty per cent. of the additional bank notes that may be issued. The act itself was a compromise of conflicting views, and, while not all that it should have been, or that must be done in order to accomplish the end, still it was a step in advance. It fixed a day as

"the earliest practicable period" for the specie payment of the legal-tender debt.

The one elementary question which is now engaging public thought, in respect to which there is no little division of opinion among the people, and which will in all probability be the controlling question in the next Presidential election, is whether United States notes shall be practically regarded as debt obligations, and provision be made for their payment and withdrawal, or whether they shall be regarded chiefly, if not exclusively, as money, "lawful money and a legal tender," not only to be perpetuated indefinitely in the future, but to be increased by new issues of the same character, and to supersede the bank note circulation of the country. Stated in a different form, the question is whether the American people, by the resumption of specie payment and the payment of the legal-tender debt, will return to the currency of value, the currency of the world, and treat paper merely as a representative thereof; or go forward with the present system of Government paper money, and finally make it the entire paper circulation of the country, to be increased from time to time as Congress shall see fit to authorize additional issues. Stated in another form, the question is whether our money shall be that of coinage, supplemented by representative paper notes convertible on demand into coin, which is the only money provided for in the Constitution; or whether it shall be the money of the paper mill and the printing press. This is no new question in the history of the world. The money of coinage and paper money have both been tried, not only in this country, but by other nations; and the results are well known. As a general fact, the exigency of war has led to the issue of paper money; and when the step has once been taken the difficulty is to retrace it and recover the previous ground. In some cases, indeed, in most cases, the previous ground has been recovered only by a down right repudiation of the money as a debt, thus rendering it worthless as a currency and throwing the entire loss upon the holders. This was the fate of the monetary scheme of John Law, of the French *Assignats*, and for the most part of the paper money issued before and during the American Revolution.

That portion of the people who reason from the obligations of the national faith, from the debt character of the legal-tender note, and from the natural laws of exchangeable value, to which money is no exception, propose to pay the debt, and not to contract any more debts of the same kind to be paid. Those, on the other hand, who reason from what is printed on the back of the legal-tender notes, from their currency character as "lawful money and a legal tender," and who practically ignore what is printed on their face, and who, moreover, forget that the value of the

notes depends upon their *credit* as obligations to be paid, and not at all upon the paper of which they are composed, and, independently of their credit, not at all upon their legal-tender quality, propose to continue and increase these notes without payment, and thus in effect reduce them to the condition of merely stamped paper, having the form of a monetary obligation, which in practice would be simply a lie.

Between these two classes there can be no compromise. Their views are as wide apart as the poles. They hold scarcely nothing in common. They differ radically in their fundamental conception of money. The money of the one class is merchandise, a commodity, a part of a nation's wealth, having value aside from its uses as money, and selected by reason of this value and other appropriate properties, both of which are best combined in gold and silver, to perform the double function of appraising other values and acting as the medium of exchanging them. The money of the other class does not depend upon its commodity character at all or upon the value or quantity of the material composing it, but wholly upon the *words* printed upon it and upon a legal statute authorizing those words. Nature creates one kind of money, and the other is absolutely the creation of statute law. The one is the money of value, and the other is wholly the money of credit.

Which, then, of these two classes represents the majority of the American people? Which of these theories is the one that will be finally adopted? Will the people go back to the Constitution, to the money of the Constitution, and to the only money that it authorizes? If so, then they will pay the legal-tender debt at "the earliest practical period," and thus redeem the nation's pledge and maintain its public faith. If not so, then they will launch out upon the high seas of paper money, and finally come back to constitutional money through repudiation. The people have conquered the greatest rebellion of history, liberated every slave in the land, and established their unity as one nation by a demonstration that will stand good for at least a century. Have they now the character, the intelligence, the honesty, the good sense to meet and wisely dispose of the currency question left as one of the inheritances of the war? This is the problem which now awaits their action in the future.

X.

THE FINANCE OF WAR.

Dr. Amasa Walker, in his "Science of Wealth," has a chapter on the "Finance of War," the object of which is to show the fallacy of the common idea "that a vastly greater amount of money is needed in time of war than of peace." The substance of his argument is that war does not increase the aggregate production of the people beyond that of peace; that it does not add to the number of exchanges incident to the transaction of business, or to the amount of services to be paid for; and, hence, that, so far as the people themselves, in distinction from the Government, are concerned, the volume of money sufficient in peace will be equally so in war. Money is simply the medium of exchange and the measure of values; and if war does not increase the number of exchanges or the amount of the commodities exchanged, then it creates no general necessity for an increased quantity of money.

The belligerent Government, however, as such, is in a position very different from that of peace. Besides its usual function of enacting and administering the laws and paying the expenses thereof, it is engaged in the special and extraordinary business of war; and this creates a demand for an unusual number of agents, as well as for a large amount of war material. Armies and navies are to be supported and equipped and kept in the fighting condition. These war appliances involve expense, and hence the "money-chest" of the Government is subjected to a greatly increased draft upon its resources. It has more bills to pay, and money, or its equivalent, though not the direct instrument of military campaigns, is, nevertheless, the instrument of paying these bills. It is in this sense only that money forms the "sinews" of war. It belongs to the financial machinery of war; and, since the Government is the prime operator and manager, and since, moreover, the business is one of rapid destruction, and not reproduction, all the time consuming the capital invested, and yielding no profits in the economical sense, the Government must have some way of constantly replenishing its own Treasury. The augmented current that flows out demands a corresponding current that flows in.

The financial problem to be solved in war is in kind precisely like the one of peace, differing from it only in a larger demand for the means with which to pay larger expenses. How shall these means be procured?

The first and direct answer is that the Government must collect more money from the people by increased taxation. The taxing power is one

of the most absolute of all the powers of Government, and its exercise may be carried to almost any extent. So far as war expenses are met in this way, no debt is incurred. The people, through a tax levy, pay the bills at the time, and by paying them have the opportunity of learning the cost of war. It is best, alike in the economical and the moral sense, that they should carry a heavy tax burden. The sacrifice is a good teacher. It would be unfortunate for the world if governments could conduct war without bringing home to the consciousness of the people the element of cost by an increased rate of taxation. The burdens thus experienced restrain the belligerent tendency of nations and contribute a powerful influence to the promotion of peace.

The other method of obtaining funds, beyond those supplied by taxation, is to borrow money by contracting a debt. All governments are clothed with the borrowing power, and to it there are ordinarily no limits, except such as may be imposed by their credit. The world is rich enough to be a lender. A vast individual wealth in every nation is ready for the service of war, provided the basis of credit is sufficiently reliable. It is by the exercise of the borrowing power that the nations of the earth have carried their debts up to about twenty-five billions of dollars, the most of which was incurred for war purposes.

The United States, during the late Rebellion, resorted to both of these methods of raising funds. Taxes were increased far beyond their peace rate, and a huge war debt was contracted, amounting at the close of the struggle to some twenty-seven hundred millions of dollars. A part of this debt consisted and still consists in United States notes, declared to be "lawful money and a legal tender in payment of all debts, public and private, within the United States," with certain specified exceptions. These notes were paid out by the Government as money, and with them the expenses of the war were in part paid. In the space of about twelve months four hundred and fifty millions of dollars in such notes were authorized to be issued, not because the ordinary business of the people demanded such an issue, but because the Government wanted funds with which to carry on the extraordinary business of war. Congress thought it expedient to take the short cut and manufacture funds, by *creating* money through the agency of the Treasury Department. The printing press was called into requisition, and loans were negotiated by printing money outright in the form of debt obligations, declared to be "lawful money and a legal tender," and hence made compulsory in their acceptance for the payment of debts. This is sometimes called a *forced* loan. It is really no loan at all in the sense of a free contract between parties. It is pure compulsion. It is manufacturing paper money and compelling creditors to take it at its face value or forfeit their claims.

The necessary result of this measure was the direct legal substitution of Treasury notes for coin, by the force of law. The financial and business operations of society were at once placed on the basis of inconvertible paper money; and its volume, increasing until paper issues of different kinds, more or less a legal tender, reached in July, 1864, the enormous aggregate of eleven hundred millions of dollars, was far in excess of any business wants of the people. The Government in relieving its own necessities, forced the country into this condition; and although it is now more than ten years since the close of the war, the paper money system then inaugurated still remains.

It is hardly necessary to say that the frequently told story of history repeated itself. The notes, notwithstanding they were legally just as good as gold, with their increased issue, circulated at an increasing discount, until they were not worth forty cents on a dollar as compared with gold. The rise and fluctuation of prices corresponded in general with the movement of the gold premium. The business of the country, as is always the fact under such circumstances, became largely a system of gambling and speculative ventures. In a word, the usual consequences of inflating the currency beyond the natural demands and growth of business followed the issue of these notes; and since the notes had no monetary character or standing outside of the United States, there was no outlet by which any redundancy could be carried off in the operations of international trade. Gold—the world's money and standard of value—left the country, and was used to pay in part for a largely increased importation of foreign goods.

The fact that these notes were issued by the Government for its own relief in the emergency of war, had no tendency to prevent or even modify these economical results. The results depended on natural causes, entirely sure in their action. The aggregate production of the country was not increased; the number of persons engaged in the different branches of industry was not augmented; and, although there was a great demand for whatever was necessary to prosecute the war, and a great diversion of labor from other channels in this direction, still the wealth of the nation was being consumed at a rapid rate for purposes not economically reproductive. A great war is a wasting process; and the artificial stimulus of a redundant paper currency, though it may conceal the fact for a time, cannot permanently conceal it or prevent the result. High prices are no proof of prosperity. The sudden enrichment of a few persons is no evidence of general thrift. To such a state of things there is always an economical sequel of exhaustion, stagnation, and depression, from which recovery is effected only by slow degrees.

Still further, the Government, as such, was constantly in the market

as a large borrower by the sale of its bonds, and a large purchaser of commodities and labor. Its bonds were sold at par in legal-tender notes; yet the latter were so depreciated that the former did not, for an average, bring much if any more than fifty cents on a dollar, if estimated according to the gold standard. The funds thus realized were expended in the purchase of commodities and labor at rates some two or three times above their usual mark. In this way the bonded debt of the Government was increased, beyond what it would have been but for these causes, probably by not less than a billion of dollars, besides leaving, as an inheritance from the war, a disordered state of our whole currency system, with all the evils naturally allied therewith, and especially the difficulty of retracing our steps and returning back to the specie standard of values.

The general theory upon which governments have resorted to the *forced* acceptance and circulation of their own notes has been that of a *temporary* expedient to bridge over an existing emergency, and not that of an established *policy*. The expedient is one of the fine arts in war finance. It is a quick and easy way of getting money by legislatively creating it on the spot. The intention at the time is to make it merely a temporary resource to get through a crisis; yet history shows that the actual result is almost always different. Professor Sumner, in his "History of American Currency," says that paper money "cannot be taken up and laid down as we choose. It is a mischief easily done but most difficult to cure." The first step leads to the second, and indeed very often, in furnishing immediate relief, creates the necessity for the second step.

The French Constituent Assembly entered upon the paper money scheme in May, 1790, by authorizing the issue of four hundred millions of francs in *Assignats*, which is equivalent to eighty millions of dollars. In September of the same year the issue had risen to twelve hundred millions of francs; in 1793, to three thousand six hundred and twenty-six millions; in 1794, to eight thousand eight hundred and seventeen millions and a half; in 1795, to nineteen thousand six hundred and ninety-nine millions and a half; and on the 7th of September, 1796, the issue amounted to forty-five thousand five hundred and seventy-nine millions, or more than nine billions of dollars, when the whole of it became totally worthless. Then a new kind of paper money was tried, in the form of *Mandats*, of which six hundred millions of francs were at first issued; but which in the end went up to twenty-four hundred millions, and finally became just as worthless. The Continental Money, starting with a limited issue in the outset, was at length swollen to some three hundred millions of dollars, the most of which fell as a dead loss upon

the holders. Professor Sumner's chapter on Austrian paper money presents the same history. The work of M. Wolowski on the finances of Russia shows a nation that has been struggling for more than a hundred years under a depreciated paper currency. Royal edicts have repeatedly placed limits to the issue; yet the next war, on the theory of a temporary expedient, has exceeded these limits. Italy tells the same story.

So also Congress, during the Rebellion, restricted its first issue of legal-tender notes to one hundred and fifty millions of dollars, and provided for funding them into a six per cent. gold-interest bond. Senator Fessenden, in his speech on the subject, said that the issue was "not to be resorted to as a *policy*," but as "a *temporary* measure." "It has been defended," he said, "simply and solely on the ground that it is to be a *single* measure, standing by itself and not to be repeated." Such was doubtless the thought and the theory of the moment; and yet this "single measure" was repeated twice in about twelve months, and legal-tender notes were expanded to four hundred and fifty millions of dollars. And even this limit was exceeded by the issue of interest-bearing notes, made a legal tender, with the exception of their interest; and to these were added the notes issued by the national banks, with no corresponding reduction of Government notes. The simple truth is, that Congress, by its "single measure," got itself into the paper-money rut, and there was no getting out of it. The measure became a policy after being once adopted. There was no retreat from it and no curtailment of it, but a continuous expansion, until Congress, in June, 1864, saw the necessity of legislatively declaring that there should be no further issue of non-interest-bearing legal-tender notes. This "single measure" had embraced within its own grasp the whole financial system of the country.

Is it any matter of wonder that the notes were depreciated, that prices were doubled and trebled, that speculation became rampant, that gold fled to a more congenial climate, that foreign importations were excessive, and that all kinds of even legitimate business were intoxicated by such an immense inflation of the circulating medium? No one who understands the laws of currency feels any surprise at the result. Congress did not mean or anticipate all this in the outset; yet, having once inaugurated the paper-money policy by "a single measure," onward it went, and onward it had to go by the very necessities of the policy. No Government ever got on the back of paper money that did not ride much further than it meant to ride; and every Government, once in this position, must get off, or it will finally ride into repudiation, and come back to the currency of value by a universal crash of credit. Paper notes, as the representative equivalent of coin, by being converti-

ble into coin, do not displace the coin, but simply share the field with it. But when these notes not only entirely outrun the point of redeemableness, but by their volume greatly exceed the amount of coin that would circulate in their absence, then all experience teaches that the financial system is moving toward the breakers. Make these notes a legal tender, and flood the market with them, as was done during the war, and the consequences in the form of depreciation, inflated prices, fluctuating values, wild speculation, general extravagance, and ultimately a reckoning day of disaster are as certain as the laws of nature.

Moreover, Congress in the outset of this policy did not exercise the precaution of providing a limit of *time* beyond which the legal-tender property should not attach to Treasury notes. The property being purely the creature of law, the period of its existence might have been limited by declaring that the legal-tender provision should cease to be operative in one year or two years, or at some definite time after the close of the war. The whole country, in anticipation of such a limitation, would have adjusted itself to it. The war measure would not then have passed into the category of a peace measure for any length of time. The original idea was that of a temporary expedient, and the legislation should have explicitly made it such, and thereby given notice to the country and the world that the notes at a certain time after the close of the war, if then in existence, should have no other character than that of debt obligations. This would long since have secured either their funding or payment in gold. They would have disappeared, and under proper regulations bank notes and specie would have taken their place. The change could not have occurred without some difficulties; yet the difficulties would have been no greater than those which must be surmounted in getting back to specie payment at any time. The return is never a royal road and never made easier by long delays.

This exhibit of facts is preliminary to the inquiry whether there was any *real necessity* for resorting to legal-tender notes, which is the common and only plea for the measure. Is it a good plea?

XI.

THE CRISIS IN THE TREASURY.

The Honorable E. G. Spaulding, in his introduction to a second edition of his "Financial History of the War," gives a concise statement of the crisis in the Treasury Department of the Government which led to the first Legal-tender Act. We summarize the statement as follows:

Congress, by the Act of July 17th and the Supplementary Act of August 5th, 1861, authorized a loan of two hundred and fifty millions of dollars, and in the latter act suspended the operation of the Sub-Treasury law of 1846 so far as to permit the Secretary of the Treasury to deposit any of the moneys thus obtained "in such solvent specie-paying banks" as he might select, and to draw against such deposits "for the payment of public dues." The object of this provision was to enable the Secretary to make use of the system of bank and clearing-house agency in the disbursement of these funds. After the battle of Bull Run the banks of New York, Philadelphia and Boston promptly agreed to take one hundred and fifty millions of this loan, with the expectation that Secretary Chase would avail himself of the permission above referred to, and thus check against the funds standing to the credit of the Government in the payment of his war accounts. He, however, declined to do so, and, hence, required the banks to pay the loan into the Sub-Treasury in the form of gold or gold certificates. The result was that he drained out the gold reserve of the banks, forced them to a suspension of specie payment in December, and thus brought on the crisis in the Treasury of the United States, which formed what was regarded as the necessity for the first Legal-tender Act.

Mr. Spaulding considers this as a very grave mistake in financial policy, but for which there would have been no suspension of specie payment by the banks in the month of December. Had the funds which they had agreed to loan to the Government been deposited with them, and had their machinery been used as a disbursing agency, the Treasury crisis of January and February, 1862, would not have occurred. The banks would for the most part have retained their gold and been in a condition to extend still further aid to the Government. Their suspension of specie payment was forced upon them as the result of a mistaken policy on the part of the Secretary of the Treasury. Alluding to this mistake, Mr. Spaulding says: "The Secretary, in breaking the banks,

at the same time broke the Sub-Treasury and both were discredited together."

The question, then, which, in these circumstances confronted Congress in the months of January and February, 1862, was to determine in what way the borrowing power of the Government should be so exercised as to meet the existing emergency. The necessity for resorting to the issue of Treasury notes in some form as the means of immediate relief was apparent and urgent; but whether these notes should be made "lawful money and a legal tender" or not involved the two questions of constitutional power and financial expediency. Congress, after a debate of nearly two months, decided to authorize the issue of one hundred and fifty millions of dollars in legal-tender notes; and with this decision the Rubicon was passed and the political economy of inconvertible paper money was established as a cardinal feature in the policy of the war.

Was this legal-tender legislation wise? Was it necessary? Was it the best thing that could be done? In the language of Senator Fessenden, was it "absolutely indispensable?" Was Congress shut up to this unusual and extraordinary method of relief? The question now is not whether Congress had the constitutional power to adopt the measure, or whether the issue of Treasury notes was expedient; but whether the annexation of the legal-tender property to these notes was expedient. To say that the Government urgently needed to borrow money by issuing evidences of debt therefor in some form proves neither the necessity nor the wisdom of making these evidences "lawful money and a legal tender." The two things are distinct and involve different considerations. There is no doubt about one of them. But as to the other, the general answer of political economy, based on a broad collation of facts, is that legal-tender notes are never expedient; that the legal-tender quality does more harm than good; that its disadvantages far exceed all its possible advantages; and, hence, that a nation is weakened rather than strengthened by it. Whatever is gained thereby is more than lost by the evils resulting from it.

Mr. Robert B. Minturn, of New York city, at the request of Secretary Chase, addressed to him a letter dated January 11th, 1862, in which he discussed the question of expediency as between raising funds in the usual way of borrowing and resorting to the issue of an inconvertible legal-tender currency. From this letter, evincing alike keen sagacity and comprehensive vision, we make the following extract as to the former of the above methods:

"At a time when the wealth of the country is necessarily consumed at so great a rate, a sound system of finance should favor economy in

public and private expenses, and at the same time stimulate industry to supply the unavoidable waste. If, then, the Government raises money on long bonds, pledging the national honor to pay interest and principal in *gold*, and selling the bonds at the best price it could obtain in the open market, the following results would, I believe, be realized:

"1. The difficulty of obtaining money, the high interest to be paid, and the heavy taxes necessary to give the loans a market would urge the greatest economy and efficiency in the Government.

"2. The low rates at which the loan would probably sell would attract foreign capital, of which we have great need.

"3. The loss represented by the rate of discount at which the loans might be negotiated would fall, as it should do, on the whole nation, and be distributed through a term of years.

"4. The inevitable high rate of taxation (which would be needed to induce capitalists to feel confidence in investing in the loans) would force the people to a realization of the extent to which they are becoming poorer. It would consequently stimulate them to economy in all articles of import, and to the utmost industry in increasing the wealth of the country by production; thus counterbalancing, to as great an extent as possible, the impoverishment of the nation by the war."

Turning to the proposition of issuing legal-tender notes, Mr. Minturn presents that side of the picture as follows:

"But if, on the other hand, the expenses of the war are met by an issue of inconvertible currency, the results will, I believe, be directly the reverse.

"1. The mere printing of paper and circulating it, by giving the prerogative of a legal tender, is so much easier than borrowing money at high rates of interest and repaying loans by heavy taxes, that if the former course is once begun, it is in danger of being carried on indefinitely; and the natural check to extravagance in the administration of the Government, which would be found in the difficulty of borrowing, is quite lost.

"2. The greater the quantity of an inconvertible currency that is issued, the lower will its value fall by an infallible natural law. Not only, therefore, will foreign capital not come to the aid of the Government in the shape of loans, but both foreign and domestic capital will be transferred abroad by its owners, to escape the loss entailed by a constantly depreciating standard of value. This movement set in some time since—say two months or more ago—in anticipation of the country adopting an inconvertible currency, as has been clearly indicated by a steadily advancing rate of exchange on Europe, in face of a balance of trade in favor of this country.

"3. If the Government currency were finally redeemed in gold, the loss arising from repaying in specie that which had been originally issued at a depreciated value in exchange for supplies would, it is true, fall on the whole nation, but in a much heavier form than the loss considered under the head (third) above. But before redemption, and while depreciation was going on, all creditors of the country would be losers in exact proportion to the decline of the currency. The debtor,

being able to discharge his obligation in a currency less valuable than it was at the time he borrowed, becomes to that extent, by the action of law, the owner of property which properly belongs to his creditors. It is easy to see the way in which such enactments operate, to force wealth away from a country where there is even danger of such a condition of the currency; and the effect occurs just at a period when our national policy should be such as to attract wealth hither by every assurance of legal protection and security.

"4. With an irredeemable currency the Government would be tempted to tax but lightly, since an onerous taxation would not be necessary to enable them to raise money, but only to furnish them means for redeeming the currency—a difficult operation, which would eventually be postponed as long as possible. The people would then not be aware of the rate at which the resources of the country and the wealth of each one were being consumed; and they would, therefore, be without the natural stimulus to economy and industry imposed by heavy taxation, and would not deny themselves a free indulgence in articles of import, which would be paid for in the gold which would have been supplanted here as a medium of exchange by the legal substitution of a less valuable currency.

"Thus, instead of the wealth of the nation being economized, by the people being stimulated to a moderate use of imports and to paying for them as far as possible by increased production, they would be seduced by a fictitious financial ease into the opposite course of consuming freely articles imported from abroad, and paying for them by the gold representing their accumulated wealth."

Two days after this letter was written, Mr. John M. Forbes addressed a shorter letter to Senator Fessenden, who was then chairman of the Senate Committee on Finance, from which we make the following extract:

"*First.* Taxation for interest and current ordinary expenses. On this all agree now, but many will oppose if you once get into the irredeemable gulf.

"*Second.* Your main reliance for the Government must be upon selling your long bonds at the net prices they will bring, after a fixed policy has been announced; and, of course, using proper judgment as to the time and manner of bringing them forward.

"*Third.* Avail of short loans, exchequer bills, or emission of small notes for currency, under the advice of experts, in whichever manner or form promises to give greatest relief temporarily; but it will be a fatal error to rely upon it as your chief dependence. It is limited in amount, and liable to great mischief the moment it is pushed beyond a certain and very moderate amount.

"*Fourth.* Make this currency or short paper or demand paper—in whatever shape you put it—as good as possible, by providing for its being received by Government for all dues, by fixing a mode of its redemption, and by making it fundable at a good rate of interest. Raise it all you can to make it good, and cause it to be received by all classes voluntarily in payment of debts already existing; but avoid making it

a legal tender, unless you want to see it depreciate. To make it a legal tender will be to give notice to capitalists to get their capital out of the country as fast as possible; and to foreign capitalists to keep from sending money here, and to sacrifice what available stock they have, Government included, as early as possible, before the depreciation has got very bad."

The Supreme Court of the United States, in the case of Hepburn *v.* Griswold (8 *Wallace*, p. 603), had occasion to consider the question whether the legal-tender legislation was "necessary and proper" in the sense of the Constitution; and, in considering this question, the Court was compelled to examine a question of fact in political economy. The decision of the Court was that the measure was not "necessary and proper," and the argument was in part directed to the proof of this fact. From this argument we make the following extracts:

"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."

"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, as we have seen, is 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 out-weighed 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."

The theory of the Court, as presented in this case, is that there was no necessity for impressing upon Treasury notes the character of "lawful money and a legal tender;" that the notes, being made receivable for taxes and exchangeable for bonds, would have met the wants of the Government as well without as with this character; and, hence, that the imperative necessity urged in support of the constitutionality of the legal-tender legislation did not exist in fact. Chief Justice Chase, who delivered the opinion of the Court in this case, also delivered a dissenting opinion when the Court, as the consequence of a change in its membership, overruled its previous decision. From the latter opinion we quote as follows:

"The real question is, was the making them [the notes] a legal tender a necessary means to the execution of the power to borrow money? If the notes would circulate as well without as with this quality, it is idle to urge the plea of such necessity. But the circulation of the notes was amply provided for, by making them receivable for all national taxes, all dues to the Government, and all loans. . . . Nobody could pay a tax or any debt or buy a bond without using these notes. As the notes, not being immediately redeemable, would undoubtedly be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the Government at or near par value of specie, they would be accepted in payment of all dues, private as well as public. Debtors, as a general rule, would pay in nothing else, unless compelled by suit; and creditors would accept them as long as they would lose less by acceptance than by suit. In new transactions sellers would demand and purchasers would pay the premium for specie in the prices of commodities. . . . The real support of a note circulation not convertible on demand into coin is receivability for debts due to the Government, including specie loans, and limitation of amount. . . . When the Government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This, certainly, does not improve the value of its notes. It is an element of depreciation. . . . But the apparent benefit is a delusion, and the necessity imaginary. In their legitimate use the notes are hurt, not helped, by being made a legal tender. The legal-tender quality is only valuable for the purpose of dishonesty. Every honest purpose is answered as well and better without it" (12 *Wallace*, pp. 577–579).

The clear and lucid statement of consequences, as given by Mr. Minturn, in that branch of it which relates to the issue of legal-tender notes, has been largely confirmed by the result. When he wrote his letter, the measure was pending before Congress; and what he foresaw as probable in the event of its adoption has become history. So also the equally lucid statement of Chief Justice Chase, when delivering the opinion of the Supreme Court of the United States, and when delivering his own opinion of dissent from the second legal-tender decision of the Court, alike denies and refutes the theory of Congress in adopting the measure, and of those who defend it as wise legislation. The suggestion of Mr. Forbes was that the chief reliance of the Government should be upon regular loans made in the usual way; that the resort to Treasury notes to a "moderate amount" should be simply an expedient for temporary relief, and that Congress should by all means avoid making these notes a legal tender. Many of the views embodied in these statements of opinion were urged by the minority in both Houses of Congress; yet they did not prevail.

The doctrine of an imperative necessity, so great that it could be met only by the legal-tender expedient, or could not be so wisely met in any other way, is the doctrine that carried the day. It was the plea of the hour. How much, if anything, there is in the plea is a question that we reserve for further consideration in the next article. It may be well, however, here to say that the country was not exhausted at the time by a long and protracted war. It had hardly entered upon the solid business of fighting. Neither the financial nor the military strength of the nation had been put to any severe test. Although the Rebellion had assumed formidable proportions, still the power of the loyal States, and of the Government through them, was at least twice that of the rebel States. The most that had been done was simply preparation. It was in these circumstances that, in the very outset of the war, a remedy was resorted to which has been generally, if not universally, regarded as the extreme expedient of a most desperate condition. Was it wise legislation? Was it necessary? Was there no other or better way of relieving the Treasury?

XII.

THE PLEA OF NECESSITY.

THE one argument which, in the winter of 1861–62, more than any other, and more than all others put together, prevailed with the majority of the two Houses of Congress in passing the first Legal-tender Act, was the plea of an imperative and overwhelming necessity. The funds of the Treasury were nearly exhausted, its liabilities and daily outgoes were large, and money must be had to pay the army and purchase supplies. But for these circumstances, no one, in Congress or out of it, would have though of turning the Treasury Department of the Government into a national paper-mill for the manufacture of paper money. It was the supposed necessity of the situation that determined Congress to adopt the legal-tender provision in the Loan and Currency Act of of February 25th, 1862, authorizing the Secretary of the Treasury to issue one hundred and fifty millions of dollars in legal-tender notes. The provision was admitted to be an unprecedented measure in the history of the Government, justifiable only upon this ground.

If we concede that the necessity was real, and that no other course than the one pursued was at the time open to Congress, we are instantly met with the question whether this same unavoidable necessity existed on the 11th of the next July, when, after the lapse of only about four months, one hundred and fifty millions of dollars more in the same kind of notes were authorized. Still further, did this necessity recur again on the 3d of the next ensuing March, when authority was given for the issue of another one hundred and fifty millions in these notes? Did the original necessity demand successive issues of legal-tender paper? Did it continue during the war, as the explanation of the various forms and amounts of this paper that were finally issued? Rather, is it not historically true that what was urged in the outset as a necessity, as a "single measure," not to be repeated, became an established *policy* in conducting the war? Congress very readily passed from the necessity to the policy; and this is just what governments are apt to do, yea, what they almost always do, after having taken the first step. Becoming fascinated with with the facility and promptitude of legal-tender therapeutics, they proceed from the necessity to the policy, and seldom fail entirely to overdose the patient, and hence the extreme danger of the first prescription.

Recurring then to the period when the first Legal-tender Act was

passed, we find the House Committee of Ways and Means equally divided between two bills—the Spaulding bill and the Morrill bill—which, without going into their details and minor differences, were, nevertheless, so much alike in their general principles that either bill, with slight modifications, could have taken the place of the other, with the single exception of the legal-tender provision in the former and its absence in the latter. Both bills proposed the issue of Treasury notes, receivable for taxes and other dues to the Government, and exchangeable at the option of the holders for Government bonds. When, however, we come to the legal-tender element, they part company and are as wide apart as the poles. The Spaulding bill, being in some respects changed by the Senate, yet retaining this element, is the one that finally became a law and was put to the test of trial. The Morrill bill was not tried; and, hence, there is no evidence from actual experiment that it would not have met the wants of the Government at the time or that its general principles would not have sufficed during the war. Nor is there any such evidence in any essential difference between the two bills, unless it be in the legal-tender provision of the one and its absence in the other.

This, then, brings us directly to the question that relates to the financial necessity and efficacy of this legal-tender element. Sifting the provision to its bottom, we find in it these two distinctive features: 1. It gave to the Government the *legal* power of *compelling* its then existing and also its future creditors—whether soldiers in the army, sailors in the navy, civil officers, or persons to whom it was or might be indebted for services or supplies—to accept the authorized notes in discharge of their claims. 2. It gave to the receivers of these notes from the Government and all subsequent holders thereof the same legal power to compel their creditors to accept the notes in payment of debts. The provision did not create the notes or make them what they were in other respects, but simply invested them with this legal character. Having been printed and duly signed, they started from the Treasury on their financial mission in possession of this attribute. How much service did it render?

Take first the Government. What was the advantage to it from the legal-tender quality beyond what would have been derived from Treasury notes without this quality? It is doubtful whether it contributed anything at all; and when we look at the whole question on all sides of it there is no doubt that the disadvantages far exceed the advantages, even supposing that there were some benefits from the measure. The quality added nothing to the promissory character of the notes or the amount promised, and furnished no guaranty for their ultimate payment. It did not increase their value to the Government or to their receivers by

a solitary penny, as arising from their receivableness for taxes and other dues to the Government and their exchangeableness for interest-bearing bonds. It was upon these provisions that the notes were mainly if not exclusively dependent for their market value; and to the action of these provisions the legal-tender quality has no relation. They are as powerful without it as they can be with it.

There was no necessity, in order to secure the acceptance and circulation of the notes among the people, that the Government should resort to legal compulsion, when the circumstances were certain to produce the desired result without it. The people at the time of the first Legal-tender Act were and for some two or three months had been doing business on the basis of inconvertible bank notes, and the $50,000,000 of demand Treasury notes previously authorized. Both classes of notes were circulating—the bank notes at a slight discount below specie; and, moreover, there was no business want for a larger note circulation. The new notes to be issued, with their receivability provisions, would, without the legal-tender quality, have been just as good as bank notes, and in some respects better, and just as good as the demand notes of the Treasury, except for the payment of customs duties. There was nothing more certain than that the creditors of the Government would have accepted the notes in payment of their claims, and that by the laws of trade they would have passed into general circulation, not only among the people, but between the Government and the people. They would have been the only payment which the Government could offer at the time, and the interests of the creditors would have prompted them to accept the notes without a moment's hesitation. There is not the slightest evidence that, so far as the Government was concerned, they would not have met the crisis then existing, or indeed any future necessity demanding the use of notes, just as well without the legal-tender quality as with it; and had the issue been moderate, they would not have depreciated below the general credit of the Government. They would have gone back to the Treasury for taxes, and in the purchase of bonds, and then gone out of it for the payment of its liabilities; and thus they would have circulated freely between the Treasury and the people. In the very nature of things, nothing else was within the limits of probability, and scarcely of possibility; and, hence, there was no imperative necessity for the legal-tender provision, to enable the Government to pay its debts or purchase supplies with these notes, or to get them into general circulation. In this respect it did nothing for the Government in the exigency calling for the issue of notes that could not have been done without it.

But it may be said that the legal-tender property had a tendency to lessen the extent of the depreciation of the notes, that would have

occurred without it. The serious difficulty with this proposition is that it is not true. The history of inconvertible paper money contradicts it. The degree to which notes not convertible into coin on demand will be depreciated depends upon their volume, as compared with the wants of business, and the prospect of ultimate payment. In respect to the first point, the legal-tender property constitutes a most dangerous temptation to overissue, seldom resisted by a government after it has once adopted the policy; and in respect to the second point, the property is a declaration of governmental bankruptcy. As a means of preventing depreciation, it has absolutely no power; and as a financial policy, it is the surest road to the result. No government can safely trust itself the moment it enters upon the business of manufacturing paper dollars as a legal substitute for real dollars. The chances are a hundred to one that it will run the printing press to the depreciation of its own credit, and sink the commercial value of its notes by their excessive volume. This is precisely what was done by Congress, and what, in all probability, would not have been done to the same extent, if the legal-tender policy had not been adopted.

As to *new* contracts, made after the notes had passed into circulation, it is sufficient to say that the legal-tender provision did not and could not lift the notes a hair's breadth above their market value. The Government could not buy with them at their legal value as the equivalent of gold, and nobody else could. Their depreciation was expressed as a commercial fact in the prices of commodities computed in this currency; and the fact that the notes passed from hand to hand as so many dollars, fully competent at their face value to settle previous contracts, did not change the fact of their depreciation, or make them equal to real dollars in purchasing power. They circulated and entered into new contracts for what they were deemed to be worth; and this is just what would have happened if they had not been made a legal tender. The legal-tender property did not release them from the operation of this law. It not only was not necessary to secure the circulation of the notes, but it had no tendency to prevent their depreciation, and added nothing to their purchasing power in new contracts made after their issue. What service, then, did this property directly render to the Government that could not have been just as well rendered without it? None whatever.

Take, secondly, the receivers of the notes in the first instance from the Government, especially the *soldiers*, whose protection formed one of the themes of eloquent appeal by those who advocated the measure on the floor of Congress. Was not the legal-tender quality a benefit to the soldiers, in enabling them to pay their debts at the face value of the notes? This supposed advantage goes upon the theory that the soldiers,

as a body, were *debtors* at the time of the first Legal-tender Act, and could, hence, use the notes at their face value to pay their debts, and could not use notes without the legal-tender quality for the same purpose with equal advantage. We do not know how many of the soldiers were debtors at the time; yet there is no probability that they belonged largely to the debtor class. At any rate, there is nothing in this argument, so far as they were concerned, except upon the supposition of their previous indebtedness. Still further, what advantage did the soldier derive from the legal-tender property when the Government adopted a financial policy, in part for his protection, and then steadily pursued it, which gradually depreciated the money paid to him and finally sunk it nearly two hundred per cent. below par with gold, and correspondingly raised the price of all things upon which his family lived, without an equal advance in his wages? Did this help him or his family? Did a policy that took the direct road to depreciation, and compelled the soldier to accept poor money, help him? Could he compel the grocer, the butcher, or anybody else to receive the money at par with gold? Was not the soldier under the necessity of paying out the notes at their market value, which is all that he would have had to do if they had not been made a legal tender? There was in Congress, as there has since been out of it, not a little of meaningless and empty oratory about the soldier, in advocacy of the legal-tender provision. It did him vastly more harm than good, as it did every man who worked for wages.

As to other persons to whom the Government was indebted at the time—such as contractors, furnishers of supplies, public officers, etc.—the legal-tender provision, so far as it helped them in the payment of their debts, by enabling them to pay in a currency less valuable than that of the contract, did so at the expense of their creditors. If it helped one party, it in the same degree injured the other; and this is precisely what it did in every instance in which the provision operated to secure payment, in a depreciated currency, of a debt previously contracted. Judge Agnew, of the Supreme Court of Pennsylvania, in the case of Shollenberger *v.* Brinton (52 *Pennsylvania Reports*, p. 87), based his defense of the legal-tender provision in part upon its necessity as the means of guaranteeing the *holder* of the notes, and in this way maintaining "the public credit." A law that provides for the downright robbery of the creditor for the benefit of the debtor, and for the benefit of the Government, because it will dispose those who have debts to pay the more readily to receive the notes, is certainly a very novel way of maintaining the public credit.

Chief Justice Woodward, of the same Court, in delivering his opin-

ion in the same case, regarded this feature as the monstrous enormity inherent in the legal-tender law. There were debts in this country to the amount of hundreds of millions of dollars, contracted on the gold basis, when the first Legal-tender Act was passed; and its direct effect, as these debts matured for payment, was to reduce their amount by the whole amount of the depreciation of the notes at the time of payment. A plea for the necessity of the law, based on the advantages to the *holders* of the notes, and regardless of the rights and interests of their creditors, is simply a plea for open and undisguised injustice. It is a plea which, upon its very face, acknowledges an outrage to the rights of one party, and releases another from the full measure of his obligations, as the means of procuring a supposed benefit to the Government. The credit of the Government, in plain English, is to be strengthened by a law which enables the holders of its notes virtually to *steal* the property of others. It first forces the notes upon its own creditors, in order to sustain its credit; and then it forces the acceptance of these notes upon those to whom these creditors sustain the relation of debtors, in order still further to sustain its credit.

Looking, then, at the side of supposed advantages from the legal-tender policy, we deny that there was any moment during the war in which there was any *real* necessity for resorting to it, or that anything was gained by it which could not have been better gained without it. The necessity was purely imaginary.

This, however, is but one side of the question—since, if we take the legal-tender policy, we must take it as a whole, with all its objections and disadvantages; and when we come to this aspect of the question, what we find is that all possible benefits are vastly outweighed by the disadvantages. Considered as a problem in political economy, Professor Sumner says, and says truly, that "the proposition involves an absurdity;" that "whatever strength a nation has is weakened by issuing legal-tender notes;" and that "one might as well say that it is necessary to open the veins of a weak man who has a heavy physical task to perform" (*History of American Currency*, p. 202). This is strong language, yet not too strong for the facts of history, including the history of this country during and since the late Rebellion. It is granted that the issue of Treasury notes was necessary; yet this is entirely distinct from the question whether the annexation of the legal-tender property to the notes was necessary or useful. What the the notes did because they were notes, issued on the credit of the Government, is one thing; and what the legal-tender property did is quite another thing. The present inquiry relates entirely to the latter point.

What, then, did this property, in connection with the policy that ad-

ministered it, do in the way of evil? It started out by violating the very first principles of financial wisdom in forcing upon the people a kind of money that was sure to bring disorder and derangement into all the business operations of society. It flooded the market with a vastly greater quantity of money than the people had any legitimate use for. It inflated prices, stimulated wild speculation, fostered extravagance, promoted dishonesty, invited excessive importations of foreign goods, and drove nearly all the gold out of the country. It changed values by a false and fictitious standard of value, that was constantly fluctuating. It confiscated the private property of creditors to vast amounts by forcing upon them, in payment of their just claims, a kind of currency inferior to that contemplated in their contracts. It gave notice to foreign capital to keep away from the country, and to domestic capital to get away as fast as possible. It fell with oppressive and crushing weight upon those who worked for wages and lived on fixed salaries, by increasing the cost of living, without a proportionate increase of their income. The pittances of the poor intrusted with savings banks, and the limited incomes of widows, orphans, and many aged people, upon which they were dependent for their daily bread, felt the blow of the legal-tender provision. The stocks of private corporations, of States and cities, received for money lent and owned and held abroad, were made payable, as to both interest and principal, in the mere promises of the Government; and the effect was to discredit the Government in the family of nations and cast a dark shadow upon our national honor. The expenses of the war were largely increased by this policy. The people were deceived by it as to the real waste and destruction of the war; and, not distinguishing between a credit currency and capital, they supposed themselves rapidly growing rich, when no such fact existed. The borrowing temper was stimulated to an inordinate degree; and, hence, private corporations, States, and municipalities rolled up immense debts in prosecuting schemes either of a doubtful character or altogether premature in their date. The law of the land made the notes of the United States a perpetual lie, by declaring their equivalence to gold in a court of justice when they were not its equivalent anywhere else. The necessity was created for the difficult steps of a final return to the specie standard of value, with all the evils and losses of the process, or for the permanent divorcement of the country from this standard, which would be a greater curse than the evils incident to a return to it.

Such are some of the fruits, not of issuing Treasury notes, but of attaching the legal-tender property to these notes. The property was not only useless, and therefore unnecessary for the attainment of any desirable end which could not have been attained without it, but, far-

worse than this, it has proved the prolific source of a long and dreary catalogue of evils, and in this respect has simply added another chapter to its well-known history. The Honorable Mr. Morrill, of Vermont, then a member of the House of Representatives and now a Senator of the United States, was right when he spoke of the expedient as "a measure not blessed by one sound precedent and damned by all." The Honorable Roscoe Conkling, of New York State, was right when he gave his reasons "for voting against the attempt by legislation to make paper a legal tender," when he said that "no precedent can be urged in its favor," when he drew a prophetic picture of the evils to result therefrom, and declared his firm belief that "all the money needed can be provided in season by means of unquestionable legality and safety." Senator Fessenden was right when he said that the measure is a "confession of bankruptcy," that "it is bad faith" and "in its very essence a wrong," that it "encourages bad morals," that "it must inflict a stain upon the national honor," that "it necessarily changes the values of all property," and that, as a still "stronger objection," "the loss is to fall most heavily upon the poor." These gentlemen, as well as other Republicans sympathizing with their views, belonged to the then dominant party; and they felt constrained to resist the measure in its inception as unnecessary and unwise.

The majority in the two Houses of Congress were unquestionably influenced by what they regarded as best for the country. Yet, in a sort of half panic, combined with patriotic fervor, they concluded that because money was needed the legal-tender provision was needed. And, so reasoning, they leaped over the Constitution and committed the financial policy of the war and the interests of a great nation to a kind of political economy whose evils have never failed to exceed all its possible benefits.

XIII.

THE LEGAL-TENDER-NOTE SCHEME.

We give the above title to a monetary scheme, which, though as to its central idea, by no means a novelty in the history of the world, is, nevertheless, in this age and country, one of the inheritances of the legal-tender policy adopted during the late war. The fundamental principle of the scheme is that the Government should directly issue all the paper currency in use among the people, declaring it to be "lawful money and a legal tender," and at all times determining its volume. This supposes, of course, the continuance of the present legal-tender notes unredeemed and unpaid, the withdrawal and retirement of all bank circulation and the issue of Government notes in its place, and also further issues of such notes from time to time as Congress shall judge expedient. To these elements is added, as a sort of appendage, the issue of Government bonds bearing interest at the rate of three-sixty-five per cent., exchangeable by the Government on demand for an equal amount of its notes, and always receivable by it upon the return of the notes.

Such is the legal-tender-note scheme which is now propounded for the consideration of the American people, and is moreover urged by a class of speculative financiers as a great improvement of our monetary system. The design of this article is to examine the merits of this plan; and for this purpose the reader is asked to note the following particulars:

1. There is not the faintest shadow of authority for the plan in the Constitution of the United States. It cannot be brought within the scope of the coining power, either as a means or an end, except by the most monstrous perversion of language. Those who talk about coining the *credit* of the Government in the form of legal-tender notes contradict all the dictionaries of the land, and use words in a false sense. Nor does the scheme come within the scope of the borrowing power. The idea that the power to borrow money includes the power to *create* money in this form, for the purpose of supplying a circulating medium, involves a mode of reading the Constitution that reads all the sense out of it, and at the same time robs its language of any definite and certain meaning. Nor has the scheme any relation to the war powers of the Government, since it does not rest upon them as a basis, or even profess to be a means for carrying them into execution. It is a currency

scheme for peace, is proposed in the time of peace, and has no pretense of any justification or foundation in the necessities of war. By no construction, except one that would outrage all the laws of interpretation, can the Constitution be so stretched as to comprehend such a monetary system; and we cannot think that the Supreme Court or any other court of average judicial intelligence would hesitate a moment in declaring it to be unconstitutional. The first thing, then, for these currency reformers to do is to amend the Constitution, and thereby give Congress the power to put their theory into practice; and, while they are about it, they might as well make the amended Constitution consistent with itself by abolishing the coining power altogether. Congress would not need both powers, since the former would render the latter practically useless.

2. This scheme, by contemplating no final payment of the legal-tender notes already issued, is in this respect a scheme for repudiation. These notes are *bona fide* debt obligations upon their face and by the law of their issue. They have been so declared by the Supreme Court of the United States and are so regarded in the Public Credit Act of 1869. They pledge the faith of the nation to payment. This new scheme, however, proposes to repudiate this pledge, since payment of the notes is no part of its purpose. They are to be kept indefinitely in circulation, having the form of debts, but not treated as debts. Their exchangeability for bonds bearing interest at the rate of three-sixty-five per cent. is not a provision for their payment, certainly not *the* provision contained in the contract of issue.

3. The volume of the currency, according to this system, is to be committed to the absolute and exclusive pleasure of Congress. History teaches that paper money, if irredeemable in gold on demand, depreciates in proportion as its volume is increased; and hence the power to control this volume is the power to control the money value of all the private property in the land, and make the whole business of society dependent on the currency will of Congress. Gold and silver distribute and regulate themselves by the natural laws of trade, and so does paper currency when redeemable in these metals; but in this monetary scheme the sovereign will of Congress is to be the sole determiner of the amount of notes to be issued, with no limitation imposed by their redemption in gold. What guaranty could the people have that this power would be discreetly exercised? No government, unless officered by archangels, would be wise enough to decide beforehand just how much currency will be needed for the convenient transaction of business; and it is doubtful whether archangels would be equal to the task. The problem can be solved only under a system that spontaneously accommodates

itself to the movements of trade, expanding or contracting with their expansion or contraction; and for this purpose no plan has ever yet been devised that will at all compare with the bank-note system under the safeguards and regulations of law. Banking responds naturally to the law of supply and demand. Those who advocate this legal-tender-note scheme cannot have well considered what a vast concentration of power it implies in Congress, and with what great liabilities to mistakes, abuses, and corruptions, especially in the direction of overissue, it is fraught. They cannot have read the history of paper money; or, if familiar with it, they are strangely blind to its oft-repeated lessons. The experiment which they propose is not essentially a new one. It has been tried over and over again, and uniformly with disastrous results.

4. The scheme appears equally faulty if we consider the only ways in which a credit circulation can be directly issued by the Government. One of these ways is to create a debt in the currency form to meet any excess of disbursements over receipts; and hence, if the ordinary revenue, as should always be true of every solvent Government in time of peace, be equal to the expenditure, not a solitary note could be issued, however urgently the wants of the people might demand a greater volume of circulation, unless the Government should diminish its revenue or increase its expenses, and by one or the other process run into debt in order to issue more currency. The second method would be to adopt the policy of making loans to individuals or private corporations in the form of Government notes; and this would at once convert the Treasury of the United States into a bank, clothed with the power and charged with the duty of discounting commercial paper, buying bills of exchange, and doing a general banking business. The third method would be to issue notes for the purpose of paying the bonded debt of the Government, exchanging notes for the bonds at the legal value of the former, which would be repudiation to the full amount of their discount as compared with gold, or making the exchange by paying the currency premium on the bonds, and in either way so inflating the volume of the circulation as to depreciate its market value just in proportion to the extent of the inflation. It ought to be sufficient simply to state these possible methods of getting a legal-tender currency out of the Treasury and into the hands of the people. The idea that runs so flippantly in a popular harangue is beset with the most formidable difficulties the moment we examine the *quo modo* of its operation. No one not literally stupefied or frenzied with a visionary theory would recommend the Government to adopt any one of the methods above sketched.

5. The proposed scheme would not and could not adjust itself to the

wants of business, unless the Government should add the banking function to its Treasury Department. This adjustment can be secured only by what is called a commercial currency—a currency that, born of commerce, increases or decreases with its tides. Banking, under the regulations of law, yet free to work its machinery in a normal manner, supplies the requisite conditions of such a currency in its system of discounts and payments. When business is active and a greater volume is needed, the increase naturally flows out in the form of discounts. The banks then enlarge their discount line, and with this the circulation expands. When, on the other hand, the amount of business lessens, the notes issued to meet greater wants naturally return to the banks for redemption, and are not at once reissued to the same extent. Thus the circulation ebbs and flows by banking machinery according to the wants of trade. Its changing volume in actual use is determined by the law of supply and demand, and in this respect its movements are analogous to those of specie. Now, unless the Government shall undertake to furnish a banking system in the operations of its own Treasury, it cannot, upon the very face of the case, give to the people a circulating medium that will spontaneously adapt itself to their business necessities. Bank agency, in the form of discounts, payments and redemption, is indispensable to the end; and the only way in which the Government itself can do the work is to become a banker. Does any one, not a financial lunatic, propose that the Government should add banking to its ordinary duties?

The proper fiscal operations of the Government consist in collecting its revenues and paying them out to meet its current expenses. This it must do. Observe, then, that it collects the largest revenue just when business is most active and when the need for a circulating medium is greatest, and the smallest revenue when the reverse conditions exist. As a revenue collector and disburser of funds for its own expenses, the Government cannot avoid this result. Money goes *into* the Treasury as revenue, and goes *out* of it in the form of disbursements; and in neither movement does the action of the Government have any reference to the wants of business, so as to increase or decrease the volume of the circulating medium according to those wants. The only way in which the Government can obviate results that naturally arise from its purely fiscal function is to become a banker, as well as a collector and disburser of revenue, lending money freely when its collections from the people are largest and their demand for it is greatest. Its fiscal function of collection and disbursement has no relation to their wants, and can have none, as a means of meeting them, unless the banking function shall be added thereto; and this at once makes the Government a banker.

6. The entire withdrawal from the banks of all power to issue a currency would in many parts of the country have the effect of denying to the people the facilities and advantages of a banking institution. This would be the result wherever the reception of deposits alone, without note issues, would not be sufficiently profitable to form any motive for the organization of a bank or the continuance of one already organized. A great many banks, especially in the country districts, would be closed up, and the people would be deprived of the convenience afforded by them, if this new scheme were put into practice. Banking capital would seek other and more remnuerative modes of employment; and this would involve a serious loss to the people.

7. The general credit of no government is good enough to maintain a note circulation at par with gold, except by redeeming it in gold at the option of the holder. If, therefore, this legal-tender-note scheme proposed gold redemption, then, in order to carry it out, the Government would have to keep in its Treasury a sufficient amount of gold to redeem on demand all the notes presented. Supposing the notes to amount to eight hundred millions of dollars, the Treasury would have to carry at all times not less than two hundred millions of dollars in gold. Gold redemption is, however, no part of scheme; and hence nothing is more certain than that the notes—notwithstanding their legal-tender character—would circulate at a depreciated and fluctuating value; and that the extent of the depreciation would in general keep pace with their volume. The scheme, then, proposes a permanently depreciated paper currency, as compared with the money of the Constitution and the money of the commercial nations with which we trade.

It is difficult, without writing a book, to enumerate in detail all the consequences of this one fact. They strike in all directions. By a law as sure as that which governs the tides, this depreciated currency would supersede the general use of gold and silver, and cause them to be exported to other countries. Such has been the effect of the notes now in use, and the effect would be continued. Though the richest gold producing country in the world, we should nevertheless be among the poorest in the money of the world. If the Government should make these notes receivable for customs duties, then it would have no means of paying either the interest or principal of its bonded debt, unless it repudiated the doctrine of gold payment and paid in a depreciated currency, or went into the market as a purchaser of gold, and paid the premium on it as fixed by gold speculators. If, however, the Government continued its present law in respect to customs duties, we should nevertheless have a double legal tender—one of gold and the other of inconvertible paper notes—both having the same legal value for ordinary

debts, yet constantly differing in the degree of their commercial value. Speculation in one of these tenders by buying and selling it at prices computed in the other, would be a permanent business. The whole foreign trade of the country, alike in what is sold and what is bought abroad, must be estimated and expressed in gold values; and as these values, when here expressed in currency values, would fluctuate according to the greater or less depreciation of the currency at one time than at another, our foreign trade and all domestic trade directly dependent upon it, would be in the state of constant uncertainty, perplexity, and danger on the question of prices. We should derive little or no benefit from the natural tendency of the gold treasure of the world to equalize its distribution among the nations of the earth according to their relative demand for it.

This system would, indeed, give us a *home* currency, that could not be exported and certainly would not run away; and the reason would be that nobody outside of the United States would deem it worth enough to accept it in payment for anything. We could not convert it into the money of the world, except at a discount, and could not use it at all as an international medium of exchange. If it be said that this would relieve us from the disturbing influences of foreign trade, then let it be remembered that we cannot separate domestic and foreign trade, except by abolishing the latter altogether. The two kinds of trade, if they exist in the same country, necessarily exist in the state of alliance and merge themselves into each other. That an international medium, as the basis of foreign trade, in current use among the people, is a great commercial desideratum no one doubts who understands the nature of such trade; and that no money that is not the money of *value* in the material of which it is composed can be such a medium is as certain as the natural laws of exchange. Money that has not sufficient value to be exported and still retain its value is by this fact proved to be an inferior kind of money. Yet this is just the sort of money proposed to the people as the permanent money of the country, accompanied with the certainty that it would expel gold and silver from general use. With such a monetary millennium all the industries of the land are to be blest. Printed bits of paper, made money by the naked force of statute law, constitute the beginning, the middle, and the end of the whole system.

8. The three-sixty-five-bond appendage of this scheme adds nothing to its value and is no remedy for its defects. The bonds are to be issued by the Government in exchange for the notes, and the notes are always to be accepted in exchange for the bonds, at the option of their respective holders. The market value of each would rest upon the other, since either by being presented to the Treasury could on demand be converted

into the other. How much, then, would a thousand-dollar three-sixty-five bond be worth? Just as much as a thousand dollars in legal-tender notes. How much would the latter be worth? Just as much as the former. Would either be at par with gold? No. Would either prevent the depreciation of the other? No. Even if the interest on the bond was paid in gold, and the principal was ultimately paid in the same way, this would not save it from depreciation, as the necessary consequence of the low rate of interest; and if neither is to be paid in gold, then we have a paper system of bonds and notes, convertible into each other and each dependent upon the value of the other, without any real and positive value as the basis of either, with the single exception of the paper of which they are composed. Any one who expects that either with such moonshine would be maintained at par with gold has a remarkable faculty of believing.

But would not this convertible system have the effect of reducing the rate of interest, and thus prove a blessing to borrowers? Clearly not. The most that it could do would be to prevent the rate from falling *below* three-sixty-five per cent., since the Government would be ready at all times to pay this rate; but it would have no power to prevent the rate from rising *above* this mark. The people would not lend money to the Government on such bonds when they could get more interest, as would generally be the fact, and would lend only when the market rate of interest was at this point, and would be below it but for the rate offered by the Government. Borrowers would gain no benefit from the system, since, in order to get the notes from the Government, they must first have the bonds, and since, further, in order to get these bonds, they must, if they have not previously obtained them from the Government, as their wants necessarily imply, go into the market and buy them with notes; and if they have the notes, then they do not need to borrow. The system gives no one either notes or bonds; and no one can get either unless he has the other. Either would exchange for the other; but before any one could work the plan he must have one or the other. We do not understand that the advocates of the system propose that the Government should start the people off by making to them a *free gift* of bonds or notes. If it issues either, it must receive an equivalent therefor, at the time of issue.

There is, moreover, no probability that the people would invest their notes in these bonds except for merely *temporary* purposes; and so far as they did this the United States Treasury would be simply a deposit bank, paying interest to the depositors for the privilege of holding their funds, and the bonds issued therefor would be equivalent to pass-books, and all of them would be *demand* liabilities. The banks would avail

themselves of the opportunity when they could not lend money at a higher rate of interest; and it would not be surprising if speculators should see in the plan a chance for testing the resources of the Treasury as a means of affecting the money market. If the amount of these demand-bond liabilities was large, especially if, as anticipated by the advocates of this system, the bonded debt of the United States should be finally changed into this form, the Treasury, besides being ready to pay the current expenses of the Government, would need to keep on hand a proportionate surplus of legal-tender notes to guarantee its own solvency. Without this there would not be a single business day in the year in which it might not be reduced to absolute bankruptcy. The theory places the Treasury in the condition of a deposit or savings bank, and makes every bond issued in exchange for notes a demand liability; and hence, if it went into an extended operation, it would put the credit of the Government in constant peril. The Government would derive no advantage from this part of the scheme; and so far as the people derived any advantage it would be at the expense of the Government.

Contrasted with and opposed to this whole system is the long-tried theory of a banking currency not made a legal tender, not directly issued by the Government, but regulated and guaranteed by the provisions of law and redeemable on demand in specie. This theory proposes that the Government should pay its legal-tender debt as soon as practicable and withdraw the notes from circulation. This being accomplished, then all the fiscal operations of the Government and all the business transactions of society return to the gold standard of value. The money provided for in the Constitution again becomes the money of use, and the Government, so far as the creation of money is concerned, goes back to the function of coinage. Note issues then resume the character of mere representatives of money, and are no longer regarded by law as money itself. What the law does is to regulate banking and guard the rights and interests of the note-holder. This, we say, is the old theory of paper currency, which has been successfully tried by the most advanced nations of the earth for more than a hundred years. And, while it is not absolutely perfect or free from all objections, it has more advantages and fewer disadvantages than any other system for a paper circulation which the wit of man has ever yet invented.

Secretary Chase, who, as is well known, was the framer of our National Banking Law, in his reports of 1861 and 1862 considered the whole subject of Government notes and bank notes in respect to the question of their relative advantages, and gave it as his judgment that the preponderance of advantage is decidedly in favor of the latter. The same question has been subjected to repeated examination in other countries by

eminent statesmen and learned commissions, and the same conclusion adopted. With a few rare exceptions, all the political economists of this country and of Europe—the men who have made the subject a study in the light of history—are unanimous in the opinion that a well-regulated system of bank currency, redeemable on demand in gold, is greatly superior to any possible system of Government circulation. Such a system the country already has by the authority of Congress; and what is now needed is to get the notes of the United States out of the way, by paying and retiring them, and thus remove the last financial relic of the legal-tender policy established during the war.

Whether this shall be done, when it shall be done, and how it shall be done—these are the questions that are now strongly occupying the public attention. The advocates of the legal-tender-note scheme do not propose to have it done at all. Their doctrine moves in exactly the opposite direction. What was resorted to as a temporary expedient at first, and then became a war policy—in regard to the constitutionality and necessity of which we have already expressed an opinion, with its reasons—they desire and design to make the permanent policy of peace. It is to be hoped that the American people will be sufficiently wise to keep these currency schemers and their disciples in the minority.