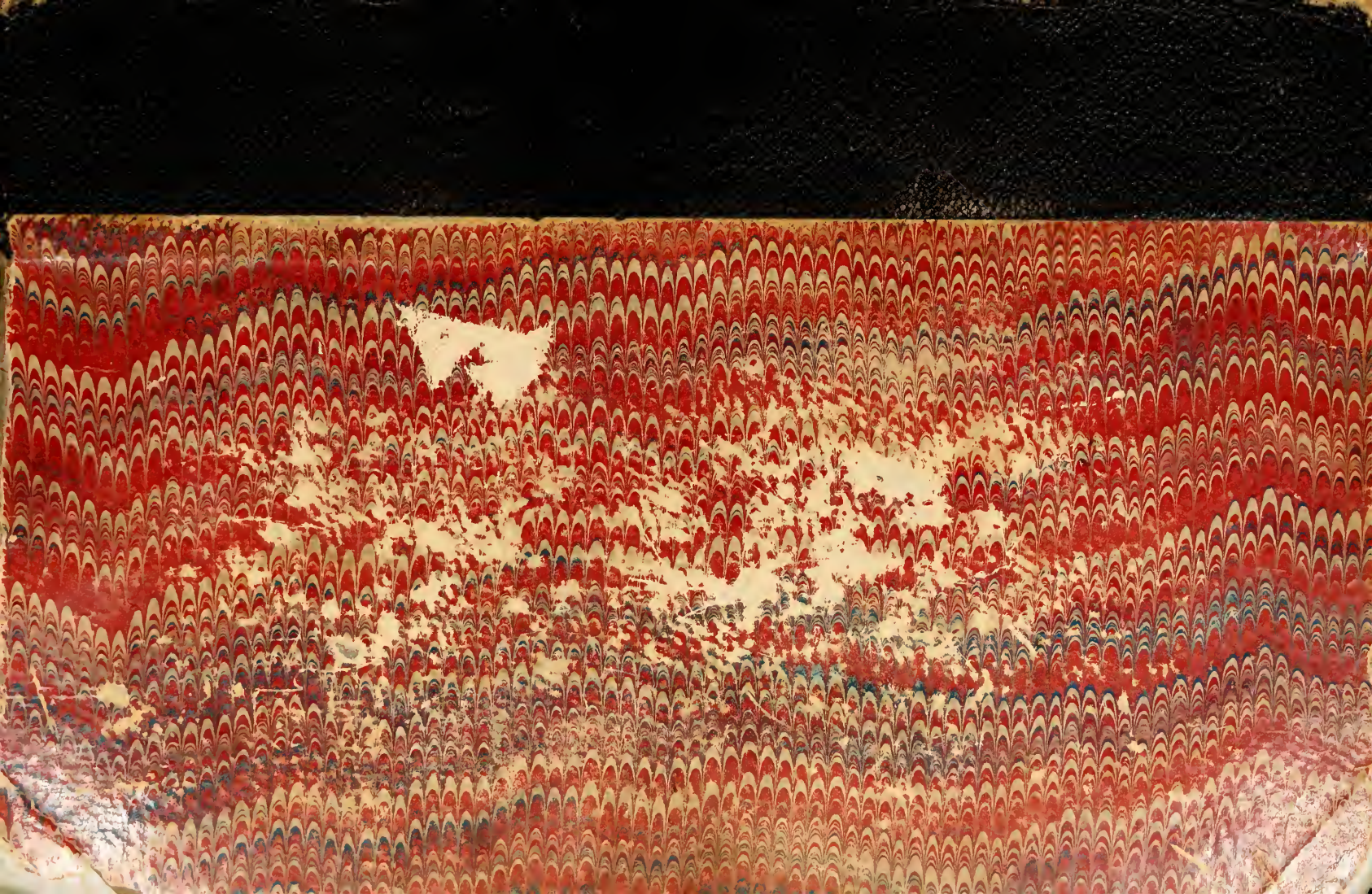

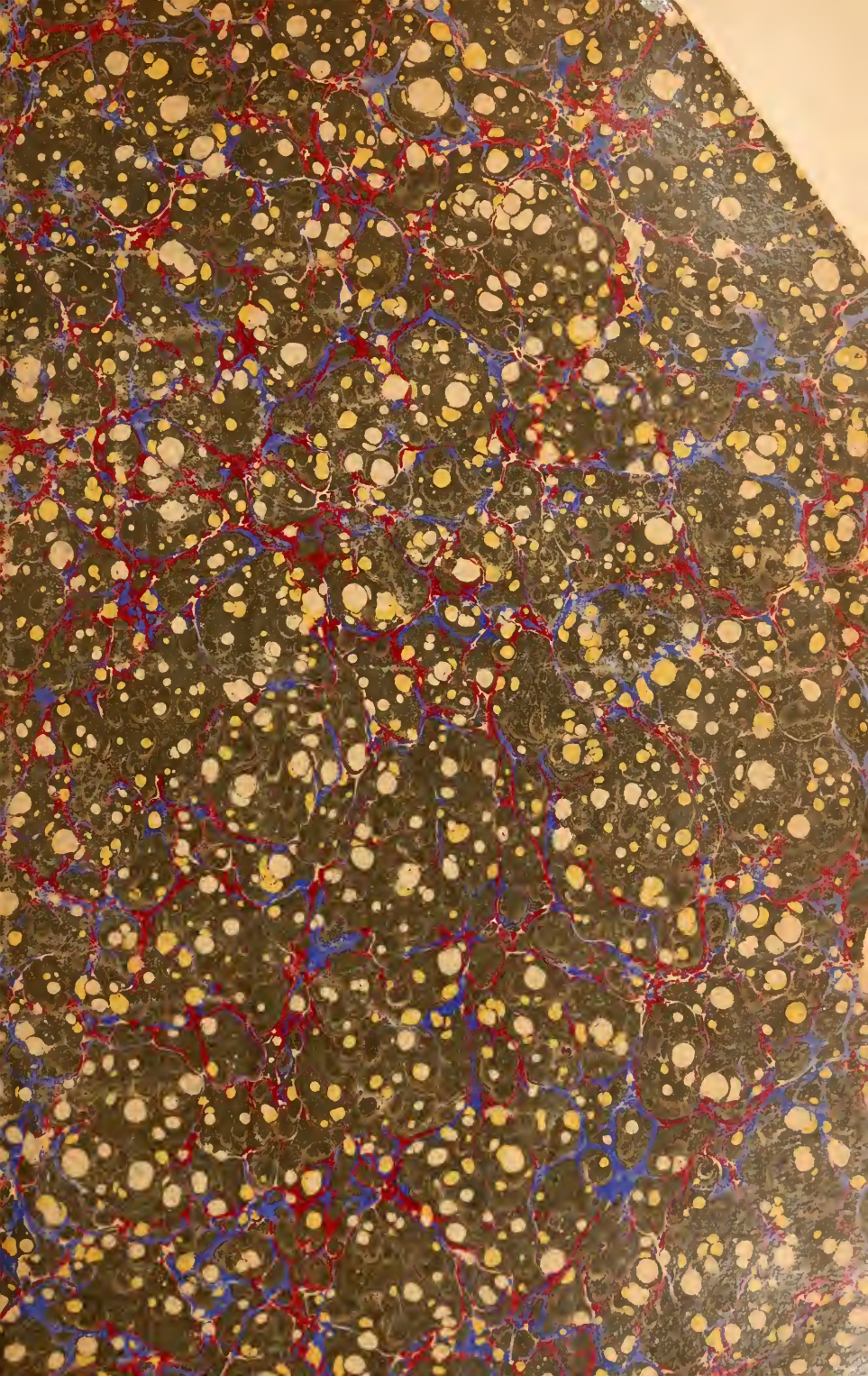

AN ARGUMENT

AGAINST

THE CONSTITUTIONAL VALIDITY

OF

THE LEGAL TENDER CLAUSE,

CONTAINED IN THE ACT OF CONGRESS OF FEBRUARY 25, 1862, AUTHORIZING THE ISSUE OF TREASURY NOTES:

DELIVERED IN THE

SUPREME COURT,

OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT, NOVEMBER 18, 1862,

BY

GEORGE TICKNOR CURTIS,

OF THE NEW YORK BAR.

REPORTED FOR THE AUTHOR.

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. OF LIBERTY.

1862.

NOTE.

The interest of every creditor and the duty of every debtor, and the vast social and commercial interests involved in this question, afford sufficient reasons for the publication of the following argument.

31 Nassau Street, New York, November 20th, 1862.

Una fides, pondus, mensura, moneta fit una.
Et status illæsus totius orbis erit.

BUDELIUS.

Supreme Court,

OF THE STATE OF NEW YORK.

FIRST JUDICIAL DISTRICT—GENERAL TERM.

LEWIS H. MEYER,
Plaintiff,
against
JAMES J. ROOSEVELT,
Defendant.

Argument for the Defendant.

MAY IT PLEASE YOUR HONORS :

Before submitting anything to your deliberations upon this case, I desire publicly to express my thanks to the defendant for having called me into it. Such a manifestation of confidence on the part of a gentleman of my own profession, possessing great experience, and holding an eminent position in this community, would, under any circumstances, be most gratifying ; * and when extended to one who, if not altogether unknown here, now appears for the first time in the tribunals of this State, it is right that the courtesy should be acknowledged, and that every effort should be made to justify the trust that has been reposed. At the same time, it would be mere affectation on my part if I were to treat this question as one new

* The defendant was Judge Roosevelt, late U. S. District Attorney for the Southern District of New York, and more recently a Judge of the Supreme Court of the State.

to my studies, or as if the opinions I am to express upon it were of recent formation. Those opinions may be very erroneous, but they are the result of long-settled convictions.

It appears that this defendant, a citizen of this State, acting as a trustee, in the year 1854, loaned the sum of $8,000 to one Samuel Bowne, also a citizen of this State, and gave to Bowne his check upon a bank in this city, "payable in gold, at the option of Bowne." That Bowne made his bond to the defendant in the penal sum of $16,000 "lawful money of the United States," conditioned, however, to pay the sum of $8,000 on the 23d of August, 1857, and also made a mortgage upon certain real estate, situated in this State, to secure the payment of the debt covered by the bond, which mortgage acknowledges that the plaintiff is indebted to the defendant in the sum of $8,000 "lawful money of the United States."

It further appears that the plaintiff, having become the owner of the mortgaged premises, on the eleventh day of June, 1862, tendered to the defendant as payment of the debt and interest, $8,170 in Treasury Notes of the United States, issued under the Act of Congress passed February 25, 1862, and claimed therefor a discharge of the mortgage. The defendant refused to receive these notes as payment of the debt, but subsequently received them under an agreement that his right to exact payment in gold should be submitted to this Court, upon a case stated under a provision of the Code.

That this was a contract payable in gold, or its equivalent, there can be no question. When the debt was contracted there was no "lawful money of the United States" but gold and silver. When the debt became due, August 23d, 1857, it was due in gold or silver money of the United States. The defendant's right under the mortgage then became perfect; it was a right to foreclose and sell for the payment of the mortgage debt measured by the current coin of the United States. It is now claimed, however, that an Act of Congress, passed more than four years after the debt was thus due and payable in coin, and after the defendant's right of foreclosure and sale for coin had become perfect, enables the plaintiff to discharge the lien of this mortgage by tendering Treasury Notes, which were at 4 per cent. discount below the value of coin at the time of the

tender, and are now vastly lower. The case, therefore, presents the naked question of the power of Congress thus to affect the value of a debt which was due and payable in specie more than four years before the Act was passed; which debt was due from one citizen of this State to another citizen of this State, and was secured by a mortgage upon real property situated within the same State.

I may remark, in passing, that the mere statement of this case precludes the possibility of resorting to the Federal power of regulating commerce, as the means of upholding the Act of Congress in its bearing upon this case. Whatever power over the currency or its uses may result to Congress from its power to regulate commerce, such power can never extend to affect contracts between citizens of the same State, for the manifest reason that the Commercial Power embraces only "Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

I do not wish, however, to be understood as admitting that resort could be had to the Commercial Power, even if this debt were between citizens of different States; for it will be seen that the rule for which I shall contend is alike applicable to *all* the powers of Congress. But I make this remark respecting the Commercial Power for the purpose of having it understood that *to this case* that power is inapplicable.

The Act of Congress of Feb. 25, 1862,—under which the plaintiff claims the right to discharge the lien of a mortgage by the tender of Treasury Notes to the nominal amount of the mortgage debt,—authorized the issue of "one hundred and fifty millions of dollars of United States notes, on the credit of the United States, not bearing interest, payable to bearer at the Treasury of the United States." Two uses of these notes by the public at large are contemplated by the act: *First*, They are made "receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in *coin*;" and *Secondly*, It is provided that these notes "*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." Provision is also made for the exchange of these notes at the treasury, in sums of not less than fifty dollars, into interest-bearing bonds of the United States; and for their reception by the United States "*the same as coin, at their par value*," in payment of future loans that may be negotiated by the Secretary of the Treasury.

It thus appears, at the start, that the Act of Congress itself recogizes and undertakes to meet the practical distinction between these notes and "coin." As a means of sustaining the credit of the Government, and in anticipation of a possible and probable depreciation of these notes below the standard value of coin, the Act pledges the faith of the Government that it will pay the interest on its own debt in coin alone, and that it will receive these notes as equivalent to coin in payment of future loans to the United States. But while it thus clearly recognises a possible distinction in value between these notes and coin, the Act requires all creditors, excepting the holders of Government bonds, to receive these notes "as lawful money, and a legal tender in payment of all debts, public and private, within the United States." So that, if this clause of the Act is valid under the Constitution of the United States, every private creditor, every State in the Union, and every municipal corporation of every State in the Union, every foreign sovereign, and every subject of a foreign State, whose "debt" is payable "within the United States," must, at the option of the debtor, receive these notes in "payment" of that "debt," be their depreciation below the standard value of coin what it may.

Such is the stupendous operation of this act, if it is constitutionally valid. It apparently sweeps into the control of the Government of the United States every private contract, every chose in action, every money demand, existing at the time when the act took effect; and declares, in substance, that although the debtor may have contracted to pay in what is of the standard value of the specie dollar, he may and shall be discharged of his obligation by tendering what may be of the value of only ninety, seventy, or fifty cents, according to the depreciation of these notes below the standard value of the dollar at the time of the tender. This clause of the act, if valid, therefore, by its

operation transfers from creditors to debtors an amount of property, the aggregate of which the imagination can scarcely measure.

The particular sum in controversy in this case is not large; but behind it are untold millions, which are to be affected by the decision that may be pronounced by this Court, and by the tribunals which will revise its judgment.

It is apparent that no question of greater magnitude, touching the rights of property, could possibly come before a Court of Justice. It is now to be determined whether, under the Constitution of the United States, Congress has power to create two standards of value—the one residing in and represented by the current "coin" of the nation—the other residing in and represented by a Government paper promise;—and whether, irrespective of the relation of actual value between these two representatives of money, Congress can compel a private creditor to receive his debt in the latter, when his debtor contracted to pay only according to the former standard. This, then, is the real question, now for the first time made in this country: Has Congress authority, under the Constitution, to create two standards of value, and to force upon private creditors, in payment of their debts, that standard which is below the regulated value of the coined money of the United States? I say that this is the real question; for your Honors will observe that the Act of Congress now in question does not undertake to debase the coin of the United States, or to alter the statutory value of foreign coin that may be in circulation in this country. On the contrary, it not only leaves the "coin" of the country just where it finds it, in point of denominational and statutory value, but it presupposes that the standard of value established in the coin may be one thing, and the standard represented by the market value of these Treasury Notes, and forced upon creditors by their being made "lawful money, and legal tender," may be another thing. The distinction is just as palpable on the face of the section, as if it had declared in so many express terms that for certain purposes there shall be hereafter in the United States one standard of value, expressed in and represented by the statute value of the coin of the United States, and for all other purposes there shall be another standard of value, which

shall be the market price of Government paper promises. The learned counsel for the plaintiff have to maintain that Congress has this power. This, then, is the first question I shall consider.

I. *Has Congress power, for any purpose, to make anything "lawful money," in the payment of a private debt, excepting the "coin" of the United States, or "foreign coin," the "value" of which Congress has previously "regulated?"*

Your Honors will not fail to see that this is a very different question from that of the supposed power of Congress to issue, or to authorize the issue, of a paper currency. It may be that the issuing of a paper currency, whether founded or not on a specie basis, is within the powers of Congress; although very great authorities have doubted it. But the act now in question has gone not only to the extent of issuing a government paper currency, but it declares that all debts may be paid in that currency, whether its value at the time of payment is or is not equal to the standard of value fixed in the coin of the United States. This power I utterly deny.

I do not hesitate to say, that in passing this act, Congress has lost sight of one of the great fundamental objects for which the Constitution of the United States was established, and has also overlooked the force and effect of one of its express provisions. It is matter of history, too familiar, and even too notorious, to require proof, that the disordered condition of the currency of the several States, the abuses attending the issues of paper money, and the monstrous frauds resulting from the enactment of "legal tender" laws, in the absence of any uniform standard of value, were the controlling reasons for vesting in Congress power to create and maintain such a standard. That power, contained in the 8th section of the 4th article of the Constitution—"To COIN MONEY, REGULATE THE VALUE THEREOF, AND OF FOREIGN COIN"—has hitherto been supposed to have embraced all the authority given to Congress for the creation of a standard of value; so, that when coined money has been issued, and its value and the value of foreign coin have been regulated, the power of Congress over the subject of a standard of value, or a representative of value, is exhausted. This view of the clause

necessarily results from its terms, and the nature of the subject. The authority given is two fold—first, it is to *coin* money; and secondly, it is to *regulate the value of coined money;* and as nothing can answer to the plain meaning of these terms, but some kind of what is known as "coin," being a piece of the precious metals, with "the image and superscription" of the public authority impressed upon its face, and as the value of such coin, when regulated, must, from the nature of the case, be the standard of value, it follows irresistibly that the standard of value must be expressed and must reside in coined money. Looking, therefore, to the terms of the coinage clause, and to the undisputed purpose for which it was placed in the Constitution, it has never, heretofore, been doubted that it imposed upon Congress a sacred trust, to be performed for the people of the United States, and to be performed in one way only. What that trust is, I shall not describe in language of my own, but shall resort to a precisely accurate definition of it, given by the Supreme Court of the United States, in the case of the United States *vs.* Marigold, 9 Howard, 567. This was an indictment under the act of Congress, of March 3, 1825, for *importing* spurious coins, with intent to utter them as true; and it was denied that the Constitution had given to Congress power to punish anything but the offence of *counterfeiting* the coin. Upon this objection, Mr. Justice Daniel, pronouncing the judgment of the Supreme Court, said, in reference to the clause of the Constitution giving the power to coin money, as follows:

"But the twentieth section of the act of Congress, of March 3, 1825, [punishing the offence of importing spurious coin,] or rather those provisions of that section brought to the view of this Court by the second question certified, are not properly referable to commercial regulations, merely as such; nor to considerations of ordinary commercial advantage. They appertain rather to the execution of an important trust invested by the Constitution, and 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.* 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;* and on account of the impossibility

which was foreseen, of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which, in different communities, would be brought to bear upon this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the Government been left disabled and impotent as to the means of securing the objects in contemplation.

"If the medium which the Government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized—one possessing no intrinsic value—then the power conferred by the Constitution would be useless; wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are, when the public good requires it, bound to perform; and on this principle, having emitted a circulating medium—*a standard of value indispensable for the purposes of the community, and for the action of the Government itself;* they are, accordingly, authorized, and bound in duty, to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin, in lieu of the constitutional currency."

U. S. *v.* Marigold, 9 Howard, 560, 567

There is, may it please your Honors, very weighty matter in this decision which I have now read. I pray you to observe that the construction of the coinage clause in the Constitution was the very thing in judgment in the cause. It was held to have vested in Congress an exclusive authority over the standard of value; that this exclusive authority imported *ex vi terminorum* a trust and a duty of creating a *uniform* and *pure metallic* standard of value throughout the Union; and hence, that Congress was both authorized and bound, when it had once created such a standard, to maintain it as the sole standard of value against all attempts to introduce what has in itself no intrinsic value, or what might tend to expel the regulate! coin of the Union from general use.

If, then, it be true that Congress is bound to create and maintain a metallic standard of value, by making a coinage and regulating its value by law, how is it possible for Congress to enact, that for all the purposes of the liquidation and payment of private contracts an antecedent promise to pay a dollar shall be subsequently taken as a promise to pay in something that may be of less value than a coined dollar at the time of payment? Is this anything more or less than the creation of two standards of value, one of which runs from day to day, and from hour to hour, upon a sliding scale, and is, from the very provisions of the act itself which creates it, presupposed to be liable to be of less value than the statute denomination of a dollar represented by the constitutional coin of the Union? I put it to the ingenuity and ability of the learned counsel for the plaintiff, who is to follow me, to show, if he can, what becomes of the trust and duty of *creating* and *maintaining* a *metallic* standard of value, when Congress undertakes to make all debts which were contracted in reference to the metallic standard of value, payable according to a standard that varies with the market price of Government paper. I put it to him to show, if he can, how there can be two descriptions of "lawful money" in these United States for the purpose of determining when a promise to pay a dollar has been fulfilled. I put it to him to ask himself how he supposes the framers of the Constitution could have thought they were doing what the country required of them, if they failed to make an instrument of government that would secure one sole and exclusive standard of value for all purposes and all time; or what would have been gained by the adoption of that instrument, if, under it, all debtors could compel all creditors to receive, as of the regulated value of a dollar, what is of a wholly indeterminate and fluctuating value.

Let me illustrate the operation of this act by referring to the kindred trust and duty of Congress to "fix the standard of weights and measures;" a power that was conferred in the same clause of the Constitution with the power to fix the standard of value, and for the same great object of "promoting the general welfare" by the establishment of a uniform standard of quantities throughout the whole country. Congress legislates, we

will suppose, and fixes the standard of weights and measures as the Constitution required of it. Will any man undertake to say that its power over the subject is not then exhausted when it has thus discharged its trust? Will any one pretend that the subject of the power is divisible, so that after the standard is fixed, and while that standard is still the law of the land, a varying, shifting, and indeterminate measure of quantities may be forced into the contracts of the people for the purpose of fulfilling contract obligations? The very idea of a *standard* of quantities implies uniformity—the existence of one, and only one, absolute measure. So it is with the standard of values. Once fixed, it is incapable of division. It cannot be one thing in New York and another thing in Pennsylvania. It cannot be one measure of value for the payment of a promissory note, and another measure for the payment of duties to the Government, or the payment of interest on the public debts. It cannot be one thing to-day and another to-morrow. It cannot at the same time reside in the coined money of the United States, and in the paper promises of the Government, or of a private corporation, or of a private individual.

But I presume it will be said that the power to enact the clause of this act now in question is not to be referred to the coinage clause of the Constitution; that it does not undertake to change or displace the metallic standard of value, but to make a paper circulation that shall represent on its face a given amount in dollars; that the Government itself receives this paper as a true representative of its nominal value for all but one exceptional purpose, and that to secure and sustain it in the confidence of the public, it requires all private creditors to receive it in the same way. In this view of the case, which is as strong as I know how to state it in favor of the act, it is of necessity assumed that Congress has power to make a paper currency, from motives of public policy, which shall, *in the event of a depreciation*, reduce the actual value of a private contract, *to just the extent of depreciation of the medium thus provided for payment*. If this was not the intent of the act, why provide that the notes shall be a legal tender? It is only upon the supposition that, after all has been done which Congress can do, or sees fit to do, to sustain the market value of these notes, they may

yet be of less value than the coin of the Union, that there can be any object in providing that private creditors shall receive them as "lawful money," or, to use another and equivalent expression of the act, "the same as coin, at their par value." Now, the power of Congress to make such a law necessarily implies an authority, in the execution of some one or more of the specific powers conferred by the Constitution of the United States, to make anything but the regulated coin of the United States a legal tender in the payment of private debts.

Of course, this supposed authority must be referred to the execution of some particular power or powers embraced in the Constitution. It will not do to say that the Constitution does not expressly prohibit Congress from issuing "bills of credit," or from passing "laws impairing the obligation of contracts;" and therefore it may do what is not expressly prohibited. You cannot so construe, and you cannot so execute the Constitution of the United States. In the case of a supposed State power, we look to see whether its exercise is prohibited by the Federal Constitution. If not, it may be exercised. But in the case of a supposed Federal power, the rule is exactly the reverse; unless it is expressly granted, by the Federal Constitution, or fairly to be implied from the provisions of that instrument, it cannot be exercised. This principle will not be doubted; and it is equally undeniable, that when any power is asserted under the Federal Constitution, especially if it be out of the ordinary course of legislation, the burthen of establishing its existence is upon him who claims under it.

I advance, therefore, to the discussion of the second question on which I shall ask the judgment of the Court.

II. *To what power or powers conferred by the Constitution is this law to be referred?*

It is not needful for me to remind your Honors that the Constitution of the United States contains a grant of certain specified powers, in the execution of which the employment of money, or some representative of money, is essential. Not to enumerate others, this is obviously true of the powers "To pay the debts of the Union;" "To establish post-offices and post

roads;" "To raise and support armies;" "To provide and maintain a navy;" and so of many other powers. But to whichsoever of these or any of the enumerated powers of the Constitution we refer this or any other law, we must still find in the Constitution either an express or an implied authority to make the law in question. Ordinarily, the legislation of Congress is in direct execution of some one or more of the powers of the Constitution, and is seen to be so upon the face of the act that is passed. But here is a law of an extraordinary character, asserting an authority over the value of private property in dealings between man and man; and, to be valid, it must be shown to be in the execution of some authority conferred by the Constitution. By what process of reasoning is that authority reached?

In an opinion given by the learned Attorney-General of the United States, before this act was passed, this authority is supposed to be found in that clause of the Constitution, which closes and completes the legislative power of Congress, in these words:

"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."

Whenever the meaning and operation of this clause of the Constitution is in question, of course we are apt to be led into a very broad field of inquiry. But it should always be remembered that when the validity of a particular law is brought to the test of the meaning and operation of this clause of the Constitution, the inquiry is narrowed to the correspondence of the particular law with the measure of power given in the clause. I shall, therefore, now consider two questions.

1st. What is the measure of legislative power given in this clause of the Constitution?

2d. Is this law within, or is it beyond, that measure?

1. What, then, is the measure of the legislative power of Congress given by this clause of the Constitution? There is no sort of question that the clause is not to be construed as giving unlimited, or what, in English constitutional law, is sometimes called "omnipotent" power. Such a construction would impute to those who made a limited government, bestowing upon it certain specific powers for certain special objects, an intention to make the means of effecting those objects wider and greater than the ends to be accomplished. The very introduction of such a clause after the recital of the objects to which the powers of Congress were to extend, implies a measure of the extent of authority that was to be given in the choice of means for reaching those objects. So, too, on the other hand, it is equally manifest that the clause is not to be construed in a narrowly restricted sense, so as to deprive Congress of a choice of means in the execution of its enumerated powers. The very same reason which excludes the latitudinarian or unlimited construction, excludes the narrowly restricted operation of the clause. That reason is found in the simple fact that the clause is present in the Constitution. It was put there in order to express a *measure* of legislative authority; and such a measure equally implies that the authority given is neither unlimited nor nugatory.

Accordingly, it is not at all difficult to discover the extent of this authority from the terms of the clause. On the one hand, they do not merely give a naked legislative authority—an authority to pass laws—but they define that authority. They give authority to make *all* laws of a certain character, possessing certain characteristics, and bearing certain relations to the execution of the particular power or powers which are to be exercised through those laws. Thus they are to be laws which are "necessary and proper for carrying into execution the foregoing powers." No one will now contend, no one of any authority in our juridical or political history ever has contended, that these are not words of qualification and definition. They may not be in one sense words of restriction; they may not have been, and certainly were not, used for the purpose of

excluding all choice of means. But the very fact that they were used at all, and used to create some latitude of choice, establishes conclusively their character as words of qualification. The authority which they express is an authority to use means which bear certain relations to the ends that are to be accomplished. The laws that are to be passed must not only execute some one of the specific powers of the Government, but they must be "necessary and proper" to that execution. There must be a certain adaptation, correspondence, direct relation as of means to an end, between the power that is to be "carried into execution" and the law by which that execution is to be effected. What that correspondence and relation must be I hope to show hereafter, both upon principle and abundant authority. At present, I will show from contemporaneous construction, that I have correctly described the purpose for which this clause was placed in the Constitution.

All contemporaneous evidence assures us that the design of the framers of the Constitution was to create a government that should possess some power of direct legislation. Power to make *laws*, in the proper and full sense of that term—namely, rules of action to be enforced directly upon the people—did not belong to the Congress of the Confederation. Nominally, many of the subjects on which it was authorized to act were the same as those embraced in the Constitution. But as the edicts and ordinances of the Congress of the Confederation upon these subjects could, from the nature of the Union, be addressed only to the States for execution, they were not, in an accurate sense, *laws*. It was for the purpose of changing this principle of the Union, and to enable Congress to exercise one of the attributes of sovereignty, that the Constitution gave it a direct legislative faculty. But, inasmuch as this was a wholly new principle of Union, as the Government was still to be a limited one in respect to the subjects on which it could act, and as it was necessary to guard it against the result of passing beyond the proper sphere of those subjects into the domain of unlimited political action, it was deemed expedient to define its general legislative power by a special clause. The grounds of this expediency are set forth with great distinctness in the 44th Num-

ber of the Federalist, written by Mr. Madison. It is there shown, that the purpose of this clause was to define *expressly*, by apt and proper terms of description, the same authority, in respect to the choice of means for executing the general powers of the Constitution, that would have resulted to the Government by *unavoidable implication*, if this clause had been left out. For the sake of removing the doubts and obviating the objections that would spring from the exercise of an *implied* legislative authority, the same extent and nature of authority that would, upon sound reasoning, have been *implied* from the grant of the general powers, was *expressly* described. Now, let us see, from the language of Mr. Madison, what the extent and nature of that *implied* authority would have been.

"Had the Constitution been silent on this head, there can be no doubt that all the *particular* powers *requisite as means* of executing the *general* powers would have resulted to the Government by *unavoidable implication*. No axiom is more clearly established in law, or in reason, than that wherever *the end* is required, *the means* are authorized; wherever a *general* power to do a thing is given, every *particular* power *necessary* for *doing it* is included. Had this last method, therefore, [omission of the clause] been pursued by the Convention, every objection now urged against their plan would remain in all its plausibility; and the real inconveniency would be incurred of not removing a pretext which may be seized on critical occasions for drawing into question the essential powers of the Union."

(The *Federalist*, No. 44.)

Here, then, we have an authoritative exposition of the meaning of this clause, by one of the most important of the framers of the Constitution. It was designed, says Mr. Madison, to supply the place of *implications*, by an express declaration that the authority of Congress should extend to the use of all means which are *requisite as means* for executing their enumerated powers. The particular power of raising an army, or of carrying on war, or of paying the debts of the Union, being the thing that is to be done, the means necessary for doing it are included. There is therefore to be a relation between the means and the end: the means are to execute the power.

To the same effect Judge Wilson, another of the framers of the Constitution, explained this clause to the Convention of Pennsylvania, as follows:

"When it is said that Congress shall have power to make all laws which shall be *necessary* and *proper*, those words are limited and defined by the following: 'for carrying into execution the foregoing powers.' It is saying no more than that the powers we have already particularly given, shall be effectually carried into execution."

(Elliott's Debates, vol. 2, p. 468.)

The same explanation was made by the friends of the Constitution in all the State Conventions, and it is beyond controversy that this was the sense in which the people understood and ratified the clause in question.

I pass now to the next important source from which to ascertain the interpretation given to this clause, by those who made the Constitution, and who undertook to administer it when it had been made. In the great controversy which arose early in the administration of Washington, respecting the power of Congress to charter a Bank of the United States, everything depended upon the meaning and application of this clause of the Constitution; for no one pretended that the power to charter a bank was anywhere expressly given. In the very important debate which took place in the House of Representatives, Mr. Madison, and Mr. Giles and others, opposed, and Mr. Ames, Mr. Sedgwick, and others defended the constitutional power of Congress to create a bank. Whoever will study that debate, will observe that there was no substantial difference between the two sides respecting the authority of Congress to make all laws necessary and proper to execute their enumerated powers. Mr. Madison and Mr. Giles did not assert that the terms of the clause restricted Congress to what was an indispensable means of executing a power. Mr. Ames and Mr. Sedgwick did not contend that the clause imported an unlimited legislative authority. Both sides allowed that there is a latitude of choice, but that that latitude ends when you cease to show a relation between the measure proposed and the power that is to be executed—a relation of means to an end. The

real difference of opinion was on what may, in a sense, be called a question of fact; namely, whether a bank really stands in that relation to the execution of any of the enumerated powers of Congress; whether it is in truth an instrument, the employment of which can be said to be in any just degree necessary to the exercise of the enumerated powers. Mr. Giles expressed the real gist of the controversy very tersely. He conceded the general truth of the proposition, that when certain general powers are given, the means necessary to their specific execution follow; but, he said, "the fallacy consists here in the application of the maxim to this particular case." A majority of Congress, however, thought otherwise, and they passed the bill chartering the first Bank of the United States, notoriously upon the doctrine that a bank, although not an indispensable, is yet a "necessary"—that is to say, a direct, appropriate, and convenient instrument for executing some of the powers of the Constitution.

(Gales and Seaton's Debates in Congress, 1st Congress, vol. 2, pp. 1944, 2012.)

So likewise, in the opinion given by Hamilton to the President on the power of Congress to pass this bill—that opinion which determined the mind of Washington, and which is, perhaps, as profound in its reasoning as anything that ever proceeded from the human understanding—it is not pretended that this clause of the Constitution called into being an unlimited legislative authority. The intellect of Hamilton was incapable of anything so absurd as the sweeping constructions to which times like the present have accustomed our ears. He knew that to place the charter of the bank on the doctrine of an unrestricted power would *peril its existence*. He knew that the intellect which he was to instruct and satisfy—which never failed to weigh justly and calmly all the reasons on all sides of a great question, and which was habitually under the control of the highest conscientiousness ever given to man — would have rejected such a doctrine in an instant.

Hamilton placed his construction of the Constitution upon the only true and impregnable ground, namely, that the incidental or implied powers of the Federal Government extend to

those things, and those only, which are requisite as *means* to the accomplishment of the *ends* for which it was created. No government, he argued, has a lawful right to do *what it pleases;* but every government that is clothed with sovereign powers has a lawful right to use any instrument in the execution of those powers, which bears a direct natural relation as a means to the end for which the power is to be exercised, and which is not immoral or pernicious. A few citations from his opinion will make his meaning and the meaning of this clause of the Constitution quite clear:

"Every power vested in a government is in its nature *sovereign*, and includes, by force of the term, a right to employ all the *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society." * * * * *

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

"The doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the National Government is sovereign in all respects, but that it is sovereign to a certain extent; that is, to the extent of the objects of its specified powers. It leaves, therefore, a criterion of what is constitutional, and of what is not so. This criterion is the *end*, to which the measure relates as a *mean.* If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further condition, which may materially assist the decision: Does the proposed measure abridge a pre existing right of any State or any individual? If it does not, there is a strong presumption in favor of its constitutionality, and slighter relation to any declared object of the Constitution may be permitted to turn the scale." (Works of Alexander Hamilton, vol. 4, pp. 105, 110, 113.)

There is, then, according to the views of this great jurist and statesman, a criterion by which to determine the extent of the legislative authority of Congress. This criterion embraces four elements:

1. The measure must have an obvious relation as a *means* to the exercise of some specified power of the Constitution as an *end*.

2. It must not be forbidden by any particular provision of the Constitution.

3. It must not be immoral, or contrary to the essential ends of political society.

4. It must not abridge a pre-existing right of any State or individual.

It was the opinion of Hamilton that if these positive and negative qualities are found in any measure of Congress it is constitutional, whether it is more or less necessary in the sense of utility. If these qualities are not found in an act of Congress, it is unconstitutional, be it ever so much adapted to promote the convenience of the Government. It was upon the ground that the incorporation of a bank possessed these positive and negative qualities, that Hamilton rested the power to create it. Whatever we may think of his reasoning on this question of the relation between a bank as an instrument and the execution of certain of the powers of the Government, we can be at no loss to understand the rule by which he tested its constitutionality. That rule is as broad as the most latitudinarian school of construction can desire to have it.

Moreover, may it please your Honors, it is, in its most important features, the rule that has been followed by the Supreme Court of the United States. The meaning of this clause of the Constitution is no longer an open question; it is a question adjudicated, decided, fixed, by authoritative construction, as firmly as any question in our jurisprudence; and where it has been fixed it must remain, until the same high tribunal unsettles or reverses it. We are no longer at liberty to say that the legisla-

tive authority of Congress depends upon broad language of the Constitution, as yet undefined. Adjudications binding upon this Court, and upon every other tribunal in this country, have established that there *is* a criterion by which the constitutionality of any act of Congress may be judicially determined.

In 1805 the power of Congress to pass an act securing to the United States a prioirty of payment out of the assets of an insolvent debtor, came before the Supreme Court. Upon this question the Court (Marshall, C. J.) said :

"In the case at bar the preference claimed by the United States is not prohibited ; but it has been truly said that, under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.

"It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

"In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

"Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are, *in fact, conducive to the exercise of a power* granted by the Constitution." (United States *vs.* Fisher, 2 Cranch, p. 212.)

Here, then, it is found : 1st, that the Constitution does not prohibit such a preference ; 2dly, that the securing what is due to the United States through the instrumentality of such a preference, is the use of means which are *in fact conducive* to the exercise of the power of paying the debts of the nation. This is Hamilton's rule precisely in respect to two great features of the criterion which he adopted.

But a still more ample affirmation of the rule was given in the controversy respecting the bank, in McCulloch *vs.* Maryland, 4 Wheaton. The chief value of that great decision to the people of the United States does not at all depend upon its

having settled the particular question respecting the constitutionality of a bank. We may or may not assent to the reasoning by which Chief Justice Marshall brought the bank as an instrument within the limits of the constitutional powers of the Government. That particular question is, perhaps, among the dead past. But while the Constitution remains to the people of this country, the *measure* of the legislative authority of Congress, applicable alike to every law that it can enact, the same yesterday, to-day, and to-morrow—varying with no exigencies, shifting with no changes of fortune—must ever be a thing of living concernment to the American people. That measure was stated in the case of McCulloch *vs.* Maryland; and I affirm, with all confidence, that it furnishes a criterion by which you can determine the validity of the law that is now before you.

In the first place, this decision ascertained the force of the terms "necessary and proper." It rejected the construction which would confine the meaning to what is indispensable, and extended it to include things that conduce to the exercise of a known general power, and may, therefore, be seen to stand in the relation of means to an end. But the rule was not allowed to rest there: for, as there may be means which bear a relation to the end of a known power, but which may yet be inconsistent with other provisions of the Constitution, it is not to be presumed that they are "necessary," because they cannot be "proper." The further limitation, therefore, of conformity with the Constitution itself, was added to the rule.

These qualifications, I affirm, are embraced in the criterion laid down by the Supreme Court, in the case of McCulloch *vs.* Maryland. Throughout the masterly opinion of the Chief Justice, in that case, it is constantly laid down that the means chosen to execute any power of Congress, must be "appropriate and conducive to the end" of that power, and must not be repugnant to the Constitution itself. After placing this criterion in a great many different lights, he sums up the rule as follows:

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it con-

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

From this rule, the Supreme Court of the United States have never departed, and they have repeatedly acted upon it.

Thus, in Wayman *vs.* Southward (10 Wheaton, 1), a question was made whether Congress has power to regulate the service of executions issued on judgments recovered by individuals in the Courts of the United States ; and it was held that an execution of a judgment bears such an obvious relation to the exercise of the judicial power, as to bring a law providing for its service plainly within the power to pass all necessary and proper laws.

Again, in United States *vs.* Coombs (12 Peters, 72), the question arose whether Congress, under the power to regulate commerce, can punish a theft of goods from vessels in distress, although committed above high water-mark ; and it was held that such a theft is a direct obstruction to the exercise of the power to regulate commerce with foreign nations, and among the several States, and is, for that reason, punishable under that power. Mr. Justice Story, in delivering the opinion of the Court, said :

"The power to regulate commerce, includes the power to regulate navigation, as connected with the commerce with foreign nations, and among the States. It was so held and decided by this Court, after the most deliberate consideration, in the case of Gibbons *vs.* Ogden, 9 Wheat, 189 to 198. It does not stop at the mere boundary line of a State ; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the States.

"Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."

One other illustration of the rule, of a recent date, will be sufficient. It arose in the case of Murray's Lessee *v.* The Hoboken Land Company, (18 Howard, 272.) The question was, whether Congress had power to authorize the Solicitor of the Treasury to issue distress warrants against defaulting collectors of the revenue. It was held that such warrants are a known, appropriate, and usual means of compelling public officers to pay over the public moneys; and that, being acts of executive, and not judicial power, they are not repugnant to the constitutional limitations on the mode of exercising the judicial power. Mr. Justice Curtis, delivering the judgment of the Court, said: (p. 281)

"The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money, and use it in payment of the debts of the Government; and whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means, to secure its due application, continues."

I shall, therefore, rest upon the construction thus repeatedly given by the Supreme Court to this clause of the Constitution; and shall hold that in order to bring any law within its terms, that law must have the following characteristics:

1. It must execute some one or more of the specified powers of the Constitution, by the use of means appropriate and conducive to the end of such power or powers.

2, It must not be repugnant to, or inconsistent with any other provision of the Constitution.

By this criterion, I propose to try the validity of the clause of the act now in question.

1. And, in the first place, I contend that this clause of the

act requiring private creditors to receive these notes in payment of their debts, bears no sort of relation as a means to the execution of any power enumerated in the Constitution. It is a mere excrescence; a work of supererogation; in no sense, and in no degree, necessary or appropriate to the exercise of any known constitutional power. The act itself, judging from its title and its chief declared purposes, is to be referred, either to the power to borrow money, or to the power of paying the debts of the Union, or to the power of collecting the revenue. It contains provisions which partake of the exercise of all these powers. Its title and its provisions relate—*first*, to the funding of certain portions of the public debt; *secondly*, to the payment of other public debts; and, *thirdly*, to the receipt of the revenues, and other demands of the Government. It authorizes the issue of a paper currency, which is to enter as a means into the accomplishment of all these objects. So far, therefore, as the act involves the exercise of the constitutional powers of borrowing money, or of paying the public debts, or of collecting the internal revenue, to make use of such a currency may be to use means that are, in the constitutional sense, "necessary and proper," because that currency stands in the direct relation of *means* to these several *ends*. It is an *instrument* which Congress sees fit to use, in direct execution of some of its constitutional powers.

But when the act passes beyond the collection of the revenue, or the funding of some of the public debts, or the payment of other public debts, and undertakes to compel private creditors to receive *their* debts in this currency, it undertakes a thing that bears no relation whatever to the exercise of any of the constitutional powers. Take, for example, the power to pay the public debts. If Congress sees fit to pay them in a paper currency, that currency stands in the relation of an instrument to the exercise of the power. But what possible relation of *means* to an *end* exists between the payment of *my private debt* in that currency, and the power of paying the *public* debts?

The *end* is the exercise of the power to pay the *public debt;* the *means* chosen relate to the vehicle or medium in which *private* debts are to be paid. No argument could make it more plain than the bare statement does, that here the relation of means to an end is entirely wanting.

But perhaps it will be argued that as this currency was created for the purpose of exercising some of the powers of the Constitution, of which it is made an instrument, it is competent to Congress to preserve it in the public confidence, and that such is the object of making it a legal tender. That it would be competent to Congress to punish the counterfeiting or imitating or defacing this currency, may be true, if Congress has power to issue it; because such legislation would be the preservation of the instrument for the ends for which it was created. But if it is to be argued that *for the sake of sustaining its market value as a representative of money*, Congress may compel me to receive it for my private debt as an equivalent for coin, and thus subject me to a loss of a part of that debt, when the actual value of these notes is less than coin—I answer, that the argument will prove a great deal too much. For, from the same motives of public policy, namely, to sustain the credit of the Government by a prompt payment of its debts, it might fill its treasury by seizing private property without the forms of taxation. This consequence of the argument, therefore, shows that it will not do to depart from the direct relation of the means to the end of a constitutional power. You cannot adopt a circuitous, remote, and indirect relation, and by means of it transfer property from one man to another, for the sake of sustaining the market value of an instrument which Congress has occasion to create and use for certain public purposes. Whatever the particular power may be that is to be executed, the exercise of that power is limited to things which relate directly to the objects of the power. When Congress punishes stealing from vessels in distress, it exercises the power of regulating commerce by protecting the vehicles and subjects of that commerce; but if it were to superadd to this a provision that the property might be taken by the Government at an arbitrary valuation to pay the expenses of prosecution, it would pass beyond the objects of the commercial power into the field of arbitrary confiscation. Just so, in point of principle, it is here. This currency may be a fit and convenient medium in which to pay the debts of the Government. But when, for the sake of sustaining this paper, I am compelled to surrender a portion of my debt to the man who owes it, by reason of an actual depre-

ciation of this medium, the power to pay the debts of the Government is plainly transcended by a provision which compels *me* to receive it for coin, and a part of *my* property is arbitrarily transferred to another.

I say that a part of my property is arbitrarily transferred to another; for no arithmetic can make depreciated paper a payment of the value I am entitled to receive, and no legal ingenuity can deprive me of the right to have that value measured by the standard provided by the Constitution.

This operation, therefore, of the "legal tender" provision upon private rights—this forced and arbitrary release of value from a creditor to a debtor, without the condition of bankruptcy—is what marks the broad distinction between this legislation and all former exercise of the powers of Congress. It is impospossible to say that a law which does such an act as this, is, in respect to that act, an *execution* of the power of paying the public debts, or of collecting the revenue, or of borrowing money, or of regulating commerce. Let it always be remembered that the incorporation of a bank was justified upon the ground, that while it furnished the Government with an instrument capable of direct use in the execution of some of its constitutional powers, *that use* in no way abridged any previous right of any State or individual.

2. In the second place, I say that this provision of the act is plainly repugnant to the letter and spirit of the Constitution which was established for the express purpose of creating and maintaining a metallic standard of value. In the former part of this argument I have had occasion to refer to the objects, purposes, and meaning of the coinage clause of the Constitution; and the Court will now perceive the bearing I intend to give to the trust and duty which that clause imposes upon Congress. Your Honors will recollect, that, for the purpose of enabling Congress effectually to perform that trust, the power of coining money, or of fixing the value of coin, was taken away from the States.

It is also a well-known and most significant fact that the power to emit "bills of credit" was actually proposed to be given to Congress in the first draft of the Constitution, and was

stricken out by a vote of nine States in convention against two. This fact evinces in the strongest manner the purposes of the coinage clause. No words of mine can adequately exhibit the vast commercial and social importance of that feature of the Constitution which makes it the duty of Congress to establish in coin a standard of commercial and monetary values; nor can I conceive of the mental operation by which any other standard or measure of such values can be extracted from the Constitution. Yet it is perfectly plain that any such enactment, either of Congress or of a State legislature, which makes anything but gold and silver a legal tender, in the payment of debts, applies to such debts a measure of accounting and payment which is *not* the measure by which the debt was contracted, and is *not* the measure expressed in the regulated coin of the Union. The passing of such tender-laws was expressly prohibited to the States. It was not expressly prohibited to Congress, because it never was imagined that a government, on which was imposed the duty of creating and maintaining a metallic standard of value, could do anything so inconsistent with the purposes of its own existence as to make the market value of paper a measure of the legal obligations between creditors and debtors. I submit, therefore, with great confidence that this law lies outside of the measure of the authority given to Congress in the execution of its powers, because it is repugnant to a great trust and duty imposed upon Congress by an express provision of the Constitution.

And here I might close this discussion, and leave the case to the deliberations of the Court. But I deem it my duty to say a few words upon the general aspects of this question.

Motives of a supposed public policy, connected with the exigencies of public affairs, have now, for the first time since the adoption of the Constitution, led Congress to an enactment making paper money a legal tender in the payment of debts; and it is now sought to apply that provision to a debt contracted to be paid in gold or its equivalent. A power that can be exercised now, can be exercised hereafter, and we may expect that it will be. Careful and far-seeing observers look forward to a time when the financial situation of the country may

lead to the establishment of another national bank, or of some national system of banking and currency. A judicial decision, sustaining the constitutional power of Congress to make paper money, issued by the Government, a legal tender in payment of debts, will authorize the same thing to be done with the notes issued by a bank; and that, too, without any reference to the nature of the security on which such a currency is issued. When, therefore, the line is once passed which has hitherto been carefully drawn against the enactment of paper money tender-laws—when the Courts have sanctioned such laws as within the constitutional powers of Congress—the step never can be retraced. Whatever schemes of banking and currency Congress may hereafter be persuaded to adopt—whether with or without adequate security—whether in the hands of corporations or of individuals—*all* paper money, however issued, if issued under the authority of Congress, may equally be made a legal tender. For, it is undeniable that if Congress may give this quality to one description of paper, it may give it to all. The Court therefore, it is presumed, will consider this momentous question in the light of the consequences which must attach to a decision in favor of the plaintiff.

Already, at the moment when this question is under discussion here, I see that schemes are in agitation for applying this "legal tender" provision to other forms of Government paper issues. As a lawyer, I warn my countrymen against them, as violations of the Constitution. As a citizen, I lift my voice against them, for they are all alike injurious to the credit of the Government and the welfare of the nation. You cannot violate the Constitution of the United States without having your inventions return to plague the inventors.

It seems as if it were an ordination of Providence that the Constitution shall vindicate itself, through the direct mischiefs flowing from its infraction—shall, by its own inherent virtue, and by the working of a moral law, as immutable as that which unites sin and suffering, restrain public action within the limits of its constitutional sphere. How strikingly is this exemplified in this attempt to make paper money a legal tender in private transactions! The moment you annex that provision to any form of Government securities or paper currency, that instant

you throw those securities and that currency into the field of litigation. You thereby create a substantial and distinct cause of depreciation, against which no legislation can guard; for it is impossible for a whole people to adjust their relations of debtor and creditor to an arbitrary and fluctuating measure of values—impossible for *all* men to submit to losses imposed by such legislation. The sense of justice revolts against it; the duties annexed to many of the social relations make resistance to it through the Courts an imperative necessity. A currency, therefore, which is thus thrown into the field of inevitable litigation, contains within itself a cause of direct injury to the credit of Government; and thus do the great principles and purposes of the Constitution protect themselves through the mischiefs entailed upon their violation.

Your Honors sit to administer the law in a community deeply interested in this question, for it touches the interest of every creditor, and the duty of every debtor. It has been brought before you by a party who was obliged to raise it; for he was under the duty of a trustee in respect to this debt, and other funds held in the same fiduciary capacity remain behind, to be affected by your decision. Not only here, but throughout the whole land, not to mention other interests, the invested funds of uncounted beneficiaries, in charitable, in religious, in educational foundations,—in public and private concerns of immeasurable amount, are touched by this question. Who can estimate all the bearings of a question which is to determine the measure of value by which all the debts of a whole people are to be adjusted?

It is not my habit to press merely extraneous considerations upon the attention of Judges. But the suggestions which I have now made spring unavoidably from this great topic, and cannot be, and ought not to be, absent from the judicial mind.