

1924

# Evolution in Paper Money in United States

William Watts Folwell

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Folwell, William Watts, "Evolution in Paper Money in United States" (1924). *Minnesota Law Review*. 2514.  
<https://scholarship.law.umn.edu/mlr/2514>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# MINNESOTA LAW REVIEW

*Journal of the State Bar Association*

---

VOL. VIII

JUNE, 1924

No. 7

---

## EVOLUTION IN PAPER MONEY IN UNITED STATES

By WILLIAM WATTS FOLWELL\*

THE story of paper money in America in colonial and revolutionary times is a tedious and pitiful one. The catalogue of possible experiments seems to have been exhausted.

Some colonial paper issues were founded on revenues or property specifically pledged for their redemption, some on receivability for taxes and other public dues, some on the uncertain basis of colonial or continental credit; some issues were declared by law to be legal tender for private debts, some not.

In a few cases the issues were so moderate in amount and so faithfully redeemed that no mischief followed, and the public convenience was served. In most instances, however, the issues were so extravagant and redemption so remote and uncertain, that the miserable consequences had only the variety of degree between slight depreciation and absolute worthlessness. Values were unsettled, trade demoralized, labor defrauded, knavery was rampant, gambling universal and beggary overtook those people least able to protect themselves. In one instance the people rose in actual insurrection against the intolerable abuses of bad money. Things were at their worst perhaps in the half dozen years next preceding the convention of 1787. The regulation of commerce between the states involving the establishment of a uniform currency was one of the motives which moved the people to demand a revolution in the general government.

With such facts and experiences before them the members of the "Grand Convention" attacked the currency problem. They went about this business as statesmen rather than as lawyers. Their minds were set upon establishing grand muniments for liberty and the general welfare of a nation, not on the mere

---

\*President Emeritus, University of Minnesota.

framing of a document. The brief and simple constitution, unincumbered by legal technicalities, is proof of the spirit and method of the framers. The absence of ability and disposition to indulge in legal finesse is shown in the circumstance that the convention at one time (August 28) voted to forbid the states to pass ex post facto laws for the purpose of preventing them from interfering with past civil contracts. It was not till the following day that Dickinson announced his discovery that the terms "ex post facto" had reference to criminal proceedings only. We are to see what came, in one instance, of this noble simplicity.

There can be no question but that the controlling minds of that convention supported by a large majority of the members meant to do these things: (1) to place the currency under the exclusive control of the national government; (2) to abolish all forms of paper money and leave the metallic currency coined under the authority of Congress the sole legal tender for all debts public and private. The feebler efforts of the few dissentients went no further than to advocate reserving to the national government the power to issue paper money in times of extreme distress. The convention however undertook the task of abolishing paper money so long as the constitution left by them should remain unamended.

The draft of a constitution reported on the 6th of August following nearly the phraseology of the articles of confederation contained among the powers to be confided to Congress the clause:

"To borrow money and emit bills on the credit of the United States." On reaching the clause the convention voted (nine states against two: New Jersey and Maryland) to strike out the words "*and emit bills.*"

Now the phrase "*to emit bills of credit*" meant in that time simply "to issue paper-money." In later days refinements unknown to the framers were devised by the lawyers and sanctioned by the courts. The convention meant by striking out the words "and emit bills" to disenable the national government from issuing paper money. A reading of the debate on the motion of Gouverneur Morris to so strike out will show that all those members who spoke for the affirmative did so on the ground that there could then be no national paper money. All those who opposed striking out did so, because they were not willing to abolish paper money.

*Wilson* of the ayes, rejoiced in the opportunity to "remove the possibility of paper money." *Mercer* of the noes, was a "friend of paper money" . . . and "was consequently opposed to a prohibition of it *altogether*."

Luther Martin of Maryland in an address to the legislature of his state, made to account for his leaving the convention before its adjournment, gave, as one of his reasons, the intention of that body to prohibit paper money—using the following language:

"A majority of the convention, being wise beyond every event, and being willing to risque any political evil rather than admit the *idea* of a paper emission, in any *possible* case, refused to trust this authority . . . and they erased that clause from the system."

The historians and commentators agree to this simple and obvious interpretation of the phrase "bills of credit," and such was the doctrine of the Supreme Court in earlier days. In the case of *Craig v. Missouri*<sup>1</sup> Chief Justice Marshall speaking for the Court defined bills of credit to be "a paper medium intended to circulate between individuals and between government and individuals, for the ordinary purposes of society."

This view is insisted upon because another has, at times, been presented explainable only upon the assumption of disgraceful insincerity and sophistication on the part of the framers. On taking up the list of powers to be forbidden to the states it was observed that the draft contained no clause prohibiting states to issue paper money.

The report by Madison<sup>2</sup> runs thus:

"Mr. Wilson and Mr. Sherman moved to insert, after the words 'coin money' the words 'nor emit bills of credit, nor make anything but gold and silver a tender in payment of debts,' thus making these prohibitions absolute."

Mr. Gorham thought "an absolute prohibition of paper money would rouse the most desperate opposition from its partisans." Mr. Sherman thought this "a favorable crisis for crushing paper money." The motion to insert prevailed, eight states to two on emitting bills, unanimous vote on legal tender clause. Luther Martin's testimony on this head is clear and emphatic:<sup>3</sup>

"As it was reported by the committee of detail, the states were not only prohibited from emitting them [bills of credit] without the consent of Congress; but the Convention was so smitten with

---

<sup>1</sup>(1830) 4 Pet. (U.S.) 410, 425, 7 L. Ed. 903.

<sup>2</sup>See 5 Elliott, Debates 484.

<sup>3</sup>See Secret Debates 69.

the paper money dread, that they insisted that prohibition should be *absolute*."

The prohibition to the states of making any thing a legal tender besides gold and silver was intended to forbid the repetition of such acts as making land and other property a tender, not as commonly supposed to forbid their making paper money a tender because *that* the convention were undertaking to abolish utterly. In the state conventions for ratifying the new constitution the references to the currency provisions are few. The general tenor of them is that paper money whether of state or nation was abolished, and in some instances this was urged as a reason for rejecting the constitution. There is but a single exception. In the convention of South Carolina Mr. Lowndes had inveighed against the constitution because it put an entire stop to paper emissions. Mr. Barnwell in reply said:<sup>4</sup>

"If to strike off a paper medium becomes *necessary*, Congress by the constitution, still have the right, and may exercise when they think proper."

Having, as was believed, prohibited all forms of paper money, and forbidden the states to make anything but metallic money a tender for debts, there remained for the convention to lodge in the hands of Congress the express power to "coin money, and to regulate the value thereof and of foreign coins." The monetary system was now complete. The currency was to be national, metallic and wholly under the control of Congress.

So much the convention did. There were some things they did not do. *First*, they did not expressly forbid Congress to emit bills of credit of any kind: *Second*, they did not forbid Congress to make any thing but gold and silver coin a tender in payment of debts, private or public, either or both: *Third*, they did not declare gold and silver coins to be a tender in payment of debts, proceeding upon the apparent assumption that coined money must be ex necessitate a tender without any express legislation: *Fourth*, they did not forbid individuals and corporations to issue bills of credit, under state supervision, or acquiescence. Whether propositions embodying any one of the prohibitions would have received approval must remain an open question. The hard money majority were content with what they supposed they had put into the constitution. Private and corporate banking had up to that time cut too small a figure to require serious attention. Hard money they assumed must be legal tender and the doctrine of

---

<sup>4</sup>See 4 Elliott, Debates 289 and 294.

strict construction acquiesced in by all, would place it out of the power of Congress to perform acts not expressly authorized, including the emission of bills of credit and making anything but gold and silver coin a legal tender for debts. The constitution was ratified and the new government went peaceably into operation. The hard money secretary of the treasury was hardly warm in his seat, however, before he drew up a report and December 13, 1790 transmitted it to Congress recommending the establishment of a bank of the United States which should have the power of issuing circulating notes receivable for all dues to the United States.

In February 1791 Congress passed a bill to charter the bank for twenty years and the document went to President Washington for his signature. Upon consulting the cabinet he found them divided. Jefferson, Secretary of State, supported by Edmund Randolph, Attorney-General, opposed the bill. Hamilton seconded by Knox of the War Department stood up vigorously for it. The two opinions are characteristic of the men and the parties they belonged to in later years. The Virginian, applying the principle of strict construction showed by an exhaustive process that the constitution gave and could give Congress no power to incorporate a bank, whether express or implied.

The great New York financier, knowing as no one else could know the need of the new government for ready money and of a lender who could be depended on in sudden emergencies—who in short as treasurer “must have money” swept aside all legal and technical objections with the broad assertion that although the government did possess but a limited range of powers, that within the range it was supreme or sovereign, and therefore entitled to do all the things necessary (in a reasonable sense of that word) to put those powers, limited only in their range, into beneficent exercise. After causing Madison to draft a veto message Washington signed the bill and the First United States Bank came into being. It can not be doubted that the impending need of ready money was the consideration which turned the scale. For twenty years the bank served the government as a convenient fiscal agency for the transmission of revenue collections and other funds. It loaned the treasury large sums in emergencies, but not without a good interest. Its notes, receivable for public dues, had extensive circulation and were in general request. It is somewhat strange that a measure meeting with so much opposition in its passage through the legislature, was not brought to

judgment in the supreme court. Had it been there can be little if any doubt that its constitutionality would have been negated.

It was in the very next year after the establishment of the bank (1792) that there began a great and remarkable development of private banking, the occasion of which would form the subject of an interesting economical inquiry. In the twenty years following more than eighty such banks were opened in the thirteen states. These banks issued circulating notes based on such an amount of specie as the directors deemed prudent to keep in their vaults. Not being legal tender, and circulating mostly near home, and being acceptable to customers, nobody called their legality in question. The profits were large, and before the close of the twenty years for which the bank, the First United States Bank, was chartered, "banking" became a craze in most if not all of the states.

When the question came up in Congress in the winter of 1811, of renewing the charter of the United States Bank, the partisans of state banking were able to defeat the measure and the institution expired by limitation. The state banking mania now raged more violently than ever and the country was flooded with paper emissions huge in bulk and correspondingly low in value. The war of 1812 came upon the country in the midst of this deluge. The government undertook to carry on the war by means of loans secured by bonds then called stocks. Ten millions were borrowed in 1812 at par; twenty millions in 1813 at 13% and in the following year fifteen millions more at 25%. Then it became impossible to borrow any more. In August 1814 the banks suspended specie payments, their currency ceased to circulate, and specie having been largely exported in consequence of the redundancy of cheap paper money, the country was without money.

Already recourse had been had to interest-bearing treasury notes of \$100 and upwards, receivable for taxes and public dues. Although fundable into United States bonds these notes suffered great depreciation and were too large in denomination to serve for currency. Congress accordingly at length authorized the issue of "small treasury notes," in denominations of 3, 5, 10, 20 and 50 dollars and specifically voted not to make them legal tender. The war coming soon after to a happy conclusion these small treasury notes being fundable into 7% bonds disappeared from sight. These notes were not made legal tender, but they were intended to serve the purposes of paper money. We have here another instance of a resort by the government to paper emissions, in a sudden emer-

gency. The constitutionality of the second bank, vigorously questioned in the legislature (as was that of the First Bank), was brought to the arbitrament of the Supreme Court in 1819 in the famous case of *McCulloch v. Maryland*.<sup>5</sup> Chief Justice Marshall announced it as the unanimous and decided opinion of the Court that the act to incorporate the Bank of the United States was a law made in pursuance of the constitution, and was a part of the supreme law of the land. The argument of the chief justice is in essence that of Hamilton, of which he remarked that it exhausted that side of the argument. To us it seems like an ingenious accommodation of the law to a state of facts, not foreseen by the framers of the constitution. It unbarred the door through which a long tandem of innovations has since been driven. In April 1816 the Second Bank of the United States was chartered by Congress for twenty years, after a stormy debate, and a trial of several bills one of which received the veto of President Madison. But there was a general agreement that a bank of some kind was indispensable. After some three years of hardship the Second Bank entered upon a career of great prosperity and, it is claimed, of usefulness. It is not necessary to the object of this paper to relate the fortunes of this institution or its overthrow in 1836. Congress refused to renew the charter but the bank continued to exist till 1839 under a charter from the state of Pennsylvania.

A second state banking craze had come upon the country in the last years of the second bank analogous to that which had accompanied the downfall of the first bank. The removal of the government deposits from the United States Bank and its branches to selected state banks, stigmatized as the "pet banks," had the effect to stimulate a process of inflation already in progress from other causes. At no period of our history has there been such an amount of wild and reckless financiering as in the closing years of Jackson's second administration. Banks were multiplied beyond all reason and their issues, based sometimes on worthless securities, reached to fabulous amounts. A panic struck in the winter of 1837 and in May all the banks of the country suspended. Here was another "sudden emergency," and a recurrence of the same now time honored remedy, an emission of government paper. From 1837 to 1844 treasury notes to the amount of forty-seven millions were issued. They were in considerable variety, as regards denomination, time and interest. The earlier issues because bearing but a low rate of interest and being fundable, failed to

---

<sup>5</sup>(1819) 4 Wheat. (U.S.) 316-437, 4 L. Ed. 579.

serve the purpose of their creation, to serve as paper money. Caleb Cushing denounced these notes as unconstitutional, being virtually "bills of credit." One of the later emissions was in denominations of \$50 bearing interest at the rate of one-thousandth of one per cent.

A committee of Congress reported these notes as "bills of credit" issued in violation of the constitution. The tradition of the fathers was still so strong in this second generation that statesmen still believed that the constitution forbade the emission of paper money by government, state or national. The evasion of the principle by the device of a national bank and its issues had however been legalized by the judiciary in the case of *McCulloch v. Maryland*.<sup>6</sup> Curiously the constitutionality of state bank paper money had had to await the lapse of many years before it received the sanction of the judiciary. In 1837 the case of *Briscoe v. The Bank of the Commonwealth of Kentucky*<sup>7</sup> had come on to be heard by the Supreme Court. The stock of this bank was wholly owned by the state and the officers were virtually agents of the state. Nevertheless the court by a majority held that the bank was not the government, nor a branch of the government, that the credit of the state was not pledged and that the bank was suable; consequently its issues were not unlawful. In this case the court amended the clear and simple definition by Chief Justice Marshall of "bills of credit" given above.

"To constitute a bill of credit within the constitution it must be issued by the state on the faith of the state, and be designed to circulate as money."<sup>8</sup>

Judge Story<sup>9</sup> in his dissenting opinion held that the constitution prohibits bills of credit not merely by a state but "by or in behalf of a state, in whatever form."

We have in this decision another positive and considerable enlargement of the constitution. Issues of paper money by institutions authorized by state governments are lawful provided that they cannot be made legal tender for private debts.

Without doubt the establishment of this doctrine as the supreme law of the land had much to do with diffusing and strengthening the state banking mania which culminated in 1837.

---

<sup>6</sup>(1819) 4 Wheat. (U. S.) 316-437, 4 L. Ed. 579.

<sup>7</sup>(1837) 11 Pet. (U.S.) 257, 9 L. Ed. 709.

<sup>8</sup>McLean, C.J. in *Briscoe v. Bank of Commonwealth of Ky.*, (1837) 11 Pet. (U.S.) 257, 318, 9 L. Ed. 709.

<sup>9</sup>(1837) 11 Pet. (U.S.) 257, 348, 9 L. Ed. 709.

We turn again to congressional action. In the course of the Mexican war the revenue of the country having been reduced by cutting down the tariff of 1842, recourse was again had to treasury notes. There were various issues, among them one of one and three quarter millions at one mill per cent per annum. This one-thousandth of one per cent interest was enough to save the constitution which was still supposed to forbid the emission of bills of credit. Again in 1857 the banks having suspended, the treasury was forced to the issue of some fifty-three million of treasury notes.

We come now to the period of the slaveholders' rebellion. In the opening year the treasury was literally empty and the credit of the United States had so fallen that when a five million loan on one year treasury notes was offered, but ten per cent of it (\$500,000) was taken at 12% interest.

Two days after the disaster of Bull Run, President Lincoln called for five hundred thousand three-year volunteers, and summoned Congress to meet in extra session on July 4. By that time the war debt was ninety millions. In the next fiscal year it had been run up to five hundred and twenty-four millions. On July 1, 1863 it stood at \$1,120,000,000. As a matter of course Congress had to resort to its power to borrow money on the credit of the United States. The first move was an issue of one hundred forty millions of "seven-thirty treasury notes" and sixty millions of demand notes without interest; mere "due-bills" in nature. Now notes not bearing interest payable on demand had in 1844 been deemed by Congress to be bills of credit under constitutional ban. In August of 1861 the associated banks of New York rallied to the support of the government whose borrowing ability appeared to be about exhausted—resolving most patriotically to stand or fall with the national credit. These banks took one hundred millions of the seven-thirties, and agreed to take, and did take up, the amount of one hundred fifty millions on condition that the government should put out no other treasury notes or bonds, except demand notes until February 1, 1862. On December 28, 1861 the banks everywhere suspended specie payment. Here was indeed an emergency. The treasury empty, expenses running up at the rate of thirty millions a month, the paymaster general already in arrears to the army, credit greatly reduced, the ability of the banks to loan exceedingly doubtful, some extraordinary means of borrowing money, or of getting money, must be resorted to.

The thirty-second Congress assembled on December 2, 1861, and immediately addressed themselves to the financial problem. The secretary of the treasury had caused a national bank bill to be prepared, for the use of Congress. The suspension of the banks rendered, or was thought to render, it impossible to await the action of Congress, however expeditious, in discussing so elaborate and intricate a bill sure to meet with opposition. On December 30, 1861 Mr. E. G. Spaulding of Buffalo, New York, introduced the legal tender bill. Attorney General Bates in an informal manner gave it as his opinion that Congress had the right to issue such bills of credit as the bill proposed and to make them legal tender in payment of private debts. There was lively opposition in the House Committee, in the great newspapers and among the bankers, a delegation of whom appeared in the Capitol. The secretary of the treasury<sup>10</sup> was opposed to the legal tender clause, but when the passage of the act was delayed forty days and forty nights and his vaults were empty, and his credit broken down, he at length signified to the legislature that the passage of the bill legal tender and all was "necessary." It was not until February 25, 1862 that the bill was passed and signed by the executive. This act authorized the issue of one hundred fifty millions of United States notes bearing no interest, payable to bearer, in denominations not less than \$5.00, receivable for all dues to the government except duties on imports, payable by government for all dues except interest on its bonds, fundable into United States six per cent five-twenties, and to be a legal tender for all other debts public and private within the country.

The notes were promptly issued and gave relief, but only for a brief season. The drain on the treasury kept on. In June of the same year the secretary asked for more and Congress gave him another one hundred fifty millions. In March 1863 still another batch of one hundred fifty millions was authorized and issued. These issues were not fundable. It is not necessary to follow the later history of these notes in detail. An act of Congress of January 14, 1875<sup>11</sup> required the treasury to provide for the redemption of greenbacks on the first day of January 1879, which order, as is well known, was conformed to. These notes or their physical successors are still in circulation and being redeemable in fact, nobody desires to exchange them for bags of

---

<sup>10</sup>Chief Justice Chase.

<sup>11</sup>18 Stat. at L. 296.

metallic money. It is worth while to remember also that under an act of Congress of May 31, 1878<sup>12</sup> these notes except in case of mutilation can not be cancelled but must be "reissued and paid out again and kept in circulation." This much came of the greenback craze of that period which with great emphasis and circumstance was demanding a paper circulation founded on the whole property of the country, whatever that phrase might mean.

Nor need any account be taken here of large amounts of interest bearing treasury notes issued in the later years of the war and declared to be legal tender for the face. It is the nature of such notes if the interest be high, to be hoarded until maturity; or if low, to be promptly presented for funding. There was wisdom enough somewhere to stop the greenback emissions at the four hundred fifty million limit. But for a momentary panic and a false expectation of closing the war in the summer of 1862 they would not have been resorted to. The best and richest government on earth could not check the depreciation which set in and ran them down to two hundred eighty-five for one hundred as compared with dollars of gold. By means of the convenient mechanism of the national banking system authorized by act of Congress February 20, 1863,<sup>13</sup> the government was enabled to float the vast loans needed to carry on the war, thus proving that the government could borrow money without putting it in the power of private debtors to swindle their creditors. The greenbacks were popular; as they went down in value prices went up. They were excellent dollars to pay old debts with. The farmers generally paid off their mortgages and times were good in spite of the ruin of war. The *legislature* had now done or permitted to be done all those acts resulting in the emission of bills of credit which the framers of the constitution, and two or three generations of statesmen following them believed the constitution to forbid, or at least, not to allow. It remained for the judiciary to sanction the acts of the legislature.

The first opportunity was presented in the case of *Hepburn v. Griswold*.<sup>14</sup> In 1860 a certain Mrs. Hepburn of Kentucky made a promissory note for \$11,000, to one Griswold. This obligation became due five days after the passage of the legal tender bill on the 25th of February 1862. In 1864 the payee brought suit on the note, whereupon Mrs. Hepburn tendered the whole sum then

---

<sup>12</sup>20 Stat. at L. 87.

<sup>13</sup>12 Stat. at L. 665.

<sup>14</sup>(1869) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

due in legal tender notes, and paid the same into court. At nisi prius the tender was adjudged good and the debt satisfied. Griswold appealed to the Supreme Court of the United States, and the cause was argued in December 1867. Upon the instance of the then attorney-general the court ordered a reargument with leave to the government to be heard. Accordingly in December 1868 the cause was elaborately argued by Mr. B. R. Curtis and Mr. Attorney-General Evarts in support of the legal tender provision and by Mr. Clarkson N. Potter against it. About the same time five other cases involving the constitutionality of the provision were argued by thirteen distinguished lawyers. The judgment of the court, agreed to in December 1869, was finally delivered by Chief Justice Chase on February 7, 1870. At that time the court consisted of eight judges and the vote on this case stood five to three. The majority were Chase, Nelson, Grier, Clifford and Field—the minority Swayne, Davis and Miller. The exact point at issue was: "Are greenbacks a lawful tender in payment of private debts contracted before and maturing after the passage of the legal tender act?" This question the court decided in the negative. Restricted as the case technically was, the arguments of counsel and the opinion of judges were nevertheless addressed to the merits of the general question of the constitutionality of the notes. The court decided that greenbacks were not legal tender for pre-existing debts because they were not constitutionally legal tender for any debts at all. On both sides it was admitted that the constitution did not specifically empower Congress to emit bills of credit or to make them legal tender. The question then stood, is such power to be found among these unenumerated powers "necessary and proper for carrying on" the scheduled powers of the eighth section of art. 1 of the constitution? The majority answered, no, and supported this negative by reference to the fact that the greenbacks possessed no advantage by virtue of their legal tender quality over national bank notes, fractional currency and other paper emissions of the time. "The legal tender quality" remarked the chief justice was "only valuable for the purpose of dishonesty."<sup>15</sup>

The minority whose mind was expressed through Justice Miller entertained the opposite opinion—that the legal tender notes were a necessary and proper means to the legitimate power of "borrowing money." After describing the financial situation of

---

<sup>15</sup>Legal Tender Cases, (1870) 12 Wall. (U.S.) 457, 579, 20 L. Ed. 287.

the government at the time of the passage of the act Justice Miller says:<sup>16</sup>

"A general collapse of credit, of payment, and of business seemed inevitable, in which faith in the ability of the government would have been destroyed, the rebellion would have triumphed, the states would have been left divided, and the people impoverished. The national government would have perished, and, with it, the constitution, which we are now called upon to construe with such nice and critical accuracy. . . . The history of that gloomy time, not readily to be forgotten by the lover of his country, will forever remain, the full, clear, and ample vindication of the exercise of this power by Congress, as its results have demonstrated the sagacity of those who originated and carried through this measure."

The political and economical effects of such a decision as this in *Hepburn v. Griswold*<sup>17</sup> had they been allowed to emerge, will account for the unusual length of deliberation after protracted and repeated argument. They may also be held to account for the surprising activity of the court in taking up some new cases involving the constitutionality of the act discredited by the decision in *Hepburn v. Griswold* to the extent of pre-existing contracts. A few days before the delivery of that opinion Justice Grier of the majority had resigned, Feb. 1, 1870, and a few days after Feb. 18, 1870 Justice Strong was appointed to the vacancy. A month later Mr. Justice Bradley was appointed as a ninth member of the court under the authority of Congress thus enlarging the court (Mar. 21, 1870). On the last day of March, 1870, Attorney-General Hoar moved to reopen the question decided in *Hepburn v. Griswold*. The court as was expected and perhaps in some quarters intended, consented to the reargument of the question of constitutionality in the cases of *Knox v. Lee* and *Parker v. Davis* already standing on its docket.<sup>18</sup> The hearing was had in December, 1870. The decision was agreed to May 10, 1871, but it was not delivered until January 15, 1872. As was expected the decision was favorable to the constitutionality of the legal tender act. The decision of the court in the case of *Hepburn v. Griswold*<sup>19</sup> stood superseded. The judges were divided five against four. For constitutionality Swayne, Davis, Miller (the three dissentients in *Hepburn v. Griswold*), Strong and Bradley (the new members); in the minority remained Chase, Nelson,

<sup>16</sup>*Hepburn v. Griswold*, (1869) 8 Wall. (U.S.) 603, 632, 19 L. Ed. 513.

<sup>17</sup>(1869) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

<sup>18</sup>The arguments as well as the decision and dissenting opinions are given in 12 Wall. (U.S.) 463 to 681.

<sup>19</sup>(1869) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

Clifford, and Field, who with Judge Grier constituted the majority in the same case.

The majority in the cases decided by the enlarged and amended tribunal founded their decision mainly upon the same ground taken by the minority in *Hepburn v. Griswold*. At the time and under the emergency the legal tender provision was a necessary and proper means to the legitimate end of supplying the absolute necessities of the treasury. Said Justice Strong in delivering the opinion of the court:<sup>20</sup>

"That they did work such results is not to be doubted. Something revived the drooping faith of the people, something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender decision?"

Dissenting opinions were delivered by the chief justice and by Judges Clifford and Field. The chief justice adhered to his opinion that the legal tender provision was not a necessary or proper means to the carrying on of the war, or to the exercise of any express power of the government. He explained the stress of circumstances which in 1862 had led him to express the erroneous opinion that the legal tender provision was then "necessary."

The opinion of Judges Clifford and Field are learned and technical historical arguments of great length to show the constitution to be what the framers supposed it to be, a grant of limited powers, to be strictly interpreted. Both quoted Mr. Webster's opinion that "there is no legal tender, and can be no legal tender in this country, under the authority of this government, or any other, but gold and silver." Judge Field claims that without the legal tender provision the notes would have circulated equally well. But the concurring opinion of Justice Bradley whose doctrine seems to have been too strong meat to be assimilated by the court, is chiefly worthy of attention. He too believed that in passing the legal tender act the legislature had but exercised a just and necessary power, "a power which, had Congress failed to exercise it when it did, we might have had no court here to-day to consider the question, nor a government or a country to make it important to do so." But the learned justice was not content to rest the issue upon the stress of war alone.

---

<sup>20</sup>Legal Tender Cases, (1870) 12 Wall. (U.S.) 457, 541, 20 L. Ed. 287.

"I do not say," he adds, "that it is a war power, or that it is only to be called into exercise in time of war; for other public exigencies may arise in the history of a nation, which may make it expedient and imperative to exercise it."<sup>21</sup>

Leaving the ground upon which his colleagues in equal strength were comparing their private opinions in regard to a state of facts he boldly announced that the power he contends for is "one of those vital and essential powers inhering in every national sovereignty and necessary to its self-preservation." The question of exigency, he held, is for the legislature.

The court, however, had gone no further than to hold that under the circumstances of 1862 the issue of legal tender notes was within the constitution and consequently that the notes were a good tender for private debts whenever contracted. There remained but one last step to be taken and that awaited the result of another celebrated case—that of *Juilliard v. Greenman*<sup>22</sup> appealed to the Supreme Court from the state of New York and decided March 3, 1884. The question here was, are greenbacks as redeemed and re-issued under the act of 1878<sup>23</sup> a legal tender in payment of private debts? As a preliminary matter the court was obliged to choose by which of the previous decisions to stand; that of *Hepburn v. Griswold*<sup>24</sup> or *Parker v. Davis*.<sup>25</sup> By a majority of eight to one they chose to adhere to the latter, thus reaffirming the constitutionality of the United States Legal Tender Notes. It is this branch alone of the question which is discussed at length in the opinion of the court. The minor, but technically real question, of this case, "whether the re-issued notes are legal tender," seems to have been left to take care of itself.

The opinion of the court delivered by Justice Gray recites as preliminary conclusions the following:

(1) Congress has power by specific designation to borrow money—and incidentally to issue in appropriate form the obligations of the United States as bonds, bills, or notes.

(2) These obligations may be in form adapted to circulation. This is admitted by the dissenting judges in the legal tender cases.

(3) Congress was lawfully empowered to charter a national bank, and later a system of national banks.

<sup>21</sup>Legal Tender Cases, (1870) 12 Wall. (U.S.) 457, 567, 20 L. Ed. 287.

<sup>22</sup>(1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122.

<sup>23</sup>20 Stat. at L. 87.

<sup>24</sup>(1869) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

<sup>25</sup>(1870) 12 Wall. (U.S.) 457, 20 L. Ed. 287.

(4) Congress has power to provide a national currency and to forbid the circulation of any but national money.

(5) The denial to states to emit bills, argues in the absence of any prohibition upon Congress the right of Congress to issue paper money. But one further question remains, can Congress make that money a legal tender for private debts. Yes, say the court:

"Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency . . . as accord with the usage of sovereign governments."<sup>26</sup>

. . . "Congress is authorized to establish a national currency, either in coin or paper, and to make that currency lawful money for all purposes."<sup>27</sup>

There is no reference in the decision to stress of war. The power is one belonging to sovereignty to be exercised whenever the legislature may deem fit. With this act the revolution is complete.

The framers of the constitution meant to abolish all kinds of paper money. They abolished no kinds. By a series of legislative and judicial acts it has become the right and perhaps the duty of Congress to issue paper money. It may issue promises to pay on the Greek Kalends and you and I must take them for our day's work or take nothing. Such is the supreme law of the land. It is probably useless and impractical to lament the failure of the constitution to protect the country against paper money. Had its provisions been drawn with ever so great precision and fullness, they would have been evaded in the first tight pinch for ready money. No written language can tie up a powerful government. There will always be lawyers who can untie or statesmen who can cut any knot however intricate, and judges who can find pretexts, when not precedents for practical solution.

Any nation is liable to get involved in war, and no nation will ever be allowed by its citizens to hold in her treasury vaults a store of ready money with which to carry on contingent campaigns. Modern wars come suddenly and with enormous expenses. It is inevitable that the borrowing power will be resorted to; all negotiable promises to pay are in a sense money. This is not all. Modern commerce is so immense, so universal and so rapid that metallic money is too cumbersome. People receive it

<sup>26</sup>Juilliard v. Greenman, (1884) 110 U. S. 421, 447, 28 L. Ed. 204, 4 S. C. R. 122.

<sup>27</sup>Juilliard v. Greenman, (1884) 110 U. S. 421, 448, 28 L. Ed. 204, 4 S. C. R. 122.

with reluctance and dread to have it in possession. Paper money of some sort we must and will have. It has been estimated that in 1873 there were in circulation in five great countries two hundred and fifty thousand millions of dollars of paper money. In what ways civilized nations may best provide a safe and convenient paper currency is now a problem of the first interest—nowhere more pressing than in our own country.<sup>28</sup>

The financial revolution whose course has been traced is however, probably of minor account compared with the political consequences which may flow from the decision of the Supreme Court. It is now the supreme law of the land that in regard to the currency the United States government may do all those things which accord with the usage of sovereign governments, save those few acts expressly forbidden in the text of the constitution, and that the legislature may judge in regard to the expediency of exercising such power. In so far, the judiciary abdicates its position as a third great power, holding a check upon the executive and legislative. The legislature has taken an immense stride in the direction prophesied by Jefferson and Tocqueville—toward parliamentary omnipotence.

From a scientific point of view the most interesting aspect of this matter is that which presents it as an evolution, a development in the art of government. We see how by a long series of legislative acts followed by judicial sanctions an important portion of the constitution has been exactly faced about from the position in which it was placed by the framers. The logic of events has constantly been too strong for the traditions of the fathers. The legislature obliged to act somehow have done what they thought at the times to be necessary. The Supreme Court, unable to decide until some aggrieved citizen after all the law's delay got his suit appealed to them, has been forced by the same inexorable logic to bring forth a judicial sanction for acts long past and done, to pronounce which unlawful would cause confusion, damage and unhappiness. One of the English lords who stood on the scaffold of Mary Stuart said in a brutal but truthful manner, "Now Madam, you see what you have got to do." The Supreme Court has simply done what reasonable and practical men had to do. On the whole our respect for the Court increases when we find it deciding such questions rather as statesmen than as lawyers, however much we may be amused at the argumentation more ingenious than cogent by which the judges have per-

---

<sup>28</sup>True up to the time of the Federal Reserve Banking System.

sueded themselves, at least, of the consistency of that venerable and august tribunal.

Constitutions are not all made; they grow. The splendid and admirable document left us by the grand convention was but the embodiment, the codification of means of government then long ancient. In deference to the public sentiment of the day they endeavored to organize a government of unlimited vigor, within a limited range. To this government they gave the purse and the sword. The main frame of the constitution will probably remain for a long time as it was put together out of the timbers remitted to them from the old time before them. Unchanged in interior arrangement, in external adornments and enlargements, it cannot remain. Each new generation will accommodate the fabric to itself. This is inevitable and doubtless beneficial. It would be a simple and convenient thing if a nation could once for all frame its fundamental law and dismiss it from their minds. This can never be done. Eternal vigilance is the price of liberty. The study therefore of constitutional law, procedure and interpretation will always remain among the highest employment of statesmen and should be a part of the best education. The art of free government is still young. Great inventions are needed to improve it, but these must be adapted to the forms and principles of the past.