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# The Legal Tender Cases - A Drama of American Legal and Financial History

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## THE LEGAL TENDER CASES—A DRAMA OF AMERICAN LEGAL AND FINANCIAL HISTORY.

THE facts giving rise to the Legal Tender Cases<sup>1</sup> lead back to one of the darkest periods of the Civil War, from the standpoint of the North, and to a type of problem which is now absent from the national life.

On February 25, 1862, the date of the passage of the first Legal Tender Act,<sup>2</sup> the financial situation of the government was desperate. Armies were in the field, and the duration of the war and the extent of its expense had already greatly exceeded the estimates made at the beginning of the conflict. The Treasury was empty, and the Secretary of the Treasury, Salmon P. Chase of Ohio, was confronted with the necessity of raising funds without delay by the use of some new expedient. Commencing about two months earlier,<sup>3</sup> the banks throughout the country and the government had been compelled to suspend specie payments; that is, they could no longer pay in gold those demanding such payments in exchange for government bills<sup>4</sup> or state bank bills which had been in general circulation as money.

The suspension of specie payments was a very serious matter. The position of both the government and the banks in dealing with the public was seriously impaired. Public confidence in the government was lessened, and strength was lent to that section of public opinion which already felt that it was not going to be worth the cost of the struggle to conquer the South.

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<sup>1</sup> Legal Tender Case (*Juillard v. Greenman*), 110 U. S. 421 (1884); Legal Tender Cases (*Knox v. Lee* and *Parker v. Davis*), 79 U. S. 457 (1871); *Hepburn v. Griswold*, 75 U. S. 603 (1870).

<sup>2</sup> Act Feb. 25, 1862, c. 33, 12 Stat. 345.

<sup>3</sup> The exact date was December 30, 1861. DEWEY, *FINANCIAL HISTORY OF THE UNITED STATES* (10th ed. 1924) 281.

<sup>4</sup> The government had therefore issued demand notes under the Act Dec. 17, 1860, c. 1, 12 Stat. 121, of which \$33,460,000 were then in circulation. DEWEY, *op. cit. supra* note 3, at 281.

In addition to this, the government was unable to secure further funds from the banks on its demand notes, or in exchange for bonds even at an interest rate of 7.3 per cent. The immediate needs of the war were so great, the government being \$60,000,000 in arrears on the one item of the meagre pay of the soldiers and sailors,<sup>5</sup> and the expenses of the government being \$2,000,000 per day,<sup>6</sup> that there was no time left to conduct a general campaign to sell bonds to the public. Taxation was too slow a process to afford any relief. Taxes should have been levied on an extensive scale earlier in the struggle, but no one had realized what was ahead.

There were only two ways to secure at once the necessary funds. One was to issue bonds and sell them upon the market for whatever they would bring, and the other was to print more paper money and use it to pay the government's bills. If bonds were issued they could only be sold at ruinous discounts, and such a display of weakness on the part of the government would tend to further impair the confidence of the people, without which a successful prosecution of the war seemed impossible. This, and the rapid increase in the public debt through bonds, would cause many others to feel that the conflict should be abandoned. Opinion was sharply divided, both among public men and in financial circles, but it was decided that bonds should not be issued. As soon as paper money was turned to, the question arose as to whether it should be made legal tender for private purposes, that is, as to whether creditors should be compelled by law to accept the new paper at its face value in the payment of private obligations.

From the adoption of the Constitution to the recent suspension of specie payments, it had always been possible to exchange government bills upon demand for gold. It was foreseen<sup>7</sup> that any extensive issuance by the government of paper money not redeemable in gold would result in a rapid depreciation of its value. This would be reflected in an increasing premium upon

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<sup>5</sup> 4 RHODES, HISTORY OF THE UNITED STATES (1906) 242.

<sup>6</sup> 3 *ibid.* 562.

<sup>7</sup> DEWEY, *op. cit. supra* note 3, at 287.

gold. The suspension of specie payments had already caused gold to be worth upon the market slightly more than its nominal equivalent in paper money.<sup>8</sup>

Paper money had not before been made legal tender in payment of private obligations. If this status were to be given the paper now to be issued, the effect upon the relations of private parties throughout the country was easy to foresee. Debts which had been contracted upon the pre-existing gold basis would now be paid with depreciated paper money. In all future dealings the nature of the legal tender could be taken into consideration, and prices fixed accordingly, but as to debts already contracted the effect would be inescapable. A depreciation of ten per cent. in the value of the legal tender would mean a transfer of ten per cent. of all the debts in the country from creditors to debtors. The government as the largest debtor in the country would be the chief beneficiary of the process. Proponents and adversaries of the legal tender feature agreed that this would be a most unfortunate and unjust result.

However, against all objections of every kind stood the absolute necessity that the government have money at once to use for all purposes of the war. It was felt necessary to make the new money legal tender in payment of preexisting debts so that those receiving it from the government could discharge their obligations with it. Many of the soldiers' families had been compelled to contract debts because of the delay in paying the soldiers, and they needed money with which those obligations could be satisfied. Also, if creditors of the government were to be paid in money which they could not use in discharge of their own obligations they would be seriously discriminated against. It was true that without making the new money legal tender these results could be avoided if the government would give all persons with whom it dealt an additional amount, but the necessity of maintaining public confidence made this impossible.

The advocates of the legal tender feature were also influenced by ideas of national sovereignty. Banks were attacked, and it was argued that the government should make itself independent

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<sup>8</sup> DEWEY, *op. cit. supra* note 3, at 293.

of banks and Wall Street by making its paper legal tender for all purposes.<sup>9</sup>

Secretary Chase held back from the drastic step of issuing such legal tender,<sup>10</sup> and worked out a plan with representatives of leading banks whereby it could be avoided. After the banking representatives had returned to their various cities, however, one wired back that his principals would not agree to the plan, and rather than inflict a hardship upon those banks which would cooperate with the government it was abandoned.<sup>11</sup> Secretary Chase, in reply to a direct request from the Committee on Ways and Means of the House of Representatives, finally stated that in his opinion legal tender notes had become necessary, and thereafter he energetically urged their issuance. Both public men and financiers were unable to agree whether the government could successfully pass through the emergency without legal tender notes,<sup>12</sup> but after the most careful consideration<sup>13</sup> the decision was made in favor of issuance, and on February 25, 1862, the Act was passed, providing for such notes in the amount of \$150,000,000. A leading historian has termed this Act "one of the landmarks in the history of American finance."<sup>14</sup>

Once the course had been embarked upon, there was no turning back. Large additional issues of legal tender notes were necessary in 1862 and 1863.<sup>15</sup> The greatest total amount outstanding at any time was \$433,160,569, in 1865.<sup>16</sup>

<sup>9</sup> DEWEY, *op. cit. supra* note 3, at 285.

<sup>10</sup> HART, LIFE OF SALMON PORTLAND CHASE (1899) 247, 249.

<sup>11</sup> 3 RHODES, *op. cit. supra* note 5, at 563.

<sup>12</sup> The following authorities approve the issuance of the legal tender notes: BOGART, ECONOMIC HISTORY OF THE UNITED STATES (2d ed. 1913) 386; CASE, CONSTITUTIONAL HISTORY OF THE UNITED STATES (1904) 247; SPAULDING, HISTORY OF THE LEGAL TENDER PAPER MONEY ISSUED DURING THE GREAT REBELLION (1869) 210. The following disapprove: HART, *op. cit. supra* note 10, at 411; McCULLOCH, MEN AND MEASURES OF HALF A CENTURY (1888) 175. Baron von Hock, the Austrian financier, in "Die Finanzen und die Finanzgeschichte der Vereinigten Staaten" (Stuttgart, 1867), said that the issue of paper money is conceded to be justifiable when a state is involved in a struggle for its own existence, after all resources of taxation and credit have been exhausted, although it is the most expensive and detrimental of all means of raising revenue. See 3 RHODES, *op. cit. supra* note 5, at 471.

<sup>13</sup> CASE, *op. cit. supra* note 12, at 245.

<sup>14</sup> DEWEY, *op. cit. supra* note 3, at 284.

<sup>15</sup> 4 RHODES, *op. cit. supra* note 5, at 237; SPAULDING, *op. cit. supra* note 12, at 154, 187; DEWEY, *op. cit. supra* note 3, at 288.

<sup>16</sup> SEN. REP. No. 275, 42d Cong. 3d Sess., Ser. No. 1548, at 1; SHERMAN,

As expected, the legal tender notes depreciated in value as compared with gold. The maximum depreciation was on July 11, 1864, when one dollar in gold was worth \$2.85½ in legal tender.<sup>17</sup> On July 1, 1865, at the close of active hostilities, a dollar in gold was worth \$1.41,<sup>18</sup> and on February 7, 1870, the date of the first legal tender decision, \$1.21.<sup>19</sup> For a time the notes were somewhat supported by an option to convert into government bonds, the principal and interest of which were payable only in gold specie, but this was terminated in 1863.<sup>20</sup> In order that depreciation of the notes might not lessen the revenue from the duty on imports, the notes were never made receivable for customs dues, and this increased the depreciation.<sup>21</sup>

It is now known that during any extensive war, inflation must follow the rapid expansion of the amount of available credit through government war loans. At that time, however, the quantity theory of money—that the value of the currency in terms of commodities depends upon the extent of the supply of all forms of money and credit—had not been developed. Consequently those who had opposed the issuance of the legal tenders attributed to them all the effects of the war-time inflation, although they were really only a contributing factor.

The effect of the inflation from all causes was to produce great distress and hardship among certain classes of creditors, particularly widows and others dependant upon small fixed incomes. A historian says that "the government not only cheated its own creditors but enabled every debtor in the land to do likewise."<sup>22</sup> There was a reduction of one-fifth to one-sixth in the real in-

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SELECTED SPEECHES AND REPORTS ON FINANCE AND TAXATION FROM 1859 TO 1873 (1879) 381; DEWEY, *op. cit. supra* note 3, at 332. 4 RHODES, *op. cit. supra* note 5, at 428, gives the figure as \$432,687,966.

This was in addition to fractional currency and interest-bearing notes running for a brief period, both of which were also endowed with the legal tender quality, but neither of which were important in their effect. DEWEY, *op. cit. supra* note 3, at 288, 310.

<sup>17</sup> POMEROY, *LIFE OF STEPHEN J. FIELD* (1881) 66; DEWEY, *op. cit. supra* note 3, at 293; SPAULDING, *op. cit. supra* note 12, at 199.

<sup>18</sup> SPAULDING, *op. cit. supra* note 12, at 212.

<sup>19</sup> HART, *op. cit. supra* note 10, at 397; 6 RHODES, *op. cit. supra* note 5, at 265.

<sup>20</sup> DEWEY, *op. cit. supra* note 3, at 290.

<sup>21</sup> DEWEY, *op. cit. supra* note 3, at 287.

<sup>22</sup> 6 RHODES, *op. cit. supra* note 5, at 264.

comes of wage earners, because of the slowness of adjustment of wages to the new currency level.<sup>23</sup> On the other hand, active business men were correspondingly benefited. Many were enabled easily to pay off their debts, and thus felt encouraged to initiate new enterprises.<sup>24</sup> In addition to those who were actually amassing fortunes, others who were slow to realize that the value of a dollar had decreased felt that they were getting rich, and both classes were spurred on to greater activity.<sup>25</sup> Of course all metals<sup>26</sup> had disappeared from circulation at the first threat of inflation of the currency, before the actual issuance of the first legal tender notes. Due to the dearth of coins, for a time "shinplasters," *i. e.*, bills less than a dollar, issued by private concerns, and stamps, were used for change, with resulting inconvenience.<sup>27</sup> Picture the citizen paying a bus driver his fare in stamps on a rainy, windy morning, or going shopping with a roll of three cent stamps, which was the denomination most commonly used. This was later remedied by the issuance of fractional bills by the government.

In the end the cost of the war was greatly increased by the use of the legal tenders. Dewey in his financial history says:<sup>28</sup>

"\* \* \* The total effect of paper issues in increasing the cost of the war has been estimated at between \$528,000,000 and \$600,000,000; even this large amount is small when compared with the burdens which inflated prices placed upon the people in the ordinary relations of trade and industry."

The fluctuating premium on gold caused a gold exchange to be opened in New York City. The usual exchange phenomena of speculation followed.<sup>29</sup>

Coincidentally with the inflation there occurred, in the fall of 1862, a marked revival of business. From then until the end

<sup>23</sup> MITCHELL, *A HISTORY OF THE GREENBACKS* (1903) 351, 395, 398.

<sup>24</sup> POMEROY, *op. cit. supra* note 17, at 66; 5 RHODES, *op. cit. supra* note 5, at 202.

<sup>25</sup> SPAULDING, *op. cit. supra* note 12, at 210.

<sup>26</sup> Nearly all the American coinage had been gold, although silver had appeared in circulation as minor coin and in insignificant amounts in the form of dollars. DEWEY, *op. cit. supra* note 3, at 211, 403.

<sup>27</sup> 5 RHODES, *op. cit. supra* note 5, at 191.

<sup>28</sup> DEWEY, *op. cit. supra* note 3, at 293.

<sup>29</sup> DEWEY, *op. cit. supra* note 3, at 295-7.

of the war the North was economically prosperous, without further occasion for alarm in regard to the financial condition of the government. The advocates of the issuance of the legal tender notes now overestimated their importance,<sup>30</sup> and attributed all the new prosperity to the use of the legal tender device.<sup>31</sup>

With this background the stage was set for a very important decision by the United States Supreme Court in regard to the constitutionality of the legal tender provisions of the various acts, the decision being rendered February 7, 1870. By the time the question reached the Supreme Court in shape for decision, Salmon P. Chase, who as Secretary of the Treasury had reluctantly and apparently against his own better judgment secured the passage of the Legal Tender Acts, had become Chief Justice. It was perhaps an unparalleled situation in American jurisprudence, at least in connection with a matter of such universal importance, for a judicial officer to be charged with the responsibility of passing upon the validity of his own acts as an executive officer.

As gold was still at a premium of twenty-one cents when the decision was rendered, a very important practical question was involved. The distress occasioned by the passage of the original Legal Tender Act was now long past, and largely forgotten, and if the legal tender provision was now to be held invalid another great upsetting of the relations of debtors and creditors would occur. This time the change would be in favor of creditors at the expense of debtors, but the ones benefited now would rarely be those who suffered when the original Act was passed. All the other effects necessarily attendant upon any sudden change in the standard of value would again follow. This time wage earners and those having fixed incomes would benefit.

The constitutional question was a very nice one. On the one hand, it was argued that the power given Congress in regard to the monetary system is "To coin Money, regulate the Value thereof, and of foreign Coin,"<sup>32</sup> and that the term "coin" ap-

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<sup>30</sup> 5 RHODES, *op. cit. supra* note 5, at 200.

<sup>31</sup> Hepburn v. Griswold, *supra* note 1, at 633.

<sup>32</sup> U. S. CONST., Art. I, § 8.

plies only to metals. On the other hand, it was contended that the Constitution gives Congress power to "borrow Money on the credit of the United States"<sup>33</sup> and to regulate commerce, and that the power to issue legal tenders is necessary and proper for carrying into execution the enumerated powers. Fundamentally the contest represented a clashing of the Hamiltonian and Jeffersonian theories in regard to the national government.

Never before the Civil War had there been a suggestion by any responsible official of the Federal Government that there was any power to make anything other than gold and silver a legal tender in payment of private obligations.<sup>34</sup> Webster in a speech in the Senate had expressed a belief that no such power existed.<sup>35</sup> On the other hand, the question was not foreclosed by the language of the Constitution, and those who favored the legal tenders claimed that the Union could not have been preserved without their issuance. Making this assumption, they then contended that it was unthinkable that the Constitution prohibited the exercise of any power necessary to the preservation of the government. The situation when the case was about to be decided has been described as follows:<sup>36</sup>

"\* \* \* The probable action of the Court had been the subject of long and excited debate in the community. On the one side, were the National and State banks, the mortgagees and creditors who demanded payment in gold; lined up with these interests were those men who, on principle, denied the right of the Federal Government to make paper currency legal tender, and opposed legalized cheating through the enforced payments of debts in depreciated currency. On the other side, were the railroads, the municipal corporations, the mortgagors of land and other debtors who now sought to pay, with a depreciated legal tender currency, debts contracted on a gold basis before the war; and with these interests, there were associated all those men who felt strongly that the Government ought not to be deprived of a power which they considered so necessary to its existence in time of war. \* \* \*"

<sup>33</sup> *Ibid.*

<sup>34</sup> HART, *op. cit. supra* note 10, at 408.

<sup>35</sup> Quoted in dissenting opinion of Mr. Justice Field, Legal Tender Cases (*Knox v. Lee and Parker v. Davis*), *supra* note 1, at 659.

<sup>36</sup> 3 WARREN, THE SUPREME COURT IN AMERICAN HISTORY (1922) 221.

The cases were argued and reargued by numerous and distinguished counsel. It is probable that never in the history of the Court has any question been more thoroughly considered before decision.<sup>37</sup>

At first sight it would seem that the public would expect the Court to lean toward upholding what the Chief Justice had done as Secretary of the Treasury, but other decisions touching fringes of the problem showed a leaning on the part of the Court against the legal tenders,<sup>38</sup> and the rumor spread that such would be the decision.<sup>39</sup> In this instance the veil has been withdrawn from the proceedings of the Justices in conference,<sup>40</sup> and it has been disclosed that when the case was taken up, on November 27, 1869, it was found, after a conference of several hours, in which all members of the Court participated, that the eight judges then on the Court were evenly divided.<sup>41</sup> They thereupon proceeded to the consideration of other cases, and in the course of the discussion of another case during the same conference Mr. Justice Robert C. Grier, then seventy-five years of age and unable to walk alone, made a statement inconsistent with his previous vote in favor of the constitutionality of the legal tender provision. This led to further discussion of the question with him, and, after being reminded by another member of the Court of what he had agreed to in a private conversation, he changed his vote, and joined those who were against constitutionality. The Court then stood five to three against constitutionality. Within a week all the other members of the Court united in advising Mr. Justice Grier that it was their

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<sup>37</sup> Dissenting opinions in *Legal Tender Cases* (*Knox v. Lee* and *Parker v. Davis*), *supra* note 1, at 603, 634.

<sup>38</sup> DEWEY, *op. cit. supra* note 3, at 362.

<sup>39</sup> SCHUCKERS, *LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* (1874) 265.

<sup>40</sup> The disclosure was made in a paper prepared by Mr. Justice Miller and signed by the other members of the later majority at the time of the second legal tender decision. The statement was prepared in reply to one by Chief Justice Chase, which he had placed upon the files of the Court. When Chase learned that a reply would be made he withdrew his statement. Consequently, that of the majority was not filed. It was published in BRADLEY, *MISCELLANEOUS WRITINGS* (1902) 71-4, and in (1902) 5 *LAW NOTES* 229.

<sup>41</sup> BRADLEY, *op. cit. supra* note 40, at 54, 71, 73; POMEROY, *op. cit. supra* note 17, at 75; 6 RHODES, *op. cit. supra* note 5, at 262.

opinion that his physical condition was such that he ought to resign. He submitted his resignation, to take effect February 1, 1870, and retired from the Court on that date, dying the following September 26th.

It was contemplated that the decision in *Hepburn v. Griswold*, the legal tender case, would be handed down January 31st, in which event Grier would have participated in it. It was, however, postponed one week, at the request of the minority, in order to enable dissenting opinions to be prepared, and consequently was not rendered until February 7, 1870, six days after Grier's resignation had taken effect. Thus the decision was technically participated in only by seven Justices, divided four against three, in a Court legally composed of nine.

As the constitutional question was a novel one neither side was able to make a convincing argument based upon precedents, and neither was able to make a clear showing upon the words of the Constitution. Chief Justice Chase, for the majority, emphasized the fact that the Federal Government was one of limited powers, while Mr. Justice Miller, for the minority, stressed the absolute necessity for the existence of the legal tender power, stating that without its exercise the government would have perished, "and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy."<sup>42</sup>

Dramatic events followed fast upon announcement of the decision. An act had been passed on April 10, 1869,<sup>43</sup> increasing the membership of the Court from eight to nine, to take effect the first Monday in December, 1869, and on February 7, 1870, the day the decision in *Hepburn v. Griswold* was announced, President Grant sent to the Senate the nominations of William Strong and Joseph P. Bradley as Associate Justices, one to fill the vacancy by Grier's resignation and the other to increase the number of Justices to nine.<sup>44</sup>

The decision was popularly "regarded as an attack on sound Republican doctrine made by five judges with Democratic affilia-

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<sup>42</sup> Dissenting opinion in *Hepburn v. Griswold*, *supra* note 1, at 633.

<sup>43</sup> Act. Apr. 10, 1869, c. 22, 16 Stat. 44.

<sup>44</sup> E. R. Hoar and Edwin M. Stanton had been nominated previously, but Hoar had been rejected by the Senate, and Stanton had died four days after confirmation.

tions while two Republican justices and one Independent had sturdily defended the faith." <sup>45</sup> Hence, from the coincidence of dates, it was easy for a portion of the public to infer that as soon as President Grant had heard of the decision he had nominated two new Republican Justices to reverse it. It seems that as a matter of fact, the nominations were actually on the desk of the Senate, which met at the same hour as the Supreme Court, before the announcement by the Court of its decision.<sup>46</sup> It is true that this does not necessarily disprove the charge, as the President could have received information as to what the decision would be. However, even though the decision was reversed as expected, the accusation that President Grant "packed" the Court seems unfair.

The men whom he nominated were Republicans of unquestioned standing and integrity. All the state courts that had passed upon the question, except Kentucky, had held in favor of constitutionality, and such was the opinion of Republicans throughout the country. It is doubtful whether the President could have found a Republican lawyer of standing who thought otherwise.<sup>47</sup> It is believed that the verdict of history is against the charge.<sup>48</sup> Whether the newly appointed judges should have seen fit to disregard the doctrine of *stare decisis* in regard to the decision just rendered is another question.

Strong's appointment was confirmed by the Senate at once, and he became a member of the Court March 14, 1870. Bradley's appointment was not confirmed until March 21st. He was sworn in on the 23rd, and took his seat on the 24th. On the 25th

<sup>45</sup> 6 RHODES, *op. cit. supra* note 5, at 265.

<sup>46</sup> Paper by Charles Bradley, a son of Justice Bradley, in BRADLEY, *op. cit. supra* note 40, at 47-50.

<sup>47</sup> 1 HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* (1903) 287; 6 RHODES, *op. cit. supra* note 5, at 270; 3 WARREN, *op. cit. supra* note 36, at 239.

<sup>48</sup> The following support the charge: THE FEDERALIST (Ford, 1898), Introduction, xviii; McCULLOCH, *op. cit. supra* note 12, at 173; SCHUCKERS, *op. cit. supra* note 39, at Chap. 18, *semble*. The following reject the charge: 1 HOAR, *op. cit. supra* note 47, at 286; HART, *op. cit. supra* note 10, at 400; Hoar, *The Appointment of Judges Strong and Bradley* (1872) 14 THE NATION 256; 6 RHODES, *op. cit. supra* note 5, at 270; 3 WARREN, *op. cit. supra* note 36, at 239; DEWEY, *op. cit. supra* note 3, at 364. The charge was made in a Liberal Republican platform. See (1872) 14 THE NATION 234.

the Attorney General moved to take up two cases which had been passed over that also involved the legal tender question, and on the following day the Court voted, five to four, to do this.<sup>49</sup> The majority was composed of the three justices who has dissented in *Hepburn v. Griswold* and the two new appointees.

With intense feeling between the Justices,<sup>50</sup> the question was reconsidered, and on May 1, 1871, the decision in the so-called *Legal Tender Cases*<sup>51</sup> was announced, by the same five-to-four vote overruling *Hepburn v. Griswold* and holding the Legal Tender Acts constitutional. The announcement of the decision on that date was somewhat unusual, as on account of the illness of the Chief Justice the opinions were not made public until January 15, 1872. The arguments presented in the opinions were substantially the same as in the earlier decision.

Was the majority justified in so quickly overruling *Hepburn v. Griswold*? The country had been put upon notice so soon after the earlier decision that the question would be reconsidered that the reversal did not have the effect that it otherwise would have had. In fact, even immediately after the announcement of the decision in *Hepburn v. Griswold* there was no reduction in the market premium on gold, showing that the public expected that the legal tenders would yet be held constitutional.<sup>52</sup>

Technically the majority in *Hepburn v. Griswold* consisted of only four Justices, in a Court legally composed of nine, the act increasing the number of Justices having taken effect the first Monday of the preceding December. On the other hand, it was due to the request of the minority for time in which to prepare dissenting opinions that the decision was not handed down until after the date of the taking effect of Grier's resignation. The majority in the newly constituted Court no doubt felt somewhat justified in disregarding Grier's connection with the case

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<sup>49</sup> SCHUCKERS, *op. cit. supra* note 39, at 261-5.

<sup>50</sup> BRADLEY, *op. cit. supra* note 40, at 61 *et seq.*; HART, *op. cit. supra* note 10, at 403; 6 RHODES, *op. cit. supra* note 5, at 268; SCHUCKERS, *op. cit. supra* note 39, at 265.

<sup>51</sup> Legal Tender Cases (*Knox v. Lee* and *Parker v. Davis*), *supra* note 1.

<sup>52</sup> HART, *op. cit. supra* note 10, at 403. *Contra*: 3 WARREN, *op. cit. supra* note 36, at 242.

because of his physical enfeeblement and the circumstances under which his adherence to the decision had been secured.

The chief objection to the reversal was the resultant loss of public confidence in the Court, which persisted for some years.<sup>53</sup> However, the contemporary prediction of "The Nation" that a reversal would set a precedent which would result in constant tampering with the number of the Supreme Court Justices by Congress has not been justified.<sup>54</sup>

While the reasoning in *Hepburn v. Griswold* was applicable to the entire constitutional question, only preexisting debts were actually involved in the facts of the case. The later Court could have preserved a technical adherence to the doctrine of *stare decisis* by limiting *Hepburn v. Griswold* to that situation and holding the Acts valid as to all obligations thereafter contracted. In view of the nature of the Court's reasoning, this would not, however, have been a frank method of handling the situation. It also would have meant that *Hepburn v. Griswold* would still destroy the feasibility of the issuance of such legal tender in the future.

In *Juilliard v. Greenman*,<sup>55</sup> the last of the legal tender cases, decided in 1884, it was held that Congress could issue legal tender notes in times of peace as well as war, the earlier cases having passed only upon the war-time power.

Did the framers of the Constitution intend that Congress should have the power to make other than gold and silver legal tender in the payment of private obligations? In an endeavor to answer this question the parties to the controversy assiduously searched the records of the Federal Convention and other early documents, but without conclusive results. The language of the Constitution leaves the question open, and the debates in the Convention do not reveal any consensus of opinion. The word "coin" is used, as has already been pointed out, and the Convention rejected by a vote of nine states to two a resolution which

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<sup>53</sup> 3 WARREN, *op. cit. supra* note 36, at 244.

<sup>54</sup> Editorial, *The Reopening of the Legal Tender Case* (1870) 10 THE NATION 218.

<sup>55</sup> Legal Tender Case (*Juilliard v. Greenman*), *supra* note 1.

would have added to the clause granting the power to borrow money the words "and emit bills."<sup>56</sup>

Those who framed the Constitution had experienced the evils of depreciated paper money. During the Revolutionary War the states had issued over \$200,000,000 of paper notes, which had become totally worthless before the Convention assembled.<sup>57</sup>

The Continental Congress had issued \$241,552,780 of paper money, \$119,400,000 of which had been redeemed at the rate of forty to one, the remainder, except \$6,000,000, being eventually a total loss.<sup>58</sup> One of the principal causes which led to the experiment of creating a national government was the desire to prevent such abuses. There was "a loud and general outcry against the conduct of the people of Rhode Island, who had kept themselves aloof from the national convention, for the express purpose, among others, of retaining to themselves the power to issue such currency."<sup>59</sup>

Nevertheless the nature of the discussion in the Convention is such as to permit the inference that the delegates did not intend to definitely deprive Congress of the legal capacity to issue bills, preferring rather to trust to the strength of the new government as a protection against abuses. The debate was upon a proposition to grant the power expressly, and its rejection is consistent with an assumption that the delegates felt that the power otherwise existed.

Was the issuance of the legal tenders necessary for the preservation of the government during the Civil War? The answer to this depends entirely upon the state of popular sentiment in support of the government at that time. This was only a matter of personal estimate then, and cannot now be accurately judged. While the issuance was being considered, "The London Economist" seized upon the difficulties of the situation to deliver an

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<sup>56</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand, 1911) 309 *et seq.*; 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Elliot, 1907) 434 *et seq.*; DEWEY, *op. cit. supra* note 3, at 67.

<sup>57</sup> DEWEY, *op. cit. supra* note 3, at 36; dissenting opinion of Mr. Justice Clifford, Legal Tender Cases (Knox v. Lee and Parker v. Davis), *supra* note 1, at 622.

<sup>58</sup> DEWEY, *op. cit. supra* note 3, at 36, 39, 41, 92; BOGART, *op. cit. supra* note 12, at 112.

<sup>59</sup> 2 CURTIS, HISTORY OF THE CONSTITUTION (1858) 329.

editorial homily to the effect that Lincoln should arrange a settlement of the war, in spite of popular clamor, pointing out that the North's money, which was the strong element on its side at the outset, had been spent, or nearly all, and that the South was still unsubdued. In the same editorial the case for inflation was well put as follows:<sup>60</sup>

"We long ago mentioned, if not to prophesy, at least to conjecture, that which is now happening. We showed that the pecuniary cost of a great military effort, such as the North is now making—an effort which costs more than seven times as much as the ordinary revenue in past times, could not be rationally defrayed by taxation. The tax-gatherer arrives at a limit to his exactions long before such vast sums can be realized. Credit is the natural resource of those who have it, but Federations at a crisis of revolutionary disunion cannot hope to have credit abroad; and America is a poor country,—perhaps that is an unduly offensive expression—a *new* country, in which profits are very high, and in which every sixpence is profitably invested. The rate of interest in Wall Street used always to be double the interest in Lombard street. Such a country cannot lend its Government much, for it has no capital disengaged. The currency remains the one fund from which a Government in the crisis of revolution, when all credit is at an end, can at once obtain a large sum. \* \* \*

"The general conclusion is the painful and lamentable one, that if Mr. Chase will spend the money he talks of, he must issue paper to an extent which will frighten every one,—which will depreciate securities,—which will derange transactions,—which will take from the creditor,—which will give to the debtor,—which will destroy what remains of the American credit in Europe. The only alternative is the cessation of the war."

After the successful conclusion of an enterprise it is hard to appreciate the difficulties and dangers encountered by those engaged in it. All that can now be said in regard to this particular situation is that those in charge of the financial destinies of the government found the situation desperate. They knew that the legal tender feature would render assistance to the new govern-

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<sup>60</sup> Editorial, *The Suspension of Specie Payments at New York* (1862) 20 LONDON ECONOMIST 57.

ment bills, and undoubtedly some help was secured from it. The government was saved. Whether it could have been preserved without this action can be only matter of conjecture.

If a sufficient quantity of the legal tenders had been issued, there would have resulted an eventual collapse of the entire monetary system, as occurred in the case of European countries during the World War. An important element of assistance to the government in avoiding this was the work of Jay Cooke in selling bonds directly to the people.<sup>61</sup> Cooke, a Philadelphia banker, was appointed by Chase general agent of the government for that purpose in 1863, and by January 21, 1864, he had sold \$5,000,000 of six per cent. bonds directly to the people at par. The people took the bonds at par as a matter of patriotism, and in 1864 the financial tide turned in favor of the government.<sup>62</sup>

Notwithstanding the power found to exist in Congress in *Juilliard v. Greenman* to issue legal tenders in time of peace as well as war, it seems clear that conscious inflation of legal tender is indefensible except under the most desperate conditions threatening the existence of the government. It is an ethical question relating to war whether it can justifiably be done then. It may be argued that it is better for the creditor to lose a portion of his debts than to lose his country. It is interesting to note that the Confederacy did not resort to the device.<sup>63</sup>

The problem closed with the resumption of specie payments January 1, 1879. Two weeks before that date the legal tenders reached parity with gold.<sup>64</sup> While the government has since been threatened with inability to continue specie payments,<sup>65</sup> no other suspension has occurred. The legal tenders have never been retired, except in part, and \$346,681,000 are still outstanding.<sup>66</sup> After the legal tender decisions resolutions were offered in Congress in favor of proposed constitutional amendments to remove from Congress the power to make other than gold and

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<sup>61</sup> SPAULDING, *op. cit. supra* note 12, at 189.

<sup>62</sup> See table of depreciation in DEWEY, *op. cit. supra* note 3, at 293.

<sup>63</sup> RHODES, *op. cit. supra* note 5, at 572.

<sup>64</sup> DEWEY, *op. cit. supra* note 3, at 375.

<sup>65</sup> DEWEY, *op. cit. supra* note 3, at 447-450.

<sup>66</sup> DEWEY, *op. cit. supra* note 3, at 341, 377; Monthly Bulletin of National City Bank of New York, Feb., 1929, at 29.

silver legal tender.<sup>67</sup> Such action would not be in accord with present monetary theories.

At the present moment of peace and prosperity the possibility that the government will again be confronted with financial difficulties such as those encountered during the Civil War seems very remote. The country has now developed a vastly stronger financial structure than it had in 1862. The Federal Reserve System was a tower of strength during the World War.<sup>68</sup> A sufficiently desperate struggle for national existence might produce a similar financial emergency.

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<sup>67</sup> 3 WARREN, *op. cit. supra* note 36, at 381.

<sup>68</sup> DEWEY, *op. cit. supra* note 3, at 503.