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121_10_001-	Subject File, Federal Reserve Board, Unified Banking Report, Clippings, 1933

EUGENE MEYER

SUBJECT FILE

FEDERAL RESERVE BOARD
UNIFIED BANKING REPORT, CLIPPINGS
1933

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CONSTITUTIONALITY OF LEGISLATION PROVIDING A UNIFIED COMMERCIAL BANKING SYSTEM FOR THE UNITED STATES

OPINION OF GENERAL COUNSEL OF THE FEDERAL RESERVE BOARD

REPRINTED FROM FEDERAL RESERVE BULLETIN
MARCH 1933

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1933

CONSTITUTIONALITY OF LEGISLATION PROVIDING A UNIFIED COMMERCIAL BANKING SYSTEM FOR THE UNITED STATES [1]

The Federal Reserve Board, at the time of the appearance of the Governor of the Board on March 29, 1932, before the Senate Committee on Banking and Currency in connection with the Glass bill (S. 4115), which was then under consideration by the committee, was requested to suggest a constitutional method of creating a unified banking system in the United States. In accord with this request, the General Counsel of the Federal Reserve Board prepared an opinion, which was transmitted to the Chairman of the Senate Committee on Banking and Currency. The text of the opinion is published below:

CONSTITUTIONALITY OF LEGISLATION PROVIDING A UNIFIED COMMERCIAL BANKING SYSTEM FOR THE UNITED STATES

To the Federal Reserve Board:

Senate Resolution 71, adopted on May 5, 1930, directed the Committee on Banking and Currency to conduct an investigation and recommend legislation "to provide for a more effective operation of the national and Federal reserve banking systems of the country." Following extensive hearings by a subcommittee of which he was chairman, Senator Glass introduced Senate bill 4115, Seventy-second Congress. At a hearing on the bill before the Committee on Banking and Currency on March 29, 1932, Governor Meyer presented a letter expressing the unanimous views of the members of the Federal Reserve Board, which contained the following statement:

> It should be recognized that effective supervision of banking in this country has been seriously hampered by the competition between member and nonmember banks, and that the establishment of a unified system of banking under national supervision is essential to fundamental banking reform.

Bankers had testified that certain provisions of the bill would make it difficult for member banks to compete with nonmember banks and would cause defections from the Federal reserve system and the national banking system; and during his testimony Governor Meyer called attention to the statement quoted above and stressed the fact that "effective supervision of banking in this country has been seriously affected by competition between member and nonmember banks," and that "competition between the State and national banking systems has resulted in weakening both steadily." Thereupon Senator Glass requested Governor Meyer to "suggest to us a constitutional method of creating a unified banking system in this country."

In view of the circumstances under which this request was made, the history of our banking system, and the provisions of Senate Resolution No. 71, it appears that, by "creating a unified banking system," is meant bringing all commercial banking business in the United States into a single banking system subject to effective regulation and supervision by the Federal Government.

Congress has already created the national banking system and the Federal reserve system; and the problem is how to achieve uniformity of corporate powers, regulation and supervision with respect to banks engaged in the commercial banking business and to provide for their safe and effective operation, by eliminating the existing competition between the Federal Government and the 48 States for the privilege of granting charters to banks transacting that type of business.

Since commercial banking necessarily involves the receipt of deposits subject to withdrawal by check, Congress can achieve that result if it can enact legislation which will have the effect of confining the business of receiving deposits subject to withdrawal by check to national banks, which have uniform powers under the national bank act, are subject to effective regulation and supervision by the Federal Government, and are required to be members of the Federal reserve system.

The question presented, therefore, is whether, in order to provide for a more effective operation of the national banking system and the Federal reserve system, Congress has the power under the Constitution to restrict the business of receiving deposits subject to withdrawal by check to national banks.

A consideration of the decisions of the Supreme Court of the United States leaves no room for doubt that this question must be answered in the affirmative. While numerous authorities supporting this conclusion are cited and discussed below, the principal reasons may be stated concisely as follows:

1. The power to create the national banking system and the Federal reserve system as useful instrumentalities to aid the Federal Govern-

[1] Reprinted from Federal Reserve Bulletin for March, 1933, pp. 166-186.

ment in the performance of certain important Governmental functions includes the power to take such action as Congress may deem necessary to preserve the existence and promote the efficiency of those systems. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Farmers and Mechanics National Bank* v. *Dearing*, 91 U. S. 29; *Westfall* v. *United States*, 274 U. S. 256.

2. Having provided the country with a national currency through the national banking system and the Federal reserve system, Congress may constitutionally preserve the full benefits of such currency for the people by appropriate legislation. *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Legal Tender Cases*, 12 Wall. 457.

3. The existence of a heterogeneous banking structure in which there have been more than 10,000 bank failures during the past 12 years constitutes a burden upon and an obstruction to interstate commerce; and Congress may enact appropriate legislation to correct this condition. *United States* v. *Ferger*, 250 U. S. 195; *Stafford* v. *Wallace*, 258 U. S. 495; *Board of Trade* v. *Olsen*, 262 U. S. 1.

Any one of these grounds standing alone would be a sufficient constitutional justification for the enactment of legislation restricting the conduct of the commercial banking business to national banks; and, when all three grounds are considered together, there can be no doubt that such legislation would be not only constitutional but also entirely appropriate and in accordance with a proper division of authority between the Federal Government and the States.

Having the power to confine the commercial banking business to national banks, Congress can exercise that power in any manner which it deems appropriate and adequate for its purposes. It is not necessary that the legislation assume the form of a revenue act or an act to regulate interstate commerce, though either of these means would be appropriate.

I. THE POWER TO CREATE AND MAINTAIN A BANKING SYSTEM

Ample authority for the first conclusion stated above is contained in the opinion of Chief Justice Marshall in the case of *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, 4 L. Ed. 579, wherein the Supreme Court of the United States established the following principles:

(1) Congress has the power to create banks as convenient, appropriate, and useful instrumentalities to aid the Federal Government in the performance of its functions.

(2) This power is derived from a group of great powers, including the powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct wars, to raise and support armies and navies and, "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."

(3) If the end be legitimate and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

(4) If a certain means to carry into effect any of the powers, expressly given by the Constitution to the Government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

(5) The States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government.

(6) The Constitution and laws of the United States are the supreme laws of the land; and "it is of the very essence of supremacy to remove all obstacles to its action within its own sphere."

Applying these principles, Congress has created the national banking system and the Federal reserve system, which are now recognized as appropriate, if not indispensable, agencies to assist the Government in the performance of certain essential Governmental functions. The States have no legal power to retard, impede, burden, or in any manner control the operation of these agencies; and Congress clearly has the right to enact such legislation as it may deem necessary to "remove all obstacles" to their safe and effective operation. If it deems it necessary to prevent banks organized under State laws from engaging in the commercial banking business in order to accomplish this object, Congress may lawfully do so.

Since the decision of the Supreme Court in *McCulloch* v. *Maryland* is the legal foundation stone upon which our national banking system, our Federal reserve system and our Federal farm loan system have been built and their constitutionality sustained, that case should be considered in more detail. The essential facts giving rise to the decision were as follows:

The Bank of the United States was granted a special charter by the act of Congress approved April 10, 1816, and was authorized to establish branches throughout the United States. It established its head office in Philadelphia and a branch in Baltimore, Md. The Legislature of the State of Maryland enacted a statute taxing all banks or branches thereof in the State which were not chartered by the State and prescribing a penalty to be collected from the officers of any bank that failed to pay the tax. The Bank of the United States did not pay this tax on the transactions of its Baltimore branch, and a suit was brought against McCulloch, the cashier of the branch, to recover the penalty.

McCulloch defended on the ground that the State law was unconsititutional and void because it was in conflict with a valid Federal statute. The State contended that the act of Congress chartering the Bank of the United States was unconstitutional and that, therefore, the State statute was valid. By a unanimous opinion, the Supreme Court of the United States held that the act of Congress chartering the Bank of the United States was valid and that the State law purporting to tax the bank was invalid.

The following quotations from the masterful opinion rendered by Chief Justice Marshall will illustrate the profound reasoning upon which the court's decision was based (4 Wheat. 407, 411, 415, 421, 422, 424):

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its Government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be entrusted with ample means for their execution.
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> But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the Government of the United States, or in any department thereof."
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> To have prescribed the means by which Government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. *It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.* To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.
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> We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think *the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.*
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> If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy.
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> After this declaration, it can scarcely be necessary to say that the *existence of State banks can have no possible influence on the question.* No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it can not control, which another government may furnish or withhold, would render its course precarious; the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, *the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election.* [Italics supplied.]

Having announced that it was "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 Chief Justice proceeded to consider the question whether the State could tax the bank (4 Wheat. 426, 427, 436):

> This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and can not be controlled by them. From this, which may be almost termed an axiom, other proposi-

tions are deduced as corollaries, on the truth or error of which, and on their application to this case the cause has been supposed to depend. These are, *1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.*

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* * * *It is of the very essence of supremacy to remove all obstacles to its action within its own sphere,* and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

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The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the *States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.* This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. [Italics supplied.]

In the case of *Osborn* v. *United States Bank* (1824), 9 Wheat. 738, 6 L. Ed. 204, substantially the same questions as had been considered by the Supreme Court in *McCulloch* v. *Maryland*, were presented in substantially the same form. Yielding to the request of counsel, the whole subject was reexamined and the principles announced in *McCulloch* v. *Maryland* were restated and upheld.

Considering more fully the question of the possession by the bank of private powers associated with its public authority and meeting the contention that the two were separable and that the public power should be treated as within, and the private power as without, the implied power of Congress, the Supreme Court expressly held that the authority of Congress was to be ascertained by considering the bank as an entity, possessing the rights and powers conferred upon it, and that the lawful power to create the bank and give it the attributes which were deemed essential should not be rendered unavailing by detaching particular powers and considering them alone and thus destroying the efficacy of the bank as a national instrument.

The ruling of the court, therefore, was to the effect that, although a particular character of business might not, when considered alone, be within the implied power of Congress, yet, if such business was appropriate or relevant to the banking business, the implied power was to be tested by the right to create a bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful.

In rendering the opinion of the court, Chief Justice Marshall said (9 Wheat. 860–863):

* * * That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the Government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch* v. *The State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the Government of the United States."

* * * *

* * * Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? * * * The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.

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* * * The operations of the bank are believed not only to yield the compensation for its services to the Government, but to be essential to the performance of those services. *Those operations give its value to the currency in which all the transactions of the Government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character, as national instruments* * * *. [Italics supplied.]

The charter of the Bank of the United States, having expired in 1836, the country was left to depend for its currency on a multitude of State banks which sprang up under numerous different State laws, most of which contained either no provisions or inadequate provisions regarding capital, reserves, and supervision.

Having experienced the difficulty of conducting the War of 1812 without the aid of a Federal banking system, however, Congress, during the Civil War enacted the national bank act on February 25, 1863, and revised it on June 3, 1864. This time it did not undertake to create a single bank with branches throughout the Union, but provided for the creation of numerous local banks each independent of the other but all operating under a single banking law and under the supervision of the Treasury Department of the United States Government.

In the case of *Farmers and Mechanics National Bank* v. *Dearing* (1875), 91 U. S. 29, 23 L. Ed. 197, the Supreme Court applied the doctrines of its earlier decisions to national banks organized under the national bank act of 1864. The case involved the question whether State usury laws were applicable to national banks; and, in holding that they were not, the court said (p. 33):

The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch* v. *Maryland* (4 Wheat. 316) and in *Osborn* v. *Bank* (9 Wheat. 738), therefore, applies. *The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.*

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is "an abuse, because it is the usurpation of power which a single State can not give." Against the national will "the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government." *Osborn* v. *Bank*, supra; *Weston and Others* v. *Charleston*, 2 Pet. 466; *Brown* v. *Maryland*, 12 Wheat. 419; *Dobbins* v. *Erie County*, 16 Pet. 435.

The power to create carries with it the power to preserve. The latter is a corollary from the former. [Italics supplied.

In *Davis* v. *Elmira Savings Bank* (1896), 161 U. S. 275, 16 Sup. Ct. 502, the same question arose in another form. The Legislature of the State of New York provided by law that a savings bank organized under the laws of that State should have a preference as a depositor in other banks in case of the insolvency of the latter, and it was sought to apply this provision to the case of a deposit by a savings bank in a national bank which had subsequently become insolvent. The Supreme Court of the United States held that such a provision of a State law could not apply to national banks, because it was in conflict with that provision of the national bank act which requires the assets of an insolvent national bank to be distributed ratably among its creditors. In so holding, the court said (p. 503):

National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. *It follows that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created.* These principles are axiomatic, and are sanctioned by the repeated adjudications of this court. [Italics supplied.]

In *Easton* v. *Iowa* (1903), 188 U. S. 220, 23 Sup. Ct. 288, Easton, the president of a national bank was convicted in the State court under a State law making it a crime to receive deposits while the bank was insolvent. On appeal, the Supreme Court of the United States held that the State law had no application to a national bank. In so holding, the court said (pp. 290, 293):

* * * the Federal legislation creating and regulating national banks * * * *has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of State legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.* Having due regard to the *national character and purposes of that system,* we can not concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. *The principles enunciated in McCulloch v. Maryland, 4 Wheat. 316, 425, and in Osborn v. United States Bank, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.*

* * * * * * *

Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; * * * *that it is not competent for State legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.* [Italics supplied.]

Having been denied the right to impose limitations and restrictions upon national banks, the States have granted increasingly liberal powers to competing State banks and, in many instances, have subjected them to fewer restrictions and less effective regulation and supervision. This has led Congress to modify the safeguards contained in the original national bank act, in order to enable national banks to compete with State banks and thus to preserve the existence of the national banking system. Such competition between the Federal Government and the various States has led to more and more laxity in bank regulation and supervision.

Moreover, when Congress has undertaken to enact legislation designed to "provide for the safer and more effective use of the assets of national banking associations" it has been told that the proposed legislation would make it difficult for national banks to compete with

State banks and would cause national banks to reorganize as State banks.

Since "it is not competent for State legislatures to interfere * * * with national banks or their officers in the exercise of the powers bestowed upon them by the general government," they can not do so indirectly by granting State banks competitive advantages; and, if the competition of State banks interferes with the safe and effective operation of national banks, Congress can put an end to such interference with the national purpose by preventing State banks from competing with national banks for commercial banking business.

First National Bank v. *Union Trust Co.* (1917), 244 U. S. 416, 37 Sup. Ct. 734, turned upon the constitutionality of section 11 (k) of the Federal reserve act, which granted to national banks the right to act, in certain circumstances, as trustees, executors and administrators. It was contended that, unlike the business of banking, there was no natural connection or relationship between acting in these capacities and carrying on the fiscal operations of the Federal Government and that, moreover, the legislation constituted a direct invasion of the sovereignty of the States, which control not only the devolution of the estates of deceased persons and the conduct of private business within the States, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. The Supreme Court of the United States, however, took cognizance of the fact that Congress had authorized national banks to act in these capacities in order to enable them to compete with State corporations which were authorized to transact such business in connection with their banking business; and, therefore, the court sustained the constitutionality of the law.

In rendering the opinion of the court on this question, Chief Justice White reviewed the earlier decisions of the Supreme Court in the cases of *McCulloch* v. *Maryland* and *Osborn* v. *Bank* and said (p. 737):

> * * * What those cases established was that although a business was of a private nature and subject to State regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in cooperation with or as part of its public authority. Manifestly this excluded the power to the State in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of State authority to prohibit Congress from exerting a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by State law, State banking corporations, trust companies, or others which, by reason of their business, are rivals or quasi rivals of national banks, are permitted to carry on such business. This must be, since *the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency.* [Italics supplied.]

Likewise, the States may not, by granting increasingly liberal powers to State banks and trust companies, create a competitive situation that makes it impossible for Congress to preserve the existence of the national banking system without removing the safeguards necessary to make it a safe and effective system and at the same time deny the right of Congress to meet the situation by putting an end to such competition.

In the case of *State of Missouri* v. *Duncan* (1924), 265 U. S. 17, 44 Sup. Ct. 427, the Burnes National Bank of St. Joseph, Mo., being duly authorized to act as executor by a permit issued by the Federal Reserve Board under the provisions of section 11 (k) of the Federal reserve act, was named as executor by a citizen of Missouri who died leaving a will. The bank applied to the probate court for letters testamentary but was denied appointment on the ground that national banks were not permitted to act as executors under the laws of Missouri. Thereupon, the national bank applied to the supreme court of the State for a writ of mandamus to require the judge of the probate court to issue letters testamentary. The Supreme Court of Missouri denied a writ of mandamus and an appeal was taken to the Supreme Court of the United States, which reversed the opinion of the State court and held that the probate court had no right to deny the national bank letters testamentary.

After quoting the second paragraph of section 11 (k) of the Federal reserve act, as amended by the act of September 26, 1918 (40 Stat. 967), the Supreme Court said, through Mr. Justice Holmes (pp. 23, 24):

> * * * This says in a roundabout and polite but unmistakable way that whatever may be the State law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power. The relator has the permit, competing trust companies can act as executors in Missouri, the importance of the powers to the sustaining of competition in the banking business is so well known and has been explained so fully heretofore that it does not need to be emphasized, *and thus the naked question presented is whether Congress had the power to do what it tried to do.*
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> The States can not use their most characteristic powers to reach unconstitutional results. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. *Pullman Co.* v. *Kansas*, 216 U. S. 56. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it can not escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent. *Kenney* v. *Supreme Lodge of the World*, 252 U. S. 411, 415. So here—the State can not lay hold of its general control of administration to deprive national banks of their power to compete that Congress is authorized to sustain. [Italics supplied.]

Nor would it seem that the States, through the exercise of their power to charter banks, can maintain a situation which impairs the efficiency of the national banking system and the Federal reserve system. The power to create these systems includes the power to preserve them; and Congress can eliminate the ruinous competition that now exists between the national banking system and the 48 State banking systems if it finds it necessary to do as a means of preserving the efficacy of its own instrumentalities.

In *Westfall* v. *United States* (1927), 274 U. S. 256, 47 Sup. Ct. 629, the defendant, who was not even an official of any member bank of the Federal reserve system, was indicted for aiding and procuring a branch manager of a State bank which was a member of the Federal reserve system to misapply the funds of the bank in violation of a provision of section 9 of the Federal reserve act. He attacked the constitutionality of the Statute on the ground that Congress had no power to punish offenses against the property rights of State banks and that the statute is so broad that it covers such offenses when they would not result in any loss to the Federal reserve bank. The Supreme Court of the United States, however, held that the statute was constitutional and said (p. 258):

> * * * And if a State bank chooses to come into the system created by the United States, the United States may punish acts injurious to the system, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement. That there is such a system and that the reserve banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently whether there is a loss to the reserve banks or not. *But every fraud like the one before us weakens the member bank and therefore weakens the system.* Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented, it may do so. It may punish the forgery and utterance of spurious interstate bills of lading in order to protect the genuine commerce. *United States* v. *Ferger*, 250 U. S. 199. See further *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26. That principle is settled. Finally Congress may employ State corporations with their consent as instrumentalities of the United States, *Clallam County* v. *United States*, 263 U. S. 321, and may make frauds that impair their efficiency crimes. *United States* v. *Walter*, 263 U. S. 15. [Italics supplied.]

If Congress can go to that length in order to protect the Federal reserve system from a relatively minor danger, it can relieve the member banks of that system of the competition of nonmember banks for commercial banking business, in order to protect the Federal reserve system from the greater danger of having the efficiency and safety of its operations impaired by such competition. If, in order to accomplish this object, it deems it appropriate to restrict the transaction of a commercial banking business to national banks, which are required to be members of the Federal reserve system, Congress clearly has the right to do so.

A brief review of the history of Federal banking legislation will disclose that Congress already has made two attempts to create a unified banking system for the United States and that, in the language of Mr. Justice Holmes in *State of Missouri* v. *Duncan*, "The naked question presented is whether Congress has the power to do what it tried to do."

When it enacted the national bank act, Congress recognized that banking is a matter of national public interest and attempted to create a unified banking system under Federal supervision. As will be shown in more detail hereinafter, the act of March 3, 1865, which imposed a prohibitive tax on the circulating notes of State banks, was intended not only to provide a uniform currency but also to compel State banks to convert into national banks. It succeeded in eliminating State bank currency and almost succeeded in eliminating State banks; but the State banks overcame the handicap of not being able to issue currency and multiplied in number until, by 1910, their number was almost twice that of national banks.

By the enactment of the Federal reserve act of December 23, 1913, Congress made another attempt to create a unified banking system, by requiring all national banks in the continental United States to become members of the Federal reserve system and inviting State banks to do so voluntarily. This object was recognized by the Federal Reserve Board in a circular issued on June 7, 1915, and published in the FEDERAL

Reserve Bulletin for July, 1915, at page 145, wherein the board said:

A unified banking system, embracing in its membership the well-managed banks of the country, small and large, State and national, is the aim of the Federal reserve act. There can be but one American credit system of nation-wide extent, and it will fall short of satisfying the business judgment and expectation of the country and fail of attaining its full potentialities if it rests upon an incomplete foundation and leaves out of its membership any considerable part of the banking strength of the country.

When we entered the Great War, however, only 53 State banks with resources aggregating $756,000,000 had become members of the Federal reserve system; and, in order to induce additional State banks to become members, so that the financial resources of the Nation might be mobilized for the great struggle then confronting it, Congress made a number of concessions which materially diminished its own control over State member banks of the Federal reserve system.

By the act of June 21, 1917 (40 Stat. 232), it eliminated the requirements of the original Federal reserve act that State member banks must comply with the loan limitations of the national bank act and must be examined at least twice a year by the Comptroller of the Currency and provided that, subject to the provisions of the Federal reserve act and the regulations of the Federal Reserve Board made pursuant thereto, such banks should retain their full charter and statutory rights as State banks or trust companies and might continue to exercise all corporate powers granted by the States in which they were created.

On October 13, 1917, the President of the United States appealed to the State banks and trust companies to become members of the Federal reserve system for patriotic purposes, saying that, "The extent to which our country can withstand the financial strains for which we must be prepared will depend very largely upon the strength and staying power of the Federal reserve banks." (Ann. Rep. F. R. Board, 1917, p. 9.)

Notwithstanding these concessions by Congress and this appeal of President Wilson, however, there were only 936 State member banks with resources aggregating $7,338,813,000 in the Federal reserve system on January 1, 1919. Only 11 per cent of the State banks had become members of the Federal reserve system, and these banks held only 54.5 per cent of the resources of all State banks and trust companies in the country. (Ann. Rep. F. R. Board, 1918, pp. 26 and 27.)

Moreover, at the peak of State bank membership, which occurred on June 30, 1922, there were only 1,648 State banks and trust companies which were members of the Federal reserve system out of a total of approximately 20,000 State banks and trust companies in the country; and the member State banks and trust companies held only 51 per cent of the total resources of all State banks and trust companies. (Ann. Rep. F. R. Board, 1922, p. 29; Ann. Rep. Comp. Cur., 1931, pp. 3, 5.) And on June 30, 1932, there were only 835 State member banks and trust companies in the Federal reserve system.

Furthermore, the amendments of June 21, 1917, which were enacted in order to induce State banks to become members of the Federal reserve system voluntarily, had greatly weakened the control of the Federal Government over State member banks; the successive amendments to the national bank act, which were intended to enable national banks to compete more effectively with State banks, had materially lowered the standard previously set by the national bank act; the "better supervision of banking," which is one of the major purposes of the Federal reserve act, had been seriously impeded; and the 10 years 1921 to 1931 witnessed numerous failures of State member banks and a larger number of failures of national banks than had occurred previously in the entire history of the national banking system from 1863 to 1921.

Mr. Eugene Meyer, then managing director of the War Finance Corporation, made the following statement on January 31, 1923, in testifying before the Committee on Banking and Currency of the House of Representatives (Hearings on S. 4280, 67th Cong., Pt. I, p. 56):

There are necessarily many difficulties involved in our dual system of banking. We have a State banking system, a national banking system, and a Federal reserve system, the latter having a membership derived from both the State and the national systems. The State banking departments supervise the State banks, and the Comptroller of the Currency supervises the national banks, while the Federal reserve system has a supervision of its own for the member banks, and there has been at times some disposition to competition between the State and the national banking systems.

The State banking laws frequently permit practices which national banks can not legally engage in. This is creating competition between the two systems which can not be regarded as wholesome and may lead to the gradual weakening of both. * * * The competition that exists at the present time between State and national banks can not fail to remind one of the competition that prevailed a generation ago among the various States seeking to become domiciles for corporations—a competition that was based upon the laxity of the laws governing incorporation. *Nothing could be more disastrous than competition between the State and national banking groups, based upon competition in laxity.* [Italics supplied.]

In testifying before the Committee on Ways and Means of the House of Representatives on April 27 and 28, 1932, in his capacity as governor of the Federal Reserve Board and chairman of the board of directors of the Reconstruction Finance Corporation and in the light of his experience as managing director of the War Finance Corporation, Mr. Eugene Meyer discussed this subject again. (Hearings re payment of adjusted service certificates, 72d Cong., 1st sess., pp. 631, 642, 643). His testimony was, in part, as follows:

Personally I feel, as I stated to a subcommittee of the Banking and Currency Committee the other day, that we will never have a satisfactory banking system in the United States until banks of deposit, commercial banks, can be gathered under one chartering, supervising, and regulatory power. The constant competion between State and national banking systems has resulted in a weakening of the laws and the safeguards of both systems which I think contributed in no small degree to the excesses of the inflation period and to the suffering of the deflation period. The minds of the committees charged with banking and currency responsibilities are engaged in studying this problem.

* * * * * * *

I am entirely in favor of maintaining State rights to the extent that they can properly be maintained. But there are various functions over which the Federal Government has had to assume jurisdiction. We have the Postal Service and have had it since the beginning of the Government. As other activities become national and interstate on a greater scale, I feel that we must take account of these changed conditions. We must have elasticity in our conception of decentralization and the advantage of local control when there are vital changes in financial and economic conditions.

This subject was also discussed by Mr. Owen D. Young, deputy chairman of the Federal Reserve Bank of New York, in his testimony before the subcommittee of the Senate Committee on Banking and Currency on February 4, 1931. (Hearings pursuant to Senate Resolution No. 71 of the 71st Cong., pp. 353 et seq.) He said:

I want to say, first, Mr. Chairman, * * * that all commercial deposit banking in the United States should be carried on under one law, that examinations of banks and their control should be under one authority. Their reserves should be mobilized in the Federal reserve system. Then we could develop for the country as a whole a sound banking system, and definitely fix responsibility. That would mean that all banks of deposit, as distinguished from savings, should be national banks.

As it is now, banks are chartered both by the National Government and by each of the 48 States. They are in competition, each endeavoring to offer the most attractive charters and the most liberal laws, to say nothing of the liberality of administrative officials in interpreting the laws. The national banking act has to compete not only with the most conservative States but the most liberal ones. Consequently, there has been a constant tendency to liberalize banking laws and to weaken their administration. In such cases the argument is always made that it is desirable to liberalize the law so as to enable the banks to be of great service to borrowers.

The first question always regarding banks doing a demand deposit business should be the safety of the deposits and the ability of the bank to return them to depositors instantly on request, unless they be time deposits. No thought of service to borrowers should be permitted to impair the safety and security of deposits. Banks of deposit are, after all, primarily custodians of liquid funds. Only such use of such funds should be permitted as may be consistent with the interests of the depositors.

In the early years of our Government, our business was largely done by currency moving from hand to hand. It was felt at that time, and properly so, that we should have a national and uniform currency. Consequently, Congress was given power to coin money and regulate the value thereof. This power was made effective as to paper money by the national bank act. Now our business is carried on mostly by transfers of bank deposits, currency forming only a small part of our money transfers. If control of our currency were necessary in the beginning by the Federal Government, control of our bank deposits by it now would seem desirable. We have transferred, either affirmatively or by acquiescence, many powers to the Federal Government which ought not to be there. I am bitterly opposed to the impairment of the rights of the States in their appropriate field. It does seem strange, however, that in the face of such gravitation toward Federal authority, we should have retained divided rather than unified power over our deposit banking system.

Except for the currency in our pockets, our banks of deposit hold the liquid capital of the people of the United States. The transfer of this capital from one of us to another, promptly and safely, should be facilitated. That means, however, that every bank of deposit is truly engaged in a national business. Its soundness and safety is of concern to our people everywhere. Our business of deposit banks is not local in character; it is, and should be, national. Therefore, in my judgment, it should be governed by the national law.

* * * * *

I should hope, sir, that you might find a way to bring all State banks holding themselves out to do a national business and carrying demand deposits into the Federal reserve system by compulsion.

Having failed to accomplish fully its purposes by creating the Federal reserve system and inviting State banks to become members voluntarily and by modifying the safeguards contained in the national bank act and the Federal reserve act, in order to encourage the organization of national banks and to induce State banks to become members of the Federal reserve system, Congress may resort to other measures. It can abandon inducement and resort to compulsion. In other words, it can prevent the transaction of a commercial banking business except by national banks, which must be members of the Federal reserve system.

That Congress has the power to adopt this means to accomplish its great objects follows necessarily from the fundamental principles established by the Supreme Court of the United States in its decision in the case of *McCulloch* v. *Maryland* and the other cases discussed above; but there are also other reasons and additional authorities for this conclusion.

II. THE POWER TO PROVIDE A NATIONAL CURRENCY

A separate and independent ground for the above conclusion and an effective method of bringing all commercial banking into the national banking system is found in the measures adopted by Congress to provide a national currency for the Nation and in the decisions of the Supreme Court regarding the constitutionality of such measures.

By the act of March 3, 1865 (13 Stat. 484), later reenacted as the Act of July 13, 1866 (14 Stat. 146), Congress imposed a tax of 10 per cent on the circulating notes of State banks paid out by National or State banks. The avowed purpose of this legislation was to create a uniform currency by driving the circulating notes of State banks out of existence and, if necessary, by driving all State banks into the national banking system; and the Supreme Court of the United States upheld its constitutionality. *Veazie Bank* v. *Fenno* (1869), 8 Wall. 533, 19 L. Ed. 482.

How near this legislation came to creating a unified banking system is indicated by the fact that up to November 15, 1864, there were only 584 national banks with capital aggregating $81,961,450 and, by October 1, 1865, there were 1,566 national banks capitalized at $276,219,450. In 1862, prior to the passage of the national bank act, there were 1,492 State banks; in July, 1864, there were 467 national banks and 1,089 State banks; in 1865, there were 1,294 national banks and 349 State banks; in 1866, there were 1,634 national banks and 297 State banks; and by 1868, the number of State banks fell to 247, the lowest figure for any time since 1857. (Report, National Monetary Commission, vol. 5, pp. 22, 103; Annual Report, Comp. Cur., 1931, p. 3.)

It is appropriate, therefore, to examine in this connection not only the legal basis for the decision of the Supreme Court in the case of *Veazie Bank* v. *Fenno*, but also the circumstances giving rise to that opinion. While the situation then confronting Congress assumed a different form, the problem of the Sixties and the method of its solution furnish a guide to the method of dealing with the problem of effecting desirable reforms in our present banking system.

In his report to Congress dated November 28, 1863, (p. 57) the Comptroller of the Currency said:

* * * The idea that the national banks can not supersede the State banks without breaking them down and ruining their stockholders is an erroneous one, and can only be honestly entertained by those who have not carefully considered the subject or noticed the process of conversion, which has changed some banks in the West, and is changing others in the East, from one system to the other. No war is being waged, or is intended to be waged, by the national system upon State institutions. So far from it, it opens the way by which the interests of stockholders can be protected, at the same time that the character of their organizations is changed.

* * * The amount of losses which the people have sustained by insolvent State banks, and by the high rate of exchanges—the result of a depreciated currency—can hardly be estimated. That some of the new States have prospered, notwithstanding the vicious and ruinous banking systems with which they have been scourged, is evidence of the greatness of their resources and the energy of their people. *The idea has at last become quite general among the people that the whole system of State banking, as far as circulation is regarded, is unfitted for a commercial country like ours.* The United States is a nation as well as a union of States. Its vast railroad system extends from Maine to Kansas, and will soon be extended to the Pacific Ocean. Its immense trade is not circumscribed by State lines, nor subject to State laws. Its internal commerce is national, and so should be its currency. At present some 1,500 State banks furnish the people with a bank-note circulation. This circulation is not confined to the States by which it is authorized, but is carried by trade or is forced by the banks all over the Union. People receive it and pay it out, scarcely knowing from whence it comes or in what manner it is secured. Banks have been organized in some States with a view to lending their circulation to the people of others. Probably not one-quarter of the circulation of the New England banks is needed or used in New England—the balance being practically loaned to other States. The national currency system is intended to change this state of things, not by a war upon the State banks, but by providing a means by which the circulation which is intended for national use shall be based upon national securities through associations organized under a national law. [Italics supplied.]

In his report of November 25, 1864, (p. 54) the Comptroller of the Currency said:

As long as there was any uncertainty in regard to the success of the national banking system, or the popular verdict upon its merits and security, I did not feel at liberty to recommend discriminating legislation against the State banks. It is for Congress to determine if there is any longer a reasonable uncertainty on these points, and if the time has not arrived when all these institutions should be compelled to retire their circulation. It is indispensable for the financial success of the Treasury that the currency of the country should be under the control of the Government. This can not be the case as long as State institutions have the right

to flood the country with their issues. As a system has been devised under which State banks, or at least as many of them as are needed, can be reorganized, so that the Government can assume a rightful control over bank-note circulation, it could hardly be considered oppressive if Congress should prohibit the further issue of bank notes not authorized by itself, and compel, by taxation, (which should be sufficient to effect the object without being oppressive), the withdrawal of those which have been already issued. My own opinion is, that this should be done, and that the sooner it is done the better it will be for the banks themselves and for the public. *As long as the two systems are contending for the field, (although the result of the contest can be no longer doubtful), the Government can not restrain the issue of paper money;* and as the preference which is everywhere given to a national currency over the notes of the State banks indicates what is the popular judgment in regard to the merits of the two systems, there seems to be no good reason why Congress should hesitate to relieve the Treasury of a serious embarrassment, and the people of an unsatisfactory circulation. [Italics supplied.]

The circumstances giving rise to the enactment of the act of March 3, 1865, and the purposes sought to be accomplished thereby were graphically described by Senator Sherman, Chairman of the Finance Committee, when he reported the bill to the Senate on February 27, 1865. His entire speech is worthy of careful study; but the following quotations will suffice. (Congressional Globe, 38th Cong., 2d Sess., pp. 1138, 1139.)

The people of the United States having definitely determined to prosecute war, it only remained for Congress to provide the ways and means to carry it on * * * I still think that with parsimonious economy and heavy taxes from the beginning, we might have borrowed money enough on a specie basis to have avoided a suspension of specie payments; but when it came we were without a currency and without a system of taxation. Gold disappeared and was hoarded by banks and individuals. It flowed in a steady stream from our country. By the Sub-Treasury act we could not use the irredeemable bills of State banks, and with the terrible lessons of 1815 and 1837 staring us in the face, *no one was bold enough to advise us to make as a standard of value the issues of 1,500 banks founded upon as many banking systems as there were States.* Under these circumstances we had but one resource.

We had to borrow vast sums, and as a means to do it we had to make a currency. This was done by the issue of United States notes. Subsequently, to unite the interests of private capital with the security of the Government as a basis of banking, we established a system of national banks, and upon this currency, as a medium for collecting taxes and borrowing money, have waged a war unexampled in the grandeur of its operations, and, as I trust, soon to be crowned with unconditional success.

* * * * *

A still more important feature of this bill is the section to compel the withdrawal of State bank notes. As the volume of currency affects the price of all commodities, I have no doubt the amount of such paper money now outstanding adds to the cost of our purchases $50,000,000. The refusal of Congress, at the last session, to pass restrictive measures to compel its redemption has seriously affected the value of our currency. *The national banks were intended to supersede the State banks. Both can not exist together;* yet, while the national system is extending, the issues of State banks have not materially decreased. Indeed, many local banks have been converted into national banks, and yet carefully keep out their State circulation. They exact interest from the people on this circulation, and yet avail themselves of the benefits of the new system. They transfer their capital to national banks, issue new circulation upon it, and yet studiously keep out the old. They issue two circulations upon the same capital. It is far better at once to abandon the national banking system than to leave it as a cloak for outstanding State issues.

If the State banks have power enough in Congress to prolong their existence beyond the present year, we had better suspend the organization of national banks. As the first friend of this measure in the Senate, I would vote today for its repeal rather than allow it to be the agency under which State banks can inflate our currency. And *the power of taxation can not be more wisely exercised than in harmonizing and nationalizing and placing on the secure basis of national credit all the money of the country.* [Italics supplied.]

The various legislative steps leading up to the passage of the act of July 13, 1866, were stated as follows in the opinion of the Supreme Court in the case of *Veazie Bank* v. *Fenno* by Mr. Chief Justice Chase, who had been Secretary of the Treasury during the events related (8 Wall. 536–540):

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently with little skill, prudence and integrity. The acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general regulation of any other by national legislation; and no national taxation was imposed in any form on the State bank circulation.

The first act authorizing the emission of notes by the Treasury Department for circulation was that of July 17, 1861. The notes issued under this act were treasury notes, payable on demand in coin. * * *

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and, for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862, a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called Treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, * * *.

This currency, issued directly by the Government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the act authorizing national banking associations was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of 2 per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the act of March 3d, 1863, a similar but lighter tax of 1 per cent annually was imposed on the circulation of State banks, in certain proportions to their capital, and of 2 per cent on the excess; and the tax on the national associations was reduced to the same rates.

* * * * *

At a later date, by the act of June 3d, 1864, which was substituted for the act of February 25th, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterwards, by the act of June 30, 1864, to provide ways and means for the support of the Government, the tax on the circulation of the State banks was also continued at the same annual rate of 1 per cent as before, but payment was required in monthly installments of one-twelfth of 1 per cent with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

* * * The act just referred to was * * * followed some months later by the act of March 3d, 1865, amendatory to the prior internal revenue acts, the sixth section of which provides, "that every national banking association, State bank or State banking association, shall pay a tax of 10 per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866."

The same provision was reenacted, with a more extended application, on the 13th of July, 1866, in these words: "Every national banking association, State bank, or State banking association, shall pay a tax of 10 per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the Commissioner of Internal Revenue."

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a national currency by the issues of United States notes and of national bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

Let us consider the present problem in the light of past experience: By the revenue act of 1932, approved June 6, 1932, Congress recently imposed a tax of 2 cents on each check, without making any distinction between checks drawn on State banks and those drawn on national banks. Is there any reason why Congress could not increase this tax to 10 per cent of the amount of each check but exempt therefrom the checks drawn upon national banks and Federal reserve banks, the instrumentalities which it has created to aid the Government in the performance of certain important functions?

While there are other grounds for holding that Congress could do so, adequate grounds for such a conclusion are contained in the reasons given by Mr. Chief Justice Chase for the court's decision in the case of *Veazie Bank* v. *Fenno*.

After disposing of the contentions that the tax was a direct tax and had not been apportioned among the States, as required by the Constitution, and that the act imposing the tax impaired a franchise granted by the State, which it was urged Congress had no right to do, he stated and disposed of the principal question as follows (8 Wall. 548–550):

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that *the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers.* The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It can not be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the Government and by repeated decisions, that Congress may consitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the Government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the Government; both are issued on the credit of the Government; and the Government is responsible for the redemption of both; primarily as to the first description, and immediatly upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it can not be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we can not doubt the constitutionality of the tax under consideration. [Italics supplied.]

Likewise, having undertaken to provide an elastic currency for the country by enacting the Federal reserve act, which authorized the issuance of Federal reserve notes through the Federal reserve banks, Congress may constitutionally secure the benefit of that currency to the people by appropriate legislation.

Federal reserve notes are secured by the assets of Federal reserve banks; and the Federal reserve banks depend largely upon their member banks to furnish the assets required for this purpose. They derive all their capital from subscriptions by member banks to their capital stock and most of their deposits consist of the legal reserves deposited with them by their member banks.

In normal times, Federal reserve notes are secured largely by eligible paper acquired by the Federal reserve banks from their member banks, and, as pointed out by the Federal Reserve Board in the circular quoted in part above, the Federal reserve act contemplated the creation of a banking system which would include most, if not all, of the commercial banks in the country.

This result not having been accomplished by the methods heretofore adopted, it would seem clear that Congress has the power to enact appropriate legislation in order to preserve for the Nation the full benefits of the flexible currency which it undertook to provide by the enactment of the Federal reserve act. If it finds that, in order to accomplish this purpose, it is necessary to prevent the transaction of a commercial banking business except by national banks, which must be members of the Federal reserve system, Congress may constitutionally adopt this means and the courts will not interfere; because the degree of the necessity for the enactment of such legislation is a question of legislative discretion, not of judicial cognizance. *McCulloch* v. *Maryland*.

At one time it was contended that Congress is not authorized to provide the people of the United States with a national currency, that the only power of this general character granted to it was the power to coin money and regulate the value thereof, and that this power is confined to matters pertaining to metallic money.

Such an argument was answered, however, in the decision of the Supreme Court of the United States in the *Legal Tender Cases* (1871), 12 Wall. 457, 20 L. Ed. 287, wherein the Supreme Court upheld the validity of certain acts of Congress making United States notes and Treasury notes legal tender for the payment of debts. In that case, the court, speaking through Mr. Justice Strong, said (544–546):

It is not easy to see why, if State bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

* * * *The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal Government, while the same power as well as the power to emit bills of credit was withdrawn from the States.* The States can no longer declare what shall be money, or regulate its value. *Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated.* * * * it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the Government and the demands of the people—when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that *the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and which they surrendered.* [Italics supplied.]

In a separate concurring opinion, Mr. Justice Bradley said (p. 562):

Another ground of the power to issue Treasury notes or bills is the necessity of providing a proper currency for the country, and especially of providing for the failure or disappearance of the ordinary currency in times of financial pressure and threatened collapse of commercial credit. *Currency is a national necessity. The operations of the Government, as well as private trans-*

actions, are wholly dependent upon it. The State governments are prohibited from making money or issuing bills. *Uniformity of money was one of the objects of the Constitution.* The coinage of money and regulation of its value is conferred upon the General Government exclusively. That Government has also the power to issue bills. It follows, as a matter of necessity, as a consequence of these various provisions, that *it is specially the duty of the General Government to provide a national currency. The States can not do it, except by the charter of local banks, and that remedy, if strictly legitimate and constitutional, is inadequate, fluctuating, uncertain, and insecure, and operates with all the partiality to local interests, which it was the very object of the Constitution to avoid.* But regarded as a duty of the General Government, it is strictly in accordance with the spirit of the Constitution, as well as in line with the national necessities. [Italics supplied.]

The tax imposed by the act of July 13, 1866, accomplished the object of eliminating the circulating notes of State banks and thus giving us a national currency of uniform value; but it has not accomplished the object of eliminating the competition of State banks and thus creating a unified commercial banking system as a basis for that currency.

Prior to the Civil War, banks derived most of their profits from the issuance of circulating notes and relied to a much lesser extent than they do now on deposits as a source of earning power. In fact, the amount of their circulating notes frequently exceeded the amount of their deposits. (Rep. National Monetary Commission, vol. 5, pp. 16, 27.) It was expected, therefore, that the imposition of a prohibitive tax on their circulating notes would cause all State banks either to convert into national banks or to go out of business.

A way was soon found, however, to conduct a profitable banking business without issuing circulating notes. It was through the development of the use of checks in lieu of currency as a means of payment. This was convenient to depositors and profitable to the banks, since the latter could enjoy the use of the money pending its withdrawal and even while the checks were in process of collection; and the practice was encouraged by national banks as well as State banks. Moreover, arrangements facilitating the easy flow of checks throughout the country made the use of checks so popular that it has been estimated that, at the present time, more than 90 per cent of all payments are made by means of checks.

Checks, therefore, have to a very large extent taken the place of currency as a medium of payment; and State banks, operating under laws allowing a greater latitude and requiring less rigorous supervision and regulation than the national bank act, have grown in number until, in the peak year of 1921, there were 20,349 State banks (other than mutual savings banks) compared with 8,154 national banks and, in 1931, there were 13,728 State banks compared with 6,805 national banks. The reduction in the number of banks of both classes resulted principally from failures and consolidations. (Ann. Rep. Compt. Currency, 1931, p. 3.)

Moreover, with the return of the predominance of State banks, many of the disadvantages of a heterogeneous banking structure have reappeared in another form; and checks, which have replaced currency as the principal medium of payment, frequently prove to be an ineffective medium. Checks go unpaid because the banks upon which they were drawn have failed. Balances against which depositors expected to draw checks in settlement of their business transactions are unavailable for that purpose, because the banks have closed their doors.

Not only has the effective operation of the national banking system and the Federal reserve system been seriously impaired by the "competition in laxity" of bank regulation and supervision, described in the statements of Governor Meyer and Mr. Owen D. Young quoted above, but the proportion of national banks to the total number of commercial banks in the country has fallen from 87 per cent in 1868 to 33 per cent in 1931; and only 38 per cent of all the commercial banks were members of the Federal reserve system in 1931. A material portion of commercial banking business, therefore, is conducted outside of the Federal reserve system and contributes nothing to the basis for our currency.

The tax on circulating notes having become ineffective as a result of the use of checks in lieu of currency, Congress has the right to bring the act of July 13, 1866, up to date by making the tax applicable to checks drawn on State banks.

III. THE POWER TO REGULATE AND PROTECT INTERSTATE COMMERCE

Either one of the two grounds discussed above is sufficient to sustain the conclusion herein reached; but there is still another separate ground upon which the same conclusion could be sustained independently. The right to enact legislation to make banks more reliable instrumentalities of interstate commerce is included in the power granted to Congress by section 8 of article 1 of the Constitution, "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In a long series of decisions, this clause of the Constitution has been held to give Congress control over all phases of interstate commerce, as well as over all other matters so connected with interstate commerce as to require Congressional control over them in order to make effective the control over such commerce itself. The rule of these decisions is that "commerce" does not include merely the transfer of goods, but that the proper regulation of commerce must include the regulation of all aspects of commerce and of all instrumentalities upon which the carrying on of commerce depends. *Mondou* v. *New York, New Haven, and Hartford R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169. Since the transportation system of the country is regarded as an essential instrumentality to this end, it has, under the commerce clause, been subjected to Congressional regulation on a vast scale. Railroad cars not used in interstate commerce, but which may be placed in the same train with those that are, must conform to the Federal safety appliance act. *Southern Railway Co.* v. *United States*, 222 U. S. 20, 32 Sup. Ct. 2. Intrastate freight rates are subjected to Federal regulation when they interfere with interstate rates. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232. The issuance of fraudulent bills of lading is punishable under a Federal statute, even when they cover no interstate shipment. *United States* v. *Ferger*, 250 U. S. 199, 39 Sup. Ct. 445. Stockyards, although engaged in dealing locally in livestock, are subjected to Federal control, because they are essential cogs in the machinery of interstate commerce. *Stafford* v. *Wallace*, 258 U. S. 495, 42 Sup. Ct. 397. The same is true of the principal grain markets. *Board of Trade of City of Chicago* v. *Olsen*, 262 U. S. 1, 43 Sup. Ct. 470. The decisions contain many other examples of a similar nature.

Although the courts have held that the powers of Congress under the commerce clause extend to a great variety of matters related to commerce—from the quality of radio broadcasting stations to the criminality of traffic in certain articles—no judicial interpretation nor any extension of the literal terms of that clause is necessary to make it include the very essentials of commerce, i. e., the acts of transferring the goods and of transmitting the consideration for them. The one is as essential as the other. A breakdown in the means of payment would be as disastrous as a breakdown in the means of shipment, since virtually every commercial transaction requires the services of a commercial bank for its consummation.

That the power to regulate commerce among the several States includes the power to remove obstructions and impediments to such commerce and to regulate the instrumentalities as well as the articles of that commerce is too well settled by numerous decisions of the Supreme Court to require argument. No attempt will be made, therefore, to review the multitude of decisions of the Supreme Court regarding the extent of this important power. A few leading cases will suffice.

The scope of the power of Congress over interstate commerce was stated concisely by the Supreme Court in *Mondou* v. *New York, N. H. & H. R. R Co.* (1911), 223 U. S. 1, 32 Sup. Ct. 169, wherein the court sustained the validity of the Federal employees' liability act and reaffirmed the power of Congress to determine the necessity for, and to enact, uniform national legislation to replace the variant State legislation governing the same subject (pp. 173, 174):

The clauses in the Constitution (art. I., sec. 8, clauses 3 and 18) which confer upon Congress the power "to regulate commerce * * * among the several States," and "to make all laws which shall be necessary and proper" for the purpose, have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:

1. *The term "commerce"* comprehends more than the mere exchange of goods. *It embraces commercial intercourse in all its branches*, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

3. "*To regulate*," in the sense intended, *is to foster, protect, control, and restrain*, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

4. *This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution.* But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. [Italics supplied.]

That these considerations apply as much to the *instruments* as to the *agents* of such commerce, is shown by the brilliant passage which immediately follows in the opinion (p. 174):

As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. *Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.*" [Italics supplied.]

If banks are destroyed, commerce is stopped; if banks are suspended, commerce is interrupted; if banks are not of the right kind or quality, "commerce in consequence becomes slow or costly or unsafe or otherwise inefficient"; and if the laws, regulations, and supervision under which banks perform their functions are wrong or inadequate, "these bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure." Therefore, it would seem that Congress may legislate about banks as agents and instruments of interstate commerce and may prescribe the conditions under which banks perform the work of finally consummating transactions in interstate commerce, "whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility" of the act of interstate commerce.

The fundamental incentive for interstate commerce is profit; and no transaction in interstate commerce is finally consummated until payment has been received for the goods which have been sold and shipped. In many instances, the very act of shipping goods in interstate commerce is inseparably connected with the forwarding, through a series of banks, of bills of lading attached to bills of exchange which must be paid or accepted before the goods are released. The ultimate payment which constitutes the object and the final act of nearly every transaction in interstate commerce is made by means of a check drawn upon a bank in one State in favor of a payee in another State; and such checks are forwarded for collection through a series of banks scattered over at least two, and frequently more, different States. Banks, therefore, are essential instrumentalities of interstate commerce.

Nearly every bank failure delays or prevents the final consummation of numerous transactions in interstate commerce by preventing or delaying the payment of the checks given in settlement therefor; and Congress clearly would be justified in finding that a heterogeneous banking system in which there have been more than 10,000 suspensions involving deposits amounting to nearly $5,000,000,000 since 1920, is a burden upon and an obstruction to interstate commerce.

Since "Congress * * * can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make the act more secure, more reliable, or more efficient," it would seem clear that Congress can create a unified banking system in order to remove such an obstruction and burden to interstate commerce.

In *Houston, etc. R. Co.* v. *United States* (1914), 234 U. S. 342, 34 Sup. Ct. 833, wherein the Supreme Court sustained the validity of an act of Congress regulating purely intrastate freight rates when such rates were found by the Interstate Commerce Commission to interfere with interstate rates, the court said (p. 836):

It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. *It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government.* The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." *By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise; and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.* [Italics supplied.]

It has been recognized that one of the principal reasons for subjecting interstate commerce and matters related to it to national rather than local regulation is the fact that *interstate commerce "is of national importance, and admits and requires uniformity of regulation." Walton* v. *Missouri* (1876), 91 U. S. 275.

In *Mondou* v. *New York, N. H. & H. R. Co.*, supra, the court said, (p. 175):

We are not unmindful that that end was being measurably attained through the remedial legislation of the several states, *but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States,* upon all carriers by railroad engaged in interstate commerce, *would better subserve the needs of that commerce.* [Italics supplied.]

Obviously the same principle applies to banks or a banking system which Congress has created. See *Easton* v. *Iowa*, supra, wherein the court said that the national bank legislation "has in view the erection of a system extending throughout the country, and *independent so far as powers conferred are concerned, of State legislation which, if permitted to be applicable might impose limitations and restrictions as various and as numerous as the States.*"

It is not only within the power of Congress, therefore, to create a unified banking system in order to remove existing impediments and obstructions to interstate commerce resulting from the existence of 48 different State banking systems, but it is also right, meet, and proper for Congress to do so, since the object is a national one which can be dealt with effectively only by the national legislature.

This conclusion is not based upon the theory that the banking business is itself commerce, but upon the fact that banks are instrumentalities of interstate commerce and that an unsound and unsatisfactory banking system is a burden upon and an impediment to interstate commerce.

If, therefore, Congress decides to solve this problem through the exercise of its powers over interstate commerce and as a means to removing an obstruction to interstate commerce, it need not confine the legislation to transactions of an interstate character, but may legislate for the banking system as a whole; since every commercial bank actually functions as an instrumentality of interstate commerce and every failure of a commercial bank obstructs and impedes the consummation of numerous transactions in interstate commerce.

The effective regulation of interstate commerce requires the regulation of some matters which in and of themselves are not interstate commerce, but which have a direct relationship to such commerce. In other words, if the transaction which is of itself purely intrastate is a vital part of interstate commerce, the regulation of that transaction may be undertaken by Congress under the commerce clause.

In *Stafford* v. *Wallace* (1922), 258 U. S. 495, 42 Sup. Ct. 397, the court considered the validity of an act of Congress which, among other things, provided for Federal supervision and control of stockyards. The court found that, although many of their transactions are purely local, the business of the packers and of the stockyards is an integral and essential part of the interstate commerce in livestock and meat, and accordingly held the statute to be a valid exercise of the power conferred on Congress by the commerce clause.

In rendering the opinion of the court, Mr. Chief Justice Taft said (pp. 517, 521):

* * * The only question here is whether the business done in the stockyards, between the receipt of the livestock in the yards and the shipment of them therefrom, is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in Swift *v.* United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. The judgment in that case gives a clear and comprehensive exposition, which leaves to us in this case little but the obvious application of the principles there declared.

*   *   *   *

* * * *Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it.* This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent. [Italics supplied.]

Two cases dealing with Congressional legislation regarding grain futures markets have an important bearing not only upon the right of Congress to regulate the commercial banking business in order to prevent an obstruction to interstate commerce but also upon the proper method of preparing such legislation.

In the first of these cases, *Hill* v. *Wallace* (1922), 259 U. S. 44, 42 Sup. Ct. 453, an act of Congress designed to regulate the conduct of business of boards of trade through the exercise of the power of taxation was held to be unconstitutional. In *Board of Trade* v. *Olsen* (1923), 262 U. S. 1, 43 Sup. Ct. 470, however, the court upheld the validity of a statute having the same object, on the ground that it was intended to remove an obstruction or interference with interstate commerce in the form of price manipulation and control in these markets.

Unlike the statute held unconstitutional in *Hill* v. *Wallace*, the statute which was sustained as constitutional in *Board of Trade* v. *Olsen* clearly stated its relation to interstate commerce. It contained a recital and finding of the facts disclosed in the hearings and committee reports, to the effect that transactions in grain involving sales for future delivery as commonly conducted on boards of trade are affected with a national public interest and that they are susceptible of speculation, manipulation and control resulting in fluctuations in prices which constitute an obstruction to and a burden upon interstate commerce in grain.

With certain exceptions, the act forbade boards of trade to use the mails or interstate telephone, telegraphic, wireless, or other communication in offering or accepting sales of grain for future delivery or to disseminate prices or quotations thereof, unless such boards of trade are located at terminal markets which have been designated by the Secretary of Agriculture as contract markets, comply with certain regulations and restrictions contained in the act, and submit to the supervision of the Secretary of Agriculture.

In rendering the opinion of the court sustaining the constitutionality of the act, Mr. Chief Justice Taft said (262 U. S. 31–41, 43 Sup. Ct. 475–479):

Appellants contend that the decision of this court in *Hill* v. *Wallace*, 259 U. S. 44, is conclusive against the constitutionality of the Grain Futures Act. Indeed in their bill they pleaded the judgment in that case as *res judicata* in this, as to its invalidity. The act whose constitutionality was in question in *Hill* v. *Wallace* was the Future Trading Act (c. 86, 42 Stat. 187). It was an effort by Congress, through taxing at a prohibitive rate sales of grain for future delivery, to regulate such sales on boards of trade by exempting them from the tax if they would comply with the congressional regulations. It was held that sales for future delivery where the parties were present in Chicago, to be settled by offsetting purchases or by delivery, to take place there, were not interstate commerce and that Congress could not use its taxing power in this indirect way to regulate business not within Federal control.

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The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held in the somewhat carefully framed language of the foregoing prevented our sustaining the Future Trading Act. As we have seen in the statement of the case, the act only purports to regulate interstate commerce and sales of grain for future delivery on boards of trade *because it finds that by manipulation they have become a constantly recurring burden and obstruction to that commerce.* Instead, therefore, of being an authority against the validity of the Grain Futures Act, it is an authority in its favor.

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It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts, from the current of stock shipments declared to be interstate commerce in Stafford *v.* Wallace, 258 U. S. 495, 42 Sup. Ct. 397, 66 L. Ed. 735. That case presented the question whether sales and purchases of cattle made in Chicago at the stockyards by commission men and dealers and traders under the rules of the stockyards corporation could be brought by Congress under the supervision of the Secretary of Agriculture to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby. It was held that this could be done, *even though the sales and purchases by commission men and by dealers were in and of themselves intrastate commerce, the parties to sales and purchases and the cattle all being at the time within the city of Chicago.*

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This case was but the necessary consequence of the conclusions reached in the case of Swift & Co. *v.* United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. *It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.* The Swift Case merely fitted the commerce clause to the real and practical essence of modern business growth. It applies to the case before us just as it did in Stafford *v.* Wallace.

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In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation, and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.

It is clear from the citations, in the statement of the case, of evidence before committees of investigation as to manipulations of the futures market and their effect, that *we would be unwarranted in rejecting the finding of Congress as unreasonable, and that in our inquiry as to the validity of this legislation we must accept the view that such manipulation does work to the detriment of producers, consumers, shippers and legitimate dealers in interstate commerce in grain and that it is a real abuse.*

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* * * The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it. By reason and authority, therefore, in determining the validity of this act, we are prevented from questioning the conclusion of Congress that manipulation of the market for futures on the Chicago Board of Trade may, and from time to time does, directly burden and obstruct commerce between the States in grain, and that it recurs and is a constantly possible danger. For this reason, Congress has the power to provide the appropriate means adopted in this act by which this abuse may be restrained and avoided. [Italics supplied.]

Likewise, if Congress finds that our present banking system, which has given rise to more than 10,000 bank failures since 1920, which necessarily have delayed and obstructed the consummation of innumerable transactions in interstate commerce, is a burden upon and

obstruction to interstate commerce, the Supreme Court would not be warranted in rejecting the finding of Congress as unreasonable or in concluding that legislation designed to correct this situation and remove such an obstruction to interstate commerce is not a proper exercise of the power to regulate commerce among the States.

If the purchase and sale of cattle by commission men, dealers and traders at the Chicago stock yards, and the sale of grain for future delivery on the Chicago Board of Trade and the dissemination of prices and quotations thereof, can be brought by Congress under the supervision of the Federal Government, on the ground that abuses in such business constitute obstructions to interstate commerce, it seems clear that the transaction of a commercial banking business, involving the payment of checks given in settlement of transactions in interstate commerce and the handling of innumerable bills of exchange secured by bills of lading growing out of transactions in interstate commerce, can also be brought under the supervision of the Federal Government.

Such cases as *Hammer* v. *Dagenhart* (1918), 247 U. S. 251, 38 Sup. Ct. 529, and *Bailey* v. *Drexel Furniture Co.* (1922), 259 U. S. 20, 42 Sup. Ct. 449, need not be distinguished in detail; because they relate to Federal legislation wherein Congress attempted to deal with purely local questions having no essential connection with interstate commerce; whereas commercial banking is a matter of national rather than local concern and is essentially connected with, and inextricably related to, interstate commerce.

Federal legislation to relieve interstate commerce of the impediments and obstructions resulting from a heterogeneous and inefficient banking structure would not constitute an invasion of the rights of the States; because it would relate to a subject which the fathers of the Constitution clearly intended to intrust to the National Government, in order that we might have a Nation and not a mere confederation of States and in order that the free flow of commerce between the different parts of the Nation might not be impeded by State legislation.

The importance of banking as an indispensable aid to commerce has already been recognized by the Supreme Court of the United States in the case of *Noble State Bank* v. *Haskell* (1911), 219 U. S. 104, 31 Sup. Ct. 186, wherein the court said, through Mr. Justice Holmes (p. 188):

* * * Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to *enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business.* * * * Even the primary object * * * is not a private benefit, * * * *but it is to make the currency of checks secure and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand.* * * * [Italics supplied.]

It is appropriate and in accordance with the fundamental principles of our Government for Congress to undertake the task of making "the currency of checks secure"; because it is essential to the free and unhampered flow of commerce between the States, the regulation of which is intrusted to Congress alone by the Constitution.

If Congress should decide that more effective regulation and supervision of the commercial banking business is desirable in order to make the currency of checks secure, it is peculiarly fitting and proper that Congress should undertake to provide that remedy; because the problem is not a local one but relates directly to matters of national concern which are expressly intrusted to Congress by the Constitution.

In the case of *United States* v. *Ferger* (1919), 250 U. S. 199, the Supreme Court of the United States sustained the constitutionality of section 41 of the act of August 29, 1916 (39 Stat. 538), which provides for the punishment of any person who forges or counterfeits a bill of lading, even though that section applies to cases where no shipment from one State to another is made or intended. The court held that, in order to protect and sustain interstate commerce, Congress may prohibit and punish the forgery and utterance of bills of lading for fictitious shipments in interstate commerce.

In delivering the opinion of the court, Mr. Chief Justice White said (250 U. S. 203–205):

* * * Thus both in the pleadings and in the contention as summarized by the court below it is insisted that, as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. *But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it.* We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, *must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the*

power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the Government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution. Art. I, sec. 8, clause 18. *A case dealing with a somewhat different exercise of power, but affording a good illustration of the application of the principle to the subject in hand, is First National Bank* v. *Union Trust Co.*, 244 U. S. 416.

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* * * *That, as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice.* Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof.

With this situation in mind the question therefore is, Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed. * * * It proceeds further, as we have already shown, upon the erroneous theory *that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce.* Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far reaching and all embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. *As the power to regulate the instrumentality was coextensive with interstate commerce,* so it must be, if the authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive. [Italics supplied.]

The reference to the court's decision in the case of *First National Bank* v. *Union Trust Co.*, which appears at the end of the first paragraph quoted from the opinion in the Ferger Case, is significant; because that is the case discussed elsewhere in this opinion, wherein the Supreme Court upheld the right of Congress to grant trust powers to national banks in order to enable them to compete with State banks and trust companies. While that case dealt with a somewhat different exercise of power, the Supreme Court recognized that it afforded a good illustration of the application of the principle to the subject dealt with in the Ferger Case. Conversely, it would seem that the court would not hesitate to apply the principle underlying its decision in the Ferger Case to the subject of banking.

If bills of lading are instrumentalities of interstate commerce, so are checks and the banks upon which they are drawn, and if Congress has the right to prohibit and to punish the fraudulent making of spurious bills of lading in order to protect and sustain the vast volume of interstate commerce operating and moving in reliance upon genuine bills, then Congress must have the right to enact legislation to safeguard the use of checks in order to protect and sustain the vast volume of interstate commerce which is consummated by payments made by means of checks. Since the safe use of checks depends primarily upon the solvency of the banks upon which they are drawn, Congress must have the right to enact legislation to promote the safer and more effective operation of commercial banks.

Nor is Congress prevented from exercising this power by the fact that part of the business of commercial banks is purely local in character; but the power to regulate interstate commerce "must include the authority to deal with obstructions to interstate commerce * * * and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

If Congress in its wisdom should find that our heterogeneous banking structure, which has given rise to more than 10,000 bank failures in the last 12 years, constitutes a burden upon or an obstruction to interstate commerce, therefore, there can be no doubt that Congress has the constitutional power to correct the situation by bringing all commercial banking business into a single system subject to effective regulation and supervision by the Federal Government, to the end that the currency of checks upon which practically every transaction in interstate commerce depends for its consummation may be made more secure.

IV. METHODS WHICH COULD BE ADOPTED

Having the power to enact such legislation, Congress could exercise the power in any manner which it deems appropriate and adequate for this purpose. It is not necessary that the legislation assume the form of a revenue act or an act to regulate interstate commerce, though either of these means would be appropriate. In the light of the decisions of the Supreme Court of the United States in *Stafford* v. *Wallace*, and *Board of Trade of Chicago* v. *Olsen*, however, it would be desirable for such legislation to contain findings of fact and a recital of the national objects to be attained, as did the grain futures act.

Among the constitutional means which Congress could adopt in order to accomplish these objects or to aid in their accomplishment are the following:

(1) It could forbid the receipt of deposits subject to withdrawal by check by any individual, partnership, or corporation other than a bank organized under the laws of the United States and provide suitable penalties for violations of this prohibition.

(2) It could impose a prohibitive tax on all checks and similar documents drawn on, or payable at, banks not organized under the laws of the United States.

(3) It could forbid any officer of the United States or any Federal reserve bank, national bank, Federal land bank, joint stock land bank, Federal intermediate credit bank, or Federal home loan bank to receive in payment, on deposit, for the purposes of exchange or collection, or for any other purpose, any check drawn upon any bank not organized under the laws of the United States.

(4) It could forbid any bank organized under the laws of the United States to make loans or extend credit to, or deposit any of its funds in, or permit the use of any of its facilities by, any commercial bank not organized under such laws.

(5) It could forbid the deposit of public funds of the United States in any bank not organized under the laws of the United States.

(6) It could exempt all national banks from taxation, State or Federal, except taxes on real estate.

In order to be completely effective, the legislation could combine several of the measures suggested above. Thus, a comprehensive bill on this subject might include the following:

(1) A finding of facts by the Congress (on the basis of evidence already obtained pursuant to Senate Resolution No. 71 and other evidence which may be produced) to the effect that, in order (*a*) to provide for the safe and more effective operation of the national banking system and the Federal reserve system, (*b*) to preserve for the people the full benefits of the currency provided for by the Congress, and (*c*) to relieve interstate commerce of the burdens and obstructions resulting from the existing situation, it is necessary to restrict the business of receiving deposits subject to withdrawal by check to national banks and thereby to subject all commercial banking business to national regulation and supervision;

(2) A prohibition against the receipt of deposits subject to withdrawal by check except by banks organized under the laws of the United States;

(3) A prohibition against any officer of the United States or any bank organized under the laws of the United States receiving in payment, on deposit, for exchange or collection, or for any other purpose, any check drawn upon any bank not organized under such laws;

(4) A prohibition against any bank organized under the laws of the United States making loans or extending credit to, depositing any of its funds in, or permitting the use of any of its facilities by, any commercial banking institution not organized under such laws;

(5) A provision imposing a prohibitive tax on all checks or substitutes therefor drawn upon or payable at any bank not organized under the laws of the United States; and

(6) A provision prescribing suitable penalties for violations of the above provisions.

If such legislation is enacted, its effective date necessarily would have to be postponed for a sufficient length of time to avoid too sudden and revolutionary a change in our existing financial structure and to allow time for existing State banks to adjust themselves to the situation, by converting into national banks or discontinuing the transaction of commercial banking business.

The time intervening between the enactment of such legislation and the date when it becomes effective could be devoted to the preparation and enactment of additional legislation for the purpose of providing further for the more effective operation, regulation, and supervision of the national banking system and the Federal reserve system, by repealing undesirable amendments to the national bank act and Federal reserve act which grew out of the competition in laxity, equipping the supervisory authorities with adequate powers to enable them to peform their functions more effectively, and adopting such other measures as might be deemed appropriate.

Respectfully,

WALTER WYATT,
General Counsel.

WASHINGTON, D. C., *December 5, 1932.*

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U. S. Investor
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Article Title: Bank Legislation Ahead – Glass Bill and Governor Meyer's Plan Present Interesting Possibilities

Journal Title: United States Investor

Volume Number: XLIII   Issue Number: 47

Date: November 19, 1932

Page Numbers: 1-4

Author(s):

Article Title: The American Banking System

Journal Title: New York Herald Tribune

Volume Number: Issue Number:

Date: November 20, 1932

Page Numbers:

Author(s):

Article Title: Forty-Nine Banking Systems

Journal Title: Hartford (Conn.) Courant

Volume Number: Issue Number:

Date: November 21, 1932

Page Numbers:

Author(s):

Article Title: American Banking Reform

Journal Title: Asheville (N. C.) Citizen

Volume Number: Issue Number:

Date: November 24, 1932

Page Numbers:

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Article Title: Need of the Nations is a Sound Banking Plan

Journal Title: Philadelphia Eve Public Ledger

Volume Number: Issue Number:

Date: March 14, 1933

Page Numbers:

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Article Title: Federal Control Desirable

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Volume Number: Issue Number:

Date: November 23, 1932

Page Numbers:

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Journal Title: St. Louis Post-Dispatch

Volume Number: Issue Number:

Date: March 30, 1933

Page Numbers:

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Volume Number: Issue Number:

Date: April 3, 1933

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Journal Title: Stockton (Cal.) Independent

Volume Number: Issue Number:

Date: March 31, 1933

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Author(s):

Article Title: Toward Unified Banking

Journal Title: The New Republic

Volume Number: Issue Number:

Date: April 19, 1933

Page Numbers: 269

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Journal Title: Washington Post

Volume Number: Issue Number:

Date: March 31, 1933

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Article Title: One System

Journal Title: Auburn (N.Y.) Citizen Advertiser

Volume Number: Issue Number:

Date: March 11, 1933

Page Numbers:

Author(s):

Article Title: A Unified Banking System

Journal Title: Boston Christian Science Monitor

Volume Number: Issue Number:

Date: March 14, 1933

Page Numbers:

Author(s):

Article Title: Our Dual Banking System

Journal Title: Stamford (Conn.) Advocate

Volume Number: Issue Number:

Date: March 11, 1933

Page Numbers:

Author(s): Julius G. Berens

Article Title: America Needs Unified Banking System Under Strict Federal Control

Journal Title: Washington Herald

Volume Number:

Issue Number:

Date: February 28, 1933

Page Numbers:

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Journal Title: Barron's

Volume Number: Issue Number:

Date: November 28, 1932

Page Numbers:

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Journal Title: Boston News Bureau

Volume Number: Issue Number:

Date: December 8, 1932

Page Numbers:

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Article Title: Other People's Money

Journal Title: Peoria (Ill.) Journal

Volume Number: Issue Number:

Date: March 30, 1933

Page Numbers:

Author(s):

Article Title: Unify the Banks

Journal Title: Barron's

Volume Number: Issue Number:

Date: April 3, 1933

Page Numbers: