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Lysander Spooner
Constitutional Law, Relative to Credit, Currency, and Banking
1843

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Contents

ernments, to interfere with such regulation, is as important as it is unconstitutional.

ERRATA.

"Chap. 5" &c., in the table of contents-" *become" for became,* on the 13th page, one line from the bottom of the notes.

governments have no prerogatives except what the people have given to them[6]and among those, is no one to dictate what articles of property may, and what may not, be bought amid sold so *frequently* as to become practically a currency. The power to coin money, and regulate the value thereof, and of foreign coins, and to make those coins an exclusive *"tender*in payment of debts," arid to provide for the punishment of counterfeiting the securities and current coin of' the United States, are the only prerogatives conferred by the people upon our governments, with any direct or evident view to a "control of the currency." The object of conferring these prerogatives on the government, obviously is, to prevent litigation, and facilitate the enforcement of contracts by courts of justice, by providing a legal medium for paying debts, *where the parties cannot otherwise agree between themselves.* And it was doubtless also another object, *incidentally,* to furnish a convenient currency, which the people should *beat liberty to use,* (that is, buy and sell,) if they should choose to do so. But such prerogatives as these are as different from that of restraining the people from the frequent purchase and sale of any thing else that they may prefer to these coins, as liberty is from tyranny.

But - granting all that the advocates of a compulsory metallic currency claim - that it is a prerogative of government to regulate the currency - that our coins are standards of value - and that the value of these standards will be varied, unless the use of all other currency be [*32] prohibited-grant all this, and it makes nothing in favor of' any power in the *stale governments* to regulate the value of this standard, either by usury laws, or by restraining the use of any other currency that the people may choose. *Congress* have all the power that exists in either government, for regulating the value of coined money," and if *they,* either from choice, or because they have no power to do otherwise, have left the value of this money to be regulated by the best of all regulators-the laws of trade, and the wants of the people-any attempt, on the part of the *state* gov-

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CHAP. I. - THE UNCONSTITUTIONALITY OF ALL STATE LAWS RESTRAINING - PRIVATE BANKING AND THE RATES OF INTEREST.

The Constitution of the United States, (Art. 1, Sec. 10,) declares that "No State shall pass any law impairing the obligation of contracts."

This clause does not designate what contracts have, and what have not, an "obligation." It leaves that question to be decided by the proper tribunals. But it plainly recognizes two things, as fixed, constitutional principles - first, that there are contracts that have an "obligation;" and, secondly, that the people have a right to enter into, and have the benefit of, all such contracts.

The force of these implications will, perhaps, be more clearly seen, when applied to a particular contract, than when applied to contracts generally. Suppose, then, the constitution had merely said that no State should pass any law impairing the obligation of the marriage contract. This provision would have plainly implied, first, that marriage contracts were in their

nature obligatory, - and, secondly, that men had a right to enter into that species of contract. But the implications, which would, in this case, have applied to marriage contracts, now apply, under the constitution as it is, to all contracts whatsoever, that are in their nature obligatory.

That this constitutional prohibition, against "impairing the obligation of contracts," implies that there *are* contracts having an obligation, no one will deny. But that it also implies that men have a constitutional right *to enter into all such contracts,* seems also to be perfectly clear.

Suppose the constitution had declared that no State should "pass any law impairing a man's right to recover the wages of his labor" - This prohibition would have certainly implied that men had a right to labor for wages - and any law that should have forbidden them to labor for wages, would have been as much unconstitutional, as one that should have deprived them of the wages they had earned.

Or suppose again that the constitution had forbidden the States to pass any law impairing the meaning and intent of *wills.* Such a [*4] provision would have manifestly implied, and therefore established it as a constitutional principle, that all men had a right to make wills. And any law that should have forbidden men to make wills, would have been as much unconstitutional, as one that should have altered or invalidated their meaning and intent when made. So also the prohibition against impairing the obligation of contracts, implies that men have a right to enter into all contracts that have an obligation. And any laws that forbid men to enter into such contracts, are as much unconstitutional, as those that would impair the obligation of the contracts when made.

The assumption, also, in the constitution, that men's contracts *have* an "obligation," implies that the parties have a right to enter into them; for if they have no right to enter into them, no obligation could arise out of them.

of some other measure of quantity than those standards specially instituted by law. Whenever other currency than coin is given and received, it is necessarily done with the knowledge and consent of both parties - because the difference between the form and material of a promissory note, and those of a [*31] metallic dollar, is so great as to render the substitution of one for the other, without the knowledge of both parties, impossible.

One argument more is perhaps worthy of notice. It is said that the "regulation of the currency, is a prerogative of sovereignty"-and it is hence taken for granted to be a prerogative of our own governments. It may be, and probably is, an assumed prerogative of all *despotic* governments - for such governments assume to control every thing they please. *But our*

[6] I am aware that it is the judicial doctrine, in this country, that our state government possess all powers, *except what are expressly prohibited to them.* But this doctrine had the same origin with the one that the law makes a part of the contract. It is a purely despotic doctrine, and is borrowed from governments founded originally in force amid usurpation, and which have retained all powers, except what have been wrested from them by the people. It is a consistent principle, that such governments have all powers, except what are prohibited to them, And our judges, ii, blind obedience to monarchical precedents, or in base subserviency to legislative usurpation, have introduced the principle into this country. But our governments, neither state nor national, were founded in force or usurpation; nor do they exist either by natural or divine right. They are mere institutions, voluntarily created by the people. Their very existence and all their powers are derived solely and wholly from the grants of the people. Of necessity, therefore, they can have no powers, *except what are granted.* This principle is universally admitted to be true of the national government, and it is equally true, (and for the same reason,) of the state governments. The contrary doctrine is the authority, and the only authority~', for a large mass of State legislation, destructive of men's natural rights. Of this legislation, the laws restraining private banking and the rates of interest, are specimens. These two doctrines, that the law makes a part of the contract, and that the state legislatures have all powers, except what are specially prohibited to them, are illustrations of the insidious manner, in which the judiciary lend their sanction to the most sweeping encroachments upon individual liberty, and the vital principles of our governments

ists mainly in sound. They differ in the essential quality of a standard, viz, that of being *fixed.* Standards of quantity can be fixed, and when fixed, they remain unalterable-because they consist of certain amounts of matter, and matter is indestructible. They also bear a fixed, ascertainable and [*30] unalterable proportion to other quantities of matter. But the *values* of different commodities, as compared with each other, can only be *conjectured* at any time, and the values of all articles, (as well those that may he selected as standards, as any others,) necessarily fluctuate with the ever varying wants and caprices of mankind-for it is only the wants and caprices of mankind that give value to any thing.[5]

But admitting, for the sake of the argument, that coins are "standards of value"-and that there is presumed to be, by the constitution, and that there actually is, an analogy between a "standard of weights and measures," and a "standard of value "-still nothing can be inferred from that analogy, to justify any restraint upon the free use of such other currency than coin, as parties may voluntarily agree to give and receive in their bargains with each other. Congress fixes the length of the yard-stick, in order that there may be some standard, known in law, with reference to which contracts may conveniently be ma de, (if the parties *c/moose* to refer to them,) and accurately enforced by courts of justice when made. But there is no compulsion upon the people to use this standard in their ordinary dealings. If, for instance, two par. ties are dealing in cloth, they may, *if they both assent to it,* measure it by a cane or a broom-handle, and the admeasurement is as legal as if made with a yard-stick. Or parties may measure grain in a brisket, or wine in a bucket, or weigh sugar with a stone. Or they may buy and sell all these articles in bulk, without any admeasurement at all. All that is necessary to make such bargains legal, is, that *both* parties should understandingly and voluntarily assent to them - and that there should be no fraud on the part of either party. The use of a pa per currency is somewhat analogous to the use

This constitutional right of men to enter into all obligatory contracts, is a natural, inherent, inalienable right. It exists antecedently to, and independently of, any positive or municipal law. It may be recognized, acknowledged, guarantied, and *secured,* by the municipal law, but it is not derived from it - nor can the municipal law rightfully take it away. It is an original right of human nature, like the right of speech - the right to enjoy life, liberty and religion - the right to keep and bear arms - and the right of self-protection. And it is *as an original right,* existing prior to the constitution, that the clause quoted from the constitution, recognizes and guaranties it.

The right to enter into obligatory contracts, is also involved in the right to *"acquire property" - for* one man can acquire property of another only by means of an obligatory contract. Every purchase and sale of property that takes place between man and man, involves a contract - that is, an agreement - an assent of their minds to an exchange of values. And every purchase and sale, that takes place between man and man, depends, for its validity, upon the *"obligation"* of the contract or agreement that the parties have entered into - an obligation, that is protected by the Constitution of the United States.

If the Slate Legislatures had power to declare, even *prospectively,* what contracts should, and what should not be obligatory, they might arbitrarily prohibit all trade between man and man - they might invalidate, not merely credit contracts, but even those contracts that are executed at the time they are entered into - for there is no difference in the intrinsic obligation of a contract that *is to be* executed, and one that *is* executed. The *equitable* right of property is transferred as absolutely by an executory, as by an executed contract; and government has as much right to declare, *prospectively,* that contracts that may afterward be *actually executed,* shall, notwithstanding, be void; and that men who may sell and *deliver* property, may nevertheless recover it back, as it has to declare that those who have sold property and promised to deliver it, shall still be entitled to

retain it -or, what is the same thing, be released from their obligation to deliver it. A promise to pay money, [*5] for value that has been received, *is* a mere promise to *deliver* money, that has been sold and paid for - and government has as much right to declare that if a banker shall actually sell and deliver money, he may nevertheless recover it back, as it has to declare that if he *promise* to deliver money that he has sold, he shall be relieved from his obligation to deliver it. The law, that should enable a man to recover property, that he had actually sold and delivered, would no more interfere with men's natural rights to acquire property, by contract, or purchase, than the law which should relieve a man from his obligation to deliver property, which he had sold and promised to deliver. But will any one pretend that government has a right, even by a prospective law, to invalidate contracts that may afterwards be actually executed? If not, he cannot consistently claim that it has a right to invalidate executory contracts - for the equitable right of property passes as absolutely by the latter contract, as the former.

The right to *acquire property,* is enumerated, in many, if not all, of the *State* Constitutions, as one of the natural, inherent, inalienable rights of men - one that is not surrendered to government - one which government has no power to infringe - one which government is bound to respect and secure. And this right to acquire property, as was before said, involves the right to enter into obligatory contracts - for men can acquire property of each other, only by such contracts.

The right of men, then, to enter into obligatory contracts, and to have the benefit of them, is guarantied, not only by the national constitution, but also by many, if not all, of the state constitutions. It is, in short, a fundamental principle in our systems of government - as much so, as the right of speech, or the right to life and liberty, or the free exercise of religion, or the right to keep and bear arms, or the right to acquire property.

But notwithstanding the general and State constitutions have thus guarantied to the citizens of this government their

property are continually exchanged, or bought and sold with and for each other, without the value of either being estimated in coin-and nobody doubts the legality of such purchases and sales. And even when the value is estimated in coin, it is the result of habit and convenience, and not of any requirement of law. But, in point of fact, when any article of property is sold for coin, such article as much measures the value of the coin, as the coin measures the value of such article. If a dollar in coin and a bushel of wheat are exchanged for each other, the wheat as much measures the value of the dollar, as the dollar measures the value of the wheat.

We hear much of an analogy between a "standard of weights and measures," and a "standard of value" - as if the constitution recognized such an analogy. But no such analogy is recognized by the constitution, nor does it, nor can it exist in fact. It ex-

[5] The value of gold and silver, as currency, depends mainly upon the value they have (or other purposes, such as gilding, dentistry, watches, ornaments &c. And their value for these latter purposes, depends upon their beauty and utility, compared with those of other articles, that are continually manufactured, invented and discovered, and made to compete with them in gratifying the wants and vanity of men. This value is affected again, by prevailing fashions, and the greater or less loudness of society (or trinkets, ornaments 4.c. This value is modified still further, by the scarcity or abundance of the metals themselves-by the discovery of new mines, the barrenness and fertility of old ones, and the price of labor in mining countries. Their value is also controlled and changed, in one country, by the legislation of other countries. And their general value, throughout the world, is continually varied by the ever changing conditions of society-by war, by peace, by the progress of the arts, and the increase of wealth, population and commerce If it were, (as it is not,) in the nature of things, that a" standard of value" could be established at all, a more unstable and tensile standard than gold and silver, could hardly be found. And every touch of legislation, instead of fixing serves but to contract or extend it. When the various elements of value, viz, fancy, fashion, caprice, utility, necessity, supply, demand, production, consumption, labor, legislation, war, peace, the progress of the arts, wealth, population, commerce, and, above all, the judgments of men in estimating value, shall all be brought under the jurisdiction of the legislature, and made to obey the statutes in such cases made and provided it will then be in time to talk about establishing " standards of value." Return

their value to be regulated by the wants of society, and to be conjectured by each individual who may at any time buy or sell them. It does nothing, and has a right to do nothing, to prevent a depreciation in their value, in consequence [*29] of the people's buying and selling other articles of property in preference to them.

But it will be said that Congress are authorized "to coin money, *and regulate the value thereof,* and of foreign coins." This is true-but its obvious meaning is, that Congress shall fix the value of each kind or piece of coin, *relatively with the other kinds or pieces, - that* they shall, for instance, decide what weight and fineness in a silver coin, shall constitute it equal in value to a gold coin of a certain weight and fineness. It means that they shall have power to declare that a dollar of silver shall be equal in value to a dollar of gold, and that they shall decide what weight and fineness of each of these metals shall constitute the dollar, or unit of reference. Congress, then, have power to fix the value of the different coins, *relatively with each other - or* to make them, respectively, *standards of each other's value.* But they have no power to make them "standards of the value" of anything else, *than each other* - or to fix their value relatively with anything, *but each other.* Nobody will pretend that Congress have power to fix the value of coin relatively with wheat, oats or hay-that they have power to say that a dollar shall be equal in value to a bushel, a peck, or even a pint, of wheat or oats. And it is only in the single case of a *"tender* in payment of debts," that the legal value of the coins, *relatively with each other,* can be set up. In all other cases individuals are at perfect liberty to give more or less for any one of the coins than they would for any others of the same legal value.

But it will perhaps be argued that the *custom* of mankind is to measure the value of commodities generally by the value of coin - and that it was the intention of the constitution that coin should be, in *practice,* a "standard of value." But this custom is by no means universally observed, for different kinds of

natural right to enter into all obligatory contracts with each other, and to have the obligation of their contracts respected, and enforced, it is nevertheless probable that the statute books of every State in the union, contain laws, or the forms of laws, whose avowed and only object is to abridge this right, and impair the obligation of these contracts; and which declare that certain contracts, that may be entered into by bankers and others, to pay money - contracts that are in their nature as obligatory as any others that men ever enter into - shall be entirely void, or essentially impaired, or that the individuals entering into them shall be fined or imprisoned.

To an unsophisticated mind, nothing could be more self evident than the unconstitutionality of these laws. Yet they are enforced by the courts, and submitted to by the people, without their constitutionality being seriously questioned.

The Courts admit that the contracts, which are thus nullified or im- [*6] paired, *would be* obligatory, were it not that the law has deprived them of their obligation. But this is no answer to the objection, because to impair their obligation is the very thing, which the law is forbidden to do. To say, therefore, that the law has deprived these contracts of their obligation, is equivalent to saying that a "law impairing the obligation of contracts" is constitutional. The very test of the constitutionality of the law, on this point, is, whether, if suffered to have its effect upon contracts, it would impair their obligation. If it would, it is unconstitutional, and, of course, void.

But let us now enquire, more particularly, what contracts are obligatory? or, rather, in what consists the obligation of contracts?

There have been differences of opinion on this point - but they have all arisen from a desire to uphold the arbitrary power that is assumed by legislatures over the subject. But for this, a doubt could never have arisen as to what constituted the obligation of a contract. The very phrase "obligation of contracts, " implies that the obligation is something intrinsic in the con-

tracts themselves. It assumes that the obligation is something that pertains to the contract *naturally,* and as a matter of course - and not that it is a quality contingent upon the will of those who had no hand in forming the contract. The facts, also, that the right of acquiring property by contract, is a natural right, and not one derived from municipal authority, and that the contracts entered into by men in a state of nature, without reference to any municipal law, are obligatory, prove that the obligation of contracts must be something intrinsic in the contracts themselves, depending upon the acts of the parties, and not upon any extraneous will.

What, then, is this intrinsic "obligation of contracts?" It is, and it can be, nothing else than the *requirements* of *natural justice,* arising out of the acts of the parties. All judicial tribunals hold it to consist in this, and this alone - as is proved by the fact, that wherever this requirement is shown to exist, they hold the contract to be obligatory as matter of course, unless the legislature have specially ordered otherwise. And they will even imply a contract, in many cases, in order to enforce this requirement. On the other hand, where this requirement is shown not to have arisen out of the acts of the parties, the contract is held to be destitute of obligation. For instance, judicial tribunals hold that contracts entered into by persons that are mentally incompetent to make reasonable contracts, are not obligatory - that contracts entered into gratuitously, or without a valuable consideration, are not obligatory - that contracts obtained either by coercion or fraud, are not obligatory upon the party against whom the coercion or fraud has been practiced - that contracts to commit any vice, crime or immorality, or to pay for the commission of any vice, crime or immorality, or the object of which is to aid or encourage any vice, crime, or immorality, are of no obligation. All these contracts are destitute of obligation, and are held to be so by judicial tribunals, not because any [*8] legislative enactments have declared them void - (for, in general, there are no such enactments) - but, simply be-

ity are ascertained-but whose *"value"* is a matter of conjecture, caprice and fluctuation, like the value of all other commodities. Instead of measuring the measuring value of other commodities, it is merely *sold for* other commodities, just as other commodities are sold for *it.* It no more measures the value of other commodities, than other commodities measure its value.

It was undoubtedly supposed by the framers of the constitution, that the "money," which was to be " coined," and which was to constitute the only legal *"tender* in payment of debts," would be the commodity, in which debts would generally be promised to be paid. And the government itself coins this money, and places its stamp upon it, and prohibits and punishes any counterfeiting or imitation of it, in order that parties, and especially courts of justice, may always know with certainty, (without having the article weighed and assayed again,) whether the thing tendered by the debtor, be the identical timing, in quantity and quality, that he had promised to pay. But the government does not at all assume to fix the value of this money that is promised. It only adopts the means necessary for having *the thing itself identified - its quantity and quality proved.* It leaves the *"value"* of the timing to be conjectured, as the value of all things must be. The value of the timing too, may be greater, or it may be less, at the time when it is paid or delivered, than it was at the time the promise was made. This will depend, in a measure, upon the greater or less consumption or use there is, by the community, of the material of which the money is composed. But the government takes no note of this variation. It leaves the parties, debtor and creditor, to take each their respective risks as to whether the value of the money promised, will be greater or less, at the time of payment, than at the time of making the contracts. The government provides only that the *identical thing* promised, shah be paid - it at no time attempts to dictate the *value* that either party, or the public, shall put upon that article. The government, in short, prescribes only the *quantity and quality* of their coins - leaving

bition, unless on the supposition that the people were incompetent to make their own bargains. This express provision for an exclusive "tender," and the entire omission of any provision in regard to an exclusive *currency,* could not have been matters of accident. It was well known, at the adoption of the constitution, that paper currency was in use both in this country and elsewhere, and if the constitution had intended to lay any restraint upon its use, so far as it might be voluntary between individuals, it certainly would have contained some explicit provision on the subject.

But it is said that coined money is established as a " standard of value," and that it was the intention of the constitution, that all other commodities should be *"measured"* by it-that is, *bought and sold with and for* it - (for that is the only way of measuring the value of commodities by money) - and that the use of any other currency, varies the value of this standard. This is a very common, but certainly a very groundless and preposterous argument. Strange as the fact must be presumed to appear to these "standard" advocates, it is nevertheless true, that the constitution no where authorizes or suggests the establishment of any "standard" for measuring the *"value"* of commodities in general. It *expressly* authorizes a "standard of weights and measures" - but it no- [*28] where alludes to a "standard of value." And the reason of this omission probably was, that the framers of the constitution understood two things, viz, that the value of any "standard" must of necessity be as uncertain and conjectural as the value of them continues to be measured by it - and, secondly, that as the value of any standard must depend principally upon the value of the commodity of which it should be composed, the standard itself must necessarily and constantly vary and fluctuate in value like other commodities-that is, according to the wants, necessities and caprices of mankind in regard to the use of' that commodity.

Money or coin, properly speaking, instead of being a "standard of value," is a mere commodity, whose quantity and qual-

cause natural justice does not require them to be fulfilled - or, what is the same thing, because the contracts had no *intrinsic* obligation - no foundation in natural justice. On the other hand, judicial tribunals, except where the legislature has ordered otherwise, hold *all* contracts to be obligatory, which justice and morality require to be fulfilled. Courts do not require statute authority for enforcing each particular contract. The principles of natural justice are a sufficient authority, and in most cases their only authority. And this practice of course proceeds on the ground that the requirements of natural justice are what constitute the obligation of contracts. And this practice shows also that the question of what contracts are obligatory, and what not, is a judicial, and not a legislative question.

The legislature, as a *general* rule, pass no laws declaring either what contracts shall, or what shall not, be obligatory. The judicial tribunals are established as much to decide what contracts are obligatory, as to enforce the fulfillment of them. Their authority to do this, is derived directly from the constitution, and not from the legislature. *In general,* the legislature do not seek to encroach upon this prerogative of the judiciary-but leave it entirely to them to determine what contracts are, and what are not, obligatory. In fact, the judiciary do determine, and must determine, in the last resort, upon the obligation of every contract that is brought before them-for they must, of necessity, decide upon the obligation of all contracts, in regard to which the legislature have *not* spoken, and they must equally decide upon the obligation of those, in regard to which the legislature have spoken, because they must determine the validity of every legislative enactment, that assumes to interfere with, or control, the obligation of contracts.

The *general* principles, then, that obtain in regard to the obligation of contracts, are, 1st, that the obligation is intrinsic, arising solely from the acts of the parties, and that the requirements of *natural justice* constitute that obligation-and, second,

that it is the province of the judiciary to determine in what cases that obligation exists.

But although such are the *general* principles that obtain in all our judicial tribunals, in regard to this particular point of the obligation and validity of contracts, the legislative department does nevertheless sometimes assume the authority of innovating upon these general principles, and of dictating to the judiciary, how they shall decide in regard to the obligation of particular contracts. In the case of the contracts of unlicensed bankers, for instance, they enact that the judiciary, whenever these contracts come before them, shall decide that they have no obligation. This is the whole purport of the law that declares that these contracts shall be void. It is nothing more, nor less, than a requirement upon the judiciary to deny their obligation- because the contracts are naturally obligatory, and the courts would of' course hold them ob- [*9] ligatory, if they were not required to do otherwise. And the legislature make this requirement, not at all on the ground that these contracts really have no obligation - but they do it arbitrarily, and simply because it is their *will*that the judiciary should deny the existence of this obligation. They thus, in effect, require that the judiciary shall assert a falsehood - that they shall declare that a contract has no obligation, when it really has an obligation. By thus requiring the judiciary to decide that a banker's contract to pay money, has no obligation, they, in effect, require them to deny that he has received value for it- because, if he have received value for it, his obligation to pay has *necessarily* arisen, and that obligation has become an existing, unalterable fact-and however much the legislature may wish to have this fact denied, the fact itself still remains. The power of the legislature is as powerless to annul that fact, as it is to annul any other fact that has ever occurred. It is as powerless to annul that obligation, as it is to annul the parental, filial, or social obligations of mankind.

rency, (whether the article be coined money or any thing else,) consists merely in buying and selling it frequently - or *more* frequently titan property in general. Now the constitution of the United States lays no restraint upon the *frequent* purchase and sale of any article of marketable property whatever.

Experience proves, that the value of promissory notes, checks, bills [*27] of exchange, certificates of stock &c., can, in many cases, be so nearly and readily judged of, that men as readily agree upon their value, and as willingly buy and sell them in the course of their dealings with each other, as they do coined money, and that in many cases they even prefer them to money. In so far as they are *voluntarily* bought and sold in this manner, they constitute as legitimate and legal a *currency,* as money itself. The principal practical difference between this kind of currency and money, is this. The latter is a legal subject of "tender," that is, a debtor can *require* his creditor to receive *it,* or nothing, in payment of his dues - whereas he *cannot require* him to receive any other *"currency."* If the creditor *voluntarily* receive the other currency, the debt is cancelled as legally and effectually as if the payment had been made in money. But if the creditor, either because he doubt the solvency of the paper currency, or for any other reason, *elect* to refuse it, the debtor must then procure and tender the money, be fore he can *demand* that his debt be cancelled.

The principles contended for by some advocates of metallic currency, that coined money is the only article that can constitutionally be used as a *currency - that* is, that it is the only article of property; that can be legally bought and sold *frequently - would* lay very great restraints upon trade, and be a manifest violation of men's natural and constitutional right to contract, make bargains, and exchange and acquire property.

Again. The constitution expressly provides for an exclusive "tender" - but it has no provision whatever in prohibition of any merely voluntary currency that might obtain among the people. Nor could there consistently have been any such prohi-

It was undoubtedly supposed that these coins, on account of their portableness, and on account of their amount and quality being accurately known, would be bought and sold, to a considerable extent, from hand to hand, as a currency, that is, in exchange for other commodities. But there is no evidence of any intention, on the part of the constitution, to preclude the people from the enjoyment of their natural right freely to buy and sell, from hand to hand, any other articles of property, which the parties might agree upon - whether those articles should be notes of hand, certificates of stock, bills of exchange, drafts, orders, checks, or whatever else might happen to be convenient for such purposes.

The more important object of the coins probably was to provide an article or subject of "tender in payment of debts," that should be uniform throughout the country, and of nearly equal value in every part of it. It was of very great importance to the e promotion of free commercial intercourse between the citizens of the different states, (which was one of the greatest objects the constitution was intended to secure,) that the subject of "tender" should be uniform throughout the country - otherwise contracts, made in one state, might not be strictly, or even tolerably, enforced, in the other states. And hence it is provided that "no state shall make any thing but gold and silver coin a *tender* in payment of debts."[4]

"Currency" may consist of any thing that is a legitimate subject of bargain and sale, provided it be so portable, and its value capable of being so nearly and readily judged of as that parties to bargains are willing *frequently* to buy and sell it, in exchange for other commodities.- The use of any article as *cur-*

[4] The decision, of some of our state courts, that bank bills are a legal tender, unless *objected to by the creditor,* are palpably unconstitutional. The courts have as much right to say that the promissory notes of any other individuals, who are supposed to be solvent, are a legal tender, unless objected to, as to say that the promissory notes of a company of bankers are such a tender. Return

The question now is, whether any requirements, that may be made by the Legislature, upon the judiciary, to deny this fact, to deny this obligation, and to assert that no such fact or obligation exists, are binding upon the judiciary?

This question may probably be answered without going to the Constitution of the United States. The constitutions of most, if not all the states, contain, in some form or other, this provision, viz: that Courts shall be open, and that right and justice shall there be administered to every man without denial or delay. Now if the Legislature enact, that in adjudications upon bankers' contracts, right and justice shall be violated, withholden or denied, are not such enactments in palpable violation of this provision of the constitution? And if the Legislature enact that the obligation of bankers' contracts shall be denied, disregarded, or not enforced, by the courts, is not that equivalent to a requirement upon the courts that they shall withhold right and justice from the holders of those contracts? Clearly it is-and the requirement is consequently void even by the state constitutions.

But perhaps it will be said, that the Legislature does not assume to declare that right and justice shall be withholden, but only to declare what right and justice, under bankers' contracts, shall be. The answer to this objection is, that right and justice, as accruing by contract, are judicial, and not legislative questions-and, therefore, if the legislature declare that right and justice, under certain contracts, shall be any thing different from what the judiciary would have decided them to be, they thereby virtually require the judiciary to violate or withhold right and justice. It is also an usurpation, on the part of the legislature, to prescribe what right and justice shall be, or to declare what rights accrue, under any contracts whatever. It is the business of the legislature to provide and prescribe the means, the instrumentalities, to be used, for enforcing the right and the justice, that may ac- [*10] crue to individuals, by virtue of their contracts - but it is the sole prerogative of the judiciary

to determine what that right and that justice are. The legislature can prescribe, to the judicial tribunals, nothing that is of the essence of justice itself. If the legislature may prescribe to the judiciary what right and justice shall be, under one class of contracts, they may, by the same rule, prescribe what they shall be under all contracts whatsoever, and thus wholly usurp this prerogative of the judiciary. They may, in fact, make the judiciary a mere supple instrument in their hands.

But, perhaps it will be said, that the legislature do not merely require that bankers' contracts shall be held void, but that they also forbid men to enter into those contracts - and that, inasmuch as the contracts themselves are forbidden, no obligation or rights can arise out of them. The answer to this, is, that the legislature has no authority to pass laws forbidding amen to enter into obligatory contracts - and that all laws of that kind are unconstitutional, as conflicting with the constitutional right to acquire property. The natural right of men to acquire property of each other, being guarantied to them by the constitution, against the action of the legislature, the right to enter into obligatory contracts is necessarily guarantied also-because it is the only means by which they can acquire it.

It follows, then, that the people are secured, by the state constitutions generally, in the possession of these two rights, viz: to enter into all contracts with each other, that are in their nature obligatory - and, secondly, to have right and justice administered upon those contracts by the judiciary.

If these views are correct, we need go no farther than the State constitutions, to determine the validity of' all those laws, or pretended laws by which the business of private banking is attempted to be prevented. These laws are palpably unconstitutional -and no mist of words, no professional quibbles, no arguments of expediency, no authority of long continued custom or acquiescence can conceal or resist the fact.

But let us now inquire whether these laws are not also in violation of the constitution of the United States.

exchanges," or to regulate any other currency than coin, or to prohibit or punish the use of any thing, as a currency, except it be "counterfeits," or fraudulent imitations, of the securities or current coin of the United States.

But collateral with these powers of Congress, is a prohibition upon the States, "to coin money, emit bills of credit, or make any thing but gold and silver coin a *tender* in payment of debts."

These are the only provisions relied upon by the advocates of a compulsory metallic currency, to prove that it was the intention of the constitution that the people should not be *allowed* voluntarily to use any currency except such as might be provided for them by the government, in conformity with these provisions.

The confusion that has arisen on this point, seems all to have resulted from confounding the terms "money" and "currency." It seems to have been taken for granted that all currency is necessarily money. But this is by no means the fact. It is true that "money" is pretty likely to be used as currency, to some extent-though it is not necessarily so to any considerable extent-and there can be no legal compulsion upon the people to use it as currency at all. But there may be many kinds of currency besides money. Currency may be any thing hiving value, or presumed to have value, which, on account of its greater convenience, or for lack of money, or for any other reason, is by [*26] mutual consent of the parties to bargains, given and received in lieu of, or in preference to, money.

Coined money, which is the only kind of money recognized by our constitution, consists of pieces of metals stamped by authority of government. The metals, previous to being stamped, are mere merchandize like any other commodity. The pieces of metal stamped, are of a particular weight and fineness prescribed by law - and the object and effect of the stamp are merely to fix upon them the government certificate to their amount and quality.

any one say that the promissory notes of all incorporated manufacturing companies are unconstitutional and void, as being within the prohibition to the States to "emit bills of credit."

It must be evident, I think, that the prohibition upon the "states" to " emit bills of credit," is a prohibition only upon the omission of bills *upon the credit of the states themselves.* [*25]

CHAP. IV - THE POWER OF CONGRESS OVER THE CURRENCY.

It is a general rule of construction, that where the constitution has clearly and particularly defined a power given to congress, that definition *limits* the power. And I know of no reason that has ever been given why this rule does not apply in this case, as well as in any other. What then are the powers of Congress over the currency?

All the powers that are expressly given to Congress, over the currency, are the powers "to coin money, and regulate the value thereof, and of foreign coins" - and "to provide for the punishment of counterfeiting the securities and current coin of the United States."

These powers are certainly very few, very simple, very definite, and perfectly intelligible. *First,* "To coin money"-we all know what that means. *Second,* "To regulate the value thereof, and of foreign coins" - that is, to fix their legal value relatively with each other. This also is a very definite and intelligible power. *Third,* "To provide for the punishment of *counterfeiting*the securities and current *coin* of the United States." This power is also so clearly expressed, that its limits are distinctly seen. It authorizes the punishment of *"counterfeits"* - that is, fraudulent *imitations,* of the securities and current coin of the United States-and *it does nothing more.* These are all the powers expressed in the constitution, on this subject - and strange as it may appear, not one of them embraces any power "to regulate

This constitution declares that "No State shall pass *any* law impairing the obligation of contracts."

What is *"the* obligation," which is here assumed to pertain to contracts, and is forbidden to be impaired?

We have already seen that the *intrinsic* obligation of contracts - the obligation that is recognized by all judicial tribunals - is the requirement of natural justice, arising out of certain acts of individuals. For instance, A sells to B a bushel of grain, and B promises that he will pay a reasonable compensation for it. Natural justice requires that he should make this payment - and this requirement of justice constitutes the obligation of *this* contract. And this requirement of natural [*10] justice is the *kind* of obligation, and the only kind, that is recognized and enforced by judicial tribunals. And it is recognized and enforced by them in all cases where it is shown to exist, except where legislatures specially interfere to set it aside. Is not this *"the* obligation," which the constitution of the United States declares shall not be impaired? If any say that it is not, it is incumbent upon them to show what other kind of obligation is meant. No other obligation pertains intrinsically to contracts. No other is known to judicial tribunals-no other is known to the consciences of men. *This* obligation, it is true, is not always enforced in full-sometimes not even at all-but that is owing, as we say, to the authority allowed to unconstitutional laws. But *no other* obligation is ever enforced. No other obligation is even

[1] If contracts had had no obligation of their own, there might have been some reason for supposing that the words of tire constitution referred to some obligation, which the government might assume to create, and annex to contracts. Bum when contracts really have the obligation, which is so precisely and naturally described by the words of the constitution, and when this is the only obligation that is acknowledged or enforced among men, it is absurd to pretend, because this obligation has not always been enticed to the letter, that the constitution intended to pass I by in silence, and apply its language to some other obligation, thereafter to be created, and the nature of which, could not be anticipated. Return

known. This, then, is *"the* obligation," which the constitution declares shall not be impaired.[1]

A prospective law may impair *this* obligation, as well as a retrospective one. There is, in this respect, no difference between them. The prohibition of the constitution is against *"any*law" - whether prospective or retrospective - that should impair the obligation of contracts.

The laws which declare that the contracts of unlicensed bankers, to pay money, shall be void, are palpable violations oh this clause of the constitution. And this position is so self-evidently correct, that I need spend no words in making it more clear. I will merely reply to the fictions and quibbles that are usually urged against it.

1st. It is said that if contracts are forbidden by law, they can have no obligation.

This ground is untenable for the following reasons. *First - It* assumes that the law is constitutional, and that the Legislature has authority to forbid men to enter into contracts that are in their nature obligatory-whereas this authority, as we have seen, is withholden from the legislature, even by the State constitutions-inasmuch 158 it would be in conflict with the constitutional right of the people to acquire property. If the legislature may forbid men to enter into one kind of obligatory contracts, they may, by the same rule, forbid them to enter into any-and the natural rights of men to buy, sell, contract, and exchange property, with each other, instead of being secured by the constitution, would become mere privileges to be withheld or permitted at the caprice or discretion of the Legislature. And if a banker's contracts, for the purchase, sale, or delivery of money, are forbidden today, a farmer's, merchant's, and mechanic's, for the purchase, sale, and [*11] delivery of their respective commodities, or appropriate articles of traffic, may be forbidden tomorrow.

2d. The State laws forbidding contracts that are in their nature obligatory, conflict also with the constitution of the United

stitutional. The act of incorporation, then, gives no new right in this respect. It only authorizes the corporation to use a corporate name, in making such contracts, and doing such business, as they had a previous right to make and do in their own names. It also allows them to be known in law by that corporate name.

The right of banking, or of contracting debts by giving promissory note! For the payment of money, is as much a natural right, as that of manufacturing cotton-and an act of legislation, incorporating a banking company, no more confers the right of banking, than an act incorporating a cotton manufacturing company, confers the right of manufacturing cotton. Basking corporations, then, are not, in any essential particular, the *"creatures"* of the State governments. Those governments create neither the individual corporators - nor furnish the capital with which they carry on their business. Nor do they confer the right of carrying on any business, which, but for the grant, they could not lawfully have carried on as individuals. A banking corporation is not necessarily any timing more than a certain number of individuals, exercising *their natural and constitutional rights,* and permitted to be known in law, under a different name and style from their ordinary ones. Neither are they, in any sense whatever, the *agents* of the State.

They do not issue their bills of credit, *for, or on behalf of,* the state. The state does not "emit bills of credit" *through them,* any more than it manufactures cotton through the agency of the manufacturing companies, which it incorporates. Neither does the state furnish any of their capital, or participate in their profits. In short, those corporations are merely associations of men, doing a lawful business for themselves alone, under a name and style which the state permits them to assume. If the granting of corporate names to banking companies, be a violation of the constitutional prohibition against the" state's emitting bills of credit," the granting of a corporate name to a manufacturing company, that should, in the course of its business, issue *its* promissory notes, would lie equally such a violation. But will

against both the natural obligation of their contract, and the laws of the States for the collection of debts-is there a man who would not say that such a charter was unconstitutional? No. Nor is there a man who can point out the difference, in principle, between such a charter, and the charters of the banks of the United States.

CHAP. III. - WHAT BANK CHARTERS ARE CONSTITUTIONAL.

A Charter, that merely authorizes individuals to assume, and he known in law by, a corporate name, without pledging to them any protection against the ordinary liability of other individuals on their contracts, cannot be considered unconstitutional on the ground of " impairing the obligation of contracts."

The usual objection made to the constitutionality of bank charters, is, that they are an evasion of that clause, which declares that "no State shall emit bills of credit." The argument is, that what the State does by another, it does by itself-and that the creation of corporations, for the purpose of issuing bills of credit, is therefore as much a violation of the Constitution as if the States were themselves to issue them. The principle is of course correct, that what one does by another, is done by himself - but the application of the principle to the case of banks chartered by a state, assumes two propositions, which are false, viz., 1st. That these corporations derive their authority to issue bills, from the grant of the state-and 2d. That in issuing them, they act as the agents of the state. Neither of these positions is correct. To issue bills of credit, that is, promissory notes, is a *natural right.* It is also a right, the exercise of which is specially protected by the constitution of the United States, as has been shown in a former chapter. It *is* one that the state governments cannot take from their citizens, and all those laws, which have attempted to deprive them of this right, are uncon-

States-because the provision against impairing the obligation of contracts, implies that men have a constitutional right to enter into all contracts that have an obligation. And all laws that forbid men to exercise their constitutional rights, are of course void.

3d. To forbid men to enter into contracts that have an obligation, and then to infer that the contracts, simply because forbidden, have no obligation, is only a circuitous way of coating to the same end. It is only doing by indirection, what the constitution forbids being done by "any law" whatever. For it is still the *law,* and the law only, that impairs the obligation of the contract - and "any law "that would produce that effect, is void.

4th. The establishment of a constitution precedes, or is presumed to precede, *in point of Lime,* any laws that are to be governed or tested by it. Of course any principles, which the constitution establishes, as a guide to legislation, are principles that are presumed to exist independently of, and anterior to, any legislation under the constitution. The provision then, in the constitution, against impairing the obligation of contracts, assumes that the obligation of contracts is a principle existing at the time the constitution is established, and of course existing independently of any legislation under the constitution-and that it does not depend upon any mere arbitrary rule, that may subsequently be established. It assumes that the obligation of contracts is a principle existing in the nature of things, or at least independently of any legislative will - because it requires that the validity of legislation shall be *tested by it.* It sets up the obligation oh contracts as a *standard,* by an appeal to which the constitutionality of subsequent legislation may be determined. But if a law were to be passed by the legislature, anti the obligation of contracts should then be tested by *it,* the constitutional order of things would be reversed. The obligation of contracts would then be tried by the assumed authority of the *law,* instead of the constitutionality of the law being tested

by its consistency with the obligation of the contract. The obligation of the contract is the constitutional standard, by which time validity of legislation is to be tried: and laws must conform to this standard, and not the standard be brought down to the measure of the laws.

5th. The constitution is, in its nature, a fundamental law, expressly intended to govern all laws that are, in their nature, temporary, or not fundamental. This fundamental law, like other laws, takes effect from the time of its adoption, and controls all other laws passed subsequently *to it.* The only question *of time,* therefore, (if any,) that can arise in the case, is, not whether the impairing law were passed prior or subsequently to the contract, on which it would operate, but whether it [*12] were passed subsequently to the adoption of the constitution.

6th. To say that the state legislatures have power to declare what the obligation of contracts shall be, or what contracts shall, and what shall not, have an obligation, is equivalent to saying that they have power to declare *what the Constitution of the United States shall* MEAN. And us this meaning would of course be arbitrary, the legislature of *each* state separately might declare that it should be something different from what it was in any of the other states - and we might consequently have, in every state in the union, a different constitution of the United States on this point. Not only this, but every state legislature might alter, at pleasure, the meaning, which it had itself given to the constitution of the United States. The constitution of the United States, therefore, might not only be different in every different state, but it might be altered in each state at every session of the legislature. Such is the necessary consequence of the doctrine, that the state legislatures have power to prescribe or determine what the obligation of contracts shall be, or what contracts shall be obligatory.

Another ground urged against the views here taken, is the commonly received doctrine, that the law makes a part of the contract. And it is said that a law, operating only upon future

all other citizens are liable. If congress may, by a charter, thus protect the private property of a company of bankers, from liability for their banking debts, according to the laws of the States, merely because, in addition to their banking business, they perform for the government the service of collecting and disbursing its revenues, then, by the same rule, congress may by law forbid the state governments to touch the private property of any collector of the customs, or of any clerk in the custom house, for the purpose of satisfying his debts. And the result of this doctrine would be, that every person, who should perform the slightest service of any kind for the government, might be authorized by congress to contract private debts at pleasure among the people, and then claim the protection of Congress, not merely for his person, but also for his property, against the state laws which would enforce the obligation of his contracts. Every postmaster, for instance, and every mail-contractor might have this privilege granted to them, as part consideration for their services - for Congress have the same right to grant this privilege to postmasters and mail-carriers, in consideration of the particular services *they* perform for the government, as they have to grant it to a company of bankers, as a consideration for their collecting and disbursing the general revenues of the government. There is no difference, in principle, between an act incorporating a company of mail-carriers, *with banking powers,* and an immunity against their debts, and one incorporating, with like powers and immunities, those who collect and disburse the revenue.

Suppose that Congress, in consideration of the engagement of a certain number of men to carry the mail between such and such points, should assume to incorporate them for that purpose - and, under cover of that pretence, should licence them also to carry on the additional business of common carriers of passengers amid merchandize, and, in [*24] that capacity, to extend their business throughout the several states at pleasure, and contract debts among the people, with an immunity

may undoubtedly limit, at discretion, the liability which the stockholders shall incur *to the government.* And the company may probably, in their corporate capacity, buy and sell bills of exchange, so far as it may be convenient to do so, in making the *necessary* transmissions of the public funds from one point of the country to another - because bills of exchange are the most usual safe, cheap and expeditious mode of transmitting money.

But all this is a wholly different thing from a charter authorizing the company, not only to perform these services for the government, but also to carry on the trade of bankers, in all its branches, and contract debts at pleasure *among the people,* without being liable to have payment of their debts enforced, either according to the natural obligation of contracts, or the laws of the states in which they live. The *principles* of the decision itself do not justify the grant of any such authority to the company. Those principles go only to the extent of authorizing the [*23] company to use their corporate rights in doing the business of the government alone - for the court say, that if an agent be needed to perform certain services for the government, the government may create an agent for that purpose.

The court admit also, that the necessity of such agent for carrying into execution the powers of the government, is the only foundation of the right to create the agent. This principle evidently excludes the idea of creating the corporation for any other purpose-and of course it excludes the right of giving it any other corporate powers than that of performing the services required by the government. Now in order that the company may collect, keep and disburse the revenues, (which are the only services the government requires, or which the decision of the court contemplates that the bank will perform), it plainly is not at all necessary that they should also have the privilege of contracting debts *among the people,* as bankers, in their corporate capacity, or under a limited liability, or with, an exemption from the operation of those state laws, to which,

contracts, cannot impair their obligation, because it makes a part of them.

In the case of Ogden vs. Saunders (12 Wheaton), where this doctrine was examined more fully, probably, than it has ever been in this country, and combated and maintained by the ablest counsel in the country, the judges were very much divided, holding no less than four different opinions, as to the relation which a law bore to a contract. A majority were of the opinion that the law did *not* make a part of the contract. Nevertheless a majority (consisting of four, out of seven, of the judges), was made up, that united in saying that a law passed prior to a contract, did not impair its obligation. This majority was made up in this way. Justice Washington (page 259) and Justice Thompson (page 298) held that the law made a part of the contract. Justice Johnson held that it did *not* make a part of the contract, but that parties were bound to submit to all "lair and candid' laws on the subject of contracts, whether made before or subsequently to the contract. Justice Trimble (page 317) held that the law did not make a part of the contract, but constituted its obligation. Thus a bare majority was obtained for the decision. But such a decision, by a bare majority, and that majority disagreeing as to the grounds on which it should rest, is of course good for nothing. Besides, one of them (Washington) expressed great doubts whether his opinion were correct, and said that he adopted it only because "he saw, or thought he saw, his way more clear on that side than on the other "-(page 2.51). The minority of the court, cun4isting of Chief Justice Marsh II, Justices Duvall and Story, held that the law made no part of the contract - that men had a natural right to contract-that that right had never been [*13] surrendered to government-that the contract was solely the act of the parties - that its obligation was intrinsic - that the law was merely the remedy provided by government for the breach of contracts, and produced no effect upon a contract unless the contract were first broken - that parties, in making their contracts, could not legally be

supposed to look at the law otherwise than as the remedy that would be enforced in case the contract were broken - and, finally, that a law passed prior to a contract, might impair its obligation, and therefore be unconstitutional, as well as one passed subsequently.[2]

So much for authority. Let us now look at the principle itself.

In the first place, then, the doctrine that any law is a part of a contract, of necessity assumes that the law is constitutional - because, if it be not constitutional, it clearly can make no part of a contract.

Now the legal definition of a contract, is simply an agreement, to do, or not to do, a particular thing. If the law strictly *conforms* to the intrinsic obligation of this agreement, it obvi-

[2] This minority, however, made one admission, that was inconsistent with their general doctrines. It was. that "acts against usury," which declared the contract (wholly) void from the beginning," and "denied it all original obligation," were valid. *They* thus held that the constitutional prohibition against "any law impairing the obligation of contracts," might be forestalled by a law declaring that contracts should have no obligation to be impaired. But they might as well have held that a constitutional prohibition against impairing a man's right to life and liberty; might be forestalled by a law declaring that no person, thereafter to he born, should he deemed to have any right to life and liberty or that the constitutional prohibition against "any law abridging the freedom of speech," might be forestalled by a law declaring that, from and after a certain time, there should be no freedom of speech to be abridged. Mr. Webster, in his argument of the cause, made the same inconsiderate admission. No reason, were given for it. by any of them, except the naked unsustained assertion, *that the States had power to prohibit such contracts.* This inconsistent and groundless admission was turned against them, at the time, and made to destroy the force of their otherwise able arguments.

Throughout the whole case, the court and counsel, on all sides, seemed to take it for granted that statute law was a guide in constitutional interpretation, and that it was more important to sustain certain statute laws of the states, than to support the constitution of the United States. How both could be sustained was an inexplicable matter. Some thought it could he done only in one way, and some only in another-and hence the irreconcilable difficulties and disagreements, in which they become involved. None of them had courage to come up to the mark of sustaining the constitution, and quashing outright every thing inconsistent with it. Return

they and the public knew that the liability, incurred by such a promise, was unconditional also. [*22]

If these views be correct, the owners of bank stock, and the members of all other incorporations, are liable, in their private property, as partners, on the promises of their respective companies-and even a transfer of their stock does not relieve them from any liabilities incurred while they were stockholders - and the rich stockholders of every insolvent corporation may be sued, and made to pay.

If the foregoing principles are correct, I suggest whether they are not a sufficient objection to the constitutionality of a bank of the United States - or at least to that feature of its charter, which would limit the liability of the stockholders for the debts they may contract among the people, in their capacity of bankers. Congress has no direct authority to pass any law impairing or limiting the obligation of men's contracts, or screening their property from the operation of state laws, unless it be a "uniform law on the subject of bankruptcies throughout the United States." A bank charter does not come within the definition of such a law, and therefore it is unconstitutional, unless some other authority for it can be shown.

In the case of McCulloch and Maryland, (4 Wheaton), the supreme court of the United States affirmed the constitutionality of a bank-but the grounds on which they affirmed it, by no means support the conclusion. The grounds, on which the question was decided, were, that Congress had authority to "pass all laws that were necessary and proper for carrying into execution" the substantive powers of the government - and that, therefore, if a corporation were a convenient and proper agent to be employed in collecting and disbursing the revenues of the government, Congress had a right to create such an agent by an act of incorporation. This doctrine all looks reasonable enough, and it Is probably correct law that congress may incorporate a company, and authorize them to do their corporate capacity, *any thing which they* are *to do for the government.* And congress

- *or* provided they should not choose to transform themselves into a joint, fictitious, incorporeal, and *non debt paying,* being.

Perhaps it will be said that these bank charters are public acts, and that the public must be presumed to have known of them, and to have trusted the company only to the extent of their chartered liability. The answer is, that the public must also be presumed to have known that any state law, which assumes to screen men from the responsibility incurred by the *terms of their contracts,* is unconstitutional-and that they must therefore be presumed to have trusted the company *on* the *strength of their promise,* without any regard to any unconstitutional law, that would convert an unconditional promise into a contingent one. No man can legally be presumed to have trusted another with *reference* to a void law, not named in the contract.

If companies or individuals wish to limit their liability on their promises, *tine limitation must be expressed in the contracts themselves - and* not in a law, which, if it lessen the liability expressed in the contract, impairs the obligation of the contract.

Perhaps it will be said that the terms of a bank promise - which are that "the President, Directors and Company of a Bank, promise to pay," &c-necessarily imply that the promise is a conditional one, limited by the amount of funds already deposited in the joint treasury. But such is not a true or natural construction of the contract. An act of incorporation does not, *necessarily,* attempt to limit the personal liability of the members of the company. It may, and often does, only grant them the privilege of making contracts, and being known in law, under a corporate name and style, to save them the inconvenience of repeating the several names of the whole company - they being all the while liable, as partners, to the extent of their private property. The promise, therefore, of a "Company," to pay money, if unconditional in its terms, carries with it no necessary implication of any limited responsibility on the part of the individuals composing the company. They all join in an absolute promise; and the presumption of law must be, that both

ously has made no part of the agreement itself, because the agreement remains the same that it was before. The law has contributed nothing to it, and of course makes no part of it. On the other hand, if the law is different from the contract, varying its intrinsic obligation in any manner, or in any degree, it is unconstitutional, as impairing its obligation. And it consequently can make no part of the contract, for the reason that an unconstitutional law is void, and has no legal effect upon any thing.

Whether, therefore, a law agrees with a contract, or differs from it, it is no part of the contract itself. If it differs from the intrinsic obligation of the contract, it is unconstitutional, and has no effect whatever upon the contract. If it agree with the contract, it is still no part of it - it is only something subsidiary and remedial.

But it will be said that parties, who expect to have their contracts [*14] enforced, must be presumed to have *intended* to make them according to law. This is true. They must be presumed to have intended to make them according to all constitutional laws - but clearly they cannot be presumed to have intended to make them according to any unconstitutional law. Now, in order that a contract may be according to law, it is only necessary that it should have an *intrinsic* obligation. So far as *any* contract has this obligation, it *is* according to law, for it is according to the fundamental law-the constitution. And this fundamental law has also provided that the people shall not be required to wake their contracts according to any other law.

Again. No one will pretend that the law can make entire contracts for parties, without their consent, and then presume their consent, and enforce the contracts as if the parties had actually agreed to them. No one, for instance, will pretend, if the legislature were to pass a law that A should pay B an Hundred dollars for his horse, and that B should sell his horse to A for an hundred dollars, that courts would be bound to presume the assent of A or B to this contract, which the law had attempted

to make for them. All admit, then, that the law cannot make an *entire* contract for parties, and then presume their consent. How, then, can it make any part of a contract, and presume their consent? If the law has a right to make the least part of a contract, it has the same right to make a whole one.

The idea that the law makes a part of the contract, cannot be sustained at all, except upon these suppositions, viz, that the natural right of individuals to make contracts, has either been entirely surrendered to government, or entirely usurped by the government-that government exercises the rights thus granted or usurped, so far as it chooses, and then gives back to individuals the privilege of exercising so much of the remainder of their original rights as government thinks it judicious to allow them to exercise. These, let it be particularly remarked, are the only grounds on which it can be pretended that government has power to make any part of a contract. Now, it is evident that, if these suppositions are correct, government has the same right to make entire contracts, that it has to make parts of contracts-amid it may accordingly proceed to make bargains to any extent, between individuals - binding, obligatory contracts-to which the individuals themselves may never render any thing but a constructive assent. The government, for example, may compel A to sell his farm to B, at a price fixed by the government, and compel B to buy it, and pay for it, at that price, when neither A nor B consent to the contract. Is this the country, in which a principle, morally and politically so monstrous, is to exist and be recognized as law?

This whole doctrine, that the law is a part of the contract, is a mere fiction, invented or adopted by English courts to uphold the supremacy of their government over the natural rights of the people to make their own contracts. And it has been acted upon in this country only in [*15] obedience to arbitrary precedent, and in defiance of our fundamental law, which provides that the natural right of the people to make their own contracts, shall *set limits* to the power of their governments.

real, bona fide, corporeal nature, to receive those profits, and put them in their pockets. But in that moment when the fulfillment of their contracts comes to be demanded, *presto!* They have all vanished into incorporeality. There is nothing left of them, but a *"legal idea!"*

Now does not a law, which allows men to make contracts in their proper persons, and would then screen them from all personal liability on those contracts, by giving them the liberty to shroud themselves, at pleasure, in a fictitious, incorporeal, intangible nature - does not such a law "impair the obligation of their contracts?" Or is this fictitious nature a sufficient plea in bar of the promises they have personally made?

Suppose the Constitution of the United States had declared that "no State should pass any law impairing a man's right to be protected against burglars." And suppose a state should then incorporate a company of burglars, by a charter that should guaranty to them full liberty to commit burglary, *in concert,* in their own proper persons, and then authorize them severally to plead a joint, incorporeal, fictitious, intangible nature, in bar of an indictment by the grand jury. Would not such a charter be void, as being a law prohibited by the constitution? Or would it really be a good plea for these burglars to say, "we committed our crimes, it is true, in our own proper persons; but it was, neverthe- [*21] less, in our joint, incorporeal, irresponsible *capacity,* and of course we cannot be held liable to such corporal responsibility and punishment, as are justly incurred by those vulgar burglars, who are not thus privileged in the commission of their offences?" The case is a fair parallel to that of a bank charter.

If such bank charters are valid, their effect is to give to individuals the advantage of two legal natures-one favorable for making contracts, the other favorable for avoiding the responsibility of them, when made. Another effect is, to convert an unconditional promise, of individuals, to pay money, into a mere promise to pay, *provided they should not choose to refuse to pay*

impair the obligation of contracts, by making those promises contingent, which in their terms are absolute.

If a state law can declare that certain obligatory promises to pay money, shall be void in the contingency of their payment requiring more money than the promissors intended to put at risk, (a contingency not mentioned in the contracts themselves,) it may equally declare that contracts shall be void in any other contingency whatever - in the contingency, for instance, of a hail-storm, or a thunder-shower. [*20]

But it will, of course, be said that the promises of a banking company are made, by the company, in their joint, incorporeal, intangible *capacity.* The answer to this argument is, that this idea of a joint, incorporeal being, made up of several real persons, is nothing but a fiction. It has no reality in it. It is a fiction adopted merely to get rid of the consequences of facts. An act of legislation *cannot* transform twenty living, real persons, into one joint, incorporeal being. After all the legislative juggling that can be devised, "*the company"* will still be nothing more, less or other, *than the individuals composing the company.* The idea of an incorporeal being, capable of carrying out banking operations, is ridiculous. The theory of one incorporeal being is not, and cannot be, consistently sustained throughout the various doings of the company. For instance, when the agents of the company, the President and Cashier, enter into contracts on behalf of the company, to pay money, they act under the dictation of the stockholders, voting severally and individually, as so many distinct and real persons, though a committee of their number, called directors. *The ma/ring of the contract, then, is the act of real persona - and* necessarily most he, for no others can make contracts. But no sooner does their *liability* for their contracts come in question, than these real persons claim that they have been resolved, by law, into an imaginary, intangible, until purely legal being. So also when the *profits* of their contracts are to be received and enjoy these same stockholders, who authorized the contracts to be made in their name, appear in their

But suppose, for the sake of the argument, that the law were a part of the contract, the result would still be the same - for then the *constitution* would be a part of the contract-for that is the fundamental law. And the intrinsic obligation of the contract would still have to prevail over any law that was inconsistent with it.

Another ground assumed by those who oppose the view here attempted to be maintained, is, that the word "contract," in the constitution, is used in a technical sense, borrowed from English precedents, and that therefore the phrase "obligation of contracts," means only the *legal* obligation of contracts, or only such obligation as legislatures may please to allow contracts to possess.

But the supreme court of the United States have decided that the language of the constitution is not to be taken in any technical or limited sense, unless it be some parts of it that are plainly intended to be so understood - but that it is to be taken in its popular sense-in that sense, in which the people, for whom it was made, and who adopted it, and gave it all its vitality, may be supposed to have understood it.

If it be said that the word "contract," in the phrase "obligation of contracts," is to be understood in a technical sense, and to mean nothing more than legislatures may please to allow it to mean, it may just as well be said that the terms freedom of speech, free exercise of religion, right to keep and bear arms, right to acquire property, and right to enjoy life and liberty, are all to be taken in a technical and limited sense, and to mean nothing more than such a *legal* freedom of speech, such a *legal* free exercise of religion, such a legal right to keep and bear arms, such a legal right to acquire property, and such a legal right to enjoy life and liberty, as legislatures may see fit to establish. Such constructions would abolish every bill of rights in the union. It would take from the people all the security afforded by their constitutions for the enjoyment of their natural

rights. It would abolish all restraints upon the legislative power, and place every right of the individual at its disposal.

Again. If there could be any doubt about the meaning of language so plain as that which declares that "No State shall pass any law impairing the obligation of contracts," that doubt would have to be decided in favor of the natural rights of men to make their own contracts - because our institutions, state anti national, profess to be founded on the acknowledgement of men's natural rights, and to be designed to secure them. And the general principles of an instrument must always decide any doubts that may arise as to the meaning of particular parts.

Finally. It is obvious that all these arguments in favor of laws controlling the obligation of contracts, are mere quibbles, pretexts and fic- [*16] tions, resorted to, to evade, or circumvent a plain unambiguous provision of the constitution-a provision too, that seeks only to place men on their natural level with each other-to protect the natural rights of all against the despotic action of legislatures-and to establish the principles of natural justice as the basis of law - a provision, which all men, who do not wish to have their most important rights made the football of legislative faction, folly, ignorance, caprice and tyranny, ought to unite to uphold.

It is also obvious that these arguments are urged almost entirely by men who have been in the habit of regarding the legislative authority as being nearly absolute - and who cannot realize the idea that "the people" of this nation, acting in their primary capacity, should ordain it as a part of their fundamental law-the law that was to govern their government - that their natural right to contract with each other, and "the obligation of their contracts" when made, should not be subjects of legislative caprice or discretion.

If the principles thus attempted to be maintained, be correct, men may exercise at discretion their natural rights to enter into all contracts whatsoever that are in their nature obligatory; and it is the duty and the prerogative of the judiciary alone, to de-

A bank charter, then, of the kind now under discussion, *so far as it is in tine nature* of a "contract," is a mere agreement, on the part of the state, to screen men against their just liability for their debts. In their character of "contracts," then, these charters are void-void for the same reason that all immoral contracts are void, viz, that justice does not require their fulfillment.

Suppose a legislature should say to a single individual, who was worth fitly thousand dollars, "Sir, If you will invest ten thousand dollars of your money in mercantile, manufacturing, or agricultural business, you shall be allowed to issue unconditional promises to pay to the amount of three times the sum you invest, and if your enterprize prove successful, you shall have all the profits - but if it prove unsuccessful, you shall lose only the ten thousand dollars which you intended to risk, and we will then protect you in refusing to pay your creditors the other twenty thousand, which you shall have promised them-and you may then retire to indulge your dignity on the forty thousand dollars that wilt still remain to you." Is there a man in the whole country, that would not declare such a contract to be a nefarious and swindling agreement, destitute of "obligation?" Void for immorality? Yet such are most of our bank charters. All the difference is, that in a bank charter, the agreement is with twenty, or an hundred men, instead of one.

Bank charters, of this kind, then, are void in their character of *contracts.* They are also void in their character of *laws.* They are unconstitutional as impairing the obligations of the contracts made by the company. They declare that the absolute promises, that may be entered into by the individuals, composing the company, to pay money, shall not, in law, be held to be absolute promises, but only promises to pay in a certain contingency - that is, in the contingency that they can be fulfilled without requiring more money than the individuals *were willing to risk* when *they* made the contract. The charters, then,

But the other kind of charters profess to guaranty to individuals the immunities, (to a certain extent,) of a joint, incorporeal, intangible being. They declare that these individuals shall, in certain contingencies, be *deemed to be* such a being. And the object is to protect theta severally in the non-performance of their joint contracts. Now it is obviously impossible for legislation to create such a being, or entity, as it here professes to do. For, after all, ‘who are “The President, Directors and Company” of a bank, but real bona fide men, who, in making contracts, consult their own interests like other men–who are as competent as other men to make contracts, and who, so far as the obligations of justice are concerned, are as much responsible for their acts, as if they had never passed through such an operation as that of being fictitiously transformed into an unreal being. Now, it is to be observed, and has been already suggested, that the whole object and effect (if any) of this legislative legerdemain, is to give to these individuals an immunity against all personal liability for the contracts they unity make. The question now is, whether this “contract,” or pledge, on the part of the state, that these individuals shall be regarded, in law, as an imaginary, incorporeal being, or rather as so many imaginary, incorporeal beings, and that they shall be held irresponsible, as *men,* for the contracts they may enter into, is an *obligatory* contract?

Perhaps, this question cannot be better answered, than by asking another. Suppose, then, a legislature, for the purpose of enabling them [*19] to perpetrate their crimes with impunity, should assume to incorporate a gang of burglars, and to guaranty to them all the immunities, such as intangibility, irresponsibility &c, that would pertain to a joint incorporeal being. Would such a charter be an *“ obligatory contract?“* Clearly not. But would it not be *as* obligatory as one that should pledge to men the privilege of contracting debts, without the liability of being held to pay them?

cide upon the obligation of all contracts that come before them for adjudication-and legislatures have no authority to interfere in the matter, further than to prescribe the means to be used for enforcing the obligation of contracts, and the extent to which these means shall be exerted.

Furthermore. If these principles be correct, they not only prohibit all laws restraining private banking, but also all laws restraining the rate of interest for money - all laws forbidding men to make contracts by auction without license, and all other laws in restraint of men’s natural right to contract. They also prohibit the legislature fruits impairing the obligation of marriage contracts. It is a judicial question whether a marriage contract have been broken by either party - acid if it have not been broken, the legislature has no power to discharge the other party from its obligation.

Here let me say, that in order to maintain the unconstitutionality of these laws against banking, usury, &c, it is not necessary to suppose that the people, who adopted the constitution, actually foresaw that the principle they were establishing in regard to contracts, would, when carried out, produce this particular effect. This result, for aught that concerns the argument, may be admitted to be one of the details of its’ operation, which they never dreamed of. They did not know, and could not pretend to know1 all the forms which the future contracts of an enterprising and commercial people might assume-and even if they had known them, no special note would have been taken of them separately, in the instrument they were adopting. The object of a constitution is to establish principles-not to follow out the operation of those principles in all their ramifications. That is the busi- [*17] ness of the legislative and judicial tribunals under the constitution. All, then, that it is necessary for us to suppose in the case, is, that “the people,” who established the constitution, recognized the inherent right of men to contract with each other-and the intrinsic magnitude of the principle that should maintain the inviolability of all their

obligatory contracts. That they also saw that these principles were vital to the free commercial intercourse of the citizens of the different States with each other-and that they saw the danger to which these principles would be exposed, if left to the caprice of numerous rival, and, in many cases, illiberal, unwise and tyrannical local legislatures. That they, therefore, ordained that these principles should be recognized throughout the country, and govern the dealings and contracts of the people with each other-and that no local or subordinate government should "pass *any* law impairing the obligation" of any of their contracts.

The supreme court of the United States, in the case of Sturges and Crowningshield, (4 Wheaton 209), have expressed the comprehensive purpose of the constitution, on this point, as follows. The court say, "The *principle,* which the framers of the constitution intended to establish, war *the inviolability of contracts.* This *principle* was to be protected, in whatever form it might be assailed. To what purpose enumerate the particular modes of violation, when it was intended to forbid all. Had an enumeration of all the laws, which might violate contracts, been attempted, the provision must have been less complete, and involved in more perplexity than it now is."

Viewing the purpose of the prohibition in this light, is there another clause in the whole instrument, that does more credit to those who framed, or to the people that adopted, the constitution, than this? Is there another clause, which more strongly

[3] The dissenting opinion of Marshall, Duvall and Story, in the case of Ogden and Saunders, (12 Wheaton,) although, as before mentioned, not a consistent one throughout, is yet a very admirable and conclusive argument in support of the intrinsic obligation of contracts, and of the right of individuals, under our constitution to make their own contracts. The opinions of the *majority* of the court are also instructive, as showing how the minds of those composing our highest tribunal, bow to the authority of fictions and precedents designed merely to sustain monarchical and arbitrary power, amid how incapable they are of appreciating the free principles of our own constitutions. Return

discloses their love of personal liberty, their sense of justice, and their respect for the equal and natural rights of men? It in fact establishes a great principle of civil liberty. It embodies also the most wise, benevolent, and far-reaching principle of political economy - a principle, the natural and necessary operation of which is, to produce the greatest aggregate increase, and the most equal distribution of wealth, that can be accomplished, consistently with men's personal rights - for it gives to each individual, what no other principle can, the full command, and the entire profit, of all his legitimate resources.[3]

CHAP II - WHAT BANK CHARTERS ARE UNCONSTITUTIONAL.

If the principles of the foregoing chapter are correct, then all bank-charters, and other acts of incorporation, which would relieve the stockholders from the full liability incurred by *the terms of their contracts,* are unconstitutional, as impairing the obligation of contracts. Such are most of the bank charters, and other acts of incorporation, in this country.

But it will, perhaps, be said that such charters are themselves contracts-and that *their* obligation, therefore, cannot be impaired.

For the sake of the argument it may be admitted that a charter is a contract-but it does not follow that it is one having an "obligation." To decide whether any contract have an obligation, we must determine whether the contract be, in itself, just or unjust, moral or immoral.

Some charters are merely an authority to the corporators to use a corporate name in their dealings and contracts, and in suing and being sued-the corporators still remaining liable, as partners, to the extent of their means, for the debts of the company. To the constitutionality of such charters, there is probably no ground of objection.