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Veterans' Legislation and Limitations upon the Implied Powers of Congress

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The enactment of "veterans' legislation" by the Congress of the United States, in all its various phases, is essentially a gift in the form of money or services to a specially constituted minority of citizens. Since the source of the funds applied to such purposes flows, by the incidence of taxation, from the assets of the people as a whole, the inquiry is at once suggested: upon what theory is justified this collection from the many and donation to the few? If, by hypothesis, all would agree that this is undemocratic, what is the basis for the exception to the general theory? The power of Congress to enact such legislation seems never to have been questioned. Perhaps it cannot be questioned judicially for the want of a proper party protestant, but of this more shall be said hereafter. The wisdom of such legislation is, however, seriously debated. It has become a political issue of capital importance. For reasons later to be made apparent, it

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1 No distinction is made in this article between pensions and other forms of reward. See People v. Westchester National Bank, 231 N. Y. 465, 132 N. E. 241 (1921). It is well settled that a pensioner has no vested legal right in a pension; it is a bounty of the government which Congress has the right to give, withhold, distribute, or recall at its discretion. U. S. v. Teller, 107 U. S. 64, 2 S. Ct. 39 (1882); Frisbie v. United States, 157 U. S. 160, 15 S. Ct. 586 (1894).

2 See Judson, Public Purposes For Which Taxation is Justifiable (1908) 17 Yale L. J. 162, at 163: "Under the comprehensive revenue system of the government, taxes are levied, not for specific purposes, but by continuing laws establishing the rate of customs, duties and internal revenue taxes. Questions relating to the lawful purposes of taxation, therefore, do not arise in the levying of Federal and State taxes, but in the appropriation of public funds for public needs."
is impossible to dissociate the question of the wisdom of the laws from the question of their constitutionality.

It is, therefore, the purpose of this article to inquire into the origin and constitutional basis of the power of Congress to enact veterans' legislation; and to discuss whether or not, conceding the existence of such power, it is unlimited.

No intelligent approach to these problems is possible without a definition of terms and a knowledge of what legislation Congress has enacted and proposed. By "veterans' legislation" is meant any form of gratuity to a former member of the military or naval forces. Following the World War, Congress enacted a series of laws for the benefit of veterans. Only two of these measures are of interest here: (a) that providing medical and hospital care (in addition to compensation payments) which is also available to veterans of the Spanish-American War, the Philippine Insurrection, and the Boxer Rebellion. It is provided that these facilities shall be available to such veterans "suffering from neuropsychiatric or tubercular ailments and diseases, paralysis agitans, encephalitis lethargica or amoebic dysentery, or the loss of sight of both eyes regardless whether such ailments or diseases are due to military service or otherwise . . . . The director is further authorized . . . . to furnish hospitalization and necessary traveling expenses to veterans of any war, military occupation, or military expedition since 1897, not dishonorably discharged without regard to the nature or origin of their disabilities." And (b) adjusted compensation, commonly called the "bonus".

The legislative history of the latter measure is still in the process of being written. Public discussion of the matter has been so thorough that there would seem to be no occasion for an extended statement of its provisions. It is essentially a twenty-year endowment insurance policy, payable at death or in 1945,

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38 U. S. C. A., § 484, (1926), cited as "World War Veterans' Act, 1924".


Mr. Angell's article states that "during 1931, 988,000 medical examinations were made, 140,000 cases were treated and 76,000 men admitted to hospitals. Less than 25 percent of the patients admitted were suffering from a disability growing out of war service." Further, "Honest officials of the Veterans' Ad-
on which the United States pays the premiums. Representative
Patman introduced a bill providing for the immediate payment in treasury notes, of the full face value of the certificates. The
bill directed the Secretary of the Treasury to issue such notes to the extent required and place them in Federal Reserve Banks subject to the order of the Administrator of Veterans' Affairs. The Secretary was further directed to issue a like amount of United States bonds, bearing three and a half per cent interest, payable in twenty years from the date of issue. These bonds were to be deposited in the Federal Reserve Banks, to be sold to the public from time to time. The currency received from the sale of the bonds was then to be exchanged for the Treasury notes issued in payment of the certificates.

The Committee on Ways and Means of the House of Representatives, submitted an adverse report. A supplemental adverse report and a minority report favorable to the bill were filed. The Senate Committee on Finance also reported adversely. The bill passed the House but was defeated in the Senate.

A statistical analysis of expenditures made under direction of veterans' legislation as a whole shows that the United States has already paid out approximately $6,000,000,000.00 on account of veterans of the World War, as against $8,000,000,000.00 for veterans of all other wars. It is estimated that under existing legislation the total expenditure for World War Veterans will reach $21,500,000,000.00. The United States is now expending for the benefit of all veterans approximately $1,000,000,000.00 a year, or nearly one-fourth of the total expenditures of the Government. The Patman bill would call for the issue of $2,400,000,000.00 of Treasury notes, since there are no other funds available. In addition, the deficit of the Government for the fiscal year 1932

ministration admit that thousands today are receiving monthly gratuities for absurd, exaggerated, and made-out-of-whole-cloth 'disabilities'."

Mr. Watson states that "These three items, national defense, debt service, and balm for veterans, making up the nation's continuing outlay for past and future wars, now represent in toto just short of 70 percent of our annual expenditures."

5 H. R. 7726, 72d Cong. 1st Sess.
6 Ibid., Part 3, May 13, 1932, submitted by Mr. Lewis.
7 Ibid., Part 2, May 13, 1932, submitted by Mr. Vinson.
8 Ibid. n. 7 at 2.
9 Ibid.
10 Supra n. 10 at 4.
will amount to more than $2,800,000,000.00, as a result of the most drastic economic depression in our history.

In support of the Patman bill it was urged (a) that the debt evidenced by the certificates was a moral obligation which should be paid by a grateful government; (b) that the distribution of $2,400,000,000.00 would tend to increase both the volume and the velocity of money and operate to revive business; (c) that many of the veterans were in urgent need of the funds; and (d) that the Treasury notes were not "fiat" money.

In opposition it was stated (a) that immediate payment was contrary to the terms of the contract; (b) that no appreciable benefit would result to business in general; (e) that only thirty per cent of the veterans were in actual need; (d) that the proposed Treasury notes would be "fiat" or "paper" money, the issuing of which would set a dangerous precedent; and (e) that in the present condition of the Treasury disastrous financial results would flow from the added burden.

The foregoing summary has been presented, not for the purpose of questioning the wisdom of legislation past and proposed, but as a necessary preface to the questions: By what constitutional delegation of power is the Congress authorized to expend a total of some $14,000,000,000.00 for the benefit of veterans of all wars? For the expenditure of one-fourth of the total national income for such purposes? For the issuance of "fiat" money, if it be such? And, finally, to inquire whether, assuming the existence of delegated power for such purposes, it is an unlimited power without relation to the degree or extent of its exercise, or to time and circumstances. Whether or not existing and proposed legislation has now reached the point where the solvency of the United States Government is endangered, is a matter of opinion. Assume, however, that in the future legislation is enacted which requires not one-fourth, but one-half, or three-fourths of the national income, for such purposes. Assume, further, that payment cannot be made pursuant to any sound fiscal policies, and that in the opinion of all qualified observers insolvency of the government is certain to result. In such a situation, is the power of Congress unlimited?

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*Tbid.*

*Supra* n. 9, at 1-9.

*Supra* n. 7 and 8.
Constitutional Basis of the Power

It is axiomatic that the powers of Congress are limited by the Constitution to those specifically enumerated therein. There cannot be found an enumerated power to grant pensions, provide for disabilities or death, or to confer gratuities on veterans of past wars. None of the legislation referred to is specifically authorized. It is apparent, therefore, that the power must be derived from the only other conceivable source: the implied power to enact all laws "necessary and proper" to carry into execution the enumerated powers. This theory, apparently never seriously questioned, is advanced in United States v. Hall, implied power being derived from the express powers to declare war, to raise and support armies, to provide and maintain a navy, and the like.

As if doubtful whether the argument carried complete conviction, Mr. Justice Clifford continued with the statement that the power to grant pensions could not be controverted, since it had been exercised by the States and by the Continental Congress during the Revolutionary War, and the exercise of the power "is coeval with the organization of the Government under the present Constitution." If such legislation is to be justified by resort to pre-constitutional history, the argument is valid only to the extent that such history supports it. But a reliable study of the subject discloses no warrant for the inference that either the States or the Continental Congress, prior to the adoption of the Constitution, granted pensions or allowances for disabilities or death suffered without regard to service origin; nor for gratuities not offered to induce enlistment and continuation of service.

27 U. S. Const., Art. I, § 8, Cl. 18: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

28 98 U. S. 343, 26 L. ed. 180 (1879). The court said: "Implied power in Congress to pass laws to define and punish offenses (relating to pension funds) is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing armies and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof."

29 Glasson, Federal Military Pensions in the United States (1918) passim.
As early as 1592 England enacted the first statute “for the reliefe of Souldiours.” By the eighteenth century the practice of granting pensions was well established and “it was natural that the English colonists in America should provide for the relief and support of their soldiers injured in wars with the Indians or with colonists of other nations.” In 1636 the Plymouth Colony enacted in their court that “if any man shall be sent forth as a souldier and shall return maimed hee shall be maintained competently by the Collonie during his life.” But, with the background of colonial precedent “it is to be noted that the disabled pensioner was required to be incapable of earning a livelihood.”

The first national pension law was enacted by the Continental Congress on August 26, 1776. On May 15, 1778, there was enacted a law providing that “officers who served until the end of the war should receive half pay for seven years after its conclusion. This allowance was not to exceed the half pay of a colonel . . . . Non commissioned officers and privates who should serve to the end of the war were promised a further reward of eighty dollars at its termination.”

The theory of such legislation was not to confer a gratuity in recognition of past services, but was for the purpose of preventing wholesale resignations. It was thought necessary in order to keep the army together. In a letter written by Washington on May 18th to the President of Congress he stated: “I shall announce the resolution of the 15th to the army, and would flatter myself it will quiet in a great measure the uneasinesses, which have been so extremely distressing, and prevent resignations, which had proceeded, and were likely to be at such a height, as to destroy our whole military system.”

There was great objection to the plan thus put into operation. The Massachusetts legislature, in July, 1783, remonstrated to Congress that the act was “inconsistent with that equality which ought to subsist among citizens of free and republican States” and “calculated to raise and exalt some citizens in
wealth and grandeur, to the injury and oppression of others.' 27 A protest was likewise filed by the Connecticut House of Representatives, in which the upper house refused to join. 28 Professor Glasson's conclusion is that while invalid-pension provisions were in harmony with colonial precedent, public opinion was opposed to officers’ half-pay legislation, and “the thought of the existence in the country after the war of a privileged class of service-pensioners was very repugnant to advocates of democracy’’. 29

In so far, therefore, as the argument in United States v. Hall rests upon colonial precedent, it offers no support for the theory that Congress has power to award compensation for disabilities or death not incurred as a result of service, or to grant pensions not offered as an inducement to enlistment or continuation of service. The granting of adjusted compensation and non-service-connected disability awards and hospitalization must, it is submitted, rest upon the implication of power under the “necessary and proper” clause, 30 rather than upon pre-constitutional precedent.

It may be noted in passing that the power of the states has been questioned upon the ground that such disbursements were not for a “public purpose”. However, it is apparently settled that a state or municipal corporation may offer bounties to induce service in the military forces of the nation. 31 They may also expend public funds for the purpose of reimbursing those, who, on the faith of the public credit and with the expectation of repayment, have advanced money toward a public fund with which to procure enlistments. 32 One group of authorities holds that a

27 Ibid., quoted at 43.
28 Ibid., at 46-47.
29 Ibid., pp. 51-52.
30 Mr. Justice Clifford, in United States v. Hall, supra n. 18, further elaborated the argument: “Even the respondent admits that Congress may declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces; and it is equally clear that Congress may make all laws which shall be necessary and proper for carrying the powers granted by the Constitution into execution. Concede that, and it follows that Congress may grant such donations to the soldiers, sailors, and seamen employed in such public service. Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements. Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out.”
31 Taylor v. Thompson, 42 Ill. 9 (1866); Henderson v. Lagow, 43 Ill. 360 (1866); State v. Baltimore, 52 Md. 398 (1879).
state may provide a bounty for past services, as a pure gratuity, in recognition of sacrifices made during the war.\footnote{Franklin v. State Examiners, 23 Cal. 173 (1863); Leonard v. Wiseman, 31 Md. 201 (1869); Opinion of Justices, 211 Mass. 608, 98 N. E. 338 (1912); Gustafson v. Ekholov, 144 Minn. 415, 175 N. W. 903 (1920); State ex rel. Hart v. Clausen, 118 Wash. 114, 194 Pac. 793 (1921); State ex rel. Atwood v. Johnson, 170 Wis. 213, 176 N. W. 224 (1920); 170 Wis. 251, 175 N. W. 589 (1919).} Opposed to them is the view that if, at the time of entering the service, there was no offer or promise of bounty, a pure gratuity is unconstitutional as authorizing the expenditure of public money for a private purpose.\footnote{Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030 (1912); Mead v. Acton, 139 Mass. 341, 3 N. E. 413 (1889); In re Bounties to Veterans, 186 Mass. 603, 73 N. E. 96 (1904); Bush v. Orange County, 159 N. Y. 212, 53 N. E. 1121 (1899); Washington County v. Berwick, 56 Pa. 466 (1869).}

In People v. Westchester National Bank\footnote{Cf. Veterans' Welfare Board v. Biley, 189 Cal. 159, 208 Pac. 678 (1922), wherein the court states: "The promotion of patriotism is recognized as a proper exercise of governmental functions and as a field for the expenditure of public money. We think, then, that this legislation may be justified upon the proposition that it is in furtherance of the general welfare by promotion of patriotism, and that the classification made is justifiable upon that basis." In that case the statute provided for free text-books, transportation and sustenance to World War veterans.} the question arose under a New York statute providing for the issue of $45,000,000 of state bonds, the proceeds of which were to be expended as a bonus to soldiers and sailors of the World War. The court stated that "whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the State's credit."

It was said that they were gifts because not made in recognition of a claim, moral or equitable, against the state, on the ground that the state took no part in calling the soldiers and sailors into service and received no benefit not common to all other states. It was, therefore, held that the statute violated the constitutional provision that "neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or other private undertaking." But more important for present purposes was the statement that:

"... if there is any reasonable ground for the legislative decision that a moral obligation exists, the courts may not intervene. If there is such a ground, the legislature must determine whether the claim shall be recognized. But the prohibitions of the Constitution may not be evaded by the assertion that such an obligation exists, when in fact it does not. Arbitrary action may not convert a wrong into a right."
The "Necessary and Proper" Clause

The leading case of *McCullough v. Maryland* involved the power of Congress to create a Bank of the United States. Chief Justice Marshall urged that the clause should receive a broad construction, in accordance with the supposed intention of the framers of the Constitution. It is difficult to accede to this argument in so far as it turns upon the use of positive rather than negative phraseology. To delegate a power to do whatever is necessary and proper is, unless the words be meaningless, to imply that what is unnecessary and improper is beyond the scope of the grant. The Chief Justice continued with the statement which has since been quoted many times:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transgressed . . . . Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

It was further stated that in determining whether the means chosen are appropriate the court may inquire whether the proposed law is really calculated to carry into effect any express power granted to Congress.  

What, then, is the effect of the clause? Marshall answered that "... if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government."

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while attending a state institution of learning. See also Veterans' Welfare Board v. Jordan, 169 Cal. 124, 208 Pac. 284 (1922).

24 Wheat. 316, 4 L. ed. 579 (1819). The reasoning was that: "If, then, their (the framers of the Constitution) intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' etc. 'No laws shall be passed but such as are necessary and proper.' Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect."

25 "But where the law is not prohibited, and is really calculated to affect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such power."

26 Madison also seems to have taken this view. See *The Federalist* (1788) No. XLIV, in which it is said: "Had the Constitution been silent on this
As to express powers exercised directly, the authority of Congress is unlimited. In principle it cannot be otherwise for the reason that sovereign power to perform certain sovereign acts must, in the nature of all governments, be lodged irrevocably, irrevocably, somewhere. We have seen fit to place this sovereignty in Congress. But when express powers are exercised by the method of indirection, sovereignty is not unlimited but on the contrary is granted with the proviso that the indirect methods shall be only such as are necessary and proper. It logically follows, therefore, that any act of Congress which attempts to carry out an express power by legislation which is unnecessary and improper, is unconstitutional. The only question for determination is: who shall judge of the necessity and propriety of the act — Congress itself or the Supreme Court of the United States? It seems strange that the question could be debatable. Conceding, since Marbury v. Madison, the power and duty of the Court to declare acts of Congress unconstitutional, is that duty any the less when Congress enacts a law which, in the judgment of the Court, is unnecessary and improper? If this be not true, one may paraphrase Marshall's celebrated inquiry in the latter case, asking to what purpose limitations are imposed and those limitations committed to writing if they may at any time be exceeded by those intended to be restrained? If Congress may in all cases reply that it is the sole judge of the necessity and propriety of its legislation, then theoretically there is no legal limitation upon its powers. At any rate, the question was not settled by McCullough v. Maryland. Perhaps it was settled, for the time being, by a series of cases following the civil war.

head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

See n. 38, supra. Madison said: "If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislature should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."

1 Cranch 137, 5 L. ed 137 (1803).

Supra n. 36.
The Legal Tender Cases

On February 25, 1862, Congress enacted a law authorizing the issue of $150,000,000.00 of its own notes, and provided that they should be legal tender for all debts, public and private, with certain exceptions. Mrs. Hepburn tendered such notes to Griswold in payment of a debt which had become due five days before the passage of the law. This gave rise to the first of the legal tender cases, Hepburn v. Griswold. The Court held the act unconstitutional. The argument ran in this wise: there is no clause in the Constitution vesting in Congress the power to make "any description of credit currency a legal tender in payment of debts." It was conceded that Congress has power to enact laws "... not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government." But, "not every Act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every act of Congress that the judges are bound. This character and this force belong only to such acts as are 'made in pursuance of the Constitution.' " Accordingly, it was held that the making of such notes legal tender was not an "appropriate" means to carry out the express power to coin money, nor to carry on war, nor to regulate commerce, nor to borrow money. Congress was not the sole judge of the necessity and propriety of its chosen means." Justices Miller, Swayne and Davis dissented."

42 S Wall. 603, 19 L. ed. 513 (1869).
43 The strength of the argument is best shown by the language of the Court: "It (the argument) carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether, in the correct sense of the word, appropriate or not, may be done in the exercise of an implied power.
"Can this proposition be maintained? "It is said that this is not a question for the Court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government .... 
"Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description."
"The dissenting opinion took the position that: "It (the majority view) would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the Spirit of the Constitution and of abstract
Following a change in the personnel of the Court, the views of the minority in the preceding case were upheld in the *Legal Tender Cases*, which overruled *Hepburn v. Griswold*. The Court was not convinced that the means adopted was inappropriate, and decided that the judgment of Congress must stand. However, even Mr. Justice Strong's opinion seems to concede the existence of power in the Supreme Court to declare an act unconstitutional upon the ground of inappropriateness." Chief Justice Chase, dissenting, so understood the position of the majority," and urged that if it be "admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited." Mr. Justice Clifford also filed an illuminating dissenting opinion," but perhaps the most lucid exposition of the minority view was stated by Mr. Justice Field, whose language cannot be bettered:"

"The utility of a measure is not the subject of judicial cognizance, nor, as already intimated, the test of its constitutionality. But the relation of a measure as a means to an end, authorized by the Constitution, is a subject of such cognizance, and the test of its constitutionality, when it is not prohibited by an specific provision of that instrument and is consistent with its letter and spirit."

justice, by declaring void laws which did not square with these views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National legislature." 42 Wall. 457, 20 L. ed. 287 (1870).

44 "Before we can hold the legal tender acts unconstitutional, we must be convinced that they were not appropriate means, or means conducive to the execution of any part of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of inappropriateness), or we must hold that they were prohibited. . . . It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."

45 "We agree, then, that the question whether a law is a necessary and proper means to execution of an express power, within the meaning of these words as defined by the rule—that is to say, a means appropriate, plainly adapted, not prohibited but consistent,—is a judicial question . . . . Whether the means actually employed in a given case are such or not the court must decide. The court must judge of the fact, Congress of the degree of necessity."

46 " . . . . Congress, in passing laws to carry express powers granted into execution, cannot select any means as requisite for that purpose or as fairly applicable to the attainment of the end, which are precluded by restrictions or exceptions contained in the Constitution, or which are contrary to the essential ends of political society."

48 He also stated: "The position that Congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the
He was of the opinion that the necessary and proper clause neither augmented nor diminished the expressly designated powers of Congress, and, in this he seems to have been supported by Madison in *The Federalist*. Mr. Justice Field again dissented in the last of the series of legal tender cases, *Julliard v. Greenman*.

The conclusion to be reached from these cases seems to be that Congress is the sole judge of the economic, political, or social necessity which may require legislation upon a given subject. But whether or not the specific legislation decided upon in order to meet the necessity is a legitimate means, a means appropriate, plainly calculated to accomplish the object, is a judicial question.

In *Adair v. United States* the decision turned upon the question whether a Congressional act making it a crime against the United States for an agent of an interstate carrier to discharge an employee because of the latter’s membership in a labor organization, was necessary and proper in order to carry out the power of Congress to regulate interstate commerce. The Court held that it was not; that “there is no such connection between interstate commerce and membership in a labor organization” as to authorize the act. “Any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress, . . . must have some real or substantial relation to or connection with the commerce regulated.”

opinion of the majority, would of course settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress.”

*Supra n. 38.*

110 U. S. 421, 4 S. Ct. 122 (1883). Contemporary discussion of the Legal Tender Cases discloses a diversity of opinion. See Hare, *The Legal Tender Decisions* (1871) 10 Am. L. Rev. (n. s.) 73; in which the writer says: “If a power can be valid under any circumstances, the question whether it is appropriate to the existing circumstances is political not legal, and does not belong to the judicial province. See also: Chamberlain, *The ‘Legal Tender’ Decision of 1864* (1884) 18 Am. L. Rev. 410, wherein it is contended that “. . . . when . . . . a ‘necessity’, as Marshall called it, *does exist or arise*, the *degree* of the existing exigency or necessity is left to the judgment of Congress. Let us clear our minds of confusion here, if possible. Granting for the purpose of this argument, that an appropriate means to carry into execution any constitutional power, is itself constitutional, or granting that in an *exigency* or under a *necessity*, Congress may make paper a legal tender, to whom is the decision upon the appropriateness of the means or the existence of an exigency or necessity, committed? To Congress? Judge Gray says yes. Judge Marshall does not say yes, but by necessary implication, says no. And if not to Congress, to whom? Necessarily to the courts.”

208 U. S. 161, 28 S. Ct. 277 (1907). Mr Justice Harlan clearly enunciated
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Again, in United States v. Harris33 there was involved the constitutionality of an act of Congress making it a criminal offense for two or more persons in any state or territory to conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It was contended that such legislation was a necessary and proper means of carrying out the provisions of the Thirteenth, Fourteenth and Fifteenth Amendments, and of section 2 of article IV of the Constitution. The Court overruled this contention.

The Application of The Principle To Veterans' Legislation

In the light of McCullough v. Maryland and subsequent cases, veterans' legislation must conform to these principles: the end must be legitimate and it must be within the scope of the Constitution. As to this there can be little question. The end (theoretically), sought to be achieved is the carrying out of the express powers to raise and support armies and to provide and maintain a navy.4 The means whereby this end is to be accomplished must be appropriate, plainly adapted to achieve the end, really calculated to accomplish the end, not prohibited by the Constitution, and consistent with its letter and spirit. Does the

the judicial power to determine the matter: "Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that which is done is in plain violation of the Constitution."

33 106 U. S. 629, 27 L. ed. 106 (1882). The court said: "... the government of the United States is one of delegated, limited and enumerated powers (citing cases). Therefore every valid act of Congress must find in the Constitution some warrant for its passage ... ." "Mr. Justice Story, in his Commentaries on the Constitution says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it.'"

4 Cf. Madison, op. cit. supra, n. 38: "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the constitution relates; accommodated too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same."
enacted and proposed veterans' legislation meet these requirements? It is submitted that it does not in so far as it confers benefits because of disabilities wholly unconnected with war services. The attempt to demonstrate any logical connection between the end (the raising and supporting of armies) and the means (the conferring of benefits for disabilities unconnected with such raising and supporting) must fail. It is a pure rationalization, without foundation in the reality of any factual connection. Congress has expended millions of dollars derived from the people as a whole in conferring benefits, specific in character and having no tendency to promote the welfare of the nation in entirety, upon a specially selected, limited class. This expenditure has not even a remote tendency, in fact, to assist Congress in carrying out the express power to raise and support armies. The explanation of this phenomenon is that Congress has chosen, for reasons deemed at least politically sufficient, to select this particular class as the objects of its bounty. So far as this writer can ascertain no Congressman has ever suggested that the measure was for the purpose of assisting Congress in carrying its express power into execution. No declaration of such a purpose, had it been made, can alter the fact that there is no logical or realistic connection between the two. No reason is perceived why such a method of procedure could not be carried to even more palpably extreme situations. If, by mere legislative fiat, Congress may declare a means to be related to an end when as a matter of fact it has no such relation, there is no limit which might be set. Congress could confer pensions on aged employees of manufacturers engaged in the production of goods moving in interstate commerce. It might establish a workmen's compensation fund for the benefit of all laborers injured while employed in the building of post offices or post roads. Examples are limited only by the powers of imagination.

The constitutionality of adjusted compensation has a firmer footing. The theory of the bonus is that it is compensation for services rendered, equalizes differences between the veteran's pay and the high wages received by non-combatants, and has a

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25 United States v. Hall, supra, n. 18; see also, United States v. Fairchilds, 25 Fed. Cas. 1035, No. 15,067 (1867); United States v. Marks, 26 Fed. Cas. 1162, No. 15,721 (1869).

26 For example, see Remarks of Hon. Evin L. Davis, in the House of Representatives, March 23, 1922.
tendency to promote patriotism. 76 Admitting that there is some logical, factual connection between such adjustments and the power to raise and support armies, is the amount and nature of such payment unlimited?

**Limitations of Degree**

When one of the states of the Union exercises its powers to interfere with private rights, the Supreme Court of the United States has quite definitely held that limitations of degree do exist. 77 Whatever may be the power of Congress, Chief Justice Marshall said in Brown v. Maryland 78 that "questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

Professor Corwin's view is that "the attitude of the Court nowadays, where it has to deal with state legislation, is very different. It takes the position that abuse of power, in relation to private rights or to commerce, is excess of power and hence demands to be shown the substantial effect of legislation, not its mere formal justification." 79 In accordance with familiar principles, a state statute must be tested by its operation and effect.

76 This argument is a pure rationalization. The tendency is probably to the direct opposite. For example, see Alfred E. Smith's article supra, n. 5, wherein it is said: "It is, to say the least, a bit discouraging to the youth of the country to think that the high and idealistic patriotism spoken of during the time of the war is sought to be cashiered in dollars and cents when the war is over by a small percentage of the people, who, in the height and glory of the situation calling for the defense of the flag and the principles for which it stands, were ready to take their place beside Nathan Hale, who regretted that he had only one life to give for his country."

77 See also President Hoover's veto message, returning House Bill No. 17054, 71st Congress, 3rd Session: "The patriotism of our people is not a material thing. It is a spiritual thing. We cannot pay for it with Government aid. We can honor those in need by our aid. And it is a fundamental aspect of freedom among us that no step should be taken which burdens the Nation with a privileged class who can care for themselves."

78 See Breck P. McAllister, Public Purposes in Taxation (1930) 13 Can. L. Rev. 137: "To say that the legislation is justified by the peculiar situation in the State is to serve notice that the Court is prepared, if it is so minded, to confine the decision closely within its particular facts. It is a warning that what has been done is not a reliable barometer of what may be done in the future. But it goes further. It is a mode of decision and as such warrants analysis. It means that the Court is not disposed to say that the legislation is unreasonable in view of the situation. That still enables the Court to say that a given enactment is unreasonably related to the situation. Given the peculiar situation the particular legislation may go too far in dealing with it. This still enables the Court to say that there is no peculiar situation."

79 12 Wheat. 419, 12 L. ed. 419 (1827).

80 Corwin, John Marshall and the Constitution (1919) 143.
In setting limits to the degree to which a state may go in interfering with private rights, the Court does not seem to pass upon the wisdom of the legislation, for the decision can always be rationalized by resorting to some fundamental guarantee of rights of person or property. No one doubts to-day that the Court does pass upon the wisdom of legislation thus evolving "American 'legalism', that curious infusion of politics with jurisprudence, that mutual consultation of public opinion and established principles." This method of solution is not applicable to veterans' legislation for the reason that, conceding a Congressional abuse of power, no specific person's rights are taken away. The injury results to an aggregate of individuals constituting the nation, each of whom contributes an infinitesimal share to the assets of the government. We are, therefore, confronted with legislation which a court might believe unwise, yet which lacks the necessary rationalizing element.

But a distinction must clearly be taken between the exercise of express and implied powers. Express power is necessarily unlimited. For example, the power to declare war could never be abrogated, nor could a declaration of war be held unconstitutional on the ground that it meant certain disaster for the nation. However, as to implied powers, we have the qualifications of necessity and propriety, which, by very definition carry with them the concept of abuse which arises from lack of necessity and impropriety.

The question is thus raised whether there is any logical distinction which can be supported on a realistic basis between legislation on the one hand which is not "proper" because not plainly adapted to achieve the end, and legislation, on the other hand, which is not "proper" because of the particular economic and social circumstances existing at the time. It is submitted that

"See McBain, The Living Constitution (1923) 160; Charles A. Beard, American Government and Politics (5th ed. 1930) 297: "Although the courts, in declaring a law void, seldom depart from the serene and austere logic of the law, they do in fact pass judgment upon the political wisdom of the measure under scrutiny . . . . Phrases such as 'necessary and proper' . . . . may be interpreted in many ways according to the theories, prejudices, and preconceptions of the judges . . . . What the judges really do in most cases, leaving all quibbling aside, is to say whether they believe a particular act of Congress or state law is wise or not . . . . that is, wise according to their notion of wisdom."

Supra n. 60, at 197.

"'Legal truth is bound to appear strictly logical in form even where in the nature of things it cannot really be so.'" Wurzel, Juridical Thinking 418, quoted in Merriam, American Political Ideas (1923) 152.
there is none. The Patman bill for immediate cash payment of the bonus has been attacked upon the ground that it would result in placing such an insupportable burden upon the Treasury as to threaten the entire credit structure of the nation. It is further said that the proposed Treasury notes are "flat" or paper money, and that their issuance would result in untold damage to the stability of the currency. As to the validity of these arguments no opinion is here expressed. Assuming, however, that reasonable minds could not differ, that all economic experts were of one opinion, and that without doubt the enactment of the Patman bill would result in consequences so serious as to threaten the stability of the government itself, does Congress have the power, notwithstanding, to pass it? Tested by the principles previously set forth, it is submitted that such legislation should be held unconstitutional.

The law must find its justification as a proper means to accomplish the end, the carrying out of power to raise and support armies. Nowhere in the debates of Congress upon the Patman bill can be found direct mention of that purpose. The issuance of the Treasury notes in immediate payment is supported by advocates of the bill upon the ground that the currency needs inflation or reflation. Mr. Vinson's report for the minority states that the bill should be passed "only if it can be done advantageously to the United States and to the betterment of the economic status of the country." Then comes this statement of the true object and purpose of the bill:

"There is a congestion of money and a paralysis of circulation, due to hoarding, and consequently a lack of sufficient active currency to carry on the normal volume of business. More money in circulation is needed and the payment of the

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See testimony of economists quoted in report, supra, n. 8

See testimony of economists quoted in report, supra, n. 8

Supra n. 9 at 1. Italics writer's.
adjusted-service certificates would supply that need by distributing $2,000,000,000 or more of actual money throughout every part of the country.'

Conceding that the Legal Tender Cases uphold the power of Congress to print and issue such currency, the gift of it to the veterans must be justified, if at all, under the power to raise and support armies. The problem would not be different if the original plan had contemplated immediate rather than postponed payment. It may be treated as if the proposal were the only one ever made; that Congress as the first and last measure in recognition of military services proposes to make a gift to the veterans in currency specially issued for the purpose. If it be true that Congress has the power to confer a bonus to some extent, under some conditions, does it follow that it has unlimited power to any extent and under all conditions?

As has been indicated, the orthodox statement is that the court will not judge of the necessity and propriety of an act of Congress within its conceded sphere of express powers. It is submitted that the court, in reality, did form its own judgments of necessity and propriety in the child-labor cases, although the opinions therein do not proceed upon that ground. If this interpretation of them is sound, the cases lend support to the proposition that the court may also exercise its own judgment as to the necessity and propriety of veterans' legislation.

In *Hammer v. Dagenhart,* the question was: "is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods," the product of child labor? It was held not, upon the ground that the evil, if any, took place before the commerce began and that the products themselves were harmless.

Mr. Justice Holmes dissented, stating that it was enough if interstate commerce "encourages" the evil. Although neither the majority nor the minority relied upon the "necessary and proper" clause, Mr. Justice Holmes' opinion indicates that he thought the act was justified as a necessary and proper means of carrying out the power of Congress, thus:

"But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the considera-

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*Ibid.,* at 8.

247 U. S. 251, 38 S. Ct. 529 (1918).
tion of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation, if it ever may be necessary, — to say that it is permissible as against strong drink, but not as against the product of ruined lives."

This case was later approved in Bailey v. Drexel Furniture Company. There Congress attempted to impose a tax of ten per cent of the net profits of the year upon an employer of child labor. It was sought to uphold the act under Congress' broad power of taxation. Chief Justice Taft remarked that "... a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limit prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others see and understand this. How can we properly shut our minds to it?"

After stating that the power of Congress is not limited because of an incidental motive in connection with the tax, the court said that "... there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty. ..." The court quoted from McCullough v. Maryland that Congress could not accomplish objects not intrusted to the government "under the pretext of executing its powers."

In both cases there is the rationalizing principle, namely, an interference with powers of local concern left by the Constitution to the States. The acts were considered to be not "necessary and proper" methods of executing the express powers to regulate commerce and to impose taxes.

It might be argued, with some show of logic, that the real intent and purpose of the Patman Bill, as shown by the Congressional debates and reports, is not to carry out the power to raise and support armies by means of conferring a bonus, but to accomplish an entirely unrelated object: relief from economic depression. If so, it might be a perversion of the power and subject to the same objections raised against the taxing power in Bailey v. Drexel Lumber Company. However, the Patman Bill has a double purpose which was non-existent in the latter case except by way of camouflage. The constitutional objection to the bill must therefore center not upon a perversion of an express

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69 259 U. S. 20, 42 S. Ct. 449 (1922).
power in order to accomplish objects not entrusted to Congress, but upon inherent limitations of degree.

As Chief Justice Taft said, after a certain point a tax ceases to be a tax and becomes a penalty. This is nothing if not a limitation of degree, capable of definition by the Court. By the same token at some point (which the writer would not undertake to define) a bonus ceases to be a recognition of a moral obligation for services rendered and becomes a systematic confiscation of the assets of the government for the benefit of a special body of citizens. The question is whether Congress can, under the power to raise and support armies, carry the means adopted to the point where the stability of the government is threatened. Obviously there must also be considered the condition of the Treasury at the time and under the circumstances. What might be a "proper" means under normal economic conditions may be quite improper and inappropriate under abnormally depressed conditions. Is this solely a question of the wisdom of the law with which the Court is fond of saying it has no concern? In a sense it is. But then, the Court in Bailey v. Drexel Lumber Company really passed upon the wisdom of the law, in denying the power of taxation at the point where it ceased to be a tax and became a penalty. No reason is perceived why the same principle should not be followed if and when the granting of bonuses is no longer really calculated to further the legitimate end.

The Spirit of the Constitution

In his argument in McCullough v. Maryland, Pinkney said:
"All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the constitution, and have no limits but the constitution itself. A more perfect union is to be

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This objection has also been applied to non-service-connected disability benefits. See speech of Lewis W. Douglas in the House of Representatives on May 3, 1932: "... I challenge any man on the floor of this House to demonstrate why a man who cannot trace his disability to his war service and who can take care of himself, his wife, and his children is entitled to a gratuity from his Government."

Mr. Douglas continued: "All the great political philosophers ... Voltaire, Hume, and Locke ... prophesied the day when under a democratic form of government the power of organized minorities would be greater than the resistance of the legislative body. I submit to you that that time has almost arrived. I submit to you that you and I and every one of us, Members of this House, at one time or another have been propaganda by an organized minority, which through ignorance has unwittingly attempted to impose upon the United States Government a burden which that Government should never have been called upon to bear."
formed; justice to be established; domestic tranquility insured; the common defense provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity."

Seventeen express powers are conferred upon Congress. Does it have authority to select one of them (the power to raise and support armies) and exercise it to the extent of destroying the stability of the government's finances whereby the exercise of the remaining sixteen powers is rendered impossible? If this be true, then the Constitution contains within itself the seeds of its own destruction, — that is to say, the Constitution as the basis of our government. If the whole structure be pulled down by insolvency so that there is no government in fact, then the Constitution ceases to be a living instrument and becomes an historical oddity; a venerable piece of paper. It becomes a mere scribble saying solemnly that thus and so is a government created which in fact was not able to exist. And while it is certainly a truism that to destroy the original document is not to destroy the government, the reverse seems to have been overlooked.

So, there is here recorded a formal objection to construing one express power of Congress as a rationalizing basis with which to justify the will of the majority of that body at the expense of the nation as a whole, when carried to a degree which undermines the national stability. It is some such feeling that has given rise to the expression "the spirit of the Constitution". In common with all spirits it is a nebulous thing and perhaps makes its habitat only in the minds of judges who speak of it. It must arise out of the fundamental objects and purposes for which a people organize a government. Marshall spoke of it in McCulloch v. Maryland. He "did not regard the Constitution as a compact between the States; if a compact at all, it was a compact among individuals, a social compact."

In Kampfer v. Hawkins Judge Roane said, "I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution; but also one which is by a plain and natural construction, in opposition to the fundamental principles thereof."

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"Supra n. 36, at 381.
"U. S. Const., Art. 1, § 8.
"Supra n. 69, at 172.
In *Calder v. Bull,* Mr. Justice Chase made this statement:

"... there are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority."

But invocation of the spirit of the Constitution has been through the medium of individual rights. There is yet to be found a "vested right" of the people as a whole in the stability of government. Witness the case of *Loan Association v. Topeka* in which it was said that "the theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere."

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"3 Dall. 386 (1798). See also: Corwin, *A Basic Doctrine of American Constitutional Law* (1914) 12 Mich. L. Rev. 247, where Chase's argument is discussed and compared with the theory of Iredell, J., that if "the government composed of legislative, executive and judicial departments were established by a constitution which imposed no limits on the legislative power..., whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void." Professor Corwin's view is that while in *form* Iredell's theory has prevailed, in *substance* Chase's has been accepted. In *Logan v. United States,* 144 U. S. 263, 12 S. Ct. 617 (1892), Mr. Justice Gray said, at 283: "In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the Constitution."

But, in *Jacobson v. Commonwealth of Massachusetts,* 197 U. S. 11, 25 S. Ct. 358 (1904), it was held that neither the spirit nor the preamble of the Constitution could be invoked to invalidate the state statute providing for compulsory vaccination.

"20 Wall. 655, 22 L. ed. 665 (1874). The court said: "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name..."

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited..., in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government..."

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."
The discussion thus transcends the bounds of formal legalism and enters the domain of political science. There is reason to believe that the Supreme Court would make short shrift of any argument which appealed to that science unaided by legal logic. Certainly United States v. Sprague so indicates. The etiquette of judicial decision requires that it be demonstrated not only that an act of Congress is calculated to undermine the governmental structure but also that Congress does not have the power to do it. It is conceivable that the question may be asked: "What if democracy must choose between its life and the Constitution? The answer was that the Nation's existence was paramount to any interpretation of the written document. . . . When, for example, the Court undertook to prevent the suspension of the writ of habeas corpus, it was quietly but firmly brushed aside until the guns had ceased firing. Lincoln declared that, 'Measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Nation.' . . . He would not permit the Constitution to interfere with the purpose for which the Constitution was framed, namely, the establishment and maintenance of a democratic nation."n

The Constitution was written not as a literary exercise but as a practical means for the accomplishment of practical ends: "the maintenance of the social order, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country."n

The system of checks and balances was to achieve an equilibrium between the rights of the individual and the tyranny of popular majorities.

It is not to be expected that those who drafted the Constitution envisioned the day when individual interests might possibly be of less importance than collective interests. Yet unquestionably today the fundamental guaranties of individual interests are, in a quite realistic way, dependent upon the stability of governmental machinery. We have not reached the point in legal thinking where the court has recognized that the nation, the intangible aggregate of persons, has a "vested right" in the stability of government. If such a concept were created it would be a simple matter to hold that Acts of Congress which were reasonably certain to destroy it, were not "necessary and proper". The

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8Supra n. 22, at 215.
9Chas. A. Beard, The Supreme Court and the Constitution (1922) 79.
collective right would then rise to the level of those "secured by fundamental law".

The view is, therefore, here advanced that Congress has not unlimited power to undermine the stability of the government under the guise of raising and supporting armies for the reason that to do so is contrary to the fundamental purposes of all governments, to achieve which the Constitution is itself a mere instrumentality. It should again be emphasized that no opinion is here expressed as to whether or not the proposed veterans' legislation proceeds to the subversive degree mentioned. The point is made that, in the opinion of capable observers, it is rapidly being approached, if not, indeed, arrived at.

Suppose that the bald proposition is presented to the Supreme Court: choose between a doctrine of unlimited power and the preservation of the government. Could it be possible that the choice must depend upon an interpretation of the Constitution merely as a written document, a piece of paper? It quite obviously has no forces within itself. It is the written evidence of basic political principles to which an aggregate of individuals has agreed to conform its actions. The principles have force and effect only so long as practice conforms to precept. The written Constitution serves as a logical justification, convincing and persuading the mind to acquiesce in the action of those in whom the power of action has been reposed: Congress. When, therefore, its action becomes, in character and degree, such that the Constitution no longer serves as a logical justification and persuasion, compelling the mind to acquiesce in such action, it becomes "unconstitutional" in a political sense. That is to say, in the sense that the action becomes truly subversive of the objects and purposes for which government exists.

It becomes unconstitutional in legal theory only upon strictly logical demonstration. It has been indicated that as to express powers exercised directly, the idea of limitless sovereignty within a limited field precludes any possibility of interference with the will of Congress. A distinction has been made as to express powers exercised indirectly upon the ground that the method of indirection is limited by the requirements of necessity and propriety. These requirements have been enforced by the Supreme Court in cases where it was shown that the proposed act of Congress had no realistic or factual connection with the express power relied upon. The remaining question is as yet unde-
decided: whether the absence of relation between the means and the end is the only sort of impropriety that can be recognized; or, whether lack of propriety may consist in carrying otherwise justifiable legislation to a degree which endangers the structure and stability of the government. The possibility of judicial recognition of this principle was implied in Judge Cardozo's dissenting opinion in People v. Westchester National Bank: 50

"Others, again, may think that, for the sake of the economic or financial stability of the Commonwealth, losses already suffered should be left to lie where they have fallen. These are questions of political or legislative expediency. I make no attempt to answer them. I am not to substitute my judgment for the judgment of the lawmakers.

"We are warned that the recognition of this equity may be followed by the recognition of others still weaker and more rarefied. . . . I am not swerved by these forebodings. I do not know the equity that is incapable of being reduced to an absurdity when extended by some process of analogy to varying conditions. Here, as often in the law, the difference between right and wrong is a difference of degree. . . . But the existence of a power is not refuted by demonstrating the opportunity for its abuse. The abuse must be dealt with when it arises." 51

If, under the theory mentioned, veterans' legislation could be carried to an unconstitutional degree, it is a very serious question whether the point is anything but academic. In Massachusetts v. Mellon and Frothingham v. Same (two cases) 52 it was asserted that the Federal Maternity Act was unconstitutional. The court held that neither the State nor an individual could raise the question. There was no showing of any direct injury, suffered or threatened, not common to the public in general. The cases, however, do not decide whether a public official such as the Secretary of the Treasury could refuse to carry out the provisions of an act of Congress upon the ground of unconstitutionality. In the state cases, there is a division of authority upon the question whether a public official having no personal or pecuniary interest involved may, in proceedings by mandamus, justify his refusal upon constitutional grounds. 53 The exigencies of the case might

50 Supra n. 30.
51 Italics writer's.
52 262 U. S. 447, 43 S. Ct. 597 (1923).
53 See note to State ex rel. Clinton Falls Nursery Co. v. Steele County Board of Commissioners, 322 N. W. 737 (Minn. 1930), discussed in (1931) 15 Minn. L. Rev. 340. See also, Collier, Unconstitutionality of Statute as Defense to
well influence the Supreme Court of the United States to uphold the right to raise the question.

As a practical matter, one might conclude that the whole situation is impossible; that if and when proposed legislation reached the degree of unsoundness at the point where competent economists could not differ, Congress would not enact the law. Perhaps. But then, is it not a startling thing that one-fourth of governmental expenditures should be devoted to such purposes? Again, perhaps. Assuming that the concept has validity, what result? Strict legal logic gives no satisfactory answer one way or the other. It says, on the one hand: the power of Congress within its recognized sphere is unlimited, by the very nature of a sovereign government. It replies, on the other hand: even a sovereign cannot destroy itself, directly or indirectly, for this is opposed to the primary objects for which government is established.

In any event, the democratic principle cannot be strengthened by leaning upon the arm of the Supreme Court. This, and other platitudes, have perished in the fires of practical politics only to rise, Phoenix-like from the ashes, to plague us. And it is probable that we regard them as platitudes for much the same reason that the dear old lady found Shakespeare full of familiar quotations.

Finally, it should be made clear that the foregoing discussion is not offered as a prophecy of what the Supreme Court would hold, but rather as a demonstration of what it could (and, it is submitted) ought to hold, without doing violence to reason or to "reinterpreted" precedents. The task involves a recurrence to the fundamental principles set forth in Hepburn v. Griswold, which still have vitality notwithstanding the lip-service paid to the Legal Tender Cases.

Mandamus Against a Public Officer to Enforce said Statute. (1911) 73 Cent. L. J. 301, at 306: "... it seems useless for the courts to have a hard and fast principle, going beyond denial of right by any officer to plead unconstitutionality when the performance of the ministerial act, performance of which he resists, is of great public consequence ... There is really no great reason why a mere rule of practice should be unbending, when public interest is at stake."