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12-31-2013

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Recommended Citation

Dawinder S. Sidhu, *The Birth of the Greenback*, *The New York Times*, The Opinion Pages (2013).

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The Birth of the Greenback

By Dawinder S. Sidhu

**The New York Times, The Opinion Pages
December 31, 2013, 12:22 PM**

On Dec. 30, 1861, Elbridge Gerry Spaulding, the chairman of the House Ways and Means Subcommittee on Banking and Currency, gave a speech on the House floor declaring that the nation was “never in greater peril than at this moment.” The Civil War was eight months old, but Spaulding’s concern wasn’t martial, but fiscal.

Federal expenditures to support the war effort were growing significantly; at the same time, revenues were stagnant – revenues produced by the federal income tax could not even cover the interest on the federal debt, which was rising at a vertiginous rate. To make matters worse, two days before Spaulding addressed his colleagues, the nation’s banks decided to suspend payments in gold and silver, which at the time were the only universally accepted means of payment; as a result, the federal government faced the prospect of being unable to make good on existing commitments.

It was under these dire circumstances that Spaulding introduced what he called a “war measure” and a “measure of necessity”: a bill that authorized Treasury Secretary Salmon P. Chase to issue \$150,000,000 in paper notes as “lawful money and a legal tender in payment of all debts, public and private, within the United States.” These United States Notes – informally called “greenbacks,” as they were printed with green ink – were not backed by specie.

Spaulding explained that the “leading object” of the bill was “to fund the debt” and to “meet the most pressing demands upon the treasury to sustain the Army and Navy until they can make a vigorous advance upon the traitors and crush out the rebellion.” Government-issued currency was a radical proposition, he admitted. But, he concluded, “These are extraordinary times and extraordinary measures must be resorted to, in order to save our Government.”

Secretary Chase reluctantly endorsed the bill, acknowledging that the situation had become “indispensably necessary that we should resort to the issue of United States notes.” Passed by Congress and signed into law by President Lincoln, the Legal Tender Act was enacted on Feb. 25, 1862.

Today Treasury-issued notes are a ubiquitous feature of modern society. But challenges to the act’s constitutionality arose immediately. Spaulding asserted that the Constitution, by its terms, empowered Congress to “raise and support armies” and “provide and maintain a navy,” and that Congress retained the “discretion” to determine how to fund the army and navy, including through the issuance of paper notes. This authority, supplemented by the enumerated power to make laws

“necessary and proper” to execute its other express powers, could afford a sufficient constitutional foundation for the act. There also existed the fallback argument that, in times of emergency, Congress can activate a law of necessity to preserve the nation.

But others, such as editors of *The New York World*, deemed the act “repugnant to the Constitution.” Critics noted that while the authority in the Constitution to issue paper notes was expressly denied to states, it was not affirmatively granted to Congress. At most, they said, the Constitution gives Congress the power to “coin money,” but it does not confer upon Congress any authority to issue paper money.

The Supreme Court’s opportunity to resolve the constitutionality of the act arose out of a case involving a simple debt. In 1861, Lewis H. Meyer, who had assumed a bond and mortgage held by James J. Roosevelt (the future father of President Franklin D. Roosevelt), sought to discharge these debts by paying Roosevelt the amount due in paper notes authorized under the act. Roosevelt refused payment, insisting instead that payment be made in gold coin. Roosevelt pointed out that proffered paper notes held a market value \$326.78 less than gold coin. Further, Roosevelt’s argued, Congress did not have the constitutional power to authorize fiat money.

In 1862, the two parties submitted the following question to a state court in New York: were the paper notes valid legal tender? In June 1863, the lower court ruled in favor of Roosevelt. In October, New York’s high court reversed, siding with Meyer.

Roosevelt appealed to the Supreme Court of the United States – a move that, in itself, raised a separate constitutional question. In written briefs to the court, Meyer contended that the court lacked jurisdiction to hear the appeal because it could not review a decision by the highest court of any state that upheld a federal statute. In response, Roosevelt stated that the court could review a decision of a state’s highest court where the decision implicated a constitutional right of either party. In this case, Roosevelt argued principally that the payment in paper money was \$326.78 short, thus he was deprived of property without due process in violation of his Fifth Amendment rights.

On Dec. 18, 1863, just three days after it heard arguments, the Supreme Court agreed with Meyer’s position, holding that it did not have jurisdiction to consider Roosevelt’s challenge to the act. The brief opinion, written by Justice James Moore Wayne, dismissed Roosevelt’s arguments, suggesting that Roosevelt merely referenced the Constitution in support of his essential claim that Congress did not have authority to pass the act, and that Roosevelt did not make an independent claim that his constitutional rights were violated. In staying its hand, the court let stand the New York high court’s ruling in favor of the act.

To be sure, the soundness of the decision was far from clear. Justice Samuel Nelson dissented from the Court’s opinion, and Chief Justice Roger Taney, who was ill and did not participate in the case, also penned an undelivered opinion against the constitutionality of the act.

The Supreme Court would not rule on the constitutionality of legal tender again until after the war was over. In 1870, the court held that the Constitution vested no power

in Congress to render paper money legal tender. Interestingly, this opinion was written by Chase, who became a Supreme Court justice in 1864. In other words, Chase believed that the very act he approved of as secretary of the Treasury was constitutionally problematic. In a separate ruling, the court explicitly admitted that its 1863 decision was wrongly decided, conceding that its appellate jurisdiction could have been sustained just as Roosevelt had argued. In 1871, however, the court, with new members nominated the same day as (and arguably in response to) the 1870 decision, found the act constitutional.

As the legal historian Charles Fairman noted, the 1863 decision constituted a “fortuitous reprieve.” The court’s avoidance of the constitutional question on technicalities, as it did in *Ex Parte Vallandingham*, fostered the impression that the court’s decision was a “judicial dodge” committed for extralegal reasons.

Still, the benefits of the decision were immediate: With paper money circulating unencumbered by judicial interference, Union soldiers in the field were compensated, public and private debts were paid, trade was stimulated and confidence in the market was enhanced. Were it not for the act, and the court’s decision to, in effect, let it stand, Justice Samuel F. Miller later observed, “the rebellion would have triumphed, the States would have been left divided, and the people impoverished ... The National government would have perished, and, with it, the Constitution.”

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