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Judicial Modesty in the Wartime Context

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Judicial Modesty in the Wartime Context, *Roosevelt v. Meyer* (1863)

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"The most important thing we do is not doing," Justice Louis D. Brandeis noted of the Supreme Court.[1] At the height of the Civil War, the Supreme Court in *Roosevelt v. Meyer*[2] claimed that it could not review, and therefore let stand, a state court decision upholding the Legal Tender Act ("Act"),[3] a critical wartime measure designed to stabilize the Union economy and fund the Union's war efforts. In this essay, I suggest that this oft-overlooked case warrants the legal community's consideration because it implicates a question fundamental to our constitutional system: should the courts decline judicial review—or, "not do"—in order to facilitate government responses to wartime challenges?

The Legal Tender Act

In the process of establishing "one great, respectable, and flourishing empire,"[4] the Framers anticipated the possibility that the United States would split into two distinct political bodies, and that this disunion would occur specifically along northern and southern lines.[5] One generation later, the prospect of this North-South division was altogether real. In his March 4, 1861 inaugural address, Abraham Lincoln acknowledged that the common ties among the North and South were bending, but urged the people not to "break our bonds of affection."[6] During the seminal speech, President Lincoln pledged to keep the peace, provided that the North was not subject to Southern provocation or aggression. There shall be "no bloodshed or violence, and there shall be none," he declared, "unless it be forced upon the national authority."[7] Soon thereafter, on April 12, 1861, confederates bombarded Fort Sumter, firing the opening salvo and thereby triggering the condition in President Lincoln's inaugural. The "one great" nation was at war with itself.

To sustain the war effort, the Union had to withstand wartime stresses on the economy. "Wars have now become rather wars of the purse than of the sword," observed Chief Justice Oliver Ellsworth as early as 1788.[8] To

the extent that war poses both financial and existential threats to a nation, the Union's initial financial situation was precarious and thus its ability to respond to the rebellion seriously compromised.

On one side of the ledger, the Union's wartime costs were growing at a rapid clip. On April 15, 1861, President Lincoln activated the militia, charging it with the awesome responsibility to "maintain the honor, the integrity, and the existence of our National Union[.]"[9] President Lincoln made additional calls for troops that year, leading to a dramatic expansion of the Union army from 16,402 soldiers on January 1, 1861 to 575,917 soldiers by the end of the year. These and other wartime preparations and necessaries were quite costly. Indeed, federal expenditures ballooned from $63.1 million in 1860 to $474.8 million in 1862. By January of 1862, war costs approached $2 million per day.

On the other side, federal revenues stagnated. For example, most federal revenue came from customs duties, and income from this source increased only slightly from $39.6 million in 1861 to $49.1 million in 1862. The federal income tax was not implemented until 1862,[10] and the meager revenues from customs duties and other taxes could not even cover the interest on the federal debt.[11] The federal government could not rest its wartime funding on borrowing because the federal government was considered a poor credit risk. Put simply by Charles Fairman, the "treasury was empty" and the "Government's credit had been shattered."[12] The combination of weak revenues and rising costs conspired to bloat the federal debt, which swelled from $75 million in 1861 to $505 million the following year.

In response to this acute, unsustainable situation, the federal government was compelled to experiment with various economic initiatives. Most notably, it introduced paper notes as currency. At the onset of the Civil War, regular exchange took place through the use of specie (*i.e.*, gold or silver coin, also called "hard money") rather than paper money. In July of 1861, Congress authorized the Secretary of the Treasury, Salmon P. Chase, to issue "demand notes," paper notes redeemable on demand for specie.[13] Banks were not fond of these notes because they bore no interest and depleted the banks' reserves of specie, an established and widely recognized commodity. Congress also authorized Secretary Chase to offer banks "treasury notes"—which paid 7.3% interest semiannually and which were redeemable in three years—in exchange for $50 million in specie.[14] In August of 1861, the banks agreed, supplying the federal government with $50 million in specie in return for $50 million in "treasury notes," making the same deal in October of 1861 and again in December. These programs held promise, but were viable only insofar as specie was readily available and flowing between banks, the people, and the government. The flood of notes in the market gave rise to inflation and, with a premium on specie, the public and banks began hoarding hard money. On December 28, 1861, banks ultimately voted to suspend specie payments.

As the Supreme Court would hold in a later ruling: "It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency" that Congress proposed the Legal Tender Act.[15]

On December 30, 1861, two days after the banks' decision to suspend specie payments, Elbridge Gerry Spaulding, chair of a House Committee of Ways and Means subcommittee, addressed his congressional colleagues, announcing that the nation was "never in greater peril than at this moment."[16] Congressman Spaulding introduced what he called a "war measure" and a "measure of necessity"[17]: a bill that would authorize Secretary Chase to issue $150 million in paper notes as "lawful money and a legal

As Secretary of the Treasury during the Civil War, Salmon P. Chase reluctantly endorsed soft money. After Congress passed the Legal Tender Act, he became responsible for approving the design of the United States Notes, and included his own face on the front of the one-dollar notes.

tender in payment of all debts, public and private, within the United States."[18] Whereas demand notes and treasury notes were backed by specie, the United States Notes were backed by the "good faith of the government."[19]

Congressman 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."[20] "These are extraordinary times and extraordinary measures must be resorted to, in order to save our Government," he continued.[21] Secretary Chase, a general proponent of hard money, reluctantly endorsed soft money, acknowledging that the situation had become "indispensably necessary that we should resort to the issue of United States notes."[22] As a sign of his acquiescence—and perhaps even more so his vanity—Secretary Chase, who was responsible for approving the design of the United States Notes as the head of the Treasury, included his own face on the front of the one-dollar notes, which would have the widest circulation.[23]

On February 5, 1862, after two weeks of debate, the House passed the legal tender bill by a vote of 93–59, and on February 12, the Senate did the same, by a 30–7 margin. President Lincoln signed the Act into law on February 25, 1862. Congress wasted no time, quickly using the Act's grant of power to authorize the issuance of $150 million in United States Notes. (By separately enacted statutes, Congress authorized $150 million in additional notes in July of 1862, and another $150 million in March of 1863). The notes, which would be printed with green ink, would come to be called "greenbacks."

The paper money issued pursuant to the Act eased the financial strain on the Union economy and facilitated the war effort. As Justice Samuel F. Miller later recounted, thanks to the Act, Union soldiers in the field were compensated, public and private debts were paid, trade was stimulated, and confidence in the market was enhanced.[24] Were it not for the Act, he wrote, "the rebellion would have triumphed, the States would have been left divided, and the people impoverished."[25] In short, Justice Miller concluded, "The National government would have perished, and, with it, the Constitution."[26]

The Constitutionality of the Act

The practical benefits of the Act may have been beyond dispute, but the

constitutionality of the Act was a completely separate—and very much open—question. For example, the Attorney General, Edward Bates, gave his opinion that the Act was constitutional, but tempered that opinion with the admission that it was prepared during the "very brief interval afforded" and "with all the brevity and without argument, for the time does not allow elaborate consideration."[27]

When the Act was under consideration, some members of Congress held concerns that the body did not have the authority under the Constitution to establish paper notes as legal tender. They argued that the Constitution prohibits states from making "any Thing but gold and silver Coin a Tender in Payment of Debts" and therefore the constitutional authority to issue paper notes is expressly denied to states, but neither is it affirmatively granted to Congress.[28] At most, they asserted, the Constitution gives Congress the power to "coin money," but it does not confer upon Congress any authority to make paper money.[29] This point was advanced by Justice Oliver Wendell Holmes, Jr. "an express grant seems to exclude implications," and therefore, "If the Constitution says expressly that Congress shall have power to make metallic legal tender, how can it be taken to say by implication that Congress shall have power to make paper legal tender?"[30] Justice Stephen J. Field stated the same proposition this way: "When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject."[31] Moreover, there was fear that paper currency would "unconstitutionally impair contracts made in specie."[32]

James Roosevelt's business interests were primarily in coal and transportation, but he also served as president of the Southern Railway Security Company. He is pictured here with his son, future President Franklin D. Roosevelt.

Accordingly, some, such as editors of the New York *World*, deemed the Act "repugnant to the Constitution."[33]

In support of the Act's constitutionality, Congressman Spaulding, who became known as the "father of the greenbacks,"[34] asserted that the Constitution's own terms empowered Congress to "raise and support armies" and "provide and maintain a navy," and that Congress therefore retained "discretion" to determine how to fund the army and navy, including through the issuance of paper notes.[35] This authority, supplemented by the enumerated power to make laws "necessary and proper" to execute other express powers,[36] afforded Congress a sufficient constitutional foundation to pass the Act, he said. Others, such as James Thayer of Harvard Law School, posited that, while the Constitution gives Congress the authority to "coin money," the text of the Constitution says nothing about "legal tender."[37] "The argument, then, that the express grant of power to make coin a tender excludes the implication of a power to make anything else a tender, is inapplicable to the actual text of the Constitution," Thayer wrote.[38] There also was the fallback "war powers" argument, espoused by Republicans, that the "Constitution authorized any Congressionally approved measures designed to maintain the government in times of insurrection."[39]

Justice James Moore Wayne of Georgia wrote the Court's brief opinion in *Roosevelt v. Meyer*, holding that Roosevelt merely referenced the Constitution in support of his essential claim that Congress did not have the authority to pass the Legal Tender Act, and that the plaintiff did not make an independent claim that his constitutional rights were violated.

Roosevelt v. Meyer

The Supreme Court's first opportunity to resolve the constitutionality of the Act arose out of a case involving a simple debt. On August 23, 1854, James J. Roosevelt—the father of future President Franklin D. Roosevelt—loaned $8,000 to Samuel Bowne. As security for the loan, Bowne executed a bond and, along with his wife, placed a lien on their property in New York. On May 28, 1861, the property was conveyed to Lewis H. Meyer, who assumed the obligation to Roosevelt. On June 11, 1862, subsequent to the passage of the Act, Meyer sought to discharge the debt to Roosevelt by paying the principal and interest in United States Notes. Roosevelt refused the notes, insisting instead that payment be made in gold coin. Roosevelt pointed out that the proffered notes held a market value $326.78 less than gold coin. Further, Roosevelt argued, Congress did not have the constitutional power to authorize the issuance of fiat money.

On June 25, 1862, the parties, in agreement as to the facts, submitted the following question to the Supreme Court of New York: were the paper notes of the Act valid legal tender? In November of 1862, the court heard arguments over two days and, on June 3, 1863, ruled in favor of Roosevelt. The next day, Meyer filed notice that he would appeal the adverse decision to New York's highest court, the Court of Appeals of New

York. On September 29, 1863, the Court of Appeals of New York entertained arguments in the case. On October 9, 1863, the court reversed, siding with Meyer. The court ordered Roosevelt to accept the paper notes as full and complete satisfaction of the debt, and to discharge the bond and mortgage.

On December 11, 1863, Roosevelt appealed, filing, pursuant to the Section 25 of the Judiciary Act of 1789, a writ of error to the Supreme Court of the United States, arguing that a "manifest error hath happened to [his] great damage" and urging that "such error . . . should be duly corrected" by the Court.[40] The same day, Meyer moved to dismiss the writ for lack of jurisdiction. Meyer contended that Section 25 did not provide the Supreme Court with authority to review a decision by a state's court of last resort that upholds a federal statute.[41] The first subsection of Section 25 provides that the Supreme Court may review the final decision of "the highest court of law or equity of a State" in which "the validity of a treaty or statute" is put into question and the "decision is against their validity[.]"[42] Here, the Supreme Court could not hear the appeal, Meyer claimed, because the Court of Appeals of New York was New York's highest court and the court did not rule "against" the validity of the Act.[43]

In response, Roosevelt highlighted the third subsection of Section 25 as the source of the Court's appellate jurisdiction. This passage authorizes the Court to review a decision by a state's court of last resort that construes "any clause of the constitution" against a "right" of either party.[44] Here, Roosevelt argued principally that the proffered payment in United States Notes was $326.78 short, thus the Court of Appeals of New York's decision forcing him to accept such payment deprived him of property without due process of law in violation of his Fifth Amendment rights. Therefore, according to Roosevelt, the decision by New York's highest court was "against" his rights and the Supreme Court could hear his challenge to the Act.

In the Judiciary Act of 1863, Congress, which has the constitutional power to establish inferior federal courts,[45] created a tenth circuit.[46] The addition of this new circuit required that the number of Justices increase from nine to ten. By the time Roosevelt's appeal was before the Court, the Bench had the following ten members: Roger B. Taney of Maryland (Chief Justice), James Moore Wayne of Georgia, John Catron of Tennessee, Samuel Nelson of New York, Robert C. Grier of Pennsylvania, Nathan Clifford of Maine, Noah Haynes Swayne of Ohio, Samuel F. Miller of Iowa, David Davis of Illinois, and Stephen J. Field of California.

On December 21, 1863, three days after it heard oral argument, the Court agreed with Meyer's interpretation of subsection one of the Judiciary Act of 1789, holding that it did not have jurisdiction to consider Roosevelt's appeal.[47] The brief opinion, written by Justice Wayne, dismissed Roosevelt's arguments as to the viability of subsection three, suggesting that Roosevelt merely referenced the Constitution in support of his essential claim that Congress did not have the authority to pass the Act, and that Roosevelt did not make an independent claim that his constitutional rights were violated.[48] In staying its hand, the Court left intact the ruling by the New York Court of Appeals on the constitutionality of the paper notes.

Justice Nelson dissented without writing separately. Chief Justice Taney, who was ill and did not participate in the case, also penned an undelivered dissent.

Judicial Modesty and *Roosevelt*

What can we make of *Roosevelt*? Whereas judicial activism and judicial restraint are unhelpful terms insofar as they are designed to characterize virtuous judicial decision making, the concept of judicial modesty may be useful at least as one measure of principled judicial review. Judicial

modesty generally occurs when a judge subordinates his or her personal policy preferences in service of and in allegiance to broader constitutional norms that contradict those personally held preferences.[49]

The legal tender context offers an example of judicial modesty. In 1870, the Supreme Court in *Hepburn v. Griswold* held that the Constitution vested no power in Congress to render paper money legal tender for preexisting debt obligations.[50] *Hepburn* was authored by Salmon P. Chase, the former Treasury Secretary who joined the Supreme Court as Chief Justice of the United States in 1864. In other words, Chief Justice Chase asserted that the very Act that he endorsed, albeit reluctantly, as the Treasury Secretary was unconstitutional. In turning down the opportunity to affirm a policy position in a judicial forum, Chief Justice Chase reflected the sort of forbearance that is central to judicial modesty.

On initial inspection, *Roosevelt* may be said to embody three aspects of judicial modesty. First, the *Roosevelt* Court declined jurisdiction, and in doing so ruled only that it lacked the authority to hear the case. In general, refusing to hear a case on jurisdictional grounds may be considered judicial modesty because the refusal demonstrates a court's ability to constrain its vast and natural adjudicative functions[51] in deference to structural constitutional considerations. Rather than give effect to personal or policy preferences, the argument would go, the *Roosevelt* Court recognized and paid tribute to its limits in our constitutional design.

Second, some also may credit the *Roosevelt* Court with exhibiting judicial modesty in that the Court declined to overturn a critical wartime statute. To some, national security matters are incapable of meaningful judicial appraisal and courts are therefore ill-equipped to second-guess the national security initiatives devised by the policy making branches.[52] Further, they may say, courts should not let the technical niceties of the law impair that which may be necessary to help the government respond to existential threats. This position calls to mind Senator William Pitt Fessenden's take on the Act: "the thing is wrong in itself but to leave the government without resources at such a crisis is not to be thought of."[53] The *Roosevelt* Court may be said to embody judicial modesty because the decision reflects the Court's self-awareness of judicial inadequacy in the national security context as well as the court's appreciation for the Union's first-order interest in self-preservation.

Third, the appearance of judicial modesty also may arise from the view that the *Roosevelt* Court, which consisted of seven Democrats and three Republicans, would be disinclined to uphold an Act passed by a Republican administration. From this perspective, *Roosevelt* was an act of judicial modesty because the majority suppressed its political preferences in refusing to strike down an Act championed by the party opposite.

Despite these three arguments, any clear sense that *Roosevelt* was an exercise of judicial modesty becomes cloudy in light of a few additional considerations. First, the force of the contention that *Roosevelt* involved judicial modesty because of the political affiliations of the Justices loses steam when one realizes that, as Akhil Amar writes of the Court in 1863, "the deepest ideological divide ran not between Republicans and Democrats but between Unionists and Secessionists."[54] The *Roosevelt* Court was dominated by Unionists. For example, in 1862, the same Court (minus Justice Field, who had not yet been appointed) held in *The Prize Cases* that President Lincoln's order of a military blockade in several Southern states was constitutional, even though Congress had not formally declared war.[55] This decision, historian Brian McGinty explains, indicated that the Court in 1862 was "prepared to sustain the government's war efforts" and "prepared to 'stretch' constitutional doctrine to meet the extraordinary exigencies of the

crisis[.]"[56] That this crisis was more acute in December of 1863 suggests that the *Roosevelt* Court likely possessed an even greater willingness to let stand the Union's wartime actions. This increased support for the Union may be reflected in the votes in the two cases —5–4 in *The Prize Cases* and 8–1 in *Roosevelt*. In short, the Court may not have subordinated its political interests in *Roosevelt*, but instead may have actively effectuated those preferences towards the Union by leaving the Act undisturbed.

The Unionist character of the Court and the potential for party identification to mislead an analysis of *Roosevelt* are reinforced by the selection of Justice Field. In picking the tenth Justice to serve on the Bench, President Lincoln, a Republican, made the seemingly unusual move of nominating Justice Field, a Democrat. This choice is perhaps puzzling from a Republican/Democrat framework, but is imminently reasonable when one realizes that Justice Field was a staunch Unionist.

With respect to the notion that the *Roosevelt* Court exhibited judicial modesty because it merely disclaimed jurisdiction, the wartime circumstances surrounding *Roosevelt* suggest that the jurisdictional ruling may have been strategic. David Silver, a scholar of constitutional issues during the Civil War, observes that "the majority of the Court did not desire to interfere with a measure devised by the administration to aid the war effort."[57] As a result, Silver notes, the *Roosevelt* Court narrowly interpreted its appellate jurisdiction and "gracefully side-stepped the broad issues involved."[58] Had the *Roosevelt* Court "not denied jurisdiction on dubious statutory grounds," writes Mark A. Graber, the Court "would have almost certainly declared the [Act] unconstitutional."[59] Seen from this light, *Roosevelt* may have been a "judicial dodge,"[60] more than a detached procedural ruling.

Subsequent post-war decisions cut in favor of this perspective. In 1871, with the war over and wartime stresses eased, the Court explicitly overruled *Roosevelt*, conceding that it was wrongly decided and that the Court's jurisdiction could have been sustained just as Roosevelt had argued in 1863.[61] The ability of the Court to recognize the propriety of Roosevelt's appellate jurisdiction argument in the calmness of peace suggests that wartime circumstances may account for the *Roosevelt* Court's "dubious" procedural decision.[62] (In 1871, the Court, with new members nominated the same day as—and arguably in response to[63]—*Hepburn*, found the Act constitutional.)[64]

To be sure, the *Roosevelt* Court may not have had much occasion to construe the subsection of the Judiciary Act of 1789 relied on by Roosevelt. Fairman suspects that the Court may have merely invoked subsection one out of "habit" and that Roosevelt's subsection three argument was a "novelty" that "caught the Justices unawares."[65] But this generous explanation is tough to square with the fact that Roosevelt expressly and plainly articulated in his brief why subsection three provided a foundation for the Court's appellate jurisdiction, and likely said the same at argument. One is hard-pressed to believe that the Court would dismiss jurisdiction in rote, automatic fashion when faced with contrary text and argument.

The *Roosevelt* Court arguably engaged in strategic inaction in another wartime case, adding further weight to the possibility of a calculated procedural ruling in *Roosevelt*. In 1864, during the war, the Court in *Ex Parte Vallandigham* unanimously held that it did not have jurisdiction to consider a challenge to a military commission.[66] In 1866, after the war was over, however, the Court in *Ex Parte Milligan* proceeded to the merits and held that military commissions could not be applied to a citizen where the civilian courts were open.[67] In *Roosevelt*, as with *Vallandigham*, the Court in wartime perhaps utilized a jurisdictional bypass as a means to secure a desired substantive outcome that was seen to be incorrect after the war, as in *Hepburn* and *Milligan*, respectively.

The final argument that *Roosevelt* constitutes judicial modesty stems from the proposition that the Court deferred to the political branches' national security efforts. But the *Roosevelt* Court did not expressly invoke a rule of necessity in its opinion. Accordingly, on this score, the virtues of judicial forbearance cannot be attributed to *Roosevelt*. In sum, to the extent that judicial modesty is a touchstone for proper judicial behavior, *Roosevelt* leaves much to be desired from a legal lens, its wartime benefits notwithstanding.

* * *

Roosevelt triggers the critically important question of whether the courts should affirmatively aid the national security policies of Congress and/or the Executive by declining jurisdiction. In general, ideas on principled judicial decision making in the wartime context seem to gravitate towards two poles. On one end is the notion that the laws are silent, or at least "speak with a somewhat different voice," in times of war.[68] The Constitution is "not a suicide pact," the Supreme Court has famously remarked.[69] On the other end is the proposition that times of war demand even more robust judicial vigilance of government measures that may curtail individual rights and liberties.[70] Experiences with excessive judicial deference to the other branches, such as in *Korematsu v. United States*,[71] may serve as useful reminders of the hazards of "not doing" in the wartime context, and may caution the courts to be particularly on guard when the government is implementing national security policies affecting personal freedoms.

The American people and their leaders remain engaged in an ongoing conversation regarding which of the spectrum, or something in between, marks the acceptable role for the courts in times of war.[72] In analyzing *Roosevelt*, I suggest that at least one option should be taken off the table: the opportunistic use of jurisdictional principles to support the war effort. It is one thing to engage in flexible judicial review in times of war, it is entirely another to close the door to judicial review altogether. This constitutional norm would still leave plenty of room within the joints for the people to fine-tune the extent to which courts should review actions by the government in moments of crisis. In this respect, the value of *Roosevelt* is that it may help us get closer, however marginally, towards determining the proper role of the courts in wartime.

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ENDNOTES

[1] Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 Sup. Ct. Rev. 299, 313; Alexander M. Bickel, **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** 71 (1962).

[2] 68 U.S. (1 Wall.) 512 (1863).

[3] Legal Tender Act of 1862, ch. 33, 12 Stat. 345.

[4] *Federalist* No. 14, Nov. 30, 1787 (Madison).

[5] "Should the people of America divide themselves," John Jay, the first Chief Justice of the United States Supreme Court, wrote, "confidence and affection" would give way to "envy and jealousy," and the "general interests of all America" would cede to the "partial interests of each confederacy." *Federalist* No. 5, Nov. 10, 1787 (Jay). Chief Justice Jay specifically identified northern and southern confederacies, or "hives," as "distinct nations." *Id.*

[6] Abraham Lincoln, Inaugural Address, Mar. 4, 1863, available at: http://www.nytimes.com/interactive/2011/03/04/opinion/20110304_Lincoln_Inaugural_Speech.html.

[7] *Id*.

[8] Henry Flanders, **The Lives and Times of the Chief Justices of the Supreme Court of the United States**, vol.

2 150 (1858) (quoting Chief Justice Ellsworth remarks to the Connecticut Convention, Jan. 7, 1788).

[9] Abraham Lincoln, *Proclamation Calling Forth the Militia and Convening an Extra Session of Congress*, Apr. 15, 1861.

[10] No federal income tax existed at the start of the war and the first federal income tax, authorized by the Act of August 5, 1861, ch. 45, § 49, 12 Stat. 292, 309, was repealed, Act of July 1, 1862, ch. 119, § 89, 12 Stat. 432, 473, prior to any enforcement or collection. The federal income tax was not effective until 1862, Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473. For a summary of the marginal involvement of the federal government in the economy prior to the war, *see* Phillip Shaw Paludan, **"A People's Contest": The Union and Civil War 1861–1865** 108–09 (2d ed., 1996).

[11] *See Hepburn v. Griswold*, 75 U.S. 603, 632 (1869) (Miller, J., dissenting).

[12] Charles Fairman, **Reconstruction and Reunion** 1864–88, 678 (1971).

[13] Act of July 17, 1861, ch. 5, § 1, 12 Stat. 259 (1861).

[14] *Id*.

[15] *Legal Tender Cases*, 79 U.S. 457, 541 (1870); *see also* Fairman, **Reconstruction and Reunion**, *supra* note 12 at 682 ("What was needed in December 1861 . . . was a program immediately effective, adequate for financing a great war, and such as would satisfy the people that the government was firmly set on a sound course.").

[16] Elbridge Gerry Spaulding, **History of the Legal Tender Paper Money Issued during the Great Rebellion: Being a Loan without Interest and a National Currency** 29 (1869).

[17] *Id*. at 5.

[18] Elbridge Gerry Spaulding, **A Resource of War—The Credit of the Government Made Immediately Available: History of the Legal Tender Paper Money Issued during the Great Rebellion. Being a Loan without Interest and a National Currency** 16–17 (1869) (hereinafter "HISTORY"). Import duties would still be paid in specie, but "[e]veryone else in the nation would have to accept the paper for debts to government or to each other." Paluden, *supra* note 10 at 111.

[19] Heather Cox Richardson, **The Greatest Nation on Earth: Republican Economic Policies during the Civil War** 71 (1997).

[20] Spaulding, **History** at 16–17 (italics, internal quotes, and citation omitted).

[21] *Id*. (internal quotes and citation omitted).

[22] Spaulding, **History**, *supra* note 18 at 46.

[23] *See* Brian McGinty, **Lincoln and the Court** 224 (2008); Emily Kendall, "*Because of His Spotless Integrity of Character*," *The Story of Salmon P. Chase: Cabinets, Courts and Currencies*, 36 J. SUP. CT. HIST. 96, 103–04 (2011) (quoting Chase as saying, "I had some handsome pictures put on them and . . . as the engravers thought me rather good looking I told them [they] might put me on the end of the one dollar bills.") (citation omitted)

[24] *See Hepburn*, 75 U.S. at 633 (Miller, J., dissenting).

[25] *Id*. at 632–33 (Miller, J., dissenting).

[26] *Id*. at 633 (Miller, J., dissenting). To be sure, any success attributed to the Act and its successors must be deemed partial. $450 million in notes were authorized, though the cost of the war approached $13 billion. *See* Paluden, *supra* note 10 at 113.

[27] Fairman, **Reconstruction and Reunion**, *supra* note 12 at 683–84.

[28] U.S. Const. Art. I, s. 10 ("No State shall. . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts[.]").

[29] *See* U.S. Const. Art. I, s. 9 ("The Congress shall have the power… To coin Money[.]"); Spaulding, **History**, *supra* note 18 at 122–24.

[30] James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 83 (1887) (quoting *In 1 Kent's Com*., (12 Ed.) 254 (1873) (Holmes, J.). Justice Holmes, in response to Thayer's arguments in support of Congress's power to make paper money legal tender, may have come around to a different conclusion.

[31] *Legal Tender Cases*, 79 U.S. at 651 (Field, J., dissenting).

[32] Heather Cox Richardson, **The Greatest Nation**, *supra* note 19 73 (1997).

[33] David Mayer Silver, **Lincoln's Supreme Court** 144 (1956) (internal quotes and citation omitted)

[34] *See* Fairman, **Reconstruction and Reunion**, *supra* note 12 at 680.

[35] Spaulding, **History**, *supra* note 18 at 5.

[36] *Id*. at 108.

[37] Thayer, *supra* note 31 at 83.

[38] *Id*.

[39] Richardson, *supra* note 19 at 28–29; *see also Hepburn*, 75 U.S. at 633 (Miller, J., dissenting).

[40] Writ of Error to the United States Supreme Court, Oct. 28, 1863 (on file with author).

[41] *Roosevelt v. Meyer*, Br. of Def.'d in Error, on Motion to Dismiss the Writ of Error at *3–6 (undated) (on file with author).

[42] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

[43] Br. of Def'd. in Error, *supra* note 42 at *3–4.

[44] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 83, 85–87.

[45] *See* U.S. CONST. Art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

[46] Judiciary Act of 1863, ch. 100, § 1 12 Stat. 794, 794.

[47] *Roosevelt*, 68 U.S. at 517.

[48] *Id*.

[49] For an articulation of the tension between personal viewpoints and judicial decision making, *see*, *e.g*., *W. Va.*

State Bd. of Educ. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting).

[50] 75 U.S. 603 (1870).

[51] *See* Michael F. Duggan, *The Law as Justification: A Critical Rationalist Analysis*, 86 N.D. L. Rev. 149, 174 (2010).

[52] *See Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

[53] Richardson, *supra* note 19 at 81.

[54] Akhil Reed Amar, **America's Constitution: A Biography** 220 (2005).

[55] 67 U.S. 635 (1862).

[56] McGinty, *supra* note 23 at 142.

[57] *Id*. at 145.

[58] *Id*.

[59] Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. Sup. Ct. Hist. 17, 36 n.31 (2000).

[60] Spaulding, **History**, *supra* note 22 at 82.

[61] *Trebilcock v. Wilson*, 79 U.S. 687 (1871).

[62] *See Hepburn*, 75 U.S. at 625–26 ("The [Civil War] was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. . . . Not a few who then insisted upon [the Act's] necessity, or acquiesced in that view, have, since the return of peace and under the influence of the calmer time, reconsidered their conclusions, and now concur [that the Act is unconstitutional].").

[63] *See* Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 1128, 1130 (1941); Kendall, *supra* note 23 at 108 (referring to the additions of the Justices as "the first Supreme Court-packing scheme.")

[64] *Legal Tender Cases*, 79 U.S. 457.

[65] Fairman, **Reconstruction and Reunion**, *supra* note 12 at 697–98.

[66] 68 U.S. (1 Wall.) 243 (1863).

[67] 71 U.S. (4 Wall.) 2 (1866).

[68] *See* William H. Rehnquist, **All the Laws but One: Civil Liberties in Wartime** 225 (1998).

[69] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

[70] *See* **Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report** 394 (2004) (noting that a "shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life").

[71] 323 U.S. 214 (1944).

[72] *See generally* Stephen Breyer, "Liberty, Security, and the Courts," Address before the Association of the Bar of the City of New York (Apr. 14, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html.