

# The Constitutional Law of Money

Professor Christine Desan

Fall, 2017

Syllabus

## Description:

Every political community faces an elemental challenge: how will it mobilize resources for its own use? Just as importantly, how will it enable individuals to measure and move value between themselves? Modern societies have responded by making and managing money. Debates over money's creation are therefore foundational to governance and they explode in formative decades. In the United States, determinations about money during the Critical Period and early Republic (1780s and 90s), the 1860s, and the 1930s defined federal and state authority, set the terms for economic development, and drew the line between public and private activities.

The constitutional work continued beyond those periods, as Americans contested decisions about money's design and distribution. Their efforts shaped and reshaped the state and federal roles (federalism), configured the character of public obligation (sovereign immunity & the Contracts Clause), and defined the reach of congressional authority (Article I and enumerated powers). The design of money also became a terrain on which the federal government and private actors fueled the rise of certain industries including banking, experimented with the corporate form, and improvised a powerful administrative state. We take the constitutional drama forward to the last decade, reaching the financial crisis and the profound public policy challenges we face, including such issues as the relationship between finance and inequality, credit allocation and the unbanked, and the independence and accountability of the Federal Reserve.

## Course requirements:

Insofar as money creates particular ways to move material resources, it is an institution of governance used by both public and private actors. Our knowledge about money as an institution of governance is, however, comparatively small. The course maps that territory with a focus on U.S. development and dynamics. The course also enlists student participation in illuminating the existing territory.

- (1) Course reading and class discussion are integral to that goal. Participation is therefore an essential requirement, and comprises 25% of the course grade. We will generally reach the readings for each class after an introductory lecture on background, and will discuss them the following day. Note that, while the readings below include links to online copies of readings, **the class materials, available on Canvas and at the Copy**

**Center, include edited versions of the readings. You are only responsible for the reading the edited versions.**

- (2) The last four classes have been set aside to discuss current policy issues. For optional course credit (25%), students are invited to work in groups (1-4 students) to design and teach those classes. The listed readings provide background, and students will meet with Professor Desan to plan the class they teach. The preparation will include the drafting of some material by students individually.

The public policy topics identified on the syllabus in classes 20-23 (and associated readings) are provisional. Student groups may suggest a different topic and, with approval, the class will concern that subject instead of one listed below.

Students should inform the instructor by Friday, Sept. 29, if they would like participate in the public policy classes.

- (3) The balance of the evaluation is by exam. By default, the exam result counts for 75% of course grade. For students who choose to work on a class, the exam grade counts for 50% of the final grade.

Course information:

Professor Christine Desan, G410

Office Hours: Tuesdays, 2 – 4 p.m.

For appointments, contact:

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Syllabus:

## I. Governing at the Material Level

### **Class 1: The Dollar as a Democratic Medium**

Opening Exercise: The Civil War as a Monetary Challenge

Post-Discussion Reading:

The Legal Tender Cases

*Knox v. Lee*, 79 U.S. 457 (1871)

*Parker v. Davis*, \_\_\_\_\_

### **Class 2: Money: the Basic Design**

Christine Desan, "The Monetary Structure of Economic Activity" (draft, July 2017).

Cotton Mather, "Some Considerations on the Bills of Credit Now Passing in New-England" (1691) in *Colonial Currency Reprints 189-196*, edited by Andrew McFarland Davis (Boston: John Wilson & Son, 1910), at [URL](#)

Captain John Blackwell, "Some Additional Considerations," (1691), in *Tracts Relating to the Currency of the Massachusetts Bay, 1682-1720*, edited by Andrew McFarland Davis (Boston, New York: Houghton Mifflin and Company, 1902), at [URL](#)

### **Class 3: Money: the Modern Design (a very brief introduction)**

Andrew Jackson and Ben Dyson, "The Current Monetary System," in *Modernizing Money* 47-80 (London: Positive Money, 2013).

Federal Reserve System, Board of Governors. "Conducting Monetary Policy," in *Purposes and Functions* (2016)

<https://www.federalreserve.gov/pf/pf.htm>.

Optional: C. Desan, A Note on the Federal Reserve's Power to Power Money, 12-16

## II. Experiments with Money: Economic Development, Sovereignty, and the Contest over Federalism (1690-1865)

### **Class 4: Money and Self-Determination -- The Colonial Experience**

E. James Ferguson, *The Power of the Purse; a History of American Public Finance, 1776-1790* 1-16, 24 (Chapel Hill: University of North Carolina Press, 1961).

Benjamin Franklin, "A Modest Enquiry into the Nature and Necessity of a Paper –Currency" (1929), at [URL](#)

Anonymous. *A Dialogue between Mr. Robert Rich, and Roger Plowman*. Philadelphia, PA: Samuel Keimer, 1725, at [URL](#)

William Douglass. "A Discourse Concerning the Currencies of the British Plantations in America" (1740) In *Colonial Currency Reprints*, edited by Andrew MacFarlane Davis (Boston: John Wilson & Son, 1910) at [URL](#)

William Borden. *An Address to the Inhabitants of North-Carolina, Occasioned by the Difficult Circumstances the Government Seems to Labour Under...* Williamsburg, VA: William Parks, 1746, at [URL](#)

### **Class 5: Money and Nation-building – the Revolution and the Constitution**

Adams, John. "Letter to the Comte De Vergennes." In *Papers of John Adams*. Boston: Massachusetts Historical Society, 1780, June 22, at [URL](#)

Benjamin Franklin, "Of the Paper Money of America" (1780?), in *The Papers of Benjamin Franklin*, Digital edition, [URL](#)

James Madison, "Vices of the Political System of the United States" (April 1787), in *The Papers of James Madison*, William T. Hutchinson et al., eds. (Charlottesville: University Press of Virginia, 1977), [URL](#)

Woody Holton, "The Capitalist Constitution," in Sven Beckert and Christine Desan, eds., *American Capitalism: New Histories* (New York: Columbia University Press, forthcoming 2017).

U.S. Constitution, Art. I, Secs. 8 & 10

### **Class 6: The New Federalist Approach to Money: Public Debt and National Banking**

Alexander Hamilton, *Report on the Public Credit* (Jan. 14, 1790), at [URL](#)

Debt Debates in the First Federal Congress, Statements of U.S. Representatives James Jackson, James Madison, Thomas Scott – Feb.

9, 11, 16, 1790, in *Documentary History of the First Federal Congress of the United States of America: Legislative Histories*, vol. 12, (Baltimore: Johns Hopkins Univ. Press, 1986).

Alexander Hamilton, *Report on the Further Provision Necessary for Establishing the Public Credit (aka, Report on the Subject of a National Bank)* (Dec. 14, 1790).

Alexander Hamilton to Edward Carrington, May 16, 1792, at Founders Online, National Archives, at [URL](#)

### **Class 7: Revising Public Obligation: The Contracts Clause and Article I, Sec. 10 Fellow Travelers**

*Chisholm v. Georgia*, 2 U.S. 419 (1793)

*Fletcher v. Peck*, 10 U.S. 87 (1810)

*Craig v. Missouri*, 29 U.S. 257 (1837)

### **Class 8: State Development Strategies in an Illiquid World: Banks and Corporations**

Richard Sylla, "U.S. Securities Markets and the Banking System, 1790-1840." *Review of the Federal Reserve Bank of St. Louis* May/June (1998): 83-98.

*Dartmouth College v. Woodward*, 17 U.S. 518 (1819)

*People v. Manhattan Company*, 9 Wend. 351 (Sup. Ct., NY, 1832)

*Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904 (1824)

### **Class 9: Federalism Contested: Jackson and the Battle over the Bank(s)**

Review: U.S. Constitution, Art. I, Sec. 10

Excerpt from Farley Grubb, "The U.S. Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and the Constitutional Transformation of the U.S. Monetary System," *Financial History Review* (April 2006).

*McCulloch v. Maryland*, 17 U.S. 316 (1819)

President Andrew Jackson's Veto Message Regarding the Bank of the United States, July 10, 1832.

*Briscoe v. Bank of Kentucky*, 36 U.S. 257 (1837)

**Class 10: Free Banking: The High Tide of State Power**

Howard Bodenhorn, *State Banking in Early America* 183-208 (Oxford, UK: Oxford University Press, 2003).

Andrew Jackson and Ben Dyson, *Modernizing Money* 129-145 (London: Positive Money, 2013).

Morgan Ricks, "Regulating Money Creation." *Harvard Business Law Review* 1 (2011): 103-109.

Review: Richard Sylla, "U.S. Securities Markets and the Banking System, 1790-1840." *Review of the Federal Reserve Bank of St. Louis* May/June (1998): 96-97 [NOTE PAGES].

John C. Calhoun, "Remarks on the Bill to Authorize an Issue of Treasury Notes," Senate, May 18, 1838, in *The Papers of John C. Calhoun*, v. 14 293-303 (1981).

**III. Configuring Federal Monetary Power (1865-Present)**

**Class 11: National Banking I: Federal Entry into Retail Banking**

*Veazie v. Fenno*, 75 U.S. 533 (1869)

*Julliard v. Greenman*, 110 U.S. 421 (1884)

Richard Franklin Bense, *Yankee Leviathan: The Origins of Central State Authority* 265-271, 285-288 (Cambridge: Cambridge University Press, 1990).

Walter Bagehot, *Lombard Street: A Description of the Money Market* 75-92 (New York: John Wiley and Sons, Inc., 1873, 1999).

Amar Bhide, *A Call for Judgment: Sensible Finance for a Dynamic Economy* 42-51 (Oxford: Oxford University Press, 2010).

**Class 12: National Banking II: Constitutional Claims to Credit Outside the Commercial System**

Southern Alliance, St. Louis Convention, Report of the Committee on the Monetary System on the Sub-Treasury Plan, Dec. 1889, as

reprinted in George Brown Tindall, ed., *A Populist Reader* (Harper Torchbooks, 1966).

Harry Tracey, Supplement on the Sub-Treasury Plan, as reprinted in James Davis, *A Political Revelation*, Appendix, i-303, 305-306, 310-313, 316-317, 323-326 (Advance Publishing Co., 1894).

The Ocala Platform, Report of the Committee on Demands, Dec. 1890, as reprinted in Tindall, ed., *supra*.

Richard Franklin Bense, *Yankee Leviathan: The Origins of Central State Authority*, 293-302 (Cambridge: Cambridge University Press, 1990).

### **Class 13: Conceptualizing the Modern Market: Gold, Futures, and Economic Expertise**

Roy Kreitner, "Money in the 1890s: The Circulation of Politics, Economics, and Law." *UC Irvine Law Review* 1, no. 3 (2011): 975-1013.

William Jennings Bryan, "Cross of Gold" Speech before the Democratic National Convention, 1896.

Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*, 231-245 (Harvard University Press 2012).

*Embrey v. Jemison*, 131 U.S. 336 (1889)

*Chicago Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905)

### **Class 14: "Fed-eralizing" the Monetary System**

Guest lecturer: Prof. Nadav Orian Peer, Tulane Law School  
[Materials to be announced]

### **Class 15: Liberating the Fed: the Movement towards Discretionary Monetary Policy**

*Norman v. Baltimore & Ohio RR Co.*, 294 U.S. 240 (1935)

*U.S. v. Perry*, 294 U.S. 330 (1935)

*Nortz v. U.S.*, 294 U.S. 317 (1935)

Randall S. Kroszner, "Is It Better to Forgive than to Receive? Repudiation of the Gold Indexation Clause in Long-Term Debt During the Great Depression" (1999).

**Class 16: Credit Allocation as a Political Project**

Louis Hyman, *Debtor Nation: The History of American in Red Ink*, 53-58, 63-70 (Princeton, N.J.: Princeton University Press, 2012).

Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, 203-209, 213-218 (1985).

Address of Marriner S. Eccles, Chairman of the Board of Governors of the Federal Reserve System, to the National Tax Association (Oct. 14, 1941).

**Class 17: Market Funding and Financialization**

Perry Mehrling, "Re-theorizing Liquidity" (draft, June 2016).

John D. Martin, "A Primer on the Role of Securitization in the Credit Market Crisis of 2007" (Feb. 17, 2009) at [URL](#)

Krippner, Greta. *Capitalizing on Crisis: The Political Origins of the Rise of Finance* 86-87, 92-97, 102-105 (Cambridge, MA: Harvard University Press, 2011).

**Class 18: The Financial Crisis**

Ricks, Morgan. *The Money Problem: Rethinking Financial Regulation* 93-101 (Chicago: University of Chicago Press, 2016).

Blyth, Mark. *Austerity: The History of a Dangerous Idea* 21-45 (New York: Oxford University Press, 2013).

Gorton, Gary, "Some Reflections on the Recent Financial Crisis," Yale and NBER (Aug. 29, 2102).

Recommended: Eric Rosengren, "Broker-Dealer Finance and Financial Stability," Keynote Remarks at the Conference on the Risks of Wholesale Funding, New York, Aug. 13, 2014, at [\[URL\]](#)

**Class 19: The Constitutional Charge of Administrative Accountability and Independence: The Fed and Monetary Policy**  
*Raichle v. Federal Reserve Bank of N.Y.*, 84 F.2d 910 (2d Cir., 1929)



Kathleen R. McNamara, "Rational Fictions: Central Bank Independence and the Social Logic of Delegation." *West European Politics* 25, no. 1 (2002): 47-76.

Sarah Binder and Mark Spindel, "Independence and Accountability: Congress and the Fed in a Polarized Era," Center for Effective Public Management at Brookings (April 2016).

Peter Conti-Brown, "The Institutions of Federal Reserve Independence," Rock Center for Corporate Governance, Working Paper Series No. 139 (2014).

**IV: Money in Constitutional Dimension: Contemporary Issues  
Provisional Reading:**

**Class 20: The Constitutional Right to Credit? Banking and the Unbanked**

Louis Hyman, *Debtor Nation: The History of American in Red Ink*, 71-97 (Princeton, N.J.: Princeton University Press, 2012).

Mehra Baradaran, *How the Other Half Banks: Exclusion, Exploitation, and the Threat to Democracy* (Cambridge, MA: Harvard University Press, 2015).

Alan M. White, "Banks as Utilities," 90 *Tulane L. Rev.* 1241 (2016).

**Class 21: Finance and Inequality**

Thomas Piketty, *Capital in the Twenty-First Century*, 20-27, 350-364. Translated by Arthur Goldhammer (Cambridge: Harvard University Press, 2014).

Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* 27-34, 39-41, 50-52 (Cambridge, MA: Harvard University Press, 2011).

Stasavage, David, and Kenneth Scheve. "Why Might Governments Tax the Rich?". Chap. 1 in *Taxing the Rich: A History of Fiscal Fairness in the United States and Europe* (Princeton: Princeton University Press, 2017).

**Class 22: Monetary Reform: Proposals to Restructure Money Creation**

Ricks, Morgan. *The Money Problem: Rethinking Financial Regulation* 145-160 (Chicago: University of Chicago Press, 2016).

Adam J. Levitin, "Safe Banking," 83 *U. Chicago L. Rev.* No. 1 (2016).

Yanis Varoufakis, "The Promise of Fiscal Money," *Project Syndicate* (Sept. 3, 2017), [URL](#)

**Class 23: The Debate over Fiscal Policy: From Austerity to Full Employment Proposals**

Mark Blyth, *Austerity: The History of a Dangerous Idea* 45-50 (New York: Oxford University Press, 2013).

Abba P. Lerner, "Functional Finance and the Federal Debt," In *Selected Economic Writings of Abba Lerner* (1943).

Pavlina Tcherneva, "Full Employment through Social Entrepreneurship: The Nonprofit Model for Implementing a Job Guarantee," *Policy Note, Levy Economics Institute of Bard College* 2 (2012).

**Class 24: Dreams about Money**