The Constitutional Law of Money

Professor Christine Desan
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Discussion Questions for Class 7

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

Readings:

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

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

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

Background:

Between 1803 (*Marbury v. Madison*, holding that a provision of the Judiciary Act of 1789 exceeded the scope of jurisdiction set out in Article III*)* and 1857 (*Dred* Scott, declaring that legislation regulating slavery in certain territories was beyond Congress's authority), the Supreme Court did not declare any federal legislation unconstitutional. The Court did, however, invalidate a significant number of state statutes or actions as inconsistent with the Constitution. In those cases, the Supreme Court invoked Article 1, Section 10 as the source of its authority again and again. As we see today and tomorrow, the cases together constrict state authority, largely by redefining public obligation.

Chisholm v. Georgia concerned a revolutionary war debt due by a state, Georgia, to a supplier who had furnished clothing and other material to the war effort. The contractor initially petitioned the state, working legislatively to get his claim heard; that route was the more traditional one both in England and in early America. As provincial legislators reconceptualized their governing principles, they rejected sovereign immunity as a monarchical notion. But rather than rejecting the protection afforded by sovereign immunity, they *repurposed* it, asserting that prerogative of the legislatures. As Congress had done in the 1790 debate over the federal debt, they claimed that only the legislatures could order disbursement from the public purse. That authority would, of course, be eroded if courts could mandate payment by a state to a claimant. The Contracts Clause played in the background of *Chisholm*, which turned on the scope of federal jurisdiction over suits between a state and an individual.

In *Fletcher v. Peck*, the Court invoked the Contracts Clause directly, as well as the prohibition against *ex post facto* legislation (previously confined to criminal cases). In 1795, a group of land companies had apparently succeeded in bribing the Georgia state legislature to convey land to them, which the state did after the legislature passed an act authorizing the sale. The next year, a new legislature repealed the act and declared all rights and claims from it to be null and void. In the meantime, however, the initial purchasers had sold the land; John Peck thus bought a piece of land as a "third party." He in turn sold the land to Robert Fletcher. Fletcher would sue Peck on the ground that he had not conveyed clear title, bringing to the Supreme Court the issue whether Georgia had violated the United States Constitution.

In *Craig v. Missouri*, the Court directly applied the Constitution's mandate that "no state shall . . . emit bills of credit." Like the other two cases, *Craig* concerns the shape of public obligation: the Federalist commitment to reduce or remove state authority over money flowed from the argument that the states had mistaken the character of their obligation in the way they made money and managed debt.

These decisions and others like them (e.g., *Dartmouth College* in the next class) arguably redefined public obligation and its requirements in ways that collided with the assumptions advanced by Adams in the 1780 letter to the Comte de Vergennes and Madison in the 1790 debt debates. They also articulated distinctive arguments about sovereignty, and the balance of power between federal and state governments. The overarching issue for us is how those notions comported with the new monetary order.

Discussion Questions:

A. On *Chisholm* and *Fletcher*

1. Note the cautious tone of Justice Iredell's opinion in *Chisholm*. What exactly is the ground of his dissent? Why was he so careful?

2. Reasoning about the character of sovereignty plays a big role in *Chisholm*. Would the same reasoning apply to the United States?
    a. If not, why not? How does the result affect the relationship between the states and the federal government?

    b. If so, how might the result have changed in the debt debates of 1790?

3. How does the kind of reasoning that Adams used in 1780 compare with the Court's approach to sovereignty in *Chisholm* and *Fletcher*? Can a state be assimilated to an individual without more and if not, what are the ways in which the state, as a collective, may have a different form of obligation?

4. How would you describe the judicial style in *Chisholm* and *Fletcher*? Were you surprised by the sources of authority invoked or rejected?

5. What effect would the decisions have on conceptions on 'individual right' in the early United States?

6. What effect would the *Fletcher* decision have on the land market in the United States?

B. On *Craig*

1. Why was Missouri so determined to issue “loan office certificates,” determined enough that it would defend that strategy all the way to the Supreme Court?

2. What *were* those certificates? How persuasive to you was Benton’s argument that they were simply evidence of loans to the state?

3. What is the difference between “bills of credit,” a medium of exchange prohibited by the Constitution, and bonds (i.e., notes) legitimately issued by a state in anticipation of taxes?

4. If the difference turns on the existence of “fund” for redeeming the notes, does landed security constitute a “fund”? Can a flow of future tax revenues constitute a “fund”?

   a. What other differences are there between money and loans, and are they significant?

   b. If they are not significant, how could states borrow after *Craig*?

5. Does the Supreme Court’s opinion amount to a decision that money is a certain kind of ‘loan’ from a state or government?

6. How does *Craig* shape federalism as an economic matter? Is there a coherent theory of the distribution of state and federal power over exchange in *Craig*?

7. What options for money creation are left to the states given *Craig*?