

The Constitutional Law of Money

Professor Christine Desan
Fall, 2017

Discussion Questions for Class 9

Federalism Contested: Jackson and the Battle over the Bank(s)

Readings:

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)

Background & Discussion Questions:

Today's materials juxtapose two cases, each about the power of a government, federal or state, to incorporate a bank. The cases raise independent issues, which we take in turn. But they also expose a common issue: both federal and state governments appear to have the capacity, given their ability to tax, spend, and create corporations, to establish and support entities that will make money.

A. *McCulloch* and the Veto Message

When Hamilton proposed establishing the Bank of the United States (BUS) in 1790, he touched off a fierce debate. James Madison and Thomas Jefferson, among others, argued that the Constitution did not grant Congress the authority to incorporate a bank. That argument remained live in 1819 and, as we will see, in 1832, when President Jackson intervened on the question. By that time, it had been reframed by decades of American experience. Consider, first, that making and maintaining a medium was clearly an extremely important aspect of governance. That made constitutional silence on the power to establish a bank somewhat more suspect. During the constitutional convention, Madison had, in fact, proposed to add a general federal power to "grant charters of incorporation where the interest of the US might require and the legislative provision of the individual states may be incompetent." The motion failed after inconclusive debate. See Grubb 2006.

At the same time, constitutional jurisprudence had been shaped by the long-standing dominance of Federalist judiciary led by Justice Marshall. By 1819, the Court and

Justice Marshall worked from an understanding of national authority and a definition of corporations that they had crafted over a long tenure. At a grander level, tension over slavery, whether slavery would exist in the territories (the legislation that would become known as the Missouri Compromise was enacted in May, 1820), and divergent patterns of economic development had intensified in the North and South.

Finally, the states asserted an expanding role in making and maintaining the bank-issued currency that supported their communities. According to its advocates, the BUS disciplined that state-based system. Others, however, including Andrew Jackson and Martin Van Buren, argued that that the BUS had abused its authority and that the states could better support their financial networks. Note that Marshall, in *McCulloch*, rejects the proposition that the state banks might provide the money supply for the federal government. That position drew upon experience in the War of 1812 when the federal government scrambled to compensate for the lack of a uniform way to pay soldiers and suppliers. But the proposition also anticipated the challenge created when Jackson determined to limit federal monetary power.

Jackson's Veto Message conveys just how central the allocation of monetary authority was to the balance of power we call "federalism." Jackson rejected wholesale the theory of congressional authority and, indeed, the theory of judicial review, propounded by Marshall. In addition, he read the limit on the states' ability to tax as a prohibition that eroded their vitality at a fundamental level.

1. Marshall's opinion is generally regarded as superb advocacy. What argument or argumentative strategy struck you as most persuasive?
2. How are those arguments framed for the times in which Marshall wrote?
3. What is Marshall's answer to Madison's challenge that the doctrine of implication – the argument that an enumerated power implied any of the means conducive to effectuate it – imposed no real limit on the federal government's power?
4. What is Jackson's theory of judicial review? How does it inform his position on the "necessary and proper" clause?
5. Granted that taxing produces revenue, why does Jackson perceive *McCulloch's* prohibition on state taxation of the federal bank as so threatening?

B. *Briscoe v. Kentucky*

On the one hand, the authority of a state to charter a bank appeared firmly established by 1820, when Kentucky chartered a bank "in the name and behalf of the commonwealth of Kentucky." State banks had been around for decades; arguably, Federalist constraints had forced states to turn their way.

On the other hand, the Bank of Kentucky appeared in many ways to be fully identified with the state. If the state was using the corporation as a shell, then it arguably

was issuing bills of credit, in violation of the Constitution. But perhaps the Court had walked into a trap: recall that, under *Planters' Bank*, a state operating as a corporation took on the attributes of a private entity.

The question split a livid Justice Story from the majority, which now took a more expansive view of state authority. As he pointed out, Justice Marshall had considered Kentucky's arrangement unconstitutional, but had died in 1835 before the case was decided. In an ironic twist, Justice Taney took Marshall's seat.

1. Were the notes issued by the Bank of Kentucky bills of credit or not?
 - a. What attributes make the notes look like bills of credit?
 - b. What attributes make them look like bank notes?
2. Does the fact that the Bank was incorporated to be "expedient and beneficial to the state, and the citizens thereof" and "to relieve the distresses of the community" make the Bank a public entity?
3. Could the amenability of the corporation to suit have been a meaningful remedy for note holders?
4. If the Bank of Kentucky was, basically, impervious to suit, was it effectively like a central bank, the Fed, for the state of Kentucky?
5. If Justice Story is correct, states could charter banks "upon private capital." Those banks would be completely constitutional. Why didn't Kentucky and the other states simply charter banks and leave them to create the money supply?