The Constitutional Law of Money

Professor Christine Desan
Fall, 2017

Discussion Questions for Class 11

National Banking I: Federal Entry into Retail Banking

Readings:

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

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

Richard Franklin Bensel, *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).

Background:

In many ways, the Civil War is the fulcrum of monetary developments in the United States. After the stunning recognition that it had no operation that effectively ensured a flow of money at the domestic level, allowed the federal government to mobilize materials when it needed them, and modulated the national money supply, the federal government resumed proactive control over money creation; it never again ceded that role. Aside from creating tax anticipation money (the Greenbacks), Congress also established the National Banking System, a network of commercial banks. While the federal government eventually retired the Greenbacks, it would in the next decades maintain and expand its commitment to supporting commercial banks. Establishing the NBS was therefore a watershed: Congress there determined that federally chartered banks should become its agents, injecting notes and issuing deposits (think of these as virtual notes) into circulation when they loaned money. In that way, the federal government delegated money creation to commercial banks, setting the mold for the way money and credit enter circulation in the United States. We consider the authority for and implications of that design choice today.

Veazie considers Congress's authority to displace state banking with federally empowered banks. In *Julliard*, the Court took up the question whether Congress could issue money based on tax anticipation during peacetime. At first glance, that question appears to pertain only to the Greenbacks. But NBS currency was, ultimately, based on public debt. As Bensel explains, National banks issued currency that was secured on the basis of United States public debt. (The system thus echoed the logic of state free banking, a strategy that itself echoed the architecture of early national banks insofar as all of them issued notes based on public debt.) At times when specie convertibility was suspended, the National banks were effectively producing money that depended on the repayment of public debt by incoming taxes. In other words, and as Calhoun argued and *Veazie* confirmed, both bank notes and tax anticipation money were bills of credit.

Given the importance of the design decision made at the time, we consider two readings that theorize the advantages of decentralized money production by commercial banks. Walter Bagehot was the editor of *The Economist*; his book about the Bank of England and the monetary activity it anchored on Lombard Street became a classic. Amar Bhide gives us a contemporary defense of the decentralized judgment that underpins commercial bank lending.

Discussion Questions:

1. Was the legislation at issue in *Veazie* necessary to establish a federal banking system?

2. In what ways does *Veazie* change the relationship of state and federal governments? How far could it go? Could the federal government tax state entities like schools and police departments out of existence?

3. In what ways does *Julliard* go further than previous Supreme Court holdings in delineating the authority of Congress over money creation?

4. Arguably, the Court could simply have used the terms adopted by the Legal Tender cases. Why do you think *Julliard* takes a more expansive approach?

5. When he is considering the constitutional power "to borrow money," Justice Field acknowledges that the United States can borrow labor and materials in return for an IOU, but objects that the United States cannot, when it borrows, give its IOUs the quality of legal tender as an added incentive to induce individuals to lend to it. Rather, the IOU should signify a contract between the government and the individual. Why do you think Field acknowledged the authority of the United States to borrow in kind? Once that is done, is it possible to limit the instruments used so that they are not transferable?

6. Why do Bagehot and Bhide advocate delegating money creation to commercial banks?

7. Are there any disadvantages to appointing commercial banks to be agents of money creation?

8. How might that decision affect the larger culture, including the public's perception of the government, its assumptions about money and credit, the role and stature of banks in American society?