

The Constitutional Law of Money  
Professor Christine Desan

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Discussion Questions for Class 13

Conceptualizing the Modern Market:  
Gold, Futures, and Economic Expertise

Readings:

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)

Background:

In the last quarter of the 19th century, Americans debated and redefined the character of the market. Part of that debate was purely abstract; participants held very different views about how economic activity occurred and how it should be supported. Another of that debate was acted out in the design of the monetary and financial system. We discuss both parts of debate and their interaction today.

"The money issue" – whether the United States should adhere to a monometallic Gold Standard or whether the specie reserve could be made of silver as well as gold (bimetallism) -- was perhaps the most contentious political issue of the 1890s. Kreitner reviews the debate. We read his article at two levels – first, for the information it conveys on the substance of the debate and second, as an argument about the effects of the debate. (Note that commentators who argued about the Gold Standard also held theories about the role of commercial banks in the system. Those considerations will become central to the debate over the Federal Reserve little more than a decade later.) William Jennings Bryan's speech is the most famous intervention on behalf of the pro-silver advocates – and arguably the most famous American political speech of all time.

As Americans were debating money's design, they were also contending over the legality of new financial transactions, including futures trading. The increasing instability (see Levy, *Freaks of Fortune* p. 234) -- or at least the argument that the new methods hedged risk. We consider the change in the Supreme Court's approach from *Embrey* to *Christie Grain*, and relate that shift to the issues of economic and commercial expertise invoked in the arguments over the Gold Standard.

Discussion Questions:

1. In what ways were the arguments of the pro-silver advocates, including Bryan, consonant with those of the agrarian populists? Where did they diverge?
2. Kreitner proposes that an approach to law divides antagonists. What exactly is the line he identifies?
  - a. Do you agree?
  - b. Do you think the ascendance of economic expertise likely to affect the political debate? If so, is that impact warranted?
3. What accounts for the singular power of Bryan's appeal? Which arguments did you find most striking? Why?
4. As you read the Levy, *Embrey*, and *Christie Grain*, compare the image of trading that Holmes adopts in *Christie Grain* to more traditional or old-fashioned approaches to trading. For each approach, please consider:
  - a. Who are the traders assumed and what are they like?
  - b. Why do they trade?
  - c. How would a court know if a given exchange was fair and therefore valid?
  - d. How does the definition of "consideration" change from one approach to another?
5. What was the justification for trading in futures? How do you understand Levy's argument on this score and were you persuaded?
6. Is Holmes's effort to distinguish *Embrey* from activity on the Chicago Board of Trade in the later case, *Christie Grain & Stock*, successful? How about his effort to distinguish the Chicago Board of Trade from the bucket-shops?
7. What do you make of Holmes' comparison between futures' traders and bankers?
8. What role does economic and/or commercial expertise play in these cases? How would you relate Holmes's vocabulary to the arguments developed by Fisher and others?