

Constitutional Law:

Money and the Making of American Capitalism

Professor Christine Desan

Fall, 2020

Syllabus

Description:

According to one of the framers, the “soul of the Constitution” is the clause allocating authority over money. And for good reason: 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? The way modern societies make and manage money determines much about how we work and what we produce, what wealth looks like and how we distribute it, who gets credit and who is shut out, who prospers and whom we fail, even what we regard as “private” and how we understand the “public” community. Money is, in other words, governance at the material level.

Through a series of constitutional debate and dramas, the United States engineered a distinctive design for its monetary system. The national government claims sovereignty over money (“the United States dollar”), disallowing state competition. In turn, the national government assigns authority over creating and diffusing the public medium to an array of banks and shadow banks. The design was new in the modern era. In fact, that monetary hardwiring came to characterize capitalism across the globe.

This course focuses on the constitutional struggles that have produced modern capitalism and its monetary hardwiring. The COVID-19 Crisis dramatized the importance of that conjunction. What industries and investors the Federal Reserve rescues, how Congress gets and spends money, how that money reaches distressed workers, why banks dominate the credit industry, whom they select and whom they reject for credit, when communities get life-giving resources and when they are left aside – all are elemental governance decisions. We approach them as a profoundly “legal” story of constitutional powers, public delegations, private privileges, and effective disenfranchisement. Americans have been arguing in law over the monetary “soul” of our society from the beginning. We follow that story in the course.

As we will see, American struggles over money’s design and distribution shaped and reshaped the state and federal roles (federalism), configured the character of public obligation (the Contracts Clause and the failure of Reconstruction), 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 commercial banking, experimented with the corporate form, constructed and contested a segregated society, and improvised a powerful administrative state. We take the constitutional drama forward to the last decade, reaching the COVID-19 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 relationship between democracy, the Federal Reserve, and representative government.

Course requirements:

- (1) Course reading and class discussion are integral to that goal. Participation is therefore an essential requirement, and comprises 25% of the course grade.

The class structure will generally be “flipped” because that structure enables rich discussion. We begin each topic with introductory material (lecture or presentation) in one session, followed by time for reading after the session. In the first half of the next session, we will discuss the topic introduced in the previous session, now framed by the background material and your reading. The second half of most sessions will be used to introduce the next topic (to be followed by your reading and discussion in the next session.) That structure means that you will come to the discussion with background both from the introduction in the previous class and your reading.

Note that, while the readings below sometimes include links to online copies of readings, **the class materials, available on Canvas, are edited versions of the readings. You are only responsible for reading the edited versions.**

- (2) The last two classes have been set aside to discuss current policy issues. For optional course credit (25%), students are invited to work in groups (2-3 students) to present cameos on those issues.

For each cameo, students should prepare background reading that will be circulated beforehand. Presentations should run 20-25 minutes to be followed by a 10-15 minute discussion period.

Students will meet with Professor Desan to discuss presentation topics and background readings. Topics currently listed on the syllabus are illustrative only; you are welcome to suggest and develop a different topic.

Students should inform the instructor by Friday, Sept. 25, if they would like to curate and present a public policy issue in one of the last two classes.

- (3) Paper/Exam Option

The remainder of your grade will be based on an exam or a research paper, at your option.

- a. Paper Option: You may choose to write a 25-30 page paper as your final product for the course. By default, the paper will count for 75% of course grade. For students who choose to do a policy issue presentation (see above (2)), the paper grade counts for 50% of the final grade.

Each paper should have two components:

- i. Original research on an issue about the constitutional law of money and capitalism. Your topic must be approved by the course instructor by October 15th. Initial outlines are due on November 15th. The paper is due on the last day of the exam period, December 18th.
 - ii. Contextualization in the course. Your paper must embed your research issue into the course material. In a lengthy discussion (5-10 pages), your paper should relate the issue you are examining to our ongoing examination of money and the making of American capitalism.
- b. Exam Option: You may take a three-hour open book exam. By default, the exam result counts for 75% of course grade. For students who choose to do a policy issue presentation (see above (2)), the exam grade counts for 50% of the final grade.

Course Policies:

We engage difficult debates, controversial histories, and dramatic public policy issues throughout the semester. That makes the course exciting as well as challenging. We welcome your energy and enthusiasm in the discussions; we will appreciate both your open mind and respect for your fellows in the classroom. That combination will create a constructive educational environment for all. We will follow the HLS [Community Principle on Non-Attribution](#) in the class.

Harvard Law School is dedicated to facilitating equal access for students with disabilities. If you are a student with a documented disability or medical need and would like to request academic accommodations, please reach out to Student Support Services in the Dean of Students Office at studentsupport@law.harvard.edu or at 617-495-1880. Additional information, including how to register for accommodations can be found at <https://hls.harvard.edu/dept/dos/student-support/accessibility-services-resources/>.

A note on COVID-19: The seminar takes place under conditions of stress on many levels, from the material to the social and emotional. We anticipate that students will have different challenges, from maintaining internet access, to ensuring quiet workspace, to participating across time zones. Please stay in touch

with us (and others at HLS) about the obstacles you are facing; we will do everything we can to help you navigate them.

Policies established by HLS for the online environment apply to this class, including the prohibition on recording and/or circulating class sessions, course content, screenshots, or other material. Students should participate in class with their video turned on, unless technical problems prevent that. Please minimize backgrounds that may distract other participants; you are welcome to use a virtual background if you wish.

Our class discussions will benefit from the extra measure of thought and consideration you can give to your classmates and their contributions. As your instructors, we will appreciate your patience as we learn how best to conduct the class and build our discussion online.

Course logistics:

All classes will be held on Zoom, and attendance at each class is important. If you must miss a class for some reason, please inform the instructor or teaching fellow. Please contact a classmate for notes and contact us with any questions about the material.

We are fortunate to be expertly staffed by Susan Smith. We will also be joined by two talented S.J.D. teaching fellows: Sannoy Das, who specializes in the study of capitalism, law and political economy, and international trade, and Dan Rohde, who specializes in the development of monetary institutions, legal history, and the law of business organizations.

All readings will be available on Canvas.

Course information:

Professor Christine Desan, Griswold 410

Office hours: Wednesdays, 2:00–4:00 p.m., and by appointment. Please schedule your office hour zoom time through Susan Smith.

Sannoy Das

sdas@sjd.law.harvard.edu

Office hours: Wednesdays, 3:00-4:00 p.m. and by appointment. Please schedule your office hour zoom time directly with Sannoy.

Dan Rohde

drohde@sjd.law.harvard.edu

Office hours: Thursdays, 12:30-1:30 and by appointment. Please schedule your office hour zoom time directly with Dan.

For scheduling, Canvas questions, and class logistics, please contact Susan Smith, Griswold 4S, ssmith@law.harvard.edu.

Syllabus

I. Governing at the Material Level

Class 1: The Spring of 2020: Exposing the Monetary Hardwiring.

Schlesinger, J. M., & Jamerson, J. (2020, March 29). After Three Coronavirus Stimulus Packages, Congress Is Already Prepping Phase Four. *Wall Street Journal*. Available [here](#).

Scott, H. (2020, April 10). The Fed Needs to Move Faster. *Wall Street Journal*. Available [here](#).

Klein, A. (Producer). (2020). 70 Million People Can't Afford to Wait for Their Stimulus Funds to Come in a Paper Check. *Series on Financial Markets and Regulation*. Available [here](#).

Timiraos, N. (2020, June 28). Automakers, Technology Firms Are Largest Components of Fed's Corporate-Bond Purchases *Wall Street Journal*. Available [here](#).

Flitter, E. (2020, July 15). Black Business Owners Had a Harder Time Getting Federal Aid, a Study Finds. *New York Times*. Available [here](#).

Smialek, J., Rappeport, A., & Cochrane, E. (2020, August 14). State and Local Budget Pain Looms Over Economy. *New York Times*. Available [here](#).

CFRB.ORG (Producer). (2020). Budget Projections: Debt Will Exceed the Size of the Economy This Year. Available [here](#)

Class 2: Money: the Basic Design

Exercise: Making Money in Times of Crisis [**Read before Class 2**]

Julliard v. Greenman, 110 U.S. 421 (1884) [**Read after Class 2**]

Subsequent material to be read after each class:

**Class 3: Capitalism and the Redesign of Money
(a very brief introduction)**

Desan, Christine. Decoding the Design of Money. *The European Financial Review* 24-27 (Feb-March 2015).

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

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

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

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

Park, K-Sue. "Money, Mortgages, and the Conquest of America." *Law & Social Inquiry: Journal of the American Bar Foundation*, 41(4) (2016).

Ferguson, E. James. *The Power of the Purse; a History of American Public Finance, 1776-1790* 1, 3-16, 24 (Chapel Hill: University of North Carolina Press, 1961).

Franklin, Benjamin. "A Modest Enquiry into the Nature and Necessity of a Paper -Currency" (1729), at [URL](#)

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

Douglass, William. "A Discourse Concerning the Currencies of the British Plantations in America" 307-357 (1740) In *Colonial Currency Reprints*, edited by Andrew MacFarlane Davis (Boston: John Wilson & Son, 1910) at [URL](#)

Borden, William. *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" (June 22, 1780), In *Papers of John Adams* (Boston: Massachusetts Historical Society), at [URL](#)

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

Madison, James. "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), at [URL](#)

Holton, Woody. "The Capitalist Constitution," in Sven Beckert and Christine Desan, eds., *American Capitalism: New Histories* (New York: Columbia University Press, 2018).

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

Class 6: The Revolutionary War Debt as a Morality Play

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

Class 7: The Federalist Approach to Capital: Money and Contract

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

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

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

Class 8: State Development Strategies in an Illiquid World: Banks, Corporations, and Everyday Exchange

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

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

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

Edwards, Laura. "Textiles, Popular Culture, and the Law," *Buffalo Law Review*, 64 (2016).

Class 9: Federalism Contested: the Battle over the Bank

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).

Class 10: Human Capital, Finance, and Instability

U.S. Constitution, Article I, Sec. 2; Sec. 9, Cl. 1; Article IV, Sec. 2

Fisher, Terry. *Mann in Context*. Harvard Law School (2019).

Baptist, Edward E. "Toxic Debt, Liar Loans, Securitized and Collateralized Human Beings, and the Panic of 1837," in M. Zakim & G. J. Kornblith (eds.), *Capitalism Takes Command: The Social Transformation of Nineteenth Century America*. Chicago (2012)

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

Marshall, Thurgood. "The Constitution's Bicentennial: Commemorating the Wrong Document?" *Vanderbilt Law Review*, 40 (6) (1987).

Class 11: Free Banking: The High Tide of State Power

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

Bodenhorn, Howard. *State Banking in Early America* 183-208, 217-218 (Oxford, UK: Oxford University Press, 2003).

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

III. Configuring Federal Monetary Power

Class 12: The Civil War as a Monetary Drama: Greenbacks or National Banks?

The Legal Tender Cases

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

and *Parker v. Davis*, _____

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

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

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

Class 13: Reconstruction and the Gold Standard

Carruthers, Bruce G. & Sarah Babb. "The Color of Money and the Nature of Value: Greenbacks and Gold in Postbellum America." *American Journal of Sociology*, 101(6), 1556-1591 (1996).

Bensel, Richard Franklin. *Yankee Leviathan: The Origins of Central State Authority*, 303-307, 348-369 (Cambridge: Cambridge University Press, 1990).

O'Malley, Michael. "[Money and the Limits to Self Making](#)," Race and Money Roundtable, [JustMoney.org](#) (Spring/Summer 2020).

Class 14: The Victory of National Banking: Constitutional Claims to Credit Outside the Commercial Banking 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).

Tracey, Harry. 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*.

Class 15: Institutionalizing the Modern Market: the Federal Reserve, Expertise, and Economics

Levy, Jonathan. *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)

Desan, C. and N. Orian Peer. "[The Constitution and the Fed after COVID-19](#)," *JustMoney.org* (2020) (Sections 1 and 2 only).

Desan, C. "Money Creation by the Federal Reserve: A Note on the Basics of Legal Authority," n.p. (2019).

Conti-Brown, P. "The Institutions of Federal Reserve Independence," *Yale Journal on Regulation*, 32(2), 54 (2015) and excerpt from *ibid.* (2013).

Raichle v. Federal Reserve Bank of N.Y., 84 F.2d 910 (2d Cir., 1929)

Class 16: The Inherent Instability of Orthodoxy: Experimenting with Money -- David Freund, guest lecturer
Materials tba

IV. Constitutional and Civil Rights over Money and Credit

Class 17: The Constitutional Drama: Credible Commitment or National Self-Preservation?

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

The Gold Clause Cases

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)

Class 18: Banked Credit Allocation as a Civil Right?

Baradaran, Merhsa. *The Color of Money: Black Banking and the Racial Wealth Gap* 1-9, 69-70, 86-96 (Cambridge, MA: Harvard University Press (2017).

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

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

Krippner, G. R. "Democracy of Credit: Ownership and the Politics of Credit Access in Late Twentieth-Century America," *American Journal of Sociology*, 123(1), 1-47 (2017).

Class 19: Financialization, Debt, and Inequality

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).

Hager, Sandy. *Public Debt, Inequality, and Power: The Making of a Modern Debt State*, Introduction (University of California Press, 2016).

Jenkins, Destin. "[Debt and the Underdevelopment of Black America](#)," Race and Money Roundtable, [JustMoney.org](#) (Spring/Summer 2020).

Turner, Adair. *Between Debt and the Devil: Money, Credit and Fixing Global Finance* 1-8, 17-33, 119-122 (Princeton, Princeton University Press, 2016).

Class 20: Capital Markets and Crises

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

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

Rosengren, Eric. "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 21: Contemporary Central Banking as a Separation of Powers Problem

Desan, Christine & Nadav Orian Peer. "[The Constitution and the Fed after COVID-19](#)," Policy Spotlight, [JustMoney.org](#) (Summer, 2020).

Kennedy, Duncan. "[The Fed Should Bail Out Low-Income Tenants and Not Just Banks and Landlords](#)," Special Edition Roundtable on Money in the Time of Coronavirus, [JustMoney.org](#) (Spring 2020).

Epstein, Gerald. "[Human Capital Bonds and Federal Reserve Support for Public Education: The Public Education Emergency Finance Facility \(PEEFF\)](#)." Special Edition Roundtable on Money in the Time of Coronavirus, *JustMoney.org* (Spring 2020).

Classes 22 & 23: Democratic Claims on Capitalism

[Class reserved for student cameos on public policy.]

Sample topics:

Fed Accounts

State and Municipal Public Banking

Monetary Finance

Reparations

Green New Deal

Job guarantee (and Modern Money Theory)

Postal Banking

Class 24: Dreams about Money