Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in Chisholm v. Georgia

Citation

Permanent link
http://nrs.harvard.edu/urn-3:HUL.InstRepos:26552066

Terms of Use
This article was downloaded from Harvard University’s DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA

Share Your Story
The Harvard community has made this article openly available. Please share how this access benefits you. Submit a story.

Accessibility
Contesting the Character of the Political Economy in the Early Republic

Rights and Remedies in Chisholm v. Georgia

The United States Constitution, as ratified in 1788, contained an odd ambiguity. It did not specify the remedy that an individual could use if a state violated his or her rights. The silence in the Constitution mattered greatly: within a few years of ratification, a contract dispute between the state of Georgia and a man who sold it supplies during the Revolution had created a constitutional crisis. Then, as now, the very definition of a right depended on the kind of remedy used to secure it. If the nature of the remedy was contested, so, too, was the meaning of the right. And if the meaning of a right was contested, so, too, was the shape of popular sovereignty—for rights against the state implicated, at a basic level, the relationship of individuals to the communities they inhabited.

The crisis caused by the Constitution’s silence left several land-
marks, including a famous Supreme Court case, *Chisholm v. Georgia*, and the country's first addition to the Constitution after the Bill of Rights: the Eleventh Amendment. Despite the intense attention paid those monuments in the centuries since, two aspects of the constitutional controversy have so far escaped sufficient notice.

First, the question that created contention was not, as later commentators often assumed, whether a remedy should exist for a breach by a state government, but what kind of remedy was appropriate. All agreed that there should be some redress; they disagreed over its nature. The contest posed a judicial against a legislative alternative: should an individual wronged by a state sue the state in a federal court or petition the state's assembly to do justice? Knowledge of the existence and depth of that contest was gradually lost over the course of the nineteenth century as changes in the constitutional structure of society weakened the connection between legislative remedy, economic authority, and political self-determination. Over time, judicial redress alone seemed real and meaningful.

The second neglected aspect of the early crisis over remedies concerns the kind of claim that was at issue. *Contract* was the cause of dispute that broke the surface of popular compliance with state authority again and again. The phenomenon was not accidental. Contract delimited the rights that an individual could claim and the duties that a government had to observe in economic exchange. That was true at the generic level of public finance, where contract as a commitment to pay gave government notes and securities their value, and at the level of individual dealings, where government encountered the many people who had sold to it, worked, or soldiered for it. In their frequency, contract claims against the government overwhelmed other categories of cause urged against it.

Both of these aspects are critical to understanding *Chisholm v. Georgia*, the Eleventh Amendment, and the events that produced them. The controversy over contract rights and remedy in the early republic laid bare a society in transition: Americans were moving from a

---

3Suit against a state in its own courts was not a possible remedy; none of the original states had waived their immunity from such suit at the time. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434–35 (1793).
constitutional tradition that cast the monetary role of the state as a part of politics to one that articulated it as a concern outside of politics, from a constitutional order that made economic relations with government a matter for legislatures to a constitutional order that made such relations a matter for the judiciary. The transition would eventually reorganize the relationship between politics and the economy, creating a recognizably modern liberal market-based state out of its early American alternative, a set of quasi-populist regimes based on mercantilist precepts that had been adapted for colonial circumstances.³ It was a dramatic shift, one that affected the way individuals conceived their own agency and their place in the polity. The new model would be based on individual action in a world of separated powers and an independent economy. It replaced one based on a more organic connection, both hierarchically structured and popularly exposed, between people and their political representatives in an order considered to compound the political and the economic.

The transformation from an older form of political economy to a modern, market-based liberalism warrants more attention as a matter of constitutional study than it has received. That is true whether one recognizes only how penetrating was the change and how powerful became the new paradigm, or whether one is also skeptical of the development of liberalism as the foundation for a beneficent constitutional tradition. The turn away from the legislatures to the courts in cases of public contract corresponded to a reconceptualization of economic obligation from a socially relative matter into a matter of individual dealing and choice. Judicial institutionalization of such relations, which represented a reform in many real senses, has at the same time obscured the selective and intensely controversial nature of

the regime that resulted. We are left with a constitutionalism that notably proclaims its own boundaries. Within that model, the economic realm appears illusively distinct from the political postulates that structured it and continue to sustain it. Granted that the new regime has brought tremendous advantages: it replaced a system of local political economies ill-suited to the transnational arena that Americans entered, and it facilitated great material development, including growth in individual and societal well-being. Liberal constitutionalism also has brought, however, destructive effects with its denial of public obligation as a unique force in regulating matters of economic right.

Legislative remedy remained vital in the new republic because early Americans attributed to their political representatives a very different authority to define the political economy of the state than the one we now assume. In the early part of the eighteenth century, colonial legislators had struggled to take power over revenues away from imperial officials by asserting control of all provincial expenditures. Simultaneously, legislators in several colonies began emitting and managing paper currency, the kind of money predominantly used in everyday life. The authority that legislators claimed over paper money and public spending rested on the responsibility they claimed to make and manage public contracts. Contract was the doctrinal device that, by distributing rights and duties to public and private actors alike, underlay most public spending and gave value to paper currency. And, the terms of the public contract were safely within legislative control: representatives had effective power to support paper money and to control government spending because they alone could provide the remedy for contract claims made against the government.

The regime that resulted gave political representatives an enormous amount of power over the course of their communities. That power—which had pried local life loose from imperial authority—came to be identified by many Americans as their source of popular

---


5See, e.g., Leslie V. Brock, The Currency of the American Colonies, 1700-1764 (New York, 1975). Money was often first emitted at the moment that a colonial assembly gained the power to pay off public claims; the new bills of credit functioned as a kind of cash on hand. See, e.g., John Hickcox, History of the Bills of Credit or Paper Money Issued in New York from 1709 to 1789 (Albany, N.Y., 1866).
sovereignty. Those in the provincial assemblies had succeeded in transferring control over the common resources of the colonies from imperial to American hands. Legislative power then, not executive or judicial, over public debts and financial obligations held the key to government by the people. And so it continued into the new republic: committed by a century of struggle to acquire legislative authority over money, Americans did not quickly surrender that approach.

The ordinary individuals caught in the contract dispute that became *Chisholm v. Georgia* put into practice these abstractions about where to find remedy. Again and again, the claimants turned for relief to the legislatures, both state and federal. The legislatures themselves, in their reception and management of claims, confirmed their expansive control over public money. Indeed, the financial and political crisis produced by the Revolutionary War and exacerbated by the uncertain relations between federal and state authorities made many Americans especially sensitive to threats against the old order.

The moment was, however, faced like Janus: the *Chisholm* drama attests not only to the power of the traditional approach but also to the strength of the challenge posed it. That challenge grew out of a new way of conceiving public obligation and latitude in economic relations. Although the process took another century, the courts eventually displaced the political branch as the appropriate forum for contract claims against the state. Abstractions about rights, like abstractions about remedies, depend for their content on institutional practice, and *contract* was not a static category. In the moment at issue here, the notion of public contract was moving from one politically mediated to one judicially defined. That shift underlay, indeed facilitated, the larger shift identified above in the political economy of America from one centered in legislative orchestration, intervention, and regulation to one assumed to be independent of legislative manipulation—for a kind of mercantilism to modern economic liberalism.

The essay invites further inquiry into the nature of the relationship between the political and the economic that existed before the détente they currently enjoy as separate spheres within the liberal order. Exploring the roots of political power in control of the economic, the essay in fact suggests the inherent presence of that relation: the transition toward a more judicialized ethic resulted from a particular political process that redefined the public approach to the
economy. The role of the courts today remains dependent on that politically structured equilibrium.

Laid out below is the story of the dispute between Georgia and the man, Robert Farquhar, who sold it war supplies. The narrative begins with the contract that started the controversy and highlights the depth of disagreement over the remedy that resulted. The account then follows the parties to the contract, considering the avenues—both legislative and judicial—they took or resisted. The constitutional regimes mapped by those routes differed dramatically on a number of dimensions, including the way each defined popular sovereignty, another abstraction made real by the practices employed to assert it. Those practices specifically articulated contrasting regimes of power for public authorities, and therefore different approaches to the political economic relations that linked members of the community.

The drama that began in 1777 finally ended more than a century later. Tracing very briefly its dénouement in the nineteenth century serves to indicate the direction of change that took place in the American system. In closing, the essay suggests that recent scholarly approaches to the Chisholm controversy define rights, remedies, and popular sovereignty in ways that assume—largely without articulation or attention—a particular relationship between the political and the economic. That relationship is, however, itself the product of a constitutional transformation over the past two centuries. We should consider, rather than assume, the character and content of that change in order to understand liberalism and its limits.

The Chisholm Claim and the Contest over Remedies

In the fall of 1777, a South Carolina citizen, the merchant Robert Farquhar, agreed to sell the state of Georgia supplies for the use of its militia. According to an official account produced years afterward, the army, then quartered near Savannah, was in a state of "great destitution." As the son of one of the executive officials who authorized

---

6 Memorial of William M. Varnum, Agent of the State of Georgia to U.S. Senate, March 8, 1858, Record Group 46, Senate 36A-H17, National Archives and Records Administration (NARA). As an earlier legislative report puts it, "It was in the day of need and sore distress that the State contracted with Robert Farquhar. By the
the contract with Farquhar later testified, "[his] father [often] mention[ed] the purchase of a cargo of goods from Captain Farquhar for the use of the State during the Revolutionary War. He always alluded to the transaction as one of the most fortunate incidents of the times, and to the end of his life regarded it as the principal means by which this State was enabled to perform a part worthy of the great cause of the Revolution."7

The state agreed to pay Farquhar £63,605 in South Carolina currency or approximately $39,141 "in Continental money."8 Thomas Stone and Edward Davis of Savannah were expressly authorized as "Commissioners" to make the deal and to draw on the state treasury for the requisite amount.9 Farquhar supplied the state militia with a great quantity of dry goods, including "26 great coats, @ £30 each, 47 jackets, @ £28 each, 21 lbs. fine thread, @ 35s. per oz," and "379 blankets, @ £30 each."10 He delivered the goods before December 1, 1777, fully performing his part of the contract.11 Stone and Davis did not reciprocate, however, ushering in a century (or more accurately two centuries) of controversy over the case.

A special state commission that struggled to reconstruct the facts of the claim some sixty years later could not ascertain what steps Farquhar initially took to demand payment for his claim. "It must, indeed,

---

7Affidavit from Tomlinson Fort to Ambrose Baber, Nov. 26, 1838, reprinted in U.S. House, Money Due the State of Georgia, p. 10. Arthur Fort, a member of the Georgia council, was present with the governor when the contract was authorized. See Minutes of Executive Department, Oct. 31, 1777, reprinted in U.S. House, Money Due the State of Georgia, p. 4.
8The executive document authorizing the contract with Farquhar carefully set out a conversion scale. Account of Robert Farquhar, see Minutes of Executive Department, Oct. 31, 1777, reprinted in U.S. House, Money Due the State of Georgia, p. 4.
10The supplies also included cloth, coarse thread, sewing silk, handkerchiefs, linen, and other goods. Account of Robert Farquhar, as sworn by Colin Cambell and Lawrence Campbell, Feb. 10, 1794, reprinted in U.S. House, Money Due the State of Georgia, p. 4.
be acknowledged as strange," the commission reported, "that no demand should have been made upon the State (and no evidence can be found that any was made), from 1777, the date of the delivery of the goods, till 1789," when Alexander Chisholm, one of Farquhar's executors, presented his petition to the legislature.\textsuperscript{12} "It may perhaps, be accounted for in the state of things then existing in the country," the commission concluded, "and in the death of Farquhar which intervened."\textsuperscript{13}

It is not clear whether Farquhar filed any petitions with the legislature, as the special commission evidently expected, or whether he worked purely through less formal channels. Nor is it clear what happened to the Continental Loan Office certificates that the state apparently did issue to Stone and Davis in order to pay for the supplies.\textsuperscript{14} On the latter point, Thomas Stone swore, after the death of his co-commissioner, Davis, that Davis alone had received the certificates.\textsuperscript{15} In any case, no certificates reached Farquhar, whose misfortunes only deepened during the attempts he did make to collect. According to his future son-in-law, Peter Trezevant, "in the Year One Thousand Seven Hundred and Eighty Four, the said Robert Farquhar was lost at sea going from Charleston to Savannah in order to endeavor to get payment of this debt."\textsuperscript{16} Farquhar's death left his only child, Elizabeth,

\textsuperscript{12}Report of Special Commissioners, Nov. 6, 1839, reprinted in U.S. House, \textit{Money Due the State of Georgia}, p. 12.

\textsuperscript{13}Ibid.

\textsuperscript{14}See Report of Committee, Georgia House, Nov. 25, 1789, reprinted in U.S. House, \textit{Money Due the State of Georgia}, p. 5. Loan office certificates were interest-bearing preferred securities issued by the Continental government. Those issued before March 1778 were especially valuable because they bore interest payable in bills of exchange drawn on France, a specie-equivalent commitment of paper. Designed to be used for procuring specie, they were increasingly given out as payment for supplies. See E. James Ferguson, "State Assumption of the Federal Debt during the Confederation," \textit{Mississippi Valley Historical Review} 38 (1951):403, 411. Their use in 1777 is, however, early and somewhat surprising. See note 28 below.

\textsuperscript{15}Some legislators in the Georgia House agreed soon after that it was "notorious that Edward Davis did receive a very considerable sum in loan office certificates of the United States for the payment of said goods" (Motion, Georgia House, Dec. 6, 1794, reprinted in U.S. House, \textit{Money Due the State of Georgia}, p. 7).

orphaned and dependent on the efforts of executor Alexander Chisholm to get satisfaction from the state of Georgia.

For James Wilson, who encountered the case in 1793 as an associate justice of the Supreme Court, the route that Chisholm could take to attain redress was relatively straightforward. It was an ordinary contract, and when a state made such an "engagement," it could be sued in court just as an individual could be sued:

If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired.

As Wilson concluded, a state, "like a merchant," could make a contract; a "dishonest state," "like a dishonest merchant," could refuse to discharge it. A state at that point could not "be permitted, proteus-like, to assume a new appearance," able to "insult [its creditor] and justice," claiming immunity from suit "by declaring I am a sovereign State[.]" Just as a man, a state was "amenable to a Court of Justice," just as a man, it was subject to "general principles of right."17

Wilson's logic seemed to later commentators virtually unimpeachable—the individual was, after all, the basis of government and the source of sovereignty itself. The state was merely an aggregation of such men, a derivative sovereignty. It was, therefore, clearly amenable to law. And the law was, just as clearly, the product of the courts.18

Finally, market transactions were matters of private right; just as the

and Some of His Descendants," South Carolina Historical and Genealogical Magazine 3 (1903):39 n. rrr: "A few days ago Mr. Robert Farquhar, of this City on his passage from hence to Georgia, was knocked overboard by the boom of the vessel, and unfortunately drowned, notwithstanding every possible assistance was given. His body was carried to Savannah, and decently interred."

17Chisholm, 2 U.S. 456 (italics and punctuation as in original).
common law courts resolved disputes between individuals over economic matters, so also should they resolve disputes between individuals and the public.

The drama of the early republic was the vehemence, the conviction, of the contrary view. James Iredell, Wilson's colleague on the bench, expressed his disagreement in tones more sober, and perhaps for that reason more striking, than many louder men. After an opinion carefully restricted to statutory interpretation,\textsuperscript{19} he broached the constitutional question with very few words. "So much, however, has been said on the Constitution," he wrote, "that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for recovery of money." "I pray to God," he continued, "that if [the contrary view argued by the attorney general of the United States] be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant."\textsuperscript{20}

Others made very clear what they believed were the evils that threatened. The alarm went to the very core of politics as it had been practiced. As one writer in Massachusetts put it, "Legislators! . . . If you acquiesce [by allowing suits against the state], you will seal your own extinction, as a legislative body — and become merely a Court of Sessions of a county, and a body of Electors of the Senators of the Union. . . . your acts [will be] those of an unimportant subordinate corporation."

\textsuperscript{21} The governor of Georgia made his northern neighbor seem circumspect. "Were [such a suit in court against Georgia allowed]," he warned the legislature, "an annihilation of her political existence must follow."

Wilson's view would come to prevail by the end of the nineteenth century; its structure of supporting assumptions about institutional roles and the meaning of abstractions is therefore more evidently coherent to us than the alternative. That alternative, now a more obscure


\textsuperscript{20}Chisholm, 2 U.S. 449, 450.


approach, and the logic that once animated it, is illuminated by the practices of the people around Robert Farquhar.

The Regime of Legislative Remedy

Robert Farquhar’s claim against the state of Georgia was first and repeatedly pressed in the Georgia legislature, was settled in the state legislature, and was considered in the federal Congress—all in the 1780s and 1790s—because Farquhar’s heir petitioned those forums to get his money. Recourse to the legislature was not, however, the sole prerogative of individuals: representatives of the state of Georgia sought indemnification from Congress in 1795 after the state had settled the claim with the heir. And it is worth noting, if only to understand their behavior, that none of these claimants was weak at heart. The Chisholm claim was revived by petition in the state legislature in the 1830s and 1840s where payment, long due on the settlement, was finally obtained. Only after that point did the regime of legislative recourse clearly erode. In the following decades, federal and state governments negotiated their own adjustment of the claim. Their use of venues both legislative and judicial choreographed a slow passage of change, arriving ultimately at a new era of remedy—recourse to the courts—in a modern liberal order.

When Alexander Chisholm acquired the problem of Robert Farquhar’s outstanding claim on the state of Georgia, then, he did what any responsible executor at the time would have done: He petitioned the state legislature for the money due. According to Elizabeth Farquhar’s husband, Chisholm filed his first petition in 1787. He received no response during that session of the legislature.23 Chisholm either filed a new petition in 1789 or pressed for an answer to his earlier submission. Persistence, it seems, was the key to bring to conclusion the mysterious workings of a state legislature. Peter Trezevant, who married Elizabeth Farquhar on September 13, 1789, quickly assumed responsibility for this role. As he later put the matter: “[I] was per-

---

23See Peter Trezevant, petition to Congress, Feb. 8, 1794, DHSC, 5:260, for reference to a Chisholm petition filed in 1787. I have been unable to confirm through any other source that Chisholm petitioned the state legislature in 1787.
sonally engaged from one thousand seven hundred and eighty-nine to one thousand seven hundred and ninety-four in the prosecution of [Captain Farquhar's] claims, and attended every meeting of the legislative body of the said State, till [I] received [in settlement] the audited certificates now in [my] possession." 24 Trezevant's tenacity in this instance was apparently characteristic; it is likely his determination that drove the claim bearing Alexander Chisholm's name to such notoriety.

A broker or bank clerk of modest fortunes, 25 Peter Trezevant apparently entered the case unwittingly. "Prior to his marriage," he later recalled, "he knew nothing of Captain Farquhar's claims on the State of Georgia." 26 If so, he became the innocent victim as well as the central figure in a half century of petitioning. He quickly "took the management of the business of the recovery of [Captain Farquhar's] claims into his own hands, under a power of attorney from Mr. Chisholm, the executor," and personally presented the series of petitions made to the state legislature in the following decade. 27

Trezevant received his first response from the state legislature—a sharp rebuff from the House committee on petitions—in late November 1789. The committee did not indicate that Trezevant's application to a legislative forum was in any way odd; to the contrary, it acted on the merits of the case. The committee reviewed the details of Farquhar's contract with the state, carefully recording the rather intricate authorization that the governor and his council had given Stone and Davis. 28 The committee agreed that the goods had been received,

---

27Ibid.
28According to the report: "It appears by a resolution of the honorable, the executive, dated the 31st day of October, 1777, that the said Thomas Stone, and Edward Davis, were empowered to purchase from Captain Farquhar, a quantity of goods, and that they were authorized to pay in Continental money, on or before the 1st day of December following; and if the same should not arrive by that time, they were authorized to pay for said goods in indigo, at the Carolina prices, and that they were empowered to draw on the treasury for a sum sufficient to discharge the same" (Report of Committee, Georgia House, Nov. 25, 1789, U.S. House, *Money Due the State of Georgia*, p. 5).
although noting that "how they were applied," it could not "from the
distance of time that has intervened . . . receive [any] information."\textsuperscript{29}

What set the Farquhar claim apart from others that were acknowl-
edged and ordered paid by the legislature was a circumstance that,
according to the House committee, exonerated the state from further
liability. The "honorable executive" had, in fact, issued Continental
Loan Office certificates to the state commissioners "for the special and
particular purpose of discharging the said Farquhar's demand."\textsuperscript{30} Ad-
mittedly, the commissioners, Stone and Davis, had failed to pass on the
money. For that, however, concluded the committee, Georgia "is by no
means accountable."\textsuperscript{31} Farquhar's executors were on their own in try-
ing to get their money; the committee suggested that they go to court
against Stone and Davis.\textsuperscript{32} The House accepted the committee's re-
port,\textsuperscript{33} and on December 12, 1789, the state Senate agreed to reject
Trezevant's petition.\textsuperscript{34}

Several aspects of the episode are clear on the basis of the scant
record, even two centuries later. One is that the 1789 state legislature
made a mistake when it concluded that the state was no longer respon-
sible for the Farquhar debt. Admittedly, one could argue as a matter of
logic that when the state paid the commissioners, it had dispatched
its duty in the case; that position did not mesh, however, with long-
established practice. More speculatively, perhaps, there were other
circumstances—collusion in the disappearance of the funds, delin-
quency in the attempt to collect, or as later representatives implied,
private dealing by Davis—that colored the case. But according to the
consensus of state legislators who subsequently reviewed the claim,
their predecessors' conclusion was wrong: the state could not dis-

\textsuperscript{29}Ibid.

\textsuperscript{30}Ibid.

\textsuperscript{31}Ibid.

\textsuperscript{32}Ibid. Five years later, a group of legislators elaborated on the reasoning of the 1789
committee, suggesting that Davis had acted in a private capacity in his dealings with
Farquhar or, perhaps, for the United States. See Motion to amend resolution, Georgia
House, Dec. 6, 1794, reprinted in U.S. House, \textit{Money Due the State of Georgia}, pp. 7–8; see
also Letter from Commissioners to Attorney General of Georgia, Nov. 6, 1839, ibid.,
pp. 12–13 (reviewing theories under which state could escape liability).

\textsuperscript{33}Committee Report agreed to by Georgia House of Representatives, Nov. 25, 1789,
reprinted in U.S. House, \textit{Money Due the State of Georgia}, p. 5.

\textsuperscript{34}Senate Proceedings, Dec. 12, 1789, Journal of Georgia State Senate.
charge a public debt simply by releasing the appropriate funds to its own officials. Additionally, no circumstances impugned Farquhar or suggested that Davis had not acted for the state. Standard agency law dictated that a principal remained liable for obligations still owed because of the misfeasance by its agents. That doctrine applied to governments as well, declared later generations of Georgia legislative committee reports.\textsuperscript{35} Like the fact that the legislature had made a mistake, a second aspect of the episode is clear: the mistake was theirs to make. As the many generations of legislative reports also indicate, the body that had generally ensured that the state fulfilled its obligations under a contract was the legislature.

\textit{Settlement and Strategies of Self-Government}

The legislature's authority over contract claims drew heavily on the American experience of self-government from the earliest days of settlement. That experience identified local or provincial authority with collective political control over the common wealth of members. In particular, legislative control over public money and finance—"the power of the purse"—was indispensable to the growth of American political power. Provincial elites moved early to take control of public spending. At the same time, in many colonies, they created and supported the paper currency that largely supplied the money for their economies. Both strategies depended on legislative control of public contract. Together, they combined to produce provincial political authority that subverted imperial control.

The political chronology of the movement to gain control of public money is recounted in the classic institutional histories of the colonial era.\textsuperscript{36} Those histories document how legislatures up and down the continent gained control over an increasing number of provincial


funds and then used their control as leverage to pry other rights and powers from imperial officials. Part of the story is familiar: American assemblies early and successfully claimed the authority to levy taxes. Because royal officials depended on provincial tax revenues to pay for everything, from their own salaries to frontier defenses, colonial legislators could negotiate the terms upon which they would grant the levies. American assemblies withheld permission to levy taxes until they received the concessions they sought from imperial officials. A complementary piece of the American strategy is less well known. If the legislatures had the authority to collect public money, they also needed the authority to control that money once they got it. The pledges of imperial officials were only so useful. Instead, provincial representatives maneuvered to add the authority to control public expenditures to their authority to tax.

In particular, legislators in most colonies over the course of the eighteenth century asserted the right, nominally justified as one of overseeing the spending practices of imperial actors, to approve every grant of money made from the provincial treasuries. In practice, the assemblies assumed jurisdiction over claims against the government, including legal claims—those of contract, taking, and compensation for service.37 In other words, the legislatures became sites for determining claims of individual right against the government.

Their procedures evolved correspondingly. To resolve cases, legislatures set up select or standing committees that dealt with claims and similar petitions, like the committee on petitions established by the Georgia House.38 Claimants generally submitted their accounts or requests for payment by petition to the elected branch of their assemblies. That phenomenon, which drew on English models, helps explain why petitioning figured so prominently as an institutional channel between citizens and their governments during the eigh-


38See generally Ralph V. Harlow, The History of Legislative Methods in the Period before 1825 (New Haven, 1917), pp. 8 (North Carolina), 11 (Virginia), 20 (Massachusetts), 21 (New Hampshire). Assumedly, most claimants were paid by administrative or legislative agents, leaving only contested cases to come to the legislatures.
teenth century. The petitions were often thus private, not public, and they were routinely granted, not disputed. The accountability of the legislature to individual claimants likely rested on conditions that ranged from the franchise to, perhaps more importantly, the capacity of claimants to disrupt or otherwise undermine the fragile governments of their day. By the end of the colonial era, most Americans apparently assumed routinely, like Alexander Chisholm, that they should petition their legislatures, rather than sue in the courts, for money due them by the government.

But the reorganization of economic life effected by the colonial assemblies extended far beyond individualized dealing with the government. Legislatures in a number of colonies created paper money to pay the public claims they now controlled. The currency responded to a powerful popular need: gold and silver (specie) were generally scarce on the continent—Americans typically had an unfavorable balance of trade with England, and their hard money went to pay for imports from the mother country. Paper money filled the void left by the outflow of gold and silver specie; it supplied a transferable medium of exchange. Not coincidentally, it alone made many public

---


41See Desan, “Constitutional Commitment to Legislative Adjudication,” pp. 1481–94.

42As originally understood, the “right to petition” was thus a guarantee that protected private as much as public or political rights. The most significant debate in the First Federal Congress over the right to petition arose when Quaker abolitionists attempted to petition for an end to slavery. Southern representatives argued that Quakers had no right to petition on matters in which they were not personally interested. See Documentary History of the First Federal Congress, 1789–1791, 14 vols. to date (1978–), vols. 12 and 13 (Helen E. Veit, Charlene Bangs Bickford, Kenneth R. Bowling, and William C. diGiacomantonio, eds.) entries for Jan. 6–Aug. 12, 1790, esp. Feb. 11 and 12, 1790, hereafter DHFFC. The southerners were rather sharply understating the scope of the petition right; the point here is simply that they could even make such an assertion.

expenditures possible, especially during wartime. The colonial governments themselves had limited specie available. By contrast, armed with a printing press and a promise to tax in the paper currency they created, they could issue as much money as they could credibly circulate and support in a provincial economy.

In a variety of ways, the advent of paper money further expanded the economic authority of the American assemblies. Most obviously, it allowed them to increase public spending. In turn, the money launched through government expenditures entered, indeed pervaded, the world of private exchange, as those who took paper notes from the colony passed them on as currency. Money returned to the government in the form of taxes; the levies imposed by assemblies generally could be satisfied in paper. Indeed, the paper had value because it could be used to pay taxes, fines, and other fees. In effect, the American legislatures ran a kind of supplemental, quasi-independent cash economy for their provinces. Their power penetrated that economy: both public creditors who were paid in notes and private individuals who took the notes afterward as tender depended on the legislatures to maintain the value of the currency and the economic system built upon it.

The responsibility of the legislatures was mediated through, or defined by reference to, contract. Specifically, the governments' responsibility to satisfy individual claims for money and to support the value of paper money—that is, the duty of the assemblies at both the level of individual dealings and the level of public finance—depended on a commitment to pay (or to do its equivalent, by accepting outstanding notes for value); that commitment was articulated as a contractual obligation that was the legislatures' to fulfill. In the case of individual claims, legislators imported the vocabulary of legal duty and debt, one inherited from English ministerial, parliamentary, and judicial sources. Just as those decision makers had molded their approach to contract in manners specific to their institutional locations, so, too, did

---


provincial representatives. In particular, the representatives shaped their responses to claimants in ways injected with their political capacity, including the ability to redefine categories of entitlement, to delay payment in order to pressure imperial officials, to extend remedies to late but deserving applicants, and to intervene in other manners we know little about.

Legislative obligation was again elaborated through the rubric of contract in the case of public finance. Paper currency itself was a kind of promissory note: It had value because of the government's agreement to receive the note for a public payment due. That agreement, which contemporaries expressed as a contract, had to be maintained despite the fluctuating social circumstances of colonial life. Economically literate Americans believed in a quantity theory of money, according to which a community required a certain amount of currency to serve as a means of economic exchange: too little hampered exchange and too much depreciated. That is, society required the right volume of money to support trade and production; at such a level, the value of the currency would remain stable, while an oversupply would cause the notes to lose value and prices to rise.46 Unlike their monetarist successors, many of these thinkers, as well as the bulk of American legislators, concluded that political actors—legislators—bore the responsibility of modulating the money supply. Indeed, a political commitment to maintain the value of money alone could protect the public contract it represented.47

The political role in this system was a complicated one in which judicial interference was, for practical purposes, inconceivable. Modulating the money supply required that assemblies take stock of their


47 Not all advocates of publicly issued money agreed that the legislatures should determine the amount supplied. See, e.g., John Webbe, A Discourse Concerning Paper Money (Philadelphia, [1742 or 1743]), pp. 8–10, who suggested a loan scheme intended to link the amount of money in circulation to the amount desired by landowners, whom Webbe took to reflect more accurately than merchants the pace of economic activity in a community.
communities and, as necessary to maintain stable values of money, issue more currency or, less frequently, hasten the retiring of excess currency. That task could conflict with the nominal commitments, made at the time of issuing paper notes, to draw in money at a pre-ordained rate. But the task became even more intricate. Legislators considered it legitimate, given their responsibilities to the larger society, to add to currency supplies at times to stimulate an economic recovery—another act that could be claimed to violate the rights of those holding existing notes. American populations themselves had power to influence the amount of currency in circulation. Most notably, they could refuse to pay taxes or to comply with price regulations.48 Finally, exigencies like war brought spending demands that upset the stability of currencies. Those phenomena could dramatically affect the circumstances in which governments and individuals exchanged money.49

In such conditions, Americans experienced the management of their paper economies to be an urgent and constant political task, one that centrally concerned legislators, not courts, as the communities' representatives. The contract underlying paper money, in particular, represented the relationship between the public and its members, a pact that rested on a commitment by all parties in "public faith" to maintain the value of money in changing situations. The approach to paper economies that the Americans developed, one that included periods of depreciation, episodes of official devaluation, price and wage controls, revisions in the periods during which paper money was valid or due for retirement, and the constant adjustment of the money supply through other means encompassed to a significant degree the challenges of their circumstances. The system was fraught with risk, including imperial interference, political ineptitude or corruption, and exposure to popular pressure—but in a majority of colonies it met the needs of the community.50

50See, e.g., Brock, Currency of the American Colonies, pp. 20, 73–74 (New York), 77–78, 82–84 (Pennsylvania), 93–95 (New Jersey), 96–99 (Delaware), 104–6 (Maryland),
Revolution and Continuity

The power of the legislatures informed the Revolutionary conflict and remained central throughout it. The decade that followed the Revolutionary War brought both challenge and adamant adherence to the model of legislative centrality that Americans had earlier established in their approach to sovereignty.

The Revolutionary War flowed, in part, from the expansion of political economic power that the American legislatures had achieved. Threats to their control of financial revenues and to their ability to support provincial paper economies catalyzed the discord that became rebellion. Financing that revolt in turn confirmed the Americans dependence on the financial systems they had developed in the colonial period. Absent either hard money or sufficient foreign loans, Americans fell back on paper money: the Continental Congress and every American state financed its Revolutionary War activity largely through printed currency. The money was paid out to participants who would, in the future, become individual claimants on the public fisc. In the end, the debts left behind were huge—the national government alone had issued some $226 million in Continental currency (approximately $45.5 million specie value) and perhaps an equal amount of noninterest bearing certificates that eventually ceased circulating because of depreciation. Remaining federal obligations to creditors were estimated after final settlement to reach approximately $42.5 million specie value.

Management of those obligations formed the very core of political life throughout the war and the decade afterward. E. James Ferguson has demonstrated, with particular power, how the controversy over


52Ferguson, Power of the Purse, pp. 30, 43, 63, 341.
funding the war monopolized American attention during the conflict and permeated society in the following years.\textsuperscript{53} Contention focused on how to support the value of money during the war and how to pay off the obligations that remained afterward.

In each of its aspects, the debate implicated the power of the American legislatures as representatives of the larger community. Although Americans took an almost infinite variety of positions on the financial crisis generated by the war, the poles of the conflict were relatively clear. On one hand, some Americans favored expansive legislative management of the Revolutionary economy and the debt it generated. This group, which dominated the Continental Congress during the first half of the war, readily employed paper money as an instrument of public finance and to some extent identified economic behavior with Revolutionary commitment: complying with currency supports and price supports was a matter of patriotism.\textsuperscript{54} These Americans recognized the cruelties of currency depreciation but emphasized its advantages in sinking public debts. And they articulated the payment of remaining debts as a complex matter requiring the calibration of diverse needs: creditors could be paid in the manner, at the time, and in the currency—land, paper, tax relief—that satisfied claims understood in a social context in which demands from many others who had contributed to the war effort also required attention.\textsuperscript{55} Each of these commitments directly affected the practical circumstances of economic life, including the distribution of public resources and the behavior of private parties.

Others preferred legislative action disciplined along new lines. This group, more deeply steeped in the approach to public finance that the

\textsuperscript{53}Ibid.


English had developed over the course of the eighteenth century, denounced paper money as an evil, although one that had been minimally necessary during the war. Supporters of this view advocated the use of gold and silver as money that would have value impervious to political manipulation; additional funds could be generated by issuing securities that represented interest-bearing loans. For these Americans, who dominated the management of Revolutionary finances during the war’s latter years, the war debt had to be repaid in hard money and punctually serviced with interest until that was accomplished. Absent public emergencies, contract claims were matters of individual right independently understood, not matters of individual right relative to other social demands.\textsuperscript{56}

The debate between those committed to traditional currency and those attracted to the English model brought challenges to the old system. Perhaps most importantly, the Constitution of 1787 limited Americans to using only silver and gold as legal tender and prohibited the states from emitting paper currency.\textsuperscript{57} The changes represented a clear victory for those advocating specie-based finance, gained at a moment when the tumults of the paper system seemed to them particularly threatening and the advantages of the alternative particularly powerful. Indeed, the shift constituted the beginning of a substantially new approach to the monetary system and to matters of the market, one in which the power of the legislatures would be radically reduced. In many ways, Peter Trezevant and Alexander Chisholm’s efforts to attain a remedy from the state of Georgia would experiment with the logic of the new approach.

But that approach would take years to establish itself. Until then, the traditional powers of the political assemblies remained apparently intact; despite their differences, most Americans assumed that their legislatures continued to hold critical power over the political economy. Thus, a population famously concerned with curbing legislative abuses


\textsuperscript{57}See Art. I, sec. 10. A paper currency note was a bill of credit in the legal terminology of the time.
took no action to relocate either the legislatures’ core power over levying taxes or their ultimate authority to approve all government expenditures; it was evidently unimaginable to limit so soon after the Revolutionary War the powers that had made the break with Britain necessary.

Likewise, state legislatures throughout the Confederation and into the new republic continued to manage the sinking of the Revolutionary debt, using methods, including official devaluations and payment in paper or confiscated property, that were inherited from paper currency days.58

Americans continued the routines of interaction that had long connected them to political assemblies endowed with such powers. During the 1780s and 1790s, claimants still assumed that they should petition their legislatures, not sue in the courts, to get money owed them by the government. Thus, committees on petitions and accounts like that of Georgia’s legislature operated in other states.59 Several court cases from the period suggest that institutional understandings like that of the earlier eighteenth century prevailed; movement to experiment with the delegation of claims to the courts was limited.60 Petitioning continued in the Confederation Congress, which, given its restricted powers, referred many petitions to state legislatures for action.61

58For the articulation of legislative power to tax and spend at the federal level, see U.S. Constitution, Art. I, sec. 7, 8, cl. 1; sec. 9, cl. 7. For the activity of state legislatures, see, e.g., Lemuel Molovinsky, “Pennsylvania’s Legislative Efforts to Finance the War for Independence: A Study of the Continuity of Colonial Finance,” Ph.D. diss., Temple University, 1975; Morrill, Practice and Politics of Fiat Finance; Ferguson, “State Assumption of the Federal Debt,” p. 408.


60See, e.g., Rappahannock v. Sparhawk, 1 U.S. (Dall.) 357 (Pennsylvania 1788); Nathan v. Virginia, 1 U.S. (Dall.) 77 (Pennsylvania Court of Common Pleas, 1781); cf., Newbold v. Republican, 1 Yeates 140 (PA, 1792); “An act for methodizing the department of accounts of this commonwealth,” Apr. 13, 1782, and “An act to give the benefit of trial by jury to the public officers of this state, and to other persons, who shall be proceeded against in a summary manner by the Comptroller-General of this state,” Feb. 18, 1785, The Statutes at Large of Pennsylvania from 1682 to 1801 (Harrisburg, 1896–1906), 11: 435, 441.

The congresses after 1789, which inherited huge numbers of claims from those who had contributed to the Continental Revolutionary effort, adopted similar procedures as those in the states, retaining ultimate authority to settle claims appealed from executive branch resolution or arising outside the authority of that branch. It is clear that the early congresses considered responding to petitions to be obligatory. Journalist John Fenno asserted in 1795 that, along with "arranging and committing the business of the session," the "principal part of [Congress's] time has been taken up in reading and referring petitions—the number of which is great." In fact, according to the best available record, there were at least seven hundred to one thousand petitions submitted to each of the early congresses on both private and public matters. From the beginning, the federal legislature struggled to manage the workload generated by private claims. It delegated significant investigatory and reporting duty to the executive branch and designed its committee structure to deal with the remaining petitions. By 1794, the House had moved beyond appointing select committees to deal with particular claims; it established the House Committee on Claims, second as a standing committee only to the Committee on Elections. Consonant with these practices, the "right to petition" was apparently originally understood as a guarantee that protected private as much as public or political rights.

Finally, the great majority of individuals left holding paper notes or claims for service, supplies, or property impressed from them during the Revolutionary War did not, in fact, sue in either state or federal court for redress. There remained a well-entrenched expectation that "sovereigns"—both state and federal—were "immune" from judicial suit by individuals in the early republic. The shell of the English practice had served eighteenth-century Americans interested in local

62Ibid., pp. 1–14.
63Ibid., p. 6 (quoting John Fenno).
64Ibid., p. 362; see also Report of Committee on Claims, Mar. 2, 1795, U.S. House of Representative, M1267, Roll 1, p. 42, NARA. A much smaller number of the petitions survive today.
65Congress did initially attempt to delegate reporting duties to the federal courts; it abandoned that possibility for more than sixty years once the federal circuit judges made clear that they could only act as courts if they had final decision-making authority. See Hayburn's Case, 1 U.S. (Dall.) 409 (1792).
66See note 42 above.
power well: sovereign immunity doctrine guaranteed that the courts had only as much authority to hear claims against the government as delegated to them by the king in Parliament—in America, the political assemblies. Leaving aside for the moment the hot issue of suits against states in the new federal system, the rule clearly remained in place for governments within their own court systems, for everything from garden variety contract claims to constitutional violations. Justice James Iredell could report that neither Georgia nor any other state had, by 1790, passed an act authorizing suit against it.  

Although he referred to a subsequently passed waiver of some kind enacted by the Georgia legislature, the act must not have delegated significant amounts of authority to the courts; nineteenth-century advocates of enlarged judicial power found no substantial waivers in any of the original states, nor indeed in many of the rest of them. The federal Congress also long retained its exclusive authority over claims, finally establishing a special legislative court, the Court of Claims, and delegating contract claims to it in 1866.

The Farquhar Claim

The claims committee in Georgia that received the Farquhar claim acted, then, from a tradition critical to American understanding of

---

67 Chisholm, 2 U.S. (Dall.) 434–35. While Iredell referred to a subsequently passed waiver of some kind enacted by the Georgia legislature, the act must not have delegated significant amounts of authority to the courts; nor do Georgia’s judiciary acts make mention of any delegation to the court. Ibid., 435; An act to revise, amend, or consolidate the several judiciary acts of this state, Dec. 18, 1792; An act for regulating the judiciary departments of this state, Dec. 23, 1789, Acts of the General Assembly of the State of Georgia.


69 The Court of Claims was first established as an advisory court in 1855. Over the next decade, Congress reorganized the court and, in 1866, strengthened its authority effectively to order payments from the treasury. Floyd Shimomura, “The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,” Louisiana Law Review 45 (1985):626, 651–60. The Court of Claims was rechristened an Article III court in 1961. See ibid., pp. 687–90.
self-government. Local elites had fashioned political authority by using the legislatures to take control of public money and to affect the economy it animated. The result was a system that bound those elements together: in the American experience, a community's sovereignty lay in its collective management of its public wealth, as orchestrated by its political representatives. That wealth consisted both in public revenues collected and spent as the legislature directed and in the creation and support of a currency (soft or hard) that supported exchange in both governmental and private relations. Over the decades, the institutions that related lay Americans to those with official authority had been configured in ways reflecting those roles.

At the moment that Georgia's legislature confronted Chisholm's claim in 1789, circumstances had raised the stakes for the traditional system. On the one hand, the federal Union represented a threat to the sources of state sovereignty insofar as they were rooted in state legislative control of money and finance. The changes effected by the Constitution—the turn to specie money and the prohibition of state paper emissions—reduced the control that state representatives had over the resources of their communities. Those convinced of the importance of local authority had reason to guard against further invasions of state legislative power. With a flamboyance that was as remarkable as his energy, Rep. James Jackson of Georgia spent most of the First Federal Congress attacking measures in the House that reduced federal, and especially state, legislative power to settle the war debt.

On the other hand, the financial crisis of the war had placed tremendous pressure on state legislators to use, as fully as possible, every bit of their power in the economic sphere. The circumstances were demanding: tied to distressed populations disparately ravaged by the war and accustomed to extralegal action, tax resistance, and, increasingly, political mobilization, representatives had to devise general methods of defining, servicing, and paying the debt, and to find ways to manage individual demands for redress.

Throughout the 1780s, those tasks had been shouldered largely by the state assemblies; to the dismay of those promoting a more powerful central authority, the Confederation Congress remained without its own tax power and thus without revenues. The fragility of government constantly confronted state legislators, pervading their calculations of
the right, the possible, and the necessary; critics concluded that they were captive to the populist demands of citizens. For a number of reasons, retirement of the war debt went especially far in Georgia and the rest of the South, where the legislatures used the means of paper finance, including levying taxes payable in securities, to sink both state and federal debts.

Despite their efforts, many in the southern states felt little assurance in 1789 that the war burdens would ever be equally spread. Convinced that they had outspent and outsacrificed their neighbors, they nevertheless had no confidence that a federal settlement of accounts, which was supposed to tally total spending, charge debtor states, and compensate creditor states for wartime expenditures, would ever be fairly accomplished. The disarray in their own records undermined their claims; Georgia never did fare particularly well under the settlement, although its claims may well have been too large for even an increasingly expansive federal commission to credit.

In this context, the Farquhar claim was shunted aside by a Georgia assembly exhausted by debt management and anxious to be rid of a large claim that they could not expect the federal government would help shoulder, especially given their own agents' misconduct. It may have seemed enough to a majority that they had already, in the straitened circumstances of the times, paid for the claim once; the Farquhar claimants could track down the money themselves and save the people of Georgia more expense. Later legislators would conclude that the 1789 decision had been a breach of the "public faith," as the responsibility of the legislatures to keep public contracts was called in the vernacular of the period. The decision was not, however, one that could be categorized as faulty according to abstractions about "popular sovereignty." The step was taken by an assembly acting with dramatic exposure to its constituent population and according to the very practices that had created local power.

---


The irony of the moment was that the Georgia legislature added a note to its 1789 report that seemed designed, in retrospect at least, to add to its problems. Without offering any clear reason that would make the affair between Farquhar and the commissioners a private matter, the House committee nevertheless expressly introduced the logic of private relations into the case. It noted that the executors should "seek redress in a court of law against the said [Thomas] Stone and the representatives of the said [Edward] Davis."\(^{73}\) Georgia legislators here exhibited the fascinating complexity of the period: mainly Federalists, they would vociferously defend state power; committed to legislative authority over public funds, they invited a private initiative in the courts to get the money; unaware that a new constitutional order approached, they launched the case that would promote it.

The particular judicial remedy that the legislature recommended was, in fact, almost sure to fail. There was obviously no guarantee that either Stone, the surviving commissioner, or the heirs of Davis any longer had the money owed the Farquhar family.\(^{74}\) But the committee's own recommendations apparently compounded the hazards of a lawsuit. The committee noted that the expense of the Farquhar contract, which had after all gone to defend the Revolutionary cause, appeared to ground "a proper charge against the Union, for which the State ought to be credited."\(^{75}\) According to the committee, the governor should therefore demand "an account and vouchers" from its former agents (or their executors). In case they could not account for the funds to his satisfaction "within three months after demand made," the governor should "direct the attorney-general to prosecute."\(^{76}\) The problem that legislators sitting in the 1793 session of the Georgia House identified with the advice of their earlier colleagues was that "the said executor could not, with safety, commence an action against the said executor of Davis and Thomas Stone, because the attorney-general was directed to prosecute them, and if both actions had been pending at the same time one must have fallen to the ground;

---


\(^{74}\)Davis in fact became insolvent after the Revolution. See *DHSC*, 5:128 n. 11.


\(^{76}\)Ibid.
whereby the said executor would have risked a total loss of his demand, as the suit of the State would have had the preference to that of an individual.\textsuperscript{77}

Whether or not the 1789 legislature laid a procedural trap for Peter Trezevant is lost in the murkiness of Georgia's common law. But it seems quite possible that by its dismissive treatment of a claimant who was following the well-established mode for obtaining payment from the state, the committee invited not only Trezevant's renewed claim on the state, but also the angry expansion of his efforts into a very different forum.

**Judicial Initiative, Legislative Defense, and the Controversy over Popular Sovereignty**

While Trezevant continued after 1789 to press the state legislature for payment, he and Alexander Chisholm attempted as well a radically new approach to remedy. By his own word, Trezevant became the moving force behind their initiative in the federal courts.\textsuperscript{78} Sometime early in the spring of 1791, the Farquhar claimants filed suit in the U.S. Circuit Court for the District of Georgia. The case was heard and dismissed for lack of jurisdiction the following fall.\textsuperscript{79} The Farquhar claimants persevered. The next spring, 1792, they filed suit under Alexander Chisholm's name in the U.S. Supreme Court.\textsuperscript{80}

The court cases were so unprecedented that neither Georgia officials nor the judges themselves were sure who should be served with the summons or who should appear for the state—governor, attorney-general, legislators?\textsuperscript{81} Despite their novelty at the time, however, the suits would be highly scrutinized later: Chisholm v. Georgia, the Supreme Court's eventual decision that the court had jurisdiction over the suit, would become the compulsory starting point for both judges


\textsuperscript{78}Trezevant, while leaving the conduct of the case in court to counsel, demonstrated his tenacity again in the judicial realm, attending "at every suit, till a verdict was given in his favor" (Affidavit of Peter Trezevant, June 15, 1840, reprinted in U.S. House, *Money Due the State of Georgia*, p. 22).


\textsuperscript{80}Ibid., 5:151.

\textsuperscript{81}Ibid., 5:128–30.
and scholars concerned with state suability for the next two centuries. The details of the litigation in *Chisholm* and the cluster of similar cases in the early republic have been definitively documented by Maeva Marcus and her colleagues; the substance of the case has been dissected by countless lawyers and academics.\(^{82}\) While that territory is well known, the conditions that made the courts a conceivable recourse are less familiar.

*The Attempt at Judicial Remedy*

Throughout the turmoil of the 1780s, many remained convinced that legislative management of finance, with its susceptibility to demonstrations of social need and the latitude it offered for the calibration of those demands, represented the fairest approach possible in a constitutional regime.\(^{83}\) During that decade and for some time afterward, representatives devised funding schemes that devalued debts across the board, treated mediums of repayment flexibly (substituting land or tax relief, for example, for values promised in cash or specie), or, occasionally on the state level, differentially paid holders of government debt on the basis of need or desert. The inability of individuals to sue states in court for payment protected such arrangements.\(^{84}\)

Those politically gauged arrangements appeared increasingly problematic to the men attracted to the British approach to public finance

---


\(^{84}\)Federal devaluation of the Continental dollar furnished the most famous such episode. See *JCC*, 16:262–67 (Mar. 18, 1790). For a similar instance in which a state legislature determined that depreciation, which had gutted the value of funds available for redeeming bills of credit, diluted the requirement that the state pay back holders ("the public [have not] made themselves answerable to aid the pledge if it should prove inadequate"), see Maryland House of Delegates, committee report, Nov. 25, 1791, *Votes and Proceedings of the Maryland House of Delegates* (Annapolis, 1792), p. 50 (also differentially treating various holders). For an example of a state determination to pay interest only on state debt held by the original holders, see "An Act to Appropriate Certain Moneys Arising from the Excise," Mar. 21, 1783, chap. 1024, *Statutes at Large of Pennsylvania*, 11:100–101. Georgia engaged in similar strategies when funding the certificates held by claimants like the Farquhar heirs. See text accompanying note 131.
that was developing across the Atlantic. Over the course of a century and a half, the English had dismantled a system built on specie, impressments, and highly concentrated large loans; they reconstructed a funding method based on specie and widely subscribed long-term government borrowing. Proponents articulated the new arrangement as one rooted in individual choice, ex ante commitment, and constancy.\textsuperscript{85}

Indirectly, if not directly, the new British funding system invited recalibration of the institutional roles imputed to legislatures and courts. In England, change took a route distinctively affected by the presence of a strong ministry and the early development of the Bank of England. Parliamentary cooperation with those institutions apparently deflected, to some degree, movement expressly to limit legislative authority.\textsuperscript{85} The course of events in America was quite different; the dramatic uses of power made by the legislatures during the war and postwar period marked them as objectionable in the eyes of those who, like Robert Morris, appointed federal superintendent of finance in 1781, were committed to developing a system of public finance along English lines.

To men like Morris and those associated with him, the modes of authority exercised by the common law courts were frequently superior to the practices of the legislatures as a means of supervising matters of economic exchange. Those most vocal about the advantages of the English system were disproportionately merchants or lawyers attached to the commercial community; men such as Gouverneur Mor-


\textsuperscript{86}The first dramatic judicial intervention explicitly to enforce a public contract was thus directed against ministerial, not parliamentary, authority to pay the debts. See \textit{The Case of the Bankers}, in \textit{A Complete Collection of State Trials}, ed. Thomas Bayly Howell, 33 vols. (London, 1809–26), 14:1–114. Similarly, Parliament almost from the start used the Bank of England to develop methods of long-term government borrowing. That device allowed private rules of liability to apply in certain parts of the process, without exposing Parliament directly to suit. The development of regime of modern public contract in England remains to be explored. Among others, Douglass North and Barry Weingast have flagged the importance of the transition. See Douglass C. North and Barry R. Weingast, \textquotedblleft Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,\textquotedblright \textit{Journal of Economic History} 49 (1989):803–32.
ris, William Duer, Alexander Hamilton, and James Wilson, were accustomed to the practice of the courts and to the law produced by them in matters of private contract. That community influenced, in ways that remain to be explored, the movement during the 1780s to enlarge generally the institutional power of the courts. At the same time, Morris and others began to realign public funding practices, especially at the federal level, so that they followed private common law analogues more closely.

The transition toward the British fiscal model was, then, a move calculated from the outset to reduce the ability of legislatures to use inflationary means beyond the power of individuals to sink public debts, such as issuing more currency. Morris and like-minded Americans also disavowed other techniques that legislatures had conventionally used flexibly to retire public debts. Assemblies had, for example, imposed restraints on the alienability of government securities in order to privilege repayment to the creditors who had earned public compensation over the speculating purchasers who appeared less deserving. More generally, those advocating the new approach to public finance rejected legislative strategies that interfered with the negotiability of notes, advocating the liberty of parties to contract as they individually judged appropriate to their interests. Their thinking drew support from models of individual economic behavior suggested by free trade theorists in the seventeenth century and powerfully developed by Adam Smith.

Arguments in favor of the new approach were publicly aired—and conspicuously endorsed by federal officials—shortly before the Farquhar claimants filed suit in Georgia’s federal circuit court. The debates in the First Federal Congress over funding the public debt

---

87See Ferguson, *Power of the Purse*, pp. 70–81, 109, 110–14, 117–24, for the predominant role of merchants in directing the funding system adopted by the Continental Congress toward English forms during certain periods of the 1780s.


furnished the platform; newspapers in the spring of 1790 were filled
with information and commentary on the progress of the congres-
sional debates.\textsuperscript{90} Time and again, the issue that divided congressmen
was the scope of legislative authority over public contract. While James
Madison of Virginia, James Jackson of Georgia, and a small group of
others staunchly defended the legislature’s latitude, indeed obliga-
tion, to adopt ways of paying the debt that attended to goals of social
equity, need, and desert, they were substantially outnumbered. Con-
gress was dominated by Federalists eager to support the proposals of
Secretary of the Treasury Alexander Hamilton, proposals similar to
those of Robert Morris a decade earlier. In matters of contract, they
argued, the legislature had to act as if it were a common law court,
applying the same rules to obtain the same results. As William Smith of
South Carolina put it: “[The payment of the face value of a contract] is
law and justice between man and man: is there another sort of law and
justice for the government? by what rule is the government to square
its conduct, if not by those sacred rules which form the basis of civil
society, and are the safeguard of private property?\textsuperscript{91}

For these men, proper servicing of the debt both met past obliga-
tions and ensured future progress. There was no conflict: A regime of
choice and unmodifiable commitment could alone provide the struc-
ture that the United States needed in order to grow into a powerful
nation.

The logic propounded so publicly by the Federalist majority made
conceivable, perhaps even evoked, Chisholm’s suit against the state of
Georgia. With scant exception, the congressmen debating how to fund
the federal debt had not themselves taken the position that an individu-
al could claim any payment from a government in court. Habituated
to the legislative control of finance, they had instead assumed that

\textsuperscript{90}As one observer reported on the eve of congressional debates, New York City was
“all in a flame about funding, nothing else heard even among the women and chil-
dren.” See William Neilson to John Chaloner, Feb. 17, 1790, as quoted in Charlene B.
Bickford and Kenneth R. Bowling, \textit{Birth of the Nation: The First Federal Congress, 1789–
1791} (Washington, D.C., 1989), p. 64; see also the Feb. 16, 1790, speech of Rep. James
Jackson, \textit{DHFFC}, 12:358. William Manning, the author of “Some Proposals for Making
Restitution to the Original Creditors of Government,” was one of many Americans who
closely attended the debate.

\textsuperscript{91}William Smith, Feb. 15, 1790, \textit{DHFFC}, 12:328.
restraints on federal legislative action would be self-imposed. But it was not such a long step to the position that limits on the legislatures had to be externally enforced. Indeed, in this view, sovereignty could only belong to the people if the power and activity of government were carefully restrained. No branch of the government, least of all the legislature with its generative and destructive potential, should be allowed special prerogatives; the public must be answerable to the same extent and in the same way as an individual in a court of law. Indeed, if economic relations were matters of free choice between bargaining parties, there was no need for legislative adjustment for changing social circumstances or for balancing multiple demands. A court could do as well, in fact better, than a political forum in enforcing established contracts.

The ambiguity of the Constitution as ratified left these individuals—as well as those still committed to the earlier model of self-government—free to consider that their own views had prevailed. To those Americans who were moving to a more judicialized understanding of the relationship between citizen and government, the extension of federal judicial power in Article III to controversies “between a State and Citizens of another State” wrote into the Constitution the recognition that a state was suable. To those who remained committed to a legislatively centered vision of popular sovereignty, the phrase allowed judicial suit only where a state legislature permitted it: a federal court could exercise jurisdiction if and when a state had waived its immunity to a cause of action against it. The Judiciary Act of 1789 carried

92 Elias Boudinot (N.J.) was the only representative who may have favored accepting court enforcement of public contracts. See Feb. 9, 1790, DHFFC, 12:227.
94 That would occur in two circumstances: either the state had initiated the suit under existing law, or the state legislature had agreed to delegate resolution of the dispute to the courts. For example, Pennsylvania had waived its immunity to certain claims against it. See “An act for methodizing the department of accounts of this commonwealth,” Apr. 13, 1782, and “An act to give the benefit of trial by jury to the public officers of this state, and to other persons, who shall be proceeded against in a summary manner by the Comptroller-General of this state,” Feb. 18, 1785, Statutes at Large of Pennsylvania, 10:448–57, 11:435–41. Although the state legislature may have believed it would need to expand that waiver in order to subject itself to suit in a federal forum, there was certainly nothing to keep the legislature from making that additional delegation.
forward the same ambiguity, with its provision for suits "where a state is a party": that provision could be read by individuals with radically different premises to be consistent with their own understandings.95

Resort to higher theory did nothing to rid the Constitution of ambiguity. For Americans committed to older ideas of the political economy, the legislature remained the institution most effectively designed to express the popular will. Legislative power over the purse continued to be a critical safeguard of a republican system. The courts could not be given the power to impose binding money damage awards against the government because that would delegate power over the treasury to the judiciary; the action was unthinkable to those who identified popular control of the purse with liberty and equity. To this group, the obligation of legislators to keep the "public faith" was vitalized by both internal conscience and popular action.96 A suit against the government, by contrast, would arrest the political pulse of the community and destroy its spirit.

Opposed to this view was a conception of popular sovereignty richly articulated by James Wilson in one of the opinions that the Chisholm claim elicited from the Supreme Court in 1793. The driving force of Wilson's idea abstracted the notion of "the People" from its previous institutional home in the legislatures. As it had became clear that "the People" could act extra-legislatively in the 1770s and 1780s, it became desirable to a significant group that "the People" should act extra-legislatively in ratifying the Constitution in order to curb potential excesses of the state assemblies. "The People," who once acted solely through their legislative representatives, were now identified as the

95The same is not true, of course, where the United States was concerned. The federal government figured only as a plaintiff in the Judiciary Act, see Sec. 9, 11. As I note below, however, the divergent treatment of the United States is, if anything, more consistent with an assumption of legislative than judicial responsibility for redress of private grievances. The federal Congress had, in the Judiciary Act or other legislation, control over a waiver of "immunity" or, put another way, the prerogative to delegate its conventional role to a judicial forum. The federal Congress could not, of course, be similarly specific with regard to that same decision on the part of various state legislatures. Conversely, if a majority of the federal legislature had been convinced that popular sovereignty demanded a judicially administered model of remedy, that majority could have arranged for the stability of the United States in the Judiciary Act.

96These issues were debated in the House of Representatives by Jackson, Madison, Page, Scott, and Stone in February 1790. See DUFF, 12:202, 213–14, 242, 248–49, 280, 281, 357, 360–61.
principals of each of the legislative, executive, and judicial branches equally. Given this evolution of thought, the judiciary would come to occupy its now familiar place as the protector of individual rights against governmental abuse.\(^9^7\)

For those willing to follow the logic of judicialized protection of individual rights as far as it went, Peter Trezevant’s case was an easy call. He had the best on the merits of the contract claim, and the misfeasance of Davis and Stone did nothing to exonerate their principal, Georgia. Finally, it was well within the power of a common law court to recognize that a cause of action existed against a state just as a cause of action existed against an individual, if states had the same status as did individuals in the law. This logic would, of course, have supported suit against the federal government itself. But for those still leery of that conclusion, this was a halfway point: those oriented toward federal authority could find this incursion into state legislative power by federal judicial power easier to stomach.

_The Vibrancy of Legislative Commitment_

Even nationally oriented Americans, however, did not fall neatly into the “judicialized protection” camp. Trezevant’s suit reached the limits of its effectiveness when it repulsed all those who continued at some level of commitment, even if vague or conflicted, to adhere to a legislatively centered model of remedy. The reaction swept up Americans of many different persuasions. It was, to be sure, even more bitterly refracted through a commitment to state authority for those who had been leery of federal union.

---

\(^9^7\)See _Chisholm_, 2 U.S. (Dall.) 555–57; Gordon S. Wood, _The Creation of the American Republic, 1776–1787_ (Chapel Hill, 1969), pp. 446–53. Wood has elaborated both the development and the power of this Wilsonian notion of popular sovereignty; I do not dispute either the character of this notion or its ultimate predominance. It is the speed of its ascendency that is belied by the institutional practices I have studied. There is no doubt that reforms in the structure of assemblies (preeminently the move to bicameralism), the institution of the convention as a form of ratification, and the fact of “constitutions” themselves were powerful limits (among others adopted in the 1780s) on legislative power. They do not, however, amount to the rejection or displacement of the legislatures as the central institution of governance in the early republic. On this point, compare M. Horwitz, _Separation of Powers and Judicial Review: The Development of Post-Revolutionary Constitutional Theory_, Thomas M. Cooley Lecture, Michigan Law School (n.d.), pp. 19–20.
By 1792, Trezevant and Chisholm had advanced their judicial initiative, filing a motion for default against the state of Georgia in the Supreme Court during its August term. Moving cautiously, the Court held the motion to give the state time to appear in the February term of 1793. Georgia officials refused to cooperate. Its legislature debated denouncing the case while the state’s governor submitted a written remonstrance against federal jurisdiction at the Court’s February term.98

Georgia’s resistance met its well-known fate on February 18, 1793, when the Court determined by a 4–1 decision that an individual could sue a state in federal court.99 The Court’s judgment catalyzed proposals in Congress to amend the Constitution that would resurface the following year: The Eleventh Amendment provided that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”100 The amendment was ratified and went into effect in 1798; applied retroactively, it barred Chisholm and the handful of suits like it that had been filed in the Court.

The drama over the Farquhar claim, however, moved back to the legislatures. On November 19, 1793, the House of Representatives of the state of Georgia passed a bill responding to the Supreme Court’s

98 On December 14, 1792, a resolution introduced into the Georgia House of Representatives linked power over the treasury and the ability of state government to function. The resolution did not pass, perhaps because of its inflammatory description of the court threat as one that could “annihilate the very shadow of State government, and . . . render them but tributary corporations to the government of the United States” (House resolution of Dec. 14, 1792, Augusta Chronicle, in DHSC, 5:161–62). The resolution was apparently introduced at the request of the governor (Ames, State Documents on Federal Relations, pp. 7–9). The remonstrance was presented by court reporters Jared Ingersoll and Alexander Dallas, who acted on behalf of the state but were instructed not to participate in the argument. Chisholm v. Georgia, 2 U.S. (Dall.) 419.
99 Justices voting in favor of jurisdiction were Blair, Wilson, Jay, and Cushing. Justice Iredell dissented. The Court determined only the jurisdictional question; it did not consider the merits of the case.
100 The Eleventh Amendment expressly addressed, and prohibited, the kind of federal court jurisdiction found to exist by the Court in Chisholm—diversity suits, or suits against a state by a citizen of another state. It was silent about suits based on federal law brought against states; those suits would have been permissible under the federal courts’ federal question jurisdiction, barring state sovereign immunity. In Hans v. Louisiana, 134 U.S. 1 (1890), the Court determined that federal question suits were, implicitly, prohibited by the Eleventh Amendment.
decision in *Chisholm v. Georgia*. One section of the bill provided that anyone who attempted to levy state property or funds "under any execution from or by the authority of the Supreme Court, for or in behalf of . . . Alexander Chisholm, executor, . . . or for or in behalf of any other person or persons whatsoever, for the payment or recovery of any debt or pretended debt, or claim against the said State of Georgia, shall be and are hereby declared to be guilty of felony and shall suffer death, without the benefit of clergy, by being hanged."\(^{101}\)

Observers, both then and now, have repeatedly cited the House bill; violent and extreme, it seems to them to discredit the rationality of the Georgians' response to the *Chisholm* decision.\(^{102}\)

However, less than a month later, a committee of the same House of Representatives responded to a petition from Trezevant by issuing a report recommending that Georgia pay the Chisholm claim.\(^{103}\) The committee recounted evidence indicating that the state clearly owed the money claimed by Chisholm; it did so without any mention of the *Chisholm* decision and without any apparent concern that its recital of these facts could affect the "merits" stage of the case, in which the Supreme Court had yet to determine the liability of the state.\(^{104}\) Concluding that "the State is now liable, and ought to pay the said debt to the petitioner," the committee resolved that the auditor of the state "examine the account of the said Robert Farquhar," that he "depreciate the same" agreeably to the correct scale of depreciation, and that

---


\(^{103}\) Trezevant had returned to the Georgia legislature in the fall of 1793, even as that body and its counterparts in states north and south mobilized to resist the *Chisholm* decision. Trezevant, petition to Congress, Feb. 8, 1794, *DHSC*, 5:260–61. Report of Committee, Georgia House, Dec. 11, 1793, reprinted in U.S. House, *Money Due the State of Georgia*, pp. 5–6.

\(^{104}\) The committee noted that "the original entry of the said goods in the handwriting of the said Robert Farquhar, corroborated by the evidence of Arthur Fort, Esq., who was at the time one of the honorable the council, prove the delivery of the goods." The committee criticized its 1789 predecessor for both its conclusion that the state was not liable and its relegation of Trezevant to a judicial remedy (Report of Committee, Georgia House, Dec. 11, 1793, reprinted in U.S. House, *Money Due the State of Georgia*, pp. 5–6).
he “give the aforesaid Peter Trezevant, heir and attorney as aforesaid, a certificate for the sterling amount of the same, expressing in the body of said certificate, that the same was given in payment for army supplies.” The Georgia Senate had apparently come to a similar conclusion. Two days after the committee issued its report, the Georgia legislature passed a joint resolution as reasonable and evenhanded in tone as the earlier House bill had been violent and extreme. The joint resolution first identified the general responsibility of the government: “That it is the duty of the State, in justice and good faith, to settle and finally adjust, all claims brought against the government thereof, in such manner as may be most beneficial to the same.”

On the Farquhar claim, specifically, the joint resolution continued: “That the honor and interest of this government is bound for the payment of all just debts that have been contracted for the defence of this State, during the late revolution; and if the said claim of the executor of Farquhar should come under this description, it is the duty of the legislature to settle the same in the manner most accommodating and beneficial to both parties; and that the necessary vouchers being produced to substantiate such claim, the general assembly will provide for payment thereof.”

Juxtaposing Georgia’s legislative actions—the hanging bill and the process of claim consideration culminating in the joint resolution—reveals their rationale, as well as the depth of feeling that animated it. Consistent with their history, political representatives articulated the state’s responsibility to “settle and finally adjust” claims against the state “in justice and good faith.” It was, however, “the duty of the legislature” alone to resolve such claims, not any federal court. As the House had demonstrated, it had the means and procedures to consider claims. And it was the “general assembly,” and only the general assembly, that had access to the treasury and could therefore “provide for payment thereof.”

The Georgia legislature acted with vehemence because underlying the apparently simple power over contract it claimed was the complex.

105 Ibid., p. 6.
107 Ibid., p. 6.
constitutional regime it defended. That regime rooted political power in control over public expenditures and, even more basically, the value of money. When Georgia’s governor addressed a joint session of the state legislature on November 4, 1793, he explicitly identified the threat represented by state suability in court as one that would fundamentally subvert the state’s system of finance and funding. According to Governor Telfair, state suability in court was “replete with danger.” The state had emitted “upwards of one hundred and fifty thousand pounds since the close of the last war, a considerable part of which is yet outstanding.” If actions against the state to recover paper money emitted by it were allowed, “an annihilation of her political existence must follow.”

A 1792 resolution debated by the Georgia House put the matter similarly. It noted: “If acquiesced in by this State [the suit] would not only involve the same in numberless law-suits for papers issued from the Treasury thereof to supply the armies of the United States, and perplex the citizens of Georgia with perpetual taxes, in addition to those the injustice of the funding system of the United States hath already imposed upon them, but would effectually destroy the retained sovereignty of the states, and would actually tend in its operation to annihilate the very shadow of state government, and to render them but tributary corporations to the government of the United States.”

The 1792 resolution exposed another, intimately related dimension of the controversy. Insofar as Americans believed that the political viability of a government depended on its power over public finance, they assumed that the state legislatures would inevitably surrender their identity to the federal government when they lost the ability to control their own economic systems. The move to hard money and the prohibition on paper emissions had reduced state power in significant

108The paper was apparently used in frontier defense. As Telfair put it, the state had been “reduced by savage inroads” to a “singular predicament.” See extracts from the message of Gov. Edward Telfair, Augusta Chronicle, Nov. 9, 1793, Ames, State Documents on Federal Relations, p. 7.

109Ibid., p. 9. The governor therefore urged the legislature to direct its representatives in Congress to seek a constitutional amendment and to press for its ratification in order to guard against “civil discord and impending danger.”

ways. But the threat went further. On August 5, 1790, Congress had assumed the bulk of the debt that the states still owed from the Revolutionary era. The initiative was an important part of Hamilton's strategy to realign toward the national government the loyalty of public creditors—the class he considered most critical to the economic development of the new country, given their resources, entrepreneurialism, and energy. The same advantages that Hamilton coveted now flowed away from the states. For Georgia, as for several of her sister states in the South, the pill was especially bitter, since inhabitants considered that they had largely sunk their own debts and would now have to bear the taxes it took to pay off the liabilities of others. It was, for many, a return to the years of the British empire and the indignities of a regime in which the only local role was to tax at the behest of a distant power.

In this context, state liability to suit in federal court was the final blow, a slap delivered by men, James Wilson and John Jay in particular, who had been highly visible and controversial nationalists. In Massachusetts, an editorial writer tied together people and self-governance, his commonwealth, its representatives, and its power, and exhorted resistance: “Citizens, rouse! Let us before [the legislature] comes together, call Town Meetings and County Conventions on this business to take the sense of the PEOPLE on a question as big with the fate of our interest and liberties as any one that has agitated the public mind since [the end of the Revolutionary War].” For the writer, the danger was clear: suits against the state “would destroy the sovereignty of this commonwealth, and with it, the liberties of the PEOPLE.”

113On Wilson, see John K. Alexander, “The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd,” William and Mary Quarterly, 3d ser. 31 (1974):589–612. Jay's allegiances had long been clear; he had co-authored The Federalist letters and, more recently, had run against Republican-identified George Clinton in the 1792 gubernatorial election. See Elkins and McKitrick, Age of Federalism, p. 288.
114“Marcus,” Massachusetts Mercury, July 13, 1793, DHSC, 5:389–90. A report of the Georgia House of Representatives, issued Nov. 9, 1793, recommended that the legisla-
The Mechanics of Legislative Remedy

In a world in which legislative responsibility for claims like Trevezant's was the norm, one might expect its logic would extend to the federal sphere. That is in fact where the drama leads. By early 1794, Trevezant was ready to try that venue. On the one hand, he responded to the state legislature's invitation to submit materials demonstrating his claim to them.\(^{115}\) On the other hand, he now approached the federal Congress. It had, after all, assumed the bulk of the states' debts, a fact of which Trevezant was aware.\(^{116}\) The act may have invited Trevezant to conceive of federal responsibility for his claim, and he was as ready as ever to read an invitation expansively. The petition he wrote to Congress was straightforward and, in its own way, quite eloquent.\(^{117}\) Trevezant recounted the facts of the Farquhar claim and the acquiescence of the state in the merits of the claim, carefully noting that he could document each step with affidavits. His theory as to the basis of federal liability was simple: "All the Articles charged in the Account against the State of Georgia, tho' purchased by that State, were bought for the Benefit of the Union, because they were for the use of the Army and Navy; your Petitioner therefore humbly conceives that as the State of Georgia would undoubtedly have charged to the United States the

ture pass a bill declaratory of state's retained sovereignty, and that it request the concurrence of other state legislatures in the "explanatory amendment" to the Constitution being debated. *Augusta Chronicle*, Nov. 16, 1793, ibid., 5:235–36.

\(^{119}\)In February 1794, two men personally acquainted with Robert Farquhar and his business, his late copartner and his former clerk, appeared before a justice in Charleston. They swore that copies of the charges made in Farquhar's book accounts in October, 1777 to the state of Georgia were authentic, and that "the original entry in the said books is made in the proper handwriting of the said Robert Farquhar, deceased" (Affidavit of Colin Campbell and Lawrence Campbell, Feb. 10, 1794, reprinted in U.S. House, *Money Due the State of Georgia*, pp. 4–5). The state special commission that assembled evidence supporting the Trevezant claim in 1839 treated this affidavit as a document submitted to the legislature rather than the court. See Report of Special Commissioners, Nov. 6, 1939, reprinted in U.S. House, *Money Due the State of Georgia*, p. 3.

\(^{116}\)Peter Trevezant, petition to Congress, Feb. 8, 1794, *DHSC*, 5:258–62.

\(^{117}\)Trevezant explained his authorship of the petition as follows: "The Petition [is that of] Peter Trevezant of the city of Charleston in the State of South Carolina who has intermarried with Eliza Willoughby Farquhar, the only child and sole Legatee and Devisee of Robert Farquhar late of Charleston aforesaid deceased, and is also the Attorney (lawfully authorized, constituted and appointed) of Alexander Chisholm of Charleston aforesaid, the surviving Executor of the last Will and Testament of the said Robert Farquhar deceased" (ibid., 5:259).
Amount of this debt and the Interest thereon if they had paid it he may with Justice apply to your Honorable House[s] for Relief.”

The claimant’s need for federal relief was just as simply stated: “This Demand is almost all [Robert Farquhar] left for the Support of his Daughter . . . and since his marriage, your Petitioner has necessarily lost a vast deal of time and expended large Sums of Money in striving to obtain payment for this Debt, and it will be ruinous to him and his Family if he is kept out of it much longer.” In fact, only the federal legislature could help him; the federal judicial route had backfired since he knew not “how he should get his [federal court] Judgement satisfied whenever he obtains it, and if he should ever attempt to have an Execution levied upon the State of Georgia, it might occasion some unhappy civil Commotion, as the Inhabitants of that State conceiving [the Chisholm ruling] a degradation are resolved not to submit to it.”

Trezevant concluded his application to Congress with a general appeal for relief but added some specific suggestions to ease the way to agreement. First, he “humbly pray[ed]” that the legislature take into account “the particular hardship of his case and provide for the Payment of his Debt with Interest.” But if Congress did not think it appropriate to assume payment of the debt, it should “secure the Amount to him out of the balance due to Georgia by the United States” given its assumption of the states’ debts. Finally, as a fallback, Georgia had clearly billed Congress for a small fraction of the goods; Congress should pay at least that amount.

It is only in retrospect that Trezevant’s petition to Congress seems a hopeless or quixotic, as opposed to a totally natural, step. Indeed, the House of Representatives, which received Trezevant’s petition on March 4, 1794, apparently handled the petition through its usual

---

118Ibid., 5:261.
119Ibid.
120Ibid.
121Ibid.
122Trezevant had been able, he said, to trace a portion of the Farquhar goods up until their delivery to the “Clothier General” of Georgia, Raymond Demere. The state had charged the United States for this portion (slightly over a tenth) of the contract price as part of the settlement reached under the assumption act. The United States should secure that portion of the money to Trezevant out of the amount still due to Georgia under the terms of the settlement. Ibid., 5:261.
claims procedure even as it debated and passed the Eleventh Amendment.\textsuperscript{123} While Congress ultimately rejected Trezevant’s claim, it did not note any institutional impropriety in Trezevant’s effort to reach the legislature.\textsuperscript{124}

To the contrary, the move that would have been truly surprising—and apparently remained inconceivable—was a suit against the U.S. government in federal court. Potential claimants were everywhere; soldiers, suppliers, government officials, and, predominantly, investors, all held evidence of federal government debt that were far more direct than Trezevant’s claim on the federal government as the state’s virtual surety. Justice John Jay, in his \textit{Chisholm} decision, had suggested that such suits would be possible; the opinions of others had adverted more nervously on the applicability of a logic that leveled state and federal authorities. The language of right, remedy, and popular sovereignty made no relevant distinctions between governments: the United States surely should have been answerable for its debts in court, as was any individual. The language of Article III would not have been a problem, since it extended “to Controversies to which the United States shall be a Party.” Congress, had it wished, could have drafted legislation clearly to implement the constitutional provision by waiving any immunity.

However, very few Americans, even those staunchly Federalist, could imagine such an arrangement. Their most notable spokesmen had conducted the entire debate on funding the national debt in the First Congress on the premise that economic arrangements remained a political matter. To be sure, the Hamiltonian funding system advanced a new kind of legislative strategy, one that modeled management of public contract on private common law analogs. That, however, was only one early step in a process that would eventually make conceivable external constraint on political power over the economic relations of the state.

From 1794 on, the drama wove from state to federal legislatures. Both played characteristic roles, drawn from the delicate transitional


\textsuperscript{124}Report of Committee on Claims, Apr. 25, 1798, U.S. House of Representatives, M1267, Roll No. 1, p. 505, NARA.
moment in which the controversy arose. Legislators in Georgia, for their part, managed the Farquhar claim in a manner consistent with traditional understandings. At the same time, they sought help from the federal Congress, the body that in many ways most threatened the old regime of locally controlled political economies. By contrast, those in the federal Congress exercised their own legislative authority: they defended its most recent product, the funding system that itself diminished the power of political representatives.

So Peter Trezevant returned to the Georgia legislature in the fall of 1794. On November 28, the Georgia Senate overwhelmingly passed a resolution (17 yeas, 1 nay) adopting the report of their “committee, No. 2” on the Trezevant petition.125 The committee report recommended payment of the whole contract price, without interest, a sum of 7,586 pounds, 10 shillings, and 1 penny, in return for which Trezevant was to “give a full and ample discharge of all claims against this State.”126 The House quickly concurred, affirming that “the book of the said Robert Farquhar, containing the entry of the late claim against the State of Georgia, [had been] corroborated by the affidavits of many respectable citizens of this State, as well as by the orders of the executive council” that had authorized the contract.127 Trezevant received audited certificates from the state totaling the stipulated amount, although the certificates did not grant him the payment in specie.128 Rather, they documented the state’s debt to him and pro-

125Proceedings of Georgia Senate, Nov. 28, 1794, reprinted in U.S. House, Money Due the State of Georgia, p. 6.
126Ibid., p. 6.
127Proceedings of Georgia House, Dec. 6, 1794, reprinted in U.S. House, Money Due the State of Georgia, p. 8. A minority in the House objected on grounds that returned to the theme of commissioner Davis’s receipt of funds, added the suggestion that any material purchased was for the “use of the United States,” and rested with the contention that the “petty ledger” produced to substantiate the Farquhar claim was insufficient—“the book of original entries and other sufficient vouchers” should be required. See motions made Dec. 6, 1794, Georgia House, reprinted in ibid., pp. 7, 8. The Senate concurred on December 8, 1794, to an amendment to the resolution made by the House. Concurrence, Dec. 8, 1794, reprinted in ibid., pp. 8–9.
128The certificates documented that the “said sum is in full of the demand of Alexander Chisholm against the said State, as executor of the last will and testament of Robert Farquhar” (receipt for certificates received Dec. 9, 1794, as sworn by Peter Trezevant, Aug. 16, 1838, reprinted in U.S. House, Money Due the State of Georgia, pp. 9–10; see also Affidavits of Seaborn and John Jones, Nov. 24, 1838, reprinted in ibid., p. 10).
vided that such a sum would be "received in payment of any purchases made by him, of confiscated property, that may have been sold pursuant to the act of attainder." If Trezevant did not choose to use this kind of credit, his payment would be "otherwise provided for by the legislature." 129

When the state legislature paid Trezevant in value receivable in confiscated property (or as "otherwise provided") instead of silver or gold, it acted according to the norms that had long regulated public obligation. According to those norms, one could hardly have expected payment in hard money, a relatively recent demand by public creditors after the war. In the colonial era, provinces had paid their debts in currency that held value because it was receivable for taxes; the scarcity of currency left governments with few other options. Nor did practice change quickly after the war, when the states were heavily indebted and strapped for money. While the most ambitious creditors had lobbied for a funding plan (state or, increasingly, federal) that would pay their principal in specie and service it with interest, many and perhaps most Americans approved or at least accommodated state funding systems that devalued currency, sank debts by imposing new taxes, or paid off public creditors in confiscated goods, western lands, or other options. 130 Constructing fair resolution of the public debts had great salience as a political matter: if the payment of such debts was a responsibility that required balancing the obligations due to a wide number of people who had sacrificed for the cause in different ways, popular representatives were the appropriate ones to fashion diverse methods of funding. In the decades that followed the settlement of the Farquhar claim, the Georgia legislature did modify its contracts with state creditors several times, once calling in notes for renewal and once reducing the value of audited certificates, apparently because the legislature believed that they were held mainly by speculators. Such strategies were risky—they had to be accepted popularly as

129 Certificates issued by Abram Jones, Georgia auditor, Dec. 9, 1794, reprinted in U.S. House, Money Due the State of Georgia, p. 9.

adjustments consistent with the public faith—but they were coherent initiatives within the conventions of the time.  

The records left by the Georgia legislature discuss only the merits of the Farquhar claim and record only the selected settlement; they do not reveal why the representatives reversed themselves when nothing about the claim had changed. The *Chisholm* litigation had brought public scrutiny; shame and embarrassment presumably goaded action, although no judicial action directly threatened the state by November 1794. Perhaps as important, state legislators at this point realized that help in paying the debt might be available. They determined that the state should "urge the justice and propriety of the United States assuming the [expense of the claim] as a debt chargeable to the general government." 

That, of course, would be done *legislatively.* The Georgia general assembly had concluded in its 1791 and 1793 sessions that "a further assumption by the United States of the debt incurred in prosecution of the late war" was warranted. Now, the state legislature resolved that "the proceedings in this case be transmitted by his excellency the governor to our Senators and Representatives in Congress," requiring them to urge that the Trezevant claim be assumed. Thus Georgia turned to the federal Congress, the body leading the movement away from traditional modes of funding, for aid on an old debt; Peter Trezevant followed closely.

---

131See Report of Commissioners, Georgia, 1839, reprinted in U.S. House, *Money Due the State of Georgia,* pp. 13–15. By contrast, the renewal requirement and devaluation were rejected by the state legislature of 1839, with its standards of private law contract, ibid., pp. 15–16.

132Popular reaction to the Supreme Court's decision in *Chisholm* had already crystallized; the Eleventh Amendment had been proposed, passed, and sent out to the states; seven states had already ratified the amendment, as would Georgia by the end of November 1794. Georgia's legislators could conceivably have wished to settle in order to avoid the possibility that the Eleventh Amendment, assuming its ratification, would be construed to have prospective effect only, which would leave the state open to a damages assessment that included interest on the contract price. But such an outcome probably did not seem likely under the political circumstances as they had developed by late 1794 or indeed dispositive to a state legislature well-acquainted to defiance.


134Ibid.

On January 26, 1795, Georgia raised its claim by a motion in the U.S. House of Representatives. The motion, which may have been supported by written material from the state, requested reimbursement for the Farquhar claim; Congress referred it to its Committee on Claims. On February 17, 1795, Trezevant petitioned Congress once again, "praying compensation for supplies furnished by [Robert Farquhar] for the use of the Army and Navy of the United States, pursuant to an order of the Governor and Executive Council of the State of Georgia, during the late war." The petition does not survive, but the House committee's report — made three years later — reviews the petition's contents:

That the petitioner states that the said Robert Farquhar, in the year 1777, sold to the State of Georgia, a large quantity of dry goods, and that no payment having been made for them, the petitioner commenced an action against the said State, in the supreme court of the United States, to recover payment for said goods, but before he could obtain final judgment and execution thereon, an alteration was made in the constitution of the United States, by which it is declared, that no action in favour of an individual shall be sustained against a state, in any court of the United States, in consequence of which he was induced to accept from the said State in satisfaction of the said demand, certain certificates, acknowledging that the said State was indebted to him for supplies furnished for the continental army in the sum of seven

137Ibid., p. 182. The summary of the motion's subject matter, as recorded in the House Journal, interestingly links the state's application and the suit against it. Thus the House referred the following resolution to its committee: "That the State of Georgia be reimbursed the amount of a suit of the executors of Robert Farquhar [sic] against the said State, for sundry good sold to the said State, for the use of the troops of the United States, which suit was depending before the Supreme Court at the time of settlement of the accounts between the United States and individual States, and had been since discharged by the said State giving its obligation for the principal sum of the said suit."

It is not clear if the claim made, presumably by Georgia's representatives, was similarly stated. The House Journal reference to settlement may be to the Report of the Commissioners of the Public Debt, issued June 29, 1793, that apportioned the amounts due and from states for common costs of the war. See Ferguson, Power of the Purse, p. 333 and n. 19.
thousand five hundred and eighty-six pounds, ten shillings and one penny, receivable in payment of any purchases made by him, of confiscated property, or to be otherwise provided for by the legislature;—being only the amount of the principal of the said debt, without any interest. The petitioner prays he may be permitted to fund the said certificates.¹³⁹

The report issued by Congress on April 25, 1798, appears to be the only answer the legislature gave to the protagonists, state and individual, in the case. At that point, Congress responded simply and on the merits; its reference to the Eleventh Amendment was limited to the section of the report in which it recharacterizes Trezevant’s petition (or later assertions to the committee), quoted above.

The Committee on Claims noted that it would be “difficult at this late period to determine” whether the articles purchased from Farquhar had gone for the use of the United States and added that no evidence had been produced to that effect. The committee admitted that “probably they were applied in a manner which would have authorized a charge of the amount of them by the state of Georgia to the United States,” but pointed out that “whether such charge was made by the State and allowed by the commissioners who settled the accounts between the United States and the individual states” was impossible to determine. The committee then rejected the liability offered it by the claimants as a liability inconsistent not with the institutional capacity of the legislature, but with the settlement of war debts it had already endorsed. “If however, it could be ascertained that the amount of said articles ought to have been allowed to the State of Georgia in said settlement, and that they were not,” the committee concluded, still “an allowance cannot be now made, without breaking up all the principles on which that settlement has been made.”¹⁴⁰ The committee similarly disposed of Trezevant’s claim, noting that he did not contend “that there ever was a contract between him and the United States.” “He has,” the committee concluded “no foundation for any claim against them.”¹⁴¹ The committee recommended that the House

¹³⁹Report of the Committee on Claims, Apr. 25, 1798.
¹⁴⁰Ibid.
¹⁴¹Ibid.
neither agree to the motion nor grant the petition. On May 1, 1798, the House accepted the committee's recommendation.\textsuperscript{142}

By protecting the unique quality of their authority to determine the Farquhar claim, state and federal legislatures rebuffed the first real challenge to a constitutionalism that defined politics as the source animating the economy. But the challenge had occurred. Its roots lay in the approach to funding and public contract advocated by Robert Morris in the 1780s. Its logic was in fact articulated and extended in the very settlement Congress defended when it rejected Trezevant's petition, a settlement that expanded the amount of public debt funded according to rules newly restrictive of legislative flexibility. Its potential for the future appeared in the court suit attempted by Chisholm and Trezevant. Constructing a constitutional system around the new understanding of public obligation, written in economic rights of individual choice and commitment, in remedies available from a court without legislative intervention, and in a popular sovereignty founded in a government of separated powers that protected an apparently independent market, was a matter of the nineteenth century. The denouement of the Farquhar claim suggests the history that remains to be explored.

\textit{The Denouement}

It took almost another century before Georgia or the United States fully dispatched their liability for the war debt incurred by Robert Farquhar. The Chisholm claim was revived by petition in the state legislature in about 1838; payment, long due on the settlement, was finally obtained in 1847, when the state of Georgia passed "an act for the relief of Peter Trezevant." The act provided that Trezevant be issued bonds worth the amount of the contractual claim without interest, a total of $22,222.22 as converted. The bonds were payable with interest in ten years ($35,555.42); on January 1, 1858, the state redeemed the bonds and paid the estate of Peter Trezevant.\textsuperscript{143}

\textsuperscript{142}Ibid. I have not yet found any surviving records of the Senate debate on Trezevant's petitions or on a state claim such as that made in the House. It is, however, apparent that neither request succeeded.

\textsuperscript{143}See U.S. House, \textit{Money Due the State of Georgia}, p. 2; An Act for the Relief of Peter Trezevant, Dec. 25, 1847, \textit{Acts of the State of Georgia}, 1847 (Midgeville, 1848), p. 255;
After Georgia paid the original heir to the claim, it returned to Congress, again by the petition route, arguing that the federal government should reimburse the state after all since the original contract was for Revolutionary War supplies. The state was on the brink of recovery, favorable committee report in hand in 1860, when it seceded instead. After the Civil War, the petitioning began again. It was ultimately rewarded by a private bill providing for Georgia's reimbursement. On March 3, 1883, Congress passed "an act to refund to the State of Georgia certain money expended by said State for the common defense in 1777."144

Just when it seemed to be over, the U.S. treasurer declined to pay Georgia, claiming that a Civil War debt owed by the state should be set off against the award appropriated. In an ironic and appropriate confirmation that it was now a new constitutional era, Georgia turned to the newly established U.S. Court of Claims. The case was litigated and finally resolved there, when Georgia won its suit in 1889.145 The United States paid the state of Georgia on October 6, 1890, one hundred and thirteen years after Robert Farquhar contracted with the state for the delivery of war supplies.146 In fact, the era of legislatively centered popular sovereignty had long since passed, and the ascendancy of the courts in a new liberal order was well on its way.

**Conclusion**

Perhaps the most surprising aspect of this essay is that it can still be written. One would think that the importance of legislative remedy in the American tradition, as well as its connection to contract, would be

---

Certificate of Treasurer of Georgia, May 5, 1874, RG 46, Senate 43A-H25, NARA (certifying issuance of bonds amounting to $22,222.22 to Peter Trezevant in 1848, and payment of bonds at maturity on Jan. 1, 1858); Memorial of James A. Green, Agent of the State of Georgia to the U.S. Senate, Mar. 17, 1874, RG 46, Senate 43A-H25, NARA.

14422 Stat. 485.
145Georgia v. United States, 24 Ct Cl. 402 (1889).
146Records of the Accounting Officers of the Department of the Treasury, Records of the Misc. Divisions, Records Relating to Accounts and Claims, Sept. 6, 1790–Sept. 29, 1894, vol. 19, entry 345, RG 217, NARA.
a well-developed story.\textsuperscript{147} After all, the trail is littered with evidence of the significance of the political role: the archives of claims left in legislative files,\textsuperscript{148} the insistence by judges and commentators that the legislatures were the appropriate arenas for redress,\textsuperscript{149} the Eleventh Amendment’s complementary prohibition forbidding a citizen of one state from suing another state, and the practice of sovereign immunity by the early states generally.\textsuperscript{150} Likewise, contract is clearly the salient issue for Americans seeking remedies against the state, judging from the subject matter of the early cases and the pressure to remedy contract rather than other causes of action against the state in the nineteenth century.\textsuperscript{151}

By the end of the nineteenth century, however, the fact that legislative remedy could have functioned as part of a coherent constitutional design had been obscured, as had the singularity of contract as the kind of claim initially at issue. The vehicles of legislative remedy, special bills and specific appropriations, had become notorious sources of political corruption,\textsuperscript{152} while the claim of the courts to deliver neutral enforcement of law was at a peak.\textsuperscript{153} By 1862, President Abraham Lincoln could pronounce in sweeping terms that “the investigation

\textsuperscript{147}Floyd Shimomura’s excellent article seems to be alone in the field. Aspects of the Chisholm story told here are recorded in volume 5 of DHSC and in Doyle Mathis, “The Eleventh Amendment: Adoption and Interpretation,” \textit{Georgia Law Review} 2 (1968):207–45.

\textsuperscript{148}For example, a three-volume index of private claims records all those submitted to Congress. \textit{Digested Summary and Alphabetical List of Private Claims} (1853; reprint ed., Baltimore, 1970).


\textsuperscript{150}See, e.g., Martindale, “The State and Its Creditors”; Davie, “Suing the State.”


\textsuperscript{152}See, e.g., Charles Chauncey Binney, \textit{Restrictions upon Local and Special Legislation in State Constitutions} (Philadelphia, 1894).

and adjudication of claims, in their nature belong to the judicial department.” And by the end of the twentieth century, the legislative court that Congress had created to resolve contract claims was reordained an Article III court, that is, a court within the judicial branch. Both federal and state legislatures had waived their traditional immunity from court suit and delegated a variety of cases to their courts. Legislative organs once designed to produce remedies for individual claims atrophied.

These developments have left courts and legal scholars to puzzle over the residue of the early republic. The courts have been caught between an obligation to preserve the increasingly incongruous commands of an earlier tradition, frozen in the Eleventh Amendment, and the relentless logic of a modern state committed to a functional separation of powers and economic dealings insulated from politics; they have produced a contorted and unwieldy jurisprudence. Legal scholars, steeped like the courts in a modern world of judicially enforced rights, have been at the same time committed with only slightly more flexibility than the courts to an ideal of constancy to early constitutional authority. Their problem has been that the more vibrant the legislatively dominated tradition in the early republic, the more conspicuous would be the change required for a modern reform. They have hunted therefore for evidence that the skepticism of judicial remedies demonstrated by Americans in the early republic had been narrowly instrumental to certain ends or, at least, motivated by unworthy considerations. The underlying premise of those efforts is that the alternative, legislative remedy, was neither a meaningful nor viable element of the earlier tradition.

154 Congressional Globe, 37th Cong., 2d sess., (1862), app. 2, as cited in Shimomura, “History of Claims against the United States,” p. 655. The Court’s action in 1896 to define congressional power over claims as based in the legislature’s power to “pay the debts” of the United States, as opposed to its power over appropriations, may be part of this same change. See United States v. Realty Co., 163 U.S. 427 (1896); cf. Shimomura, “History of Claims against the United States,” pp. 668–70.


156 In a string of cases from the late nineteenth century through the twentieth, the U.S. Supreme Court enforced quite rigorously the prohibitions left on suing governments by earlier generations and, at the same time, expanded methods of evading those prohibitions by various means, including permitting suits against government officials. See DHSC, 5:4.
The dilemma of the courts and the scholars is a product of the development of modern economic liberalism and a tribute to its power. That paradigm made legislative power over economic relations with the state, epitomized by cases of public contract, untenable. The re-location of such cases to the judicial realm, by contrast, facilitated the isolation of contractual relations from continuing and unpredictable changes in social and economic circumstance, the reduction of those relations to bipolar exchanges (as opposed to agreements involving and affecting many people), and the insulation of the decision makers from popular means of expression and pressure.\textsuperscript{157}

To that end, the controversy in \textit{Chisholm} was a monument well suited. It was crisp, discrete, and bipolar, a case with few of the attributes inviting legislative calibration for circumstance and all the potential vulnerability to legislative abuse. It remained from Wilson's time to the late twentieth century a perfect vehicle for driving down legislative legitimacy and advocating the mandate of the courts to do justice or, put in somewhat later terms, the institutional competency of the courts to enforce legal rights. Contract rights, delegated to and defined by the courts, became the model for other rights, and the business of the judicial branch, operating under the premises identified above, to resolve. As the plausibility of another kind of remedy—in this case, legislative—faded, rights became increasingly and essentially identified with the remedies associated with and available in the judicial arena.

The judicialization of public contract rights greatly strengthened the hands of individuals whose claims could be clearly presented in a court forum: as practices that revalued public debt on rationales of social need faded, nominal obligations took on added sanctity and named parties wielded rights against the state independent of other

\textsuperscript{157}The best demonstration of the importance of these factors is the debate over discrimination in the payment of the public debt, conducted in the First Federal Congress. See \textit{DHFC}, 12:181–490 (Feb. 8–Feb. 22, 1790). According to those defending legislative prerogative in that context, Congress had to consider the larger political and social circumstances in which the debt was incurred and had to be paid, if it was to do justice to the creditors who had originally contributed their services or money to the United States. The argument involved multiple parties in the settlement of individual contracts. Finally, it assumed an exposure to popular response, a kind of political reactivity on the part of the public, that was substantial. For an initial investigation, see Christine Desan, “Constituting Capitalism: From Political Economy to the Law of the Market” (paper presented at the American Society for Legal History, Oct. 2000).
claims. Those who had different kinds of claims against the public, claims dependent on equitable evaluations of sacrifice in paying taxes, for example, fared less well. The judicialization of economic relations with the state in turn supported the idea that market relations with the public as well as with private individuals was an affair insulated from politics.

Those developments have helped to obscure both the political process that engendered the shape of the economic realm and the particularity of the institutional commitments that continue to determine the way it operates. The challenge for modern Americans is to understand the relationship between politics and the market itself as a public constitutional matter, intricately connected to both informed and informing matters of right, remedy, and popular sovereignty. Like those abstractions, it is also susceptible to change not acknowledged in the odd discourse of liberal constitutionalism.

---

158See Desan, “Constituting Capitalism.”