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Fletcher v. Peck and Constitutional Development in the Early United States

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One hundred years after Charles Beard's *An Economic Interpretation of the Constitution of the United States*, few scholars attend actively to that book or its specific claims. Yet it has become conventional wisdom that the movement for a new Constitution in 1787 was no democratic movement but a conservative effort to rein in the allegedly reckless policy impulses of the state governments. Power would be transferred substantially to the center, where an elite might better control the direction of policy. This conservative movement had important, Beardian economic dimensions, particularly its determination to secure the rights of the propertied against the supposed desires of the unpropertied to redistribute wealth.[1] But closely allied to this economic conservatism was necessarily a legal conservatism, perhaps even a legal counterrevolution, as Aaron Knapp's essay for this Symposium argues.[2] The Contracts Clause of the new Constitution was only the most explicit protection in the document for traditional rights of property and contract as against the state governments' demonstrated readiness to interfere with contract performance and debt collection. The triumph of the Framers of 1787, then, appears to some an abiding victory for a fundamentally conservative structure of American law and a major defeat for serious advocates of equality and democracy.[3]

[1] For an important modern statement of this point, see generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990).

[2] Aaron Knapp, *The Legal Counterrevolution: The Jurisprudence of Constitutional Reform in 1787*, 47 UC DAVIS L. REV. (2014).

[3] *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 53-65 (1969) (demonstrating the elitism of the Constitution even as it formally rests on popular sovereignty). *See generally* NEDELSKY, *supra* note 1.

The truth, though, is that, for all the conservatism of 1787, the framing and ratification constituted only one moment in the fluid history of American constitutionalism. If the years before 1787 accommodated a widespread — though far from unanimous — constitutional egalitarianism, the adoption of the Constitution represented only a momentary defeat for that view.[4] Ratification did not send the egalitarians home to lick their wounds and never return. Rather, a range of constitutionalisms survived ratification, all of them now necessarily identifying themselves with the Constitution without feeling obligated to take the Constitution's conservatism as given. The Constitution became subject to interpretation as soon as it went into effect, and the years after 1789 revealed a multi-handed contest both to control the meanings of particular provisions of the Constitution and to locate the authoritative interpreters of the Constitution.

This Essay will sketch some of the main lines of struggle over control of the Constitution in the first generation after ratification by focusing on a single major issue, the Yazoo land scandal, which brought out a range of theories of the Constitution and republican authority, eventually generating the landmark Supreme Court case *Fletcher v. Peck*,[5] often said to be the first case in which the Supreme Court struck down a state statute for unconstitutionality. The Yazoo story began with the corrupt sale of millions of acres of Georgia public lands in 1795, climaxed with the *Fletcher* case in 1810, and concluded with congressional resolution of all claims in 1814. During these years, Radical Republicans, moderate Jeffersonian Republicans, Federalists, and the Supreme Court struggled to determine whether the meaning of the Constitution belonged to the people themselves, the people's elected representatives, or the life-appointed justices of the Supreme Court.

In the Yazoo fraud of 1795, companies of land speculators bribed much of the Georgia legislature to execute a mammoth land sale — most of present day Alabama and Mississippi — to the companies for a mere $500,000.[6] The speculators' title was thus clouded by the flagrant corruption and also by continuing Indian claims to much of the land,

[4] *See* GERALD LEONARD, THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS 18-19 (2002) (explaining that the rise of the Jacksonian Democratic Party in the 1820s and 1830s represented the ascendancy of constitutional egalitarianism two generations after ratification of a designedly elitist Constitution).

[5] 10 U.S. (6 Cranch) 87 (1810).

[6] C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* 3, 7 (1966).

claims that could only be extinguished by the United States. In spite of these clouds, the new owners went north and resold their claims to purchasers who may or may not have been aware of the original fraud. Meanwhile, in Georgia, a political movement arose to invalidate the sale, and in 1796, a newly elected legislature passed "AN ACT declaring null and void a certain usurped act,"[7] that is, an act voiding the prior land grant.

Georgia's action — almost unintelligible to us today — asserted the legislature's right to review the constitutionality of legislation, without recourse to the courts and regardless of the federal constitutional protection for contracts. The 1796 Act was not a conventional repeal but a finding and declaration that the 1795 Act had never been law. In this respect, it foreshadowed Jefferson's famous Kentucky Resolutions, which (for all their differences) similarly insisted on a sovereign state's authority to legislatively declare a statute unconstitutional (in that case, the federal Sedition Act) without recourse to the judiciary.[8] The Georgia rescinders (for lack of a better term) might thus have expected the strong support of the Jeffersonian Republican Party, defenders of states' rights and extra-judicial constitutional enforcement. But the Georgians had also provocatively challenged some common law rules of contract. Their actions thus directly assaulted not just Federalist constitutionalism but that of the moderate parts of the Jeffersonian movement, which shared the Federalists' reverence for common-law legalism. For that and other reasons, the Republicans would split badly over the claims of the putatively innocent northern purchasers of the Yazoo lands.

The more-radical Republicans defended Georgia's actions in the language of popular sovereignty and states' rights. For them, such popular constitutional review rested on even firmer footing than did judicial review. The rescinding statute was not a mere legislative act. Rather, it represented the will of the people themselves, who had deputized their representatives to act in a special constitutional capacity in response to exigent circumstances. Local resolutions addressed to a state constitutional convention, declarations of grand juries throughout the state, and popular meetings out of doors had specially "invest[ed] this Legislature with conventional powers"; that

[7] The Georgia Repeal Act of 1796, *reprinted in* MAGRATH, *supra* note 6, at 127-29 [hereinafter Georgia Repeal Act].

[8] *See* Gerald Leonard, *Jefferson's Constitutions*, *in* CONSTITUTIONS AND THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM JOHN FORTESCUE TO JEREMY BENTHAM (D.J. Galligan ed., forthcoming 2014) (manuscript at 21-22); *see also* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 719-21 (1993).

is, with the powers of the people themselves, as if assembled in convention.[9] The people of Georgia had thus exploited the wide repertoire of "constitutional" options in the early nation to put their sovereignty into practice.[10] In so doing, the people and their delegates in the legislature reviewed the original Act and declared the land grant void — without effect from the moment of its supposed enactment — on the basis of the fraud and other constitutional defects.

This apparently Jeffersonian expression of popular constitutional review, however, proved controversial, even among Jeffersonians. Jefferson, Madison, and a moderate minority of the Republican Party would seek a compromise solution. For Federalists like John Marshall, moreover, the notion of the people taking questions of legal interpretation into their own hands perverted the Constitution. Adjudication belonged in courts, just as legislation was delegated to carefully designed legislatures. The people remained sovereign and so elected their representatives and even amended the Constitution. But, for Federalists, "popular sovereignty" must be bounded by law, by close adherence to the traditions of the common law and to the courts' commitment to reason rather than will.[11] In this belief, they were not far from Jefferson himself, whose First Inaugural insisted that the people's sovereign acts must not forsake reason for pure, popular will.[12] And they could point to the Constitution of the United States, which placed the judicial power in the courts.[13]

The subsequent history of Yazoo played out as an extended series of tactical moves by Georgia, by Congress, by the parties and their leaders, by the President, and by the federal courts, navigating between the democratic and the legalist approaches to the Constitution with at least one eye on the whirl of practical politics. At each step, the moves revealed important beliefs about the nature and development of the Constitution but equally the inevitability that constitutional development would rest on the imperatives of political competition and pragmatic compromise, not mainly judicial

[9] Georgia Repeal Act, *supra* note 7, at 135.

[10] On the variety of means by which the people sought to exercise their constitutional authority, see generally SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828 (1999); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[11] *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 204-09 (2001).

[12] THOMAS JEFFERSON, *First Inaugural Address*, *in* 33 THE PAPERS OF THOMAS JEFFERSON 148, 148-52 (1801), *available at* http://www.princeton.edu/~tjpapers/inaugural/infinal.html.

[13] *See* U.S. CONST. art. III.

reasoning. Soon after Georgia purported to void the sale and word began to spread that the Indian claims might undermine it anyway, a pamphlet war flared among the buyers and sellers of the Georgia grants. A pamphlet by the South Carolina Federalist and participant in the Yazoo speculation, Robert Goodloe Harper,[14] drawing reinforcement from an opinion letter of Alexander Hamilton,[15] argued that no legislature could void the enactments of a prior legislature. Rather, "the force, validity, or meaning of a legislative act, is purely a judicial question, and altogether beyond the province of the legislature."[16] Moreover, "[t]his is a fundamental principle of all our constitutions which declare, that the judicial and legislative powers shall be distinct and separate. . . . As well might the legislature try causes, or hear appeals, as attempt to expound, enforce, or declare void, one of its own acts."[17] Further, even if the merits of the grant were to be considered, Harper's legalist view was that the grants were manifestly contracts and that, "[i]t is an invariable maxim of law, and of natural justice, that one of the parties to a contract, cannot by his own act, exempt himself, from its obligation." Even a state "could no more relieve itself from the obligation, by any act of its own, than an individual, who had signed a bond, could relieve himself from the necessity of payment."[18] By such arguments, Harper and Hamilton hoped to reassure the public of the validity of the grant and the security of the claims then being sold and resold.

On the opposite side, Abraham Bishop wrote perhaps the most famous anti-Yazoo pamphlet.[19] Bishop was a Connecticut Republican who evidently purchased a Yazoo claim substantially on credit. As he came to realize the multiple shadows on his title, he wrote the pamphlet as a polemic against the sellers who sought his remaining payments, explaining the Republican defense of Georgia's refusal to recognize the grant. Starting with the assertion that Georgia had only contingent claims to the land in the first place, given that Indian nations remained in possession and that only the federal government could legally dispossess them, Bishop then vindicated the authority of

[14] *See* ROBERT GOODLOE HARPER, THE CASE OF THE GEORGIA SALES ON THE MISSISSIPPI CONSIDERED, *reprinted in* MAGRATH, *supra* note 6, at 140-48.

[15] *See* ALEXANDER HAMILTON, OPINION ON THE GEORGIA REPEAL ACT, *reprinted in* MAGRATH, *supra* note 6, at 149-50.

[16] MAGRATH, *supra* note 6, at 141.

[17] *Id.* at 141-42.

[18] *Id.* at 142.

[19] *See* ABRAHAM BISHOP, GEORGIA SPECULATION UNVEILED, *reprinted in* MAGRATH, *supra* note 6, at 152-71.

the state of Georgia to void a grant previously made. He asserted that, "This is the sovereign independent state of Georgia, having a right to make or repeal their own laws at pleasure, and this right wholly uncontrollable." Moreover, the laws of Georgia "must be such as are recognized by the people, legally represented." To him, it was obvious that "a legislature may declare a pretended act void" in any number of circumstances: when pretended to be enacted in the absence of a quorum; when the speaker or president of the body is bribed to misrepresent the outcome of the vote; when necessary votes come from those who have not taken prescribed oaths; and when the act violates the constitution or the votes come from those materially interested in the outcome. Such hypothetical and not so hypothetical circumstances drove home the fundamental point that a state was not the same as a private party to a contract but stood in a unique place. It was an independent sovereignty that must be able to control the question of what laws it had enacted and what "pretended acts" it might repudiate as void and no act of the state at all. "Take this power from a legislature, and where is the sovereignty of the state?"[20]

As to the common law doctrines that would supposedly rescue the sellers of the Yazoo claims, Bishop lumped them with the many "delusions" under which he thought the sellers to be laboring. The notions that "a grant is in its nature irreversible" and that "book-principles relating to real estate and to notes are in favor of the settlers" ran up against the more fundamental principles of sovereignty: since the Revolution, each state had gained and never relinquished sovereignty, Bishop presumed.[21] Implicitly dismissing the idea that the Constitution had subjected the states to contract law enforceable in federal court, Bishop moved directly to the conclusion that "*an independent power can make, or unmake grants at will; because no power can decide on the morality, equity, or policy of their measures*."[22] Be legal doctrine what it may, the reasonings of judges and the traditions of the commercial law had only as much authority as the unreviewable will of the people chose to give them. Even if the sellers had all morality on their side, the fact would remain that the sovereign power on the other side was "beyond their control."[23] And, although Bishop's polemic did not mention it, the Supreme Court's recent failure to vitiate the sovereignty of the states offered Bishop good grounds for treating state sovereignty as a given. The Court had

[20] MAGRATH, *supra* note 6, at 155.

[21] *See id.* at 162-63.

[22] *Id.* at 163.

[23] *Id.*

attempted in *Chisholm v. Georgia*[24] to render the states suable in federal court and thus subject to the general law of contracts, only to be soundly undone by the new Eleventh Amendment's affirmation of state sovereignty under the Constitution.[25]

The pamphlets helped set the terms of constitutional debate, but the fate of the claimants and the lands fell to Congress. And the Republicans in Congress were divided both by constitutional principles and by competing views of how to maintain the ascendancy of republicanism in the face of the continuing threat of Federalist aristocracy. In 1802, Congress made the Yazoo problem its own by negotiating Georgia's cession of any claims it had to the territory (much has it had negotiated cession of western lands from several other states) in return for a payment of $1.25 million, also reserving 5 million acres of the territory as a fund to satisfy any outstanding claims.[26] At the same time, Congress created a commission of cabinet luminaries (Secretary of State James Madison, Secretary of the Treasury Albert Gallatin, and Attorney General Levi Lincoln) to investigate the claims to the territory and propose a resolution. Constituting most of Jefferson's cabinet, these commissioners can fairly be seen as representing the views of Jefferson as well as themselves. The commissioners transmitted their report to Congress in February 1803.[27] In the report, these legalists avoided vindicating popular constitutional control and distanced themselves from the idea that "the Legislature of the State of Georgia was competent" to void the land grant. At the same time, they expressed "no hesitation" in agreeing with Georgia that "the title of the claimants cannot be supported." Still, the commissioners departed from the Georgian view on what to do with the claims. Notwithstanding the claimants' lack of title, the commissioners "nevertheless, believe that the interests of the United States, the tranquility of those who may hereafter inhabit that territory, and various equitable considerations which may be urged in favor of most of the present claimants, render it expedient to enter into a compromise on reasonable terms."[28]

The commissioners did not explain further, but they had committed themselves to a few propositions: first, that the doctrine of states'

[24] 2 U.S. (2 Dall.) 419 (1793).

[25] *See* WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 188-202 (1995).

[26] *See* MAGRATH, *supra* note 6, at 35.

[27] *Id.* at 36.

[28] JAMES MADISON, ALBERT GALLATIN & LEVI LINCOLN, GEORGIA LAND CLAIMS, H.R. DOC. NO. 7-74 (Feb. 16, 1803), *reprinted in* 1 AMERICAN STATE PAPERS, PUBLIC LANDS 120, 122 (Walter Lowrie ed., 1834).

rights probably did not go so far as to authorize a legislature to break the contract of a prior legislature, even if, second, the Yazoo claimants could not in fact sustain their "titles" under the law; and, third, many of the current claimants, lacking timely notice of the fraud, might have equitable claims of some sort — of a sort that might be recognized in court, presumably — even if what they bought was never actually good title. The report thus tried to straddle the positions of different parts of the Republican Party, opening room for political compromise on a question that the populist, states'-rights Radicals and the legalist Federalists both saw as a matter of pure constitutional principle. For the moderate Republicans, compromise was essential for multiple reasons: because they were sympathetic both to the populist principles of the Radicals and to the legalism of the Federalists; and because, as a practical matter, the party needed to conciliate powerful New England Republicans, who were deeply invested in Yazoo claims at the same time that they were indispensable to the ongoing dismantling of Federalist hegemony in its strongest region.[29]

For John Randolph, Virginia's radical leader of the House Republicans,[30] however, principles of states' rights and popular sovereignty were more important than the conciliation of nominal, New England Republicans. The latter relied on characteristically Federalist arguments to legitimate their morally corrupt claims. So these radicals, who generally could command a majority of the party but only a minority of the House, firmly opposed any compromise. To indulge any Yazoo claims at all and to disrespect the Georgia legislature's reviewing authority was to bow to the legalist position that state and popular sovereignty must yield to judge-made commercial law.

Congress had set aside 5 million acres of the Georgia cession for the purpose of settling claims to those lands in whatever way it ultimately chose. In early 1804, the House returned to the commissioners' proposal that the government settle with the Yazoo claimants. Now Randolph drew a line in the sand, proposing a series of resolutions to the effect that "no part of the five millions of acres . . . shall be appropriated to quiet or compensate any claims derived under any act, or pretended act, of the State of Georgia" of 1795. The resolutions insisted on the radical proposition that legislators are always subject to the people's overruling of their acts whenever they should stray from "the public good." When legislators act "to promote their own private

[29] *See* MAGRATH, *supra* note 6, at 30-31, 38-47.

[30] *See* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 19-20 (1971); *id.* at 39-49.

ends," then "it is the inalienable right of a people . . . to revoke the authority thus abused, to resume the rights thus attempted to be bartered, and to abrogate the act thus endeavoring to betray them."[31]

There were at least two major problems with this assertion. First, the claim that the people could override the doings of the legislature contradicted the legalist notion that established principles of contract law as well as established principles of constitutional law limited what the people could do. But, second, even those who accepted the right of the people at any time to reclaim all delegated power and repudiate the contracts of their legislature still had to explain how one could tell when the people — as opposed to self-appointed demagogues — had spoken in this way. Nevertheless, Randolph confidently asserted that it was "the good people of Georgia, impressed with general indignation," who voided the act, choosing for their mechanism the subsequent legislature's rescinding act, enacted "under circumstances of peculiar solemnity, and finally sanctioned by the people, who have subsequently ingrafted it on their constitution . . . ."[32] The "circumstances of peculiar solemnity" were not explained, but Randolph presumably referred not only to whatever mood hung over the capital as the legislature exercised its "conventional powers" but also to the collected acts of popular resistance to the original act, via grand juries, public gatherings, and the like.[33] These doings, combined with the fact that the new Georgia Constitution of 1798 subsequently ratified the voiding of the original grant, were enough to demonstrate to Randolph's satisfaction that the voiding of the grant was the act of the sovereign people.[34] And, indeed, it seems fair to say that, if ever the people of a state stepped forward generally and unambiguously to vitiate an official act, then the people of Georgia did so in 1795. In all of the long congressional debate on the subject, no one (to my knowledge) tried to argue otherwise. Rather, defenders of the Yazoo claims merely insisted that, be the circumstances what they were, the Georgia legislature could never step into the shoes of a court to void a contract.

When debate resumed on Randolph's resolutions some days later, on March 7, 1804, Randolph sketched the current state of parties in the House, explaining that the hopeless minority of Federalists had successfully divided and conquered the huge majority that were the Republicans, manufacturing for the purpose disingenuous states'-rights arguments in favor of the compromise. The defenders of the

[31] 13 ANNALS OF CONG. 1039 (1804).

[32] *Id.* at 1039-40.

[33] *See* Georgia Repeal Act, *supra* note 7, at 135-36.

[34] *See* 13 ANNALS OF CONG. 1039-40.

land sale now insisted that for Congress to question the validity of the 1795 grant would be to invade the prerogatives of a sovereign state. An amused Randolph sardonically celebrated the Federalists' conversion to states' rights principles before ridiculing the idea that recognition of the Yazoo claims would properly respect states' rights. Georgia itself had declared the invalidity of the putative statute, and states'-rights principles commanded Congress to respect that determination, not the prior fraud. Moreover, Randolph explained that, in instructing the commissioners on the scope of their authority to recognize and compromise this or that claim, the House could not avoid determining that the claims either had or had not a basis in law. Any indulgence of the claims amounted to a legitimation of the 1795 grant and a congressional striking down of the 1796 declaration of unconstitutionality. The only rightful course available to the House, therefore, was to avoid such legitimation by recognizing Georgia's own absolute voiding of all claims under the corrupt Yazoo grant. Here, he again outlined the evidence that this voiding was indeed the act of the state as a whole, supported by an allegedly unanimous people and subsequently enshrined in the state constitution itself.[35]

The House ultimately voted to postpone any consideration of the resolutions and returned to the Yazoo issue in its next session, almost a year later. Randolph again took the lead for the Radicals, arguing that the law was on his side, but more importantly insisting that, even if it was not, the Yazoo claims constituted such an exceptional case that "municipal jurisprudence" could not be applied but only "first principles": "Attorneys and judges do not decide the fate of empires."[36] The case might be about land titles, but it did not belong in court. Rather, it belonged in the hands of the people of Georgia, who had already lived up to their responsibilities and declared the law void.

In contrast to Randolph's high-flying rhetoric, moderate Republican advocates of compromise insisted that the proposal did not involve the eternal fate of republicanism in its struggle with Federalist aristocracy. Rather, a compromise would simply reflect the fact that the claimants had just enough color to their legal claims that it behooved the United States to settle with them and remove the clouds on a vast tract of land. Thus, Representative James Elliot of Vermont, declaring himself as much a democratic republican as any in the House,[37] noted that the

[35] *Id.* at 1109-11.

[36] 14 ANNALS OF CONG. 1029-30 (1805).

[37] *See id.* at 1041. Magrath labels Elliot a Federalist, but the available evidence suggests the accuracy of Elliot's own declaration that he was a Republican. *See* Eugene L. Huddleston, *Indians and Literature of the Federalist Era: The Case of James Elliot*, 44

Georgia cession and Congress's embrace of that cession certainly contemplated a pragmatic settlement of the claims. The matter was simple:

> We are about to make arrangements for carrying into effect a solemn stipulation in the treaty with Georgia, and a solemn act of our predecessors, by devoting a part of the five millions of acres, specially reserved for that purpose . . . to the extinguishment of the colorable claims of equitable claimants.[38]

Extended debate over four days ended in seeming victory for the compromisers. The House voted by a small margin to endorse a report of the Committee of Claims that had recommended the appointment of a new commission with authority to settle the claims with finality.[39] Yet, when the Committee later reported a bill to implement that resolution, the House ignored it.

Debates over the Yazoo claims would resurface in the next Congress as well, but the radicals always maintained enough strength to prevent any authorization of a settlement. The Yazooists consequently turned their attention to the courts. In fact, the collusive suit of *Fletcher v. Peck* had been pending without action in federal court in Massachusetts since June 1803.[40] The parties were the buyer and seller of claims to substantial Yazoo lands, Fletcher nominally challenging Peck's title. But, in reality, both hoped for a ruling that the claims were good so that Peck could sell and Fletcher could buy with profit to both. No one in the case sought to argue earnestly that the titles were invalid. But the suit did not move forward in 1803 or for the next several years. At that time, the Radicals were aggressively impeaching Federalist judges, convicting one in the Senate before coming up just short of conviction of Supreme Court Justice Samuel Chase in 1805.[41] It stands to reason that the Yazooists preferred to await the outcome of their claims in Congress, supported by the Administration, rather than press forward for vindication by judges who would be looking over their shoulders at an aggressive, anti-legalist Congress. By 1806, however, Congress had repeatedly failed to produce a compensation

NEW ENG. Q. 221, 231-32 & n.44 (1971).

[38] 14 ANNALS OF CONG. 1041.

[39] *Id.* at 1173.

[40] Lindsay G. Robertson, *"A Mere Feigned Case": Rethinking the* Fletcher v. Peck *Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 252-53.

[41] *See generally* ELLIS, *supra* note 30, at 69-107 (detailing the events of Judge Pickering and Justice Chase's impeachment proceedings).

law, and the threat of impeachment of federal judges had withered with Chase's acquittal. The courts newly looked like the most eligible avenue for the Yazoo claimants, and so the *Fletcher* case was finally tried to a pro-Yazoo conclusion. But that was only the first step, since only a Supreme Court endorsement of that result would apply nationwide and have the sort of influence in Congress that the Yazooists wanted.[42]

After years of efforts to compromise claims of between 35 and 50 million acres for a mere 5 million acres, the case would now go up to the Supreme Court with at least the formal potential to grant the Yazooists the entire, vast tract of land. And when the case got to the Court, it found a Chief Justice who was himself both a seasoned land speculator and a vigorous common-law legalist.[43] Although three of the five justices who would decide the case were Jefferson appointees, they generally shared Marshall's legalism and yielded to his view of the case.[44]

Marshall's opinion[45] largely recapitulated the legalist arguments that had been made at length by the pro-compromise members of Congress. Marshall insisted that the land grant was a contract within the meaning of the federal Contracts Clause. He then offered a kind of back-handed respect to state sovereignty by disregarding the charges of corruption. The Court would not disregard a statute bearing all the forms of a Georgia law.[46] Of course, there was essentially no doubt that, in the most innocent version of events, the 1795 legislators had sold much of the state's land to themselves, and further that Georgia had already decided for itself that the 1795 Act was no law. But, for Marshall, the people of a state had no power to say what its law was. The people, he insisted, could only act through their constitutionally authorized agents,[47] not on their own. The task of declaring the law was for judges, not the people, and no court could recognize an attempt to "devest" property rights in the name of a state. Rather, "certain great principles of justice," "those rules which would have regulated the decision of a judicial tribunal," must always govern, and

[42] *See* MAGRATH, *supra* note 6, at 50-59 (describing the Yazooists' likely calculations).

[43] NEWMYER, *supra* note 11, at 36-38.

[44] MAGRATH, *supra* note 6, at 63. The Jeffersonian Justice Johnson did write a separate concurrence of some interest, but it did not substantially deviate from Marshall's legalism.

[45] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[46] *Id.* at 129-31.

[47] *Id.* at 132-33.

those rules included the rule of equity that protected good faith purchasers, even when sold a defective title.[48] To suppose otherwise, Marshall argued, was to disregard the law and usurp the place of the judiciary, thus ignoring the very nature and limits of legislative power and the principle of separation of powers.[49] Moreover, recognition of the legislative voiding of the sale would flout the federal Constitution's "bill of rights for the people of each state"; that is, the Contracts Clause, as well as the bans on bills of attainder and ex post facto laws.[50] To Marshall and other Federalists, Georgia's legislature exhibited exactly the vices of the legislatures of the 1780s, the very legislative vices that the Constitution had been designed to prevent.

The Yazooists' resounding judicial victory, however, did not put money in their pockets. Various obstacles remained to their claiming and reselling land that was in a distant location and that, in many cases, already had settlers on it. So they returned to Congress once again.[51] There, the Court's opinion no doubt had some influence, but no one considered actually implementing the logical remedy implied by the court — recognition of the full title of the claimants to the vast area that would soon constitute most of Alabama and Mississippi. Rather, while Radical Republican orthodoxy continued to impede the progress of a compensation bill, the imperative of facilitating settlement finally overcame the lingering congressional doubts about the "'strict legality' of the claimants' title."[52] In 1814, Congress at last enacted a compensation law, appropriating the long-reserved 5 million acres for the purpose of settling the claims. The Yazooists, for their part, unhesitatingly accepted this roughly one-eighth compensation for the "titles" that the Court had impotently recognized.[53]

Fletcher had thus failed to control the question of the Yazoo claims, proving the Court just one of several important sources of legal and constitutional meaning. But it illuminated the range of constitutionalisms available in the generation after ratification of the Constitution. For the heirs of the most radical Antifederalists, the events in Georgia enacted the true meaning of popular sovereignty. Moderate Republicans, however, embraced a pragmatic legalism, defending all at once the forms of law, states' rights, and pragmatic political compromise. For moderates, unorthodox manifestations of

[48] *Id.* at 133-34.

[49] *Id.* at 135-36.

[50] *Id.* at 137-38.

[51] MAGRATH, *supra* note 6, at 85-97.

[52] *Id.* at 94.

[53] *See id.* at 99-100.

"popular sovereignty" were not the way to go, but neither was unthinking deference to the courts. Rather, Congress had its own important role in giving operative meaning to the Constitution, just as the Court had its role. In the Yazoo case, for example, Congress attended to lawyerly considerations, both to doubt the "strict legality" of the original sale and at the same time to respect the grounds on which the Court defended the equitable claims of innocent purchasers. But that did not mean that Congress would simply defer to a judicial perspective on the claims. Rather, it sought to settle the legal and constitutional claims in the political arena, recognizing but compromising both the legal claims of the Yazooists and the claims to sovereignty of Georgia and the American people more generally.

On the Supreme Court and among the Federalists, common-law legalism reigned. The Court deemed itself the only legitimate and reliable source of legal interpretation. And it used its special status to sanctify those rights of property and contract that it thought the foundation of civilization as well as the core values of the Constitution itself. To Marshall, *Fletcher*'s importance lay not in its pioneering invalidation of a state law but in its vindication of a legalist, common-law Constitution.

In sum, the original Constitution had indeed represented an important victory for the conservative forces of 1787–1788, but the story of the Yazoo scandal and *Fletcher v. Peck* demonstrates that that victory carried only so far. While Marshall, the Federalists, and the Supreme Court did all in their power to vindicate the common-law Constitution of contract and property rights along with judicial supremacy, they could not control the meaning of the Constitution in practice. The radical heirs of the Antifederalists gained office in large numbers, ultimately driving the ascendancy of the Jacksonian Democratic Party and the marginalization of the Court.[54] And, as the Yazoo events illustrated, they insisted on a populist Constitution that empowered the people to override the doings of their legislatures and their courts alike, determining for themselves when their agents had strayed from their delegated tasks and reserving to themselves the final authority to say what the law was and to dispose of legal claims. Meanwhile, the moderate, legalist Republicans insisted on a Constitution that neither resorted to direct popular control of legal

[54] *See generally* LEONARD, *supra* note 4 (describing the ascent of the two party system and abandonment of antipartyism); Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221 (2001) (detailing the adoption of the two party system).

claims nor erased popular will in deference to judicial claims of special expertise. Rather, consistent with Jefferson's famously departmentalist approach to constitutional interpretation,[55] all branches of government and the people themselves had rightful claims to interpret the Constitution when acting within their legitimate spheres. The people of Georgia might instruct their legislature to disregard an act they disapproved. Marshall and the Court would necessarily interpret the law and the Constitution when resolving Fletcher's claim against Peck, however feigned. But none of that prevented Congress too from stepping in to take the larger, national view of the controversy and interpose a statutory settlement of all claims. That settlement became final not because the courts or the people were constitutionally required to accede to Congress's will but because, by 1814, the nation was finally ready to accept that settlement. Future constitutional controversies, similarly, might be settled by popular movements, by state action, by congressional action, or by the courts, as circumstances dictated. But no dogma of constitutional authority — including Marshall's insistence that the Constitution had granted supremacy to the Supreme Court[56] — would ever grasp final victory.

[55] *See, e.g.*, ELLIS, *supra* note 30, at 66 (describing Jefferson's view that each branch is empowered to decide constitutional issues).

[56] Beyond the implications of *Fletcher* on this point, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-01 (1819).