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Editors’ Preface

Rarely can one say that a study of a case is definitive. Charles Hobson’s study of *Fletcher v. Peck* (1810) is the exception to this rule. It is difficult to see how it can be surpassed.

The case itself is a tangle of land speculation, state building, corruption, and ambition that is worthy of study in itself and opens a window on land transactions, Indian relations, and politics in the early nation. The scene shifts from the frontier to the courtroom and from Georgia to New England, as it seemed the entire nation had a financial interest in the Yazoo lands.

Hobson’s mastery of the details of the litigation is matched by his intimate understanding of the Marshall Court. His exposition of the legal story is both clear and technically accurate. A leading student of Marshall, Hobson presents a cast of characters that also includes sharp dealers like Robert Morris, hot-headed politicians like James Jackson, and able counsel like John Quincy Adams to tell a story full of dramatic twists and fascinating turns.

The case is surely a landmark worthy of a first-rate study. It established judicial review of state legislative proceedings, provided a gloss on the contract clause of the Constitution (extending it to acts of states themselves), and established the preeminent role of the High Court in private law matters. As Hobson concludes, “Yet *Fletcher*, like *Marbury*, transcended its peculiar circumstances to become the foundation for the Marshall Court’s effort to fashion the contract clause into an effective instrument to restrain the legislative powers of the states.”

This is must reading for any student of our early law and our early politics.
The idea for this book arose around the turn of the present century when I learned of the University Press of Kansas series Landmark Law Cases and American Society. A few years earlier the press had published The Great Chief Justice: John Marshall and the Rule of Law, which included a chapter on Marshall’s contract clause opinions. In response to my inquiries, editor-in-chief Michael Briggs informed me that series editors Peter Hoffer and N. E. H. Hull were open to my participation and that I could choose the contract case or cases I preferred to write on.

This was in May 2000. In what proved to be an ominous pattern, I set the matter aside, mostly out of sight though not entirely out of mind. After a lapse of more than two years, Mike Briggs inquired if I was still interested and would be willing to put together a proposal, assuring me there was “no rush.” This gentle prodding succeeded in eliciting a proposal, which I submitted early in 2003. After review, the proposal was accepted and I signed a contract in May of that year with Fred M. Woodward, then director of the press. In signing, I agreed to deliver a manuscript by August 2006. Publication was scheduled for fall 2007. The irony of failing to fulfill the strict terms of a contract for a book on the contract clause has weighed heavily on me. It is some consolation that actual publication has occurred less than ten years after the stipulated date.

With great forbearance the press granted me successive reprieves on hearing my pleas that ongoing professional commitments prevented my timely compliance. I thank Mike Briggs in particular for his kindly indulgence over the years when I had to give primary attention to two scholarly editions: first, The Papers of John Marshall, the twelfth and final volume of which was published in 2006; then three volumes of St. George Tucker’s Law Reports and Selected Papers, published in 2013. By the latter date I had no more excuses. That year Charles T. Myers introduced himself as the new director of the press and as having taken over responsibility for the Landmark Law Cases series. I was much gratified (and relieved) by his warm encour-
agement and willingness to work with me. Like Mike Briggs he has shown tact and patience in coaxing me to the finish line.

I chose Fletcher v. Peck as my contribution to the series because of its undoubted landmark status as the first case to expound the contract clause and as the first application of judicial review to a state law. In both these respects the case provided the occasion for Chief Justice Marshall to shape the development of American constitutional law. Fletcher also had a decided narrative advantage in having as its “backstory” Georgia’s land sales of 1795, perhaps the most infamous land-speculating venture in American history. The law case grew out of and was part of the broader episode known as “Yazoo,” which roiled the politics of the new nation for nearly two decades. Another consideration was that no general work on the subject had appeared since 1966. In the ensuing decades a proliferation of studies has significantly enriched our knowledge and understanding of American constitutional history and law. The time seemed right to look at this case anew, aided by the perspectives of recent scholarship.

My indebtedness to this scholarship should be evident in the appended bibliographical essay. At an early stage I had the benefit of valuable comments and suggestions from two readers of the original proposal. At a late stage Chuck Myers read the manuscript with the critically discerning eye one would expect from the head of a university press. Besides catching errors, he identified passages that needed clarification and revision.

I would like to recognize persons and institutions who aided my research. Walter Hickey, archives specialist with the National Archives at Boston (now retired), supplied copies of the records and proceedings of Fletcher v. Peck as heard in the U.S. Circuit Court from 1803 to 1807. These records were particularly valuable for identifying the lawyers who represented Fletcher and Peck. Frank C. Mevers, then archivist of the state of New Hampshire, sent me information about Robert Fletcher not otherwise easily accessible. Melissa Bush of the University of Georgia’s Hargrett Rare Book and Manuscript Library made copies of that institution’s New England Mississippi Land Company Records, much of it relating to Perez Morton’s tenure as the company’s agent.

For more than three decades I had a congenial academic home
at the College of William and Mary, both as member of the staff of the Omohundro Institute of Early American History and Culture and as a resident scholar at the William and Mary School of Law. The Swem Library and the Wolf Law Library were indispensable to my research, not only for their holdings of actual books and other sources but also and more importantly for giving access to a vast virtual archive of online databases.

I am deeply grateful to my wife, Ann, for many years of love and companionship. She cheerfully lifted depressed spirits and sent me back to the writing table with renewed conviction that I was equal to the task.
The Great Yazoo Lands Sale
Map showing the Yazoo grants of 1795. From *The South in the New Nation, 1789–1819* by Thomas P. Abernethy, University Press, Louisiana State University Press. Reprinted with permission. All rights reserved.
Introduction

The case of *Fletcher v. Peck* (1810) is a landmark of American constitutional law for two reasons: It was the first time the Supreme Court invalidated a state law as contrary to the Constitution and the first time the Court applied the clause of the Constitution that prohibits the states from impairing the “Obligation of Contracts.” Although in *Marbury v. Madison* (1803) the Court had struck down a portion of a federal statute, the practice of what came to be known as “judicial review” had its true beginnings with the exposition of the contract clause in *Fletcher*. Ideas about the judiciary’s authority to void legislative acts were still in flux at the time of this decision, with jurists appealing to extraconstitutional principles as well as specific provisions of the Constitution. Chief Justice John Marshall interpreted the contract clause in a way that resolved this debate in favor of invoking the written constitutional text, a development of great significance in consolidating the practice of judicial review.

Marshall served as chief justice of the United States from 1801 to 1835, longer than any other chief justice to date. During his tenure the contract clause emerged as the constitutional expression of the doctrine of “vested rights,” which held that rights acquired by individuals under law—most importantly, the right to the security and free enjoyment of property—were to be regarded as inviolable, not to be infringed by governmental power. Vested rights, in the words of twentieth-century scholar Edward S. Corwin, became “the basic doctrine of American constitutional law.” Through much of the nineteenth century the contract clause was the Supreme Court’s principal weapon to restrain state interference with the vested rights of property. *Fletcher* established a precedent for an expansive reading of the clause that brought under judicial scrutiny a wide spectrum of state laws. It established the principle that public as well as private contracts
were protected against impairment and extended the meaning of contract to include grants of land. In subsequent cases the Court voided a New Jersey law repealing a tax exemption on land formerly belonging to Indians, struck down New Hampshire’s laws radically modifying Dartmouth College’s colonial charter, and overruled Kentucky’s occupying-claimant laws. The term “contract” was further broadened to embrace corporate charters and compacts entered into between two states. In cases between private persons, the Court invalidated a New York bankruptcy statute discharging a previously contracted debt. However, a closely divided Court later upheld a bankruptcy law that discharged a debt contracted after the law’s enactment.

In its last decade the Marshall Court sustained state laws challenged under the contract clause, including a Rhode Island tax on a bank chartered by the state. These later decisions modified but did not repudiate the broad reading first articulated in *Fletcher*. The Supreme Court continued to apply the clause robustly to protect property rights against state interference throughout the chief justiceship of Roger B. Taney (1836–1864). In the late nineteenth century the contract clause began to lose its high standing in constitutional law, superseded by the far more comprehensive due process clause of the Fourteenth Amendment. Although the contract clause in our own time has largely receded into insignificance, the broader purposes of constitutional law that it served have proved enduring.

The ruling in *Fletcher v. Peck* did not actually prevent a state from impairing vested rights the Supreme Court deemed to be protected by the Constitution, though it did contribute indirectly to bringing about a partial redress for this infraction. The Court in 1810 held that a law enacted in 1796 by the legislature of Georgia was unconstitutional, by which time the proscribed act had long since achieved its purpose and was well on its way to becoming a revered milestone of state sovereignty. In *Fletcher*, Chief Justice Marshall could do no more than demonstrate the contract clause’s great potential to be an effective restraint upon the state legislatures.

The case had its beginnings in January 1795, when the state of Georgia sold its western lands, encompassing most of present-day Alabama and Mississippi, to four land companies for $500,000. Then inhabited by the Choctaw, Chickasaw, Creek, and Cherokee tribes of
Native Americans, this territory was commonly called “Yazoo,” after the river that flows into the Mississippi River near Vicksburg. The Yazoo sale earned a dubious reputation as the greatest land-speculation venture in American history, perhaps unsurpassed in the scale of its operations, in the mania generated by its promise of untold wealth, in the pervasiveness of corruption attending the sale, and in the political and legal reverberations radiating from it.

The next year, in February 1796, a newly elected Georgia legislature, reacting to charges of bribery and corruption, revoked this sale and all contracts made under it and reclaimed the lands. Six years later, in 1802, Georgia ceded these lands to the United States for $1,250,000, more than twice the amount paid by the land companies. In the meantime, however, the companies had sold the lands to third-party purchasers in the northeast, many of them residing in New England. By this time the Yazoo sale became embroiled in national politics, as the New England claimants, once it was clear they would not obtain actual possession of the lands, looked to the federal government for compensation. For nearly two decades they doggedly pursued their case in Congress. The lawsuit brought by Robert Fletcher of New Hampshire against John Peck of Massachusetts in 1803 and culminating in the Supreme Court’s decision in 1810 was inseparably connected with this political goal.

Ostensibly a legal dispute between private parties, Fletcher v. Peck, as C. Peter Magrath observed a generation ago, provides a case study of the interplay of law and politics in the Early Republic. From the nation’s beginning, organized interest groups have looked to government to accomplish their ends—typically, to ensure the success of an investment in a commercial enterprise. Courts no less than the political branches of government have been vital to this process, of which Fletcher furnishes an early prototype. A central player in this case, though not an actual party, was the New England Mississippi Land Company, which simultaneously pursued its interests in Congress and in the federal courts.

More than is usual for a case that makes constitutional law, Fletcher has the attraction of being an integral part of a fascinating episode of our early national history. Beneath its dry legal pleadings lay a tale of bribery and collusion, featuring vivid incidents and a color-
ful cast of characters. More than an engaging story, the controversy over the Yazoo lands draws within its narrative such resonant themes as land speculation, westward expansion and settlement, republicanism, party politics, and relations with the Native American tribes. Beyond its political and legal aspects, Yazoo had a moral dimension that transformed it into a battle for the republican character of the citizens and government of the new nation.

The founding of the colonies was the first speculation in North America’s “vacant” lands, and many more would follow. From the onset of colonization, governments relied on companies of investors to purchase large tracts and sell them in smaller parcels to settlers. Speculation was a routine and indeed essential part of the process of opening and settling new lands. It provided an outlet for private ambition to serve public ends. This “public good” aspect was present in attenuated form even in the Yazoo sale act, which was blandly (and misleadingly) cast as an appropriation of “unlocated territory” for paying state troops and defending the state’s frontiers. Georgia’s western lands sale shared features of earlier speculative land ventures, differing mostly in degree rather than in kind. The term “speculator” applied to a wide variety of persons, from the modest investor seeking to enlarge his holdings to the “jobber” who bought land for no other purpose but to “flip” it for a quick profit. Few equaled George Washington in accumulating lands over a lifetime, but he denied that he was “a monopolizer, or land-jobber.” One who did surpass Washington in the avidity and extent of his speculations was Robert Morris, at heart a jobber with no intention of holding lands for long.

Great land-speculating enterprises that preceded Yazoo, such as those formed to purchase the Northwest Territory and western New York, were accompanied by genuine attempts to colonize and settle the lands. A distinguishing feature of the purchase of Georgia’s western lands was that it was conceived and executed not to settle the lands but to resell them immediately. The sale originated in the particular circumstances of Georgia’s postwar history as a thinly populated settlement on the margins of the new nation. Alone among those states with western land claims, Georgia had not ceded its claims to Congress before 1789. The state’s continued possession of vast reaches of territory west of the Chattahoochee River mostly in-
habited by Indian tribes was costly and ineffectual. After two earlier attempts to dispose of the lands, the Georgia legislature approved a sale to a consortium of land companies headed by James Gunn, then a U.S. senator. Gunn was a representative type of postwar land speculator: a Continental army officer of modest origins who parlayed successful military service into political prominence, which in turn provided a platform to launch ambitious land schemes. A believer in the politics of interest and influence, Gunn skillfully pushed the Yazoo sale through, even resorting to bribing potentially friendly legislators with shares in the companies. In his mind such tactics were an acceptable, even necessary, means of influencing the legislature. Gunn gained his grand prize but seriously miscalculated the degree to which revelations of bribery and corruption would provoke popular revulsion and bring forth a political movement dedicated to undoing the Yazoo sale.

As Gunn was the mastermind of the sale, so James Jackson, Georgia’s other U.S. senator, was the guiding genius who brought about its revocation. To this task he brought a crusading zeal that aimed to restore and preserve the republican character of Georgia. In a series of published letters he spelled out the principles of a populist constitutionalism subsequently embodied in one of the most extraordinary laws enacted by an American legislature. The rescinding act of 1796 aimed not just to repeal but to declare the sale act and all rights derived from it “null and void.” It further ordered the “usurped act” to be expunged from the public records. Before adjourning, the anti-Yazoo legislators staged a public burning of the reviled act, a ritual purging by fire designed to remove all traces of the state’s infamous descent into corruption.

Before these events had transpired, the two largest Yazoo companies—the Georgia Company and the Georgia Mississippi Company—hastily sold their lands, mostly to purchasers in New England. The New Englanders were eager buyers, who pushed the price steadily upward until the bubble burst with news that Georgia had revoked the sale. Many of the purchasers resided in Boston, where Yazoo fever ran high. They included John Peck, who was among the most conspicuous investors in Georgia lands, accumulating large tracts in his own name and as a principal in the N.E.M. Land Co., formed
early in 1796 to purchase the Georgia Mississippi Company’s tract. For the next two decades Peck was an influential participant in the company’s affairs and actively engaged on his own behalf. He was by no means a nominal party to the case that bears his name.

Even if Georgia had allowed the Yazoo sale to stand, the federal government was prepared to intervene to prevent any immediate colonizing or settlement plans that third-party purchasers might have contemplated. Alarmed about the sale’s potential to provoke conflict with the Indian tribes, the Washington administration referred the matter to Congress. The upshot was a report presented by the attorney general in April 1796 on land claims in the Southwest. This report prepared the way for legislation in 1798 establishing the Mississippi Territory and authorizing negotiations with Georgia for ceding the lands reclaimed by the rescinding act. Around this time arguments began to surface in Congress contending that title to all or part of the Mississippi lands actually belonged to the United States. Yazoo purchasers, who bought on the assurance that Georgia had complete authority to sell its western lands in 1795, viewed this development with alarm. Indeed, they perceived the assertion of a U.S. title to be a greater threat to their titles than the rescinding law. Two pamphlets published in 1797 defending the Yazoo title focused primarily on refuting the case for a U.S. title.

As purchaser of an extensive Yazoo tract, the N.E.M. Land Co. soon evolved into an organization dedicated to asserting its title, directing its attention to the federal government, which so far had been more inclined to delay or block than facilitate the interests of the New England claimants. As early as 1798 the company joined with others in a memorial to the president, complaining that the governor of the newly created Mississippi Territory would not let them take steps to settle their lands. The company then still intended to colonize the territory, but it soon became evident that the government would not allow private settlement for fear of provoking hostilities with the Indians. In 1800 U.S. commissioners, then negotiating with Georgia for a cession of its western lands, were empowered to allow private claimants to submit compromise proposals. The New England claimants now abandoned their colonizing plans and shifted their attention to obtaining the best possible indemnity from the government.
After Georgia ceded its Mississippi lands in 1802, the U.S. commissioners presented a report to Congress in February 1803. Much to the claimants’ disappointment, the commissioners asserted that titles derived from Georgia’s 1795 sale act could not “be supported.” At the same time, they acknowledged “equitable considerations” rendering it “expedient” to compromise on “reasonable terms.” They proposed to compensate the claimants out of 5 million acres set aside in thecession compact with Georgia, though that agreement said nothing about claims based on the act of 1795. Rather than adopt the commissioners’ plan, Congress in March 1803 postponed consideration of these claims until the next session without giving them any specific recognition. Nonetheless, the New England purchasers remained optimistic that Congress would act promptly and favorably on their behalf.

From 1803 onward, the N.E.M. Land Co. devoted all its attention and considerable resources to lobbying Congress for an act to indemnify the New England claimants for their investments in Yazoo lands. It hired lawyers to draw up memorials and serve as agents on the spot in Washington. As part of this campaign, the company in June 1803 instituted the lawsuit between Fletcher and Peck in the U.S. circuit court at Boston. The law case and the political lobbying were directed at the single aim of obtaining compensation. It was understood that a Supreme Court decision upholding the title would not put the claimants in possession of lands in Mississippi but might well induce Congress to provide them monetary relief.

How to get the nation’s highest court to give a decision on the Yazoo title was no simple matter. By this time it was more or less settled that the Supreme Court would decide only cases or controversies; it would not give advisory opinions unconnected with adjudicating a legal dispute. The problem for the company’s lawyers was to devise a case that would in effect produce an advisory opinion. *Fletcher v. Peck* was the result of shrewd and painstaking deliberation about all aspects of the case, including the type of legal action, the parties, and most importantly the pleadings, which were carefully crafted to bypass a jury and produce only legal issues for the court to decide. Everything about the case bespoke its feigned character, provoking charges that it was not a true adversarial case and that the Supreme Court should not have agreed to hear it.
If Congress had settled quickly with the claimants, there would have been no need for the law case. This possibility was soon foreclosed, however, when fierce resistance to the Yazoo claims arose in the House of Representatives, led by the redoubtable John Randolph of Virginia. Randolph combined deft political tactics with ideological passion that adamantly opposed compromise with the claimants as sanctioning vile corruption. He made Yazoo a test of Republicans’ loyalty to party principles, turning it into a battle to preserve true republicanism. The ensuing debate was unmatched for intemperate language and vituperative personal attacks, exposing a division in the party between unbending purists and moderates willing to accommodate principle to expediency. Despite an apparent majority disposed toward compromise, Randolph and his followers maintained the upper hand for years by exploiting delaying tactics to prevent votes from taking place or postponing the subject to the next session or to a new Congress. Repeated frustration did not deter the claimants, who matched their adversaries in stubborn pursuit of their interests.

Anticipating timely approval of a compensation bill, the N.E.M. Land Co. let Fletcher languish in the U.S. circuit court for several years, not bothering to obtain a judgment. By June 1807, Congress’s inaction prompted a renewal of proceedings, and judgment for Peck was entered in October of that year without arguments of counsel, jury deliberations, or opinion of the judges. The judgment was a mere formality, allowing Fletcher to bring a writ of error as expeditiously as possible. He filed his appeal with the Supreme Court in February 1808, which put the case on the docket for argument at the February 1809 term.

The Supreme Court was then less than a decade into the tenure of John Marshall as chief justice—before it had become the “Marshall Court.” Thanks to his moderate temperament and sound political instincts, Marshall had successfully navigated the turbulent years of Thomas Jefferson’s first administration, which included Marbury v. Madison, the repeal of a Federalist judiciary act, and the impeachment of federal judges. Although he did not shy away from conflict, Marshall sought accommodation by means of a strategic retreat from politics, reserving for the judiciary department the authority to decide only matters of law. By the time Fletcher was first argued in 1809,
the Supreme Court had emerged from crisis and confrontation to a state of mutual respect if not harmony with the other branches of government. Chief Justice Marshall had begun to shape the institution and define the office in certain characteristic ways, such as adopting the practice of a single majority opinion and promoting institutional unity by bringing the justices together in the same boardinghouse during court terms.

_**Fletcher v. Peck**_ was argued over four days in early March 1809 but without any decision on the merits. In fact, the Court ruled against Peck on a technical point, meaning that the pleadings had to be amended and the case reargued at the next term. But this concern for technical propriety also provided a cover for the justices' reluctance to decide a case so obviously made up to extract an advisory opinion from the Court. No doubt the chief justice and his brethren aired this matter in conference before agreeing that despite its feigned aspects the case presented a legal issue appropriate for judicial decision. The rehearing of _Fletcher_ in 1810 required only one day. As expected, the Supreme Court upheld Peck on all counts, most importantly in ruling that Georgia held rightful title to the Yazoo lands in 1795 with full authority to sell them and that Georgia's rescinding act of 1796 was invalid. Despite this victory in the courtroom, Peck and the other New England claimants were denied immediate satisfaction in the halls of Congress. Anti-Yazoo Republicans, now led by Georgia's George M. Troup, continued to block compromise in the House. Yet with the onset of the War of 1812, their ideological grip on the party was weakening. More Republicans came round to the view that indemnifying the claimants was not a betrayal of republican principles but an honorable and just measure that served the true interests of the United States. The Supreme Court's decision of 1810 appears to have had a real though indeterminate influence in tilting opinion in the claimants' favor and bringing about the Yazoo compensation act of 1814.

Whatever effect it had in settling the Yazoo controversy, _Fletcher v. Peck_ marked a critical step toward making good the Supreme Court's claim to enforce the law of the Constitution, to interpret and adjudicate this law as it did any other law. No part of the Constitution proved to be more important than the contract clause in establishing the Supreme Court as a tribunal for deciding on the validity of state
legislative acts. That *Fletcher* became the first contract clause case was largely the doing of Chief Justice Marshall. Until his opinion, the clause had not figured centrally in the debates and commentary provoked by Georgia’s revocation of the Yazoo sale. “Natural justice” and general principles of law took precedence over the contract clause in denying the validity of the rescinding act. Marshall recognized the opportunity to show how the text of the Constitution, through its prohibition against impairing the obligation of contract, could be an effective means of enforcing the limits on the legislative powers of a state.

The contract clause had its origins in the reaction to the excesses committed by the state legislatures during the 1780s. As James Madison acutely pointed out, the laws enacted by these faction-ridden assemblies often reflected the selfish interests of popular majorities who proved only too willing to sacrifice the private rights of individuals and minorities. Anxiety about the security of private rights in the republican governments of the new nation was a strong impetus to the reform movement that resulted in the Federal Convention of 1787. Madison went so far as to propose a federal “negative” or veto on the acts of the state legislatures. The Convention rejected this radical measure but not the idea behind it, choosing instead to enumerate certain prohibitions on the states in the text of the Constitution. Protecting private rights against state infringement was thus entrusted to the federal judiciary.

For Marshall the meaning and intent of the contract clause was essentially the same as what Madison hoped to accomplish with his negative, to provide a comprehensive check on the state legislatures that embraced not only past and present but also unanticipated mischiefs that might arise. He adopted a broad construction of the contract clause in the confident belief that the framers intended the Constitution to serve as a charter of rights for protecting the American people from the acts of their state governments. As Marshall observed in *Fletcher*, “the constitution of the United States contains what may be deemed a bill of rights for the people of each state.”