

## **CURRENT SCHOLARSHIP**

# **The Janus Faces of Money, Property, and Governance: Fiscal Finance, Empire, and Race**

**Author: Jamee K. Moudud**

This paper contributes to the literature on racial capitalism by deploying a key insight of the Law and Political Economy tradition, which is that politics acting through the law plays a constitutive role in the monetary hardwiring of economies and their property rights. By focusing on two key elements of fiscal finance, central banking and taxation, the paper shows that while the pressures of democratic self-governance created one type of hardwiring in Britain and its white dominions racialized politics created a different type in the colonies of color. In short, the particular monetary hardwiring of the colonies of color effectively “kicked away the ladder” needed for their successful socio-economic development, occluding the very different policies pursued in Britain and the dominions. This left the colonies of color in a vulnerable state at independence, providing much weaker foundations for their subsequent economic development. Given the key role played by gold in the anchoring of banknote emissions by the Bank of England (BoE) Britain’s global politics of gold and silver was central to its domestic economic development. And the BoE, a private joint-stock corporation, was deeply enmeshed in the government’s domestic and colonial governance policies. As with the BoE taxation systems domestically and internationally exemplified the same principle: private property was always embedded in the public sphere following different modes of governance in different historic and geographic contexts. Simply put, politics acting through the law was actively creating markets in different ways rather than protecting pre-existing and privately-created ones.

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# Special Edition: Money in the Time of Coronavirus

**Special Edition: Money in the Time of Coronavirus**

**Prompt for Discussion**

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The financial strains brought by the coronavirus outbreak feel strangely reminiscent of 2008, and yet, markedly different. In the United States, at the writing of this prompt, the S&P 500 has crashed 25%, and the federal funds target rate is once again moving towards the zero bound. The treasury securities market is in disarray, and the Federal Reserve is set to increase its repo lending by over one trillion. In Washington, the administration's insistence that concerns were overblown is now replaced with negotiations over the size and shape of a

stimulus package. "I don't want to use the b-word", said a senior administration official about plans to support distressed industries, like airlines. The b-word is, of course, bailout.

So far, so 2008. But the monetary dynamics we are witnessing in the time of corona also take us into new territory. The proximate cause of the crisis past came from within the financial system itself: the housing credit bubble and abuses in subprime lending. The corona crisis, on the other hand, emerges from a material threat to human health. Where the 2008 crisis revealed the vulnerabilities of *financial* globalization, the corona crisis is disrupting the global *production* system, upending supply chains, and threatening shortages in essential inventories.

We wonder about the extent to which the policy arsenal of 2008 can contain the dislocations currently occurring, and what, exactly, stimulating consumer demand means when the consumer herself is in quarantine. Moreover, the crisis response to the corona crisis is taking place within an institutional setting that was itself reshaped by the 2008 crisis reforms. As corona strains unfold, it remains to be seen whether the promise of financial resilience will be borne out, or whether fundamental design flaws left in place will frustrate reformers' efforts.

In this Special Edition Roundtable, JM invites contributors to provide live analysis of money in the time of corona, here in the U.S., and around the world.

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## **Contributions**

June 29, 2020

### ***Roundtable Wrap-up***

*Sannoy Das, Harvard Law School*

May 21, 2020

### ***Human Capital Bonds and Federal Reserve Support for Public Education: The Public Education Emergency Finance Facility (PEEFF)***

*Gerald Epstein, University of Massachusetts Amherst*

May 12, 2020

### ***The Fed Should Bail Out Low-Income Tenants and Not Just Banks and Landlords***

*Duncan Kennedy, Harvard Law School*

April 29, 2020

### ***Getting to Know a Brave New Fed***

*Oscar Perry Abello, Next City*

April 10, 2020

### ***The Problem with Shareholder Bailouts isn't Moral Hazard, but Undermining State Capacity***

*Carolyn Sissoko, University of the West of England*

April 2, 2020

### ***Crises, Bailouts, and the Case for a National Investment Authority***

*Saule Omarova, Cornell Law School*

March 31, 2020

***Why the US Congress Gives Dollars to the Fed***

*Jens van 't Klooster, KU Leuven and University of Amsterdam*

March 26, 2020

***A Fire Sale in the US Treasury Market: What the Coronavirus Crisis Teaches us About the Fundamental Instability of our Current Financial Structure***

*Carolyn Sissoko, University of the West of England*

March 25, 2020

***The Democratic Digital Dollar: A 'Treasury Direct' Option***

*Robert Hockett, Cornell Law School*

March 22, 2020

***Derivative Failures***

*James McAndrews, TNB USA Inc. and Wharton Financial Institutions Center*

March 20, 2020

***The Case for Free Money (a real Libra)***

*Katharina Pistor, Columbia Law School*

March 19, 2020

***The Monetary/Fiscal Divide is Still Getting in Our Way***

*Leah Downey, Edmond J. Safra Center for Ethics at Harvard University*

March 18, 2020

***Is Monetary System as Systemic and International as Coronavirus?***

*Elham Saeidinezad, UCLA Department of Economics*

March 17, 2020

***Here We Go Again? Not Really***

*Dan Awrey, Cornell Law School*

March 16, 2020

***Repo in the Time of Corona***

*Nadav Orian Peer, Colorado Law*

March 16, 2020

***Beyond Pathogenic Politics***

*Jamee K. Moudud, Sarah Lawrence College*

March 15, 2020

***Economic and Financial Responses to the Coronavirus***

*James McAndrews, TNB USA Inc. and Wharton Financial Institutions Center*

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# Analyzing the Constitutional Theory of Money: Governance, Power, and Instability

Jamee K. Moudud, Sarah Lawrence College

At the heart of the constitutional theory of money is the argument that money is central to governance. This article explores the ways in which the core mechanism of the publicly undergirded monetary system, involving the incentivization and disciplining of private investors in the money creation process, creates its 'fiscal value' and generates both power struggles and possible instability in the unit of account. This twin dynamic of power and instability is intrinsic to a *longue durée* analysis of money. It is argued that since the current jural relations allocate money and power in particular ways, the basis is created for potential future political challenges to the status quo *ante*, thereby creating instability. Further, the article emphasizes the centrality of the indeterminacy criterion which is at the core of the critical legal studies (CLS) framework, and its intimate connection to Keynes's notion of uncertainty. The indeterminacy/uncertainty nexus is used to explore how currency stability is determined or undermined by expectations, power struggles, tax contestations, and broader policy frameworks. Finally, the article relates this monetary theory to the literature on state-led industrialization and shows how such a constitutional money theory of industrialization is an alternative to the New Institutional perspective which emphasizes the centrality of 'clear and well-defined' property and contracts in order to create an 'efficient' economy.

MOUDUD, J. (2018). Analyzing the Constitutional Theory of Money: Governance, Power, and Instability. *Leiden Journal of International Law*, 31(2), 289-313. doi:10.1017/S0922156518000134

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# J. K. Moudud, Beyond Pathogenic Politics

March 16, 2020

**Jamee K. Moudud, Professor of Economics, Sarah Lawrence College, and Board Member, *Association for the Promotion of Political Economy and the Law* (APPEAL)**

In considering the recent stock market crash the casual observer cannot help but be struck by the way in which history repeats itself. Seen in retrospect the current second major crisis of the twenty-first century appears to eerily parallel the first one at the end of the previous decade. Then, as now, the prelude to the crisis was a period of hubris in élite circles whose triumphalism celebrated GDP growth and falling unemployment rates. Then as now those same élites –whether in politics, the corporate world, or mass media–were blind-sided when the world fell off the proverbial cliff. One may wonder, why did they not see the troubling structural problems brewing under the superficial economic booms in each of the two decades of the twenty-first century?

And yet all the troubling signs were there in both contexts,

although they were rendered hidden because of ideological reasons. If we want to stop the recurrence of cataclysmic crises of one sort or another we need to take a longer-run view of the causal factors that repeatedly plunge us into such crises, going beyond the conventional preoccupation of boosting stock markets and economic growth. A number of authors have discussed the origins of neoliberal financial flows<sup>[1]</sup> and the roots of the subprime mortgage crisis of 2007/2008<sup>[2]</sup> but the purpose of this article is not to repeat their arguments. It suffices to say here that financial market “liberalization” over many decades has involved growing inequality<sup>[3]</sup> along with the acceleration of speculative investments relative to long-term production-oriented ones. The rise of what Keynes called *casino capitalism* is seen by the growth of the finance, insurance, and real estate (FIRE) sectors relative to GDP in all OECD countries since the 1980s.<sup>[4]</sup> I would argue that this growth-at-any-cost paradigm is responsible for both crises.

If neoliberal globalization has been responsible for creating toxic financial assets it has had another consequence. To understand this issue it is worthwhile quoting Dr. Margaret Chan, Director General of the World Health Organization, who in 2009 said:

*Last year, our imperfect world delivered, in short order, a fuel crisis, a food crisis, and a financial crisis. It also delivered compelling evidence that the impact of climate change has been seriously underestimated. All of these events have global causes and global consequences, with serious implications for health. They are not random events. Instead, they are the result of massive failures in the international systems that govern the way nations and their populations interact. In short: they are the result of bad policies... In far too many cases, economic growth has been pursued, with single-minded purpose, as the be-all, end-all, cure-for-all.*

*The assumption that market forces could solve most problems has not proved true.<sup>[5]</sup>*

The narrow pursuit of growth and “free markets” has produced climatic disturbances and largescale deforestation in particular in the Global South in which countries are under the mandate of free trade agreements to pump out their purported “comparative advantages” in cash crop exports. Casino capitalism has led to “land grabs” in the Global South by domestic and foreign investors for commercial or speculative purposes.<sup>[6]</sup> The felling of trees and deforestation have also been linked to largescale commercial farming projects thereby “helping to create the perfect ecology for breeding newly virulent and pathogenic influenza viruses”<sup>[7]</sup> because of closer human contact with wild animals that harbor microbes. And there is a growing body of scientific work that has linked the melting of the polar ice caps to the release of ancient bacteria and viruses buried deep in the ground.<sup>[8]</sup> In short the climate crisis, the consequence of relentless growth and privatization programs, is exacerbating the threats from dangerous pathogens. Thus the appearance of the Covid-19 virus is not the equivalent of a black swan event. As Sonia Shah reports,<sup>[9]</sup> there is a long pattern over many decades of the periodic reappearances at random moments of deadly pathogens which have devastating consequences. In other words, like financial crises, pathogenic crises are “known unknowns”, i.e. they are events that we know will occur but not when.

Toxic pathogens and toxic financial assets are two sides of the same coin which is neoliberal financial globalization. Just like their financial counterparts, pathogenic contagions do not respect borders. Robust public health care systems in Europe and Canada will be only as effective as those in the rest of the world. However, decades of right-wing assaults against the public health care system in the US have left it

woefully underfunded and unprepared<sup>[10]</sup> while many countries in the global South under IMF-imposed austerity programs<sup>[11]</sup> are grossly deficient in delivering high-quality healthcare to their populations. The not-for-profit *Trust for America's Health* reports that, adjusted for inflation the CDC's (Centers for Disease Control and Prevention) budget was cut by 10 per cent over the decade 2010 – 2019.<sup>[12]</sup> To compound the problem pharmaceutical corporations, like those in other sectors, have over the past several decades devoted disproportionate shares of their earnings in stock buybacks relative to R&D expenditures, especially in basic research.<sup>[13]</sup> In other words, for the pandemic crash of 2020 all the pre-conditions, established over many decades, were in place to create the perfect storm just like those leading up to the financial crash of 2007/2008. Then as now blind faith in our current market architecture ruled in élite circles.

The problem is that the dominance of neoclassical economics has elevated “market forces” to a Panopticon-like status with the prison yard of the market providing little scope for political agency. This has reached its highest level of absurdity in US élite-level political discourse when calls by large segments of the population for universal healthcare in this turbulent period are routinely derided as “dangerously socialistic.” Markets in this view are implicitly treated as pre-political; thus “state interference” is always unnatural. In order to change the dominant discourse, therefore a first step is to debunk the purportedly purely private and “natural” basis of markets. As the Legal Realists, Karl Polanyi, and “old” institutional economists such as John R. Commons wrote, markets are fundamentally political constructions with the background regimes of property, contracts, and tort laws constituting the context within which “market forces” operate. And of course markets cannot exist without money creation and flows. In short, in order to understand how the economy currently works and how it could be reconstituted one needs to

drill down to reveal the political and legal foundations of money, as Christine Desan has shown.<sup>[14]</sup>

Variants of capitalism exist precisely because the political and legal foundations of money and markets can vary enormously in different contexts. This is the central conclusion that comes from the contributions of Wesley Hohfeld, Robert Hale, and John R. Commons. The romanticized notion of the isolated private entrepreneur saving, investing, and creating jobs is completely at odds with both contemporary capitalism<sup>[15]</sup> and its history. One of the central concerns of business historians is the study of varying political and legal contexts<sup>[16]</sup> that determine business investment thereby creating different variants of capitalism. As I have argued, one has to conceptualize the business enterprise as constitutionally embedded, i.e. the “small c” constitutionalism that Christine Desan and Sabeel Rahman discuss.<sup>[17]</sup>

This has two important implications. First, given the corrosive feedback relationship between inequality, destitution, ill-health, and vulnerability to infection<sup>[18]</sup> there is an urgent need to change the tax code to mitigate the highly regressive nature of the current taxation system by bringing it back to its previously more progressive nature.<sup>[19]</sup> Second, in the wake of the current public health crisis state-business relations, in particular with regard to the pharmaceutical industry, have to be reconfigured because that industry will play a central role in mass producing a global vaccine that should be accessible to all. For example, share buybacks need to be made illegal (as they once were) so that greater proportions of retained earnings can be devoted to basic R&D in developing current and future vaccines. Given the massive direct and indirect subsidies that corporations have historically received from the government<sup>[20]</sup> pharmaceutical companies should be required to contribute taxes to a

government-administered fund (equivalent to the Social Security Trust Fund) that would expand research on pathogens at public agencies like the National Institutes of Health (NIH) and the CDC. The reconfiguration of state-business relations is not a particularly radical proposal – it has always been a *central feature of capitalism*, as business historians have documented. Given the governance context in which they are embedded, which includes their state-enforced charters, private corporations are quasi-public agencies.<sup>[21]</sup> Thus their *modus operandi* has been restructured many times and continues to be malleable.

In terms of a global immunization program the distinguished global health expert Jonathan Quick, author of *The End of Epidemics* (2018), concluded that “Virus biology and vaccines technology could be the limiting factors, but politics and economics are far more likely to be the barrier to immunisation.”<sup>[22]</sup> Further, despite the optimistic title of his book, Quick notes that infectious diseases with the potential to become epidemics or even pandemics are inevitable.<sup>[23]</sup> Given the plausibility of this pessimistic assessment, I would argue that the current moment is equivalent to the widespread increase in industrial accidents that spread across the US, Europe, and other countries starting in the mid-nineteenth century. What came to be known as “occupational risk” was one of the first major challenges confronting industrializing societies. As Julia Moses<sup>[24]</sup> and John Fabian Witt<sup>[25]</sup> discuss in their legal histories of industrial accidents, economic development had over time generated the dominant view that this human disaster which crippled, killed, and caused widespread destitution among the working classes was an “inevitable” concomitant to industrialization. And yet industrial accidents were causing labor unrest, production interruptions, and liability lawsuits against employers by injured workers. In short, faced with a growing governance crisis, occupational risks over time triggered workplace

safety laws which included workmen's compensation. Moses, in particular, argues that the significance of such laws which mitigated workplace risks provided the foundation to the modern social states in which public authority came to play an increasingly important role in managing new and emerging risks faced by society, such as lack of healthcare and prolonged unemployment.

We are at such a moment now in terms of the urgent need to rethink global public policy in the face of existential risks. For scholars, this requires challenging the core theoretical foundations of neoclassical economics and legal formalism whose cultural power has made terms like "market forces" and "free markets" seemingly non-controversial terms. As the coronavirus demonstrates all too tragically, we must strengthen, not subvert, our society's ability to create socio-economic and legal arrangements to deal with such threats.

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1. For example Greta R Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (2011). ↑
2. Jennifer Taub, *Other People's Houses: How Decades of Bailouts, Captive Regulators, and Toxic Bankers Made Home Mortgages a Thrilling Business* (2014). ↑
3. See Carlo Panico & Antonio Pinto, *Income Inequality and the Financial Industry*, 69 *Metroeconomica* 39–59 (2018). ↑
4. David Felix, *Asia and the Crisis of Financial Globalization*, in *Globalization and Progressive Economic Policy* 163–191 (Dean Baker, Gerald Epstein, & Robert Pollin eds., 1998). ↑

5. Margaret Chan. "Steadfast in the Midst of Perils." Keynote address at the 12th World Congress on Public Health Istanbul, Turkey (2009). Cited from Matthew Sparke, *Health and the Embodiment of Neoliberalism: Pathologies of Political Economy from Climate Change and Austerity to Personal Responsibility*, in *Handbook of Neoliberalism* 237–251 (Simon Springer, Kean Birch, & Julie MacLeavy eds., 2016). ↑
6. Lorenzo Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System (African Arguments)* (2013). ↑
7. Sparke, *supra* note at 243. ↑
8. See "The Zombie Diseases of Climate Change: What lurks in the Arctic's Thawing Permafrost?" *The Atlantic* November 2017 (<https://www.theatlantic.com/science/archive/2017/11/the-zombie-diseases-of-climate-change/544274/>) and "Melting Glaciers and Thawing Permafrost Could Release Ancient Viruses Locked Away for Thousands of Years", *Newsweek* February 6 2020 (<https://www.newsweek.com/melting-glaciers-thawing-permafrost-ancient-viruses-1486037>). ↑
9. See her "Think Exotic Animals Are to Blame for the Coronavirus? Think Again", *The Nation* February 18 2020 (<https://www.thenation.com/article/environment/coronavirus-habitat-loss/>) and her book *Pandemic: Tracking Contagions, from Cholera to Ebola and Beyond*. ↑
10. See "The Coronavirus Swamps Local Health Departments, Already Crippled by Cuts", *The New York Times* March 14, 2020 (<https://www.nytimes.com/2020/03/14/us/coronavirus-health-departments.html>). ↑

11. Sparke, *supra* note. ↑
12. Matt McKillop & Vinu Ilakkuvan, *The Impact of Chronic Underfunding on America's Public Health System: Trends, Risks, and Recommendations*, 2019 (2019). ↑
13. Mariana Mazzucato, *The Entrepreneurial State: Debunking Public versus Private Myths* (2015). ↑
14. Christine Desan, *Money as a Legal Institution*, in *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* 18–36 (David Fox & Wolfgang Ernst eds., 2016). ↑
15. Mazzucato, *supra* note. ↑
16. See the roundtable on business history and varieties of capitalism in the *Business History Review* 84 (Winter 2010). For the turn to law, see Jamee K. Moudud, *A Critical Legal History of French Banking and Industrialisation: an Alternative to the Law and Development Framework*, 7 *London Rev. Int. Law* 215–251 (2019); Marianne Dahmén & Mats Larsson, *Business history and legal history*, 56 *Bus. Hist.* 54–70 (2014). ↑
17. “The Constitutional Theory of the Business Enterprise: Toward a Monetary Theory of Production” (<https://lpeblog.org/2020/02/20/the-constitutional-theory-of-the-business-enterprise-toward-a-monetary-theory-of-production/>) ↑
18. “As Coronavirus Deepens Inequality, Inequality Worsens Its Spread” *The New York Times* March 16 2020. ↑
19. See the website *Tax Justice Now* : <https://www.taxjusticenow.org/#/>. ↑
20. Mazzucato, *supra* note. ↑
21. “Privatizing Sovereignty, Socializing Property: What Economics Doesn't Teach You About the Corporation”

(<https://lpeblog.org/2020/02/18/privatizing-sovereignty-socializing-property-what-economics-doesnt-teach-you-about-the-corporation/#more-3270>) ↑

22. "When will a Coronavirus Vaccine be Ready?" *The Guardian* March 15, 2020 ([https://www.theguardian.com/world/2020/mar/15/when-will-a-coronavirus-vaccine-be-ready-human-trials-global-immunisation?CMP=share\\_btn\\_link](https://www.theguardian.com/world/2020/mar/15/when-will-a-coronavirus-vaccine-be-ready-human-trials-global-immunisation?CMP=share_btn_link)). ↑
23. "Epidemics expert Jonathan Quick: 'The Worst-Case Scenario for Coronavirus is Likely'", *The Guardian* March 1 2020 (<https://www.theguardian.com/world/2020/mar/01/the-worst-case-scenario-for-coronavirus-dr-jonathan-quick-q-and-a-laura-spinney>). ↑
24. Julia Moses, *The First Modern Risk: Workplace Accidents and the Origins of European Social States* (2018). ↑
25. John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2006). ↑