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*Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People*

Timothy A. Canova

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## Lincoln's Populist Sovereignty: Public Finance Of, By, and For the People\*

Timothy A. Canova\*\*

In recent months, there has been a resurgence of interest in the presidency of Abraham Lincoln, in no small part because a new president, also from Illinois, has openly and repeatedly identified with and invoked Lincoln.<sup>1</sup> Academic interest in Lincoln has mostly focused on the darker side of wartime presidential powers, such as the suspension of civil liberties and overstepping lines of constitutional authority. Far less attention has been given to Lincoln as the activist executive who set a new standard for mobilizing public finance in a crisis, pursuant to express Congressional authority under the Legal Tender Acts, presidential authority at its zenith.<sup>2</sup> There is a modern tendency to dismiss any lessons from the past, to believe that we have little to learn from earlier ages and that our age is superior to all that has come before.<sup>3</sup> This is particularly so in the world of finance. Perhaps the great financial crash of 2008 and its grim economic aftermath may allow scholars to approach with some humility Lincoln's monetary experiment in issuing greenbacks directly into circulation. Lincoln, after all, did mobilize public

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<sup>1</sup> Lee Siegel, *Obama's Muse: His literary and political inspiration, the career of Abraham Lincoln, has a double edge*, WALL ST. J., Nov. 15, 2008, at W3; John F. Harris and Alexander Burns, *Straw Man? Historians say Obama is no Lincoln*, POLITICO, Dec. 15, 2008, <http://www.politico.com/news/stories/1208/16569.html>; James Oakes, *What's So Special About a Team of Rivals*, N.Y. TIMES, Nov. 20, 2008, at A43.

<sup>2</sup> Recall Justice Jackson's concurrence in the steel seizure case: "when the President acts pursuant to an express or implied authorization, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>3</sup> According to Ortega y Gasset, "our age is characterized by the strange presumption that it is superior to all past time; more than that, by its leaving out of consideration all that is past, by recognizing no classical or normative epochs, by looking on itself as a new life superior to all previous forms and irreducible to them." JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 44 (Anonymous trans., W.W. Norton & Co., Inc. 1957) (1932).

finances and therefore public energy on a grand scale that continues to elude our own generation.

Lincoln is remembered for overcoming enormous political and military challenges. Often overlooked, however, is the economic and financial chaos he confronted upon taking office. In the weeks prior to Lincoln's inauguration, the nation was swept by fear, the hoarding of gold, and a panic perhaps more dangerous than other classic Keynesian liquidity traps in March 1933 and September 2008, since there was no central bank in 1861 with the authority to issue currency and inject liquidity into the financial system to try to break a downward spiral by restraining the psychology of hoarding.<sup>4</sup>

Lincoln's approach to public finance was effective. It empowered the federal government with renewed fiscal capacity, mobilized a massive army, unleashed great latent energy and enormous economic growth.<sup>5</sup> As we bemoan the many ills in today's financial marketplace, we may consider what Lincoln would do if he was alive today. Would a president who asserted executive control over public finance in time of a great civil war do so in our time of obstinate foreign wars and market drama? Today the task may be greater, particularly if private financial interests have undermined the integrity of regulatory agencies and Congress alike. Of course, if he were alive today, Lincoln would also have to contend with all kinds of international financial constraints, far different from what he faced in his own time. This should not diminish from Lincoln's model of national economic sovereignty, but should instead prod us to think how his approach could be updated and squared with the realities of

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4 ROBERT P. SHARKEY, MONEY, CLASS, AND PARTY: AN ECONOMIC STUDY OF CIVIL WAR AND RECONSTRUCTION 26–27, 39, 44 (John Hopkins Press 1959) (1959). It is somewhat misleading to refer to the decades prior to the Civil War as a period of “unprecedented quiescence of monetary issues.” Jeffrey Rogers Hummel, *Civil War Finance: Lessons for Today*, 12 CHAP. L. REV. 596, n. 29 (2009). This ignores both the political and economic turmoil surrounding the First and Second Banks of the United States, including the conflict between Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson over the First Bank, constitutional challenges to the First Bank, and President Andrew Jackson's veto of the recharter of the Second Bank on constitutional grounds, as well as the financial turmoil that resulted in the wake of these disputes. WILLIAM F. HIXSON, TRIUMPH OF THE BANKERS: MONEY AND BANKING IN THE EIGHTEENTH AND NINETEENTH CENTURIES 89–120 (1993).

5 This was the view of Lincoln articulated by the economic historian Eliot Janeway who wrote that Lincoln “never organized the Union for victory – he was too practical to try. Instead, he inspired and provoked it to mobilize the momentum for victory. The result was inefficient but irresistible. A victory small enough to be organized is too small to be decisive.” ELIOT JANEWAY, THE STRUGGLE FOR SURVIVAL: A CHRONICLE OF ECONOMIC MOBILIZATION IN WORLD WAR II 16 (Yale University Press 1951). As argued below, it was in part through the Legal Tender Acts that Lincoln was able to provide the tools to mobilize.

today's global financial marketplace and national political institutions.

At the time of this writing, the U.S. banking and financial system remains in serious trouble, unemployment and home foreclosures are at dangerously high levels. The real economy suffered a deep contraction, one of the sharpest drops in history.<sup>6</sup> The recovery appears weak and fraught with danger. The U.S. trade and current account deficits exceed \$700 billion a year, requiring capital inflows of more than \$2 billion a day.<sup>7</sup> Meanwhile, the federal budget deficit has grown from more than \$485 billion in the final year of the Bush administration to \$1.6 trillion today.<sup>8</sup> Now, with the first installment of a bank bailout costing \$700 billion, a fiscal stimulus package of \$787 billion, and the Federal Reserve spending another trillion to prop up the markets, a big question on the minds of investors and public officials around the world is how the U.S. will pay for this spending, and whether so much federal borrowing will ultimately undermine the value of the dollar and lead to renewed inflation and some future financial chaos.<sup>9</sup>

This essay will consider Lincoln's financing of the Civil War and its possible application to today's crisis. Lincoln expanded the scope of federal authority by creating the nation's first fiat currency since the American Revolution, a strategy that was seen by many, including himself, as necessary to the financing of the Union's military efforts.<sup>10</sup> This approach harkened back to the emergency measures of the Continental Congress during the American Revolution and the economic development strategies of the colonies prior to the Revolution. It foreshadowed New Deal financing during the Great Depression and was also comparable to the low interest rate financing of the U.S. effort in World War II. Perhaps an enriched view of this history will provoke fresh

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<sup>6</sup> Michael Tsang & Whitney Kisling, *Obama May Inherit Bull Market After \$6 Trillion Loss*, BLOOMBERG, Nov. 5, 2008, <http://www.bloomberg.com/apps/news?pid=20601110&sid=akRyOGDs1EHI#>.

<sup>7</sup> See Jennifer Hughes, *Drop in US inflows spooks dollar*, FINANCIAL TIMES, Feb. 15, 2006, <http://www.ft.com/cms/s/0/dda665fc-9e58-11da-b641-0000779e2340.html> (reporting disturbing drop in U.S. capital inflows from approximately \$3 billion a day to approximately \$2 billion a day); *US surprises: trade deficit down; budget shortfall up*, MERCOPRESS, Aug. 13, 2008, <http://en.mercopress.com/2008/08/13/us-surprises-trade-deficit-down-budget-shortfall-up>.

<sup>8</sup> Rodger Runnigen, *U.S. Deficit to Reach Record \$490 Billion in 2009*, BLOOMBERG, July 28, 2008, <http://www.bloomberg.com/apps/news?pid=20601103&refer=news&sid=ae7O8o2c0iNY>.

<sup>9</sup> Nelson D. Schwartz, *Hearing Stimulus, Fearing Debt*, N.Y. TIMES, Jan. 30, 2009, at B1 (reporting estimate by Niall Ferguson, a Harvard historian, that \$2.2 trillion in new U.S. government debt will be issued in 2009, assuming approval of the stimulus plan).

<sup>10</sup> MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY 45 (1992).

insights about today's financial difficulties and challenging institutional environment.

### I. LINCOLN'S LEGAL TENDER ACTS

When Lincoln was elected in November 1860, the money supply in the United States consisted of about 28% gold coins, 3% silver coins, and about 69% in bank created money, mainly bank notes and bank deposits (or check book money) created by state-chartered banks.<sup>11</sup> This was not a money supply conducive to a strong national government. Indeed, on the day of Lincoln's inauguration, March 4, 1861, the Union was on shaky ground.<sup>12</sup> When Fort Sumter was fired upon barely a month later, the Union Army had only 17,000 soldiers.<sup>13</sup> Lincoln's response was to organize the most impressive mobilization of military manpower in American history up to that time. Within a year, the Union Army numbered nearly 200,000, by the end of 1863 it was more than 600,000, and by the end of 1863, the fateful year of Gettysburg and Vicksburg, the Union Army exceeded 900,000 men.<sup>14</sup>

The costs of this military buildup and the war were enormous. According to William Hixson, the federal government spent about \$35 million on the war effort in 1861.<sup>15</sup> In 1862 it spent about \$446 million, about a thirteen-fold increase.<sup>16</sup> It was not enough. Union wartime spending rose to \$683 million in 1863, \$826 million in 1864, and \$1.2 billion in 1865.<sup>17</sup>

How was this war effort financed? There was no federal income tax at the start of the war.<sup>18</sup> Most federal revenues came from the sale of public lands and customs duties.<sup>19</sup> But with homesteading rampant, public land sales revenue was falling.<sup>20</sup> Also, without duties on southern exports, and despite passage of

<sup>11</sup> HIXSON, *supra* note 4, at 129.

<sup>12</sup> The day of Lincoln's first inauguration, March 4, 1861, was also the birth of the college that would become Chapman University. The History of Chapman University, <http://www.chapman.edu/about/chapfacts/history/history2.asp> (last visited March 14, 2009).

<sup>13</sup> HIXSON, *supra* note 4, at 129.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 132, 139.

<sup>18</sup> *Id.* at 130.

<sup>19</sup> *Id.*

<sup>20</sup> The Homestead Act was passed in 1862. LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 108 (Vanderbilt University Press 1968) (1968). The Morrill Land-Grant College Act, which provided for use of public lands for establishing colleges, was signed by Lincoln in the same year. *Id.* at 114–15.

the Morrill Tariff in the days before Lincoln took office, customs revenues began to fall as well.<sup>21</sup>

In 1861, the nation's fiscal house was in crisis when Congress authorized the Treasury to borrow \$250 million by selling bonds to big banks and paying 7% interest.<sup>22</sup> In July 1861, in carrying out this Congressional authorization, Treasury Secretary Salmon Chase entered into agreements with the banks of New York, Philadelphia, and Boston, which, like all banks at the time, were state-chartered banks.<sup>23</sup> These banks were to purchase U.S. Treasury bonds with \$50 million in gold.<sup>24</sup> The plan was for the Treasury to then spend the gold back into circulation, which it hoped would then be deposited back into the banks, thereby allowing them to lend again and again to the Treasury.<sup>25</sup> However, due to the psychology of fear and hoarding that swept the nation, the gold did not return to the banking system.<sup>26</sup> The banks suspended payment in gold and so did the Treasury.<sup>27</sup>

This left Chase with few viable options, hoping the banks would extend loans to the Treasury or pay for US Treasury bonds in the form of banknotes and bank credits rather than gold.<sup>28</sup> During the Buchanan presidency, the federal government was paying ruinous interest rates of 10 to 12%, and the yield would likely have to rise even higher to induce the banks to lend to the Treasury.<sup>29</sup> This was neither a viable nor a sustainable option.

Instead, Congress found other means, with Lincoln signing the first of three Legal Tender Acts on February 25, 1862,<sup>30</sup> to create a new government-issued, irredeemable paper currency

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<sup>21</sup> SHARKEY, *supra* note 4, at 18; Roger L. Ransom, *The Economics of the Civil War*, EH.NET ENCYCLOPEDIA, (ed. Robert Whaples), Aug. 25, 2001, <http://eh.net/encyclopedia/article/ransom.civil.war.us>. The North was harmed by the loss of tariff revenues from Southern cotton exports, as well as the loss of Southern purchases of Northern manufactured products. *Id.*

<sup>22</sup> SHARKEY, *supra* note 4, at 20.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* (Stating that “[i]n essence, though not in legal form, the banks were acting as underwriters”).

<sup>26</sup> *Id.* at 27.

<sup>27</sup> *Id.*; HIXSON, *supra* note 4, at 129–31. In praising the “de facto regime of quasi-free banking” prior to the Civil War, Hummel argues that the currency “consisted solely of state bank notes redeemable for specie on demand.” Hummel, *supra* note 4, at 596. This ignores the gold hoarding that preceded Lincoln’s inauguration and the suspensions of payment in gold later that year, indicating a failure in the free banking regime. The weaknesses in the free banking regime were perhaps masked by major discoveries of gold in California beginning in 1849, but became apparent when gold production slowed at a time of rising public financing requirements. HIXSON, *supra* note 4, at 121–31.

<sup>28</sup> HIXSON, *supra* note 4, at 130–31.

<sup>29</sup> SHARKEY, *supra* note 4, at 18.

<sup>30</sup> HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49.

(i.e., not redeemable in gold or other specie), United States Notes known as “the Greenback,” which were declared by government fiat to be legal tender for all private debts (hence, the term fiat money).<sup>31</sup> By war’s end there would be nearly \$450 million in these Greenbacks.<sup>32</sup>

The Constitution provided no specific authority for Congress to create a currency, but neither was there any express prohibition on such Congressional power.<sup>33</sup> At the time, numerous public officials, businessmen, bankers, and financial experts supported The Legal Tender Acts.<sup>34</sup> They called on the federal government to assert constitutional authority over the currency and keep the profit from the issuance of currency for the taxpayer, a practice known as “seigniorage.”<sup>35</sup> For instance, in the floor debate, Representative Thaddeaus Stevens argued that the government and not the banks should have the profit from creating a medium of exchange.<sup>36</sup>

Lincoln himself wrote, in a letter dated December 6, 1864, that Treasury Secretary Chase had thought the issuance of legal tender notes was “a hazardous thing but we finally accomplished it and gave the people of this Republic the greatest blessing they ever had—their own paper money to pay off their debts.”<sup>37</sup> Although Chase had misgivings about the Greenback, by February 1862, Chase wrote, in a letter to the *New York Post*, “I

<sup>31</sup> MILTON FRIEDMAN, *MONEY MISCHIEF: EPISODES IN MONETARY HISTORY* 45 (1992) (describing fiat paper money as “notes that are issued on the fiat of the sovereign” specified in value and declared as legal tender for payment of debts).

<sup>32</sup> HIXSON, *supra* note 4, at 131; SHARKEY, *supra* note 4, at 49. Congress began removing the greenback from circulation in 1879 when it made the greenback redeemable in gold. GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* 24, 38 (Cambridge Univ. Press 1997).

<sup>33</sup> See HIXSON, *supra* note 4, at 89–90. Delegates to the Constitutional Convention voted down a proposed clause that would have given the federal government specific authority to issue paper money, and also voted down a proposed clause that would have denied the federal government such authority. *Id.*

<sup>34</sup> The list of public officials included Congressional leaders, majorities in both houses of Congress, the President, an apparently reluctant but willing Treasury secretary, Salmon Chase, and Attorney General Edward Bates. HIXSON, *supra* note 4, at 131, 133–35, 150 (reporting the support of Henry C. Carey, the so-called founder of the American School of Economics); SHARKEY, *supra* note 4, at 30, 31, 35 (“Letters of support [for the first Legal Tender Act] from various bankers and business men pointed up the fact that the [opposing] opinions of the associated bankers [of New York, Boston, and Philadelphia] voiced in Washington, by no means represented the sentiments of the business community at large.”).

<sup>35</sup> Seigniorage is defined as “the return on the monopoly right to print money held by domestic monetary authorities.” PETER MOLES & NICHOLAS TERRY, *THE HANDBOOK OF INTERNATIONAL FINANCIAL TERMS* 491 (1997).

<sup>36</sup> BRAY HAMMOND, *SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR* 192 (1970).

<sup>37</sup> HIXSON, *supra* note 4, at 133.

consent to the expedient of United States Notes in limited amounts being made a legal tender.”<sup>38</sup>

Of the \$3 billion direct cost of the war to the North, taxes paid for about 20 percent, borrowing in the form of bank paper covered about 65 percent, and the Greenback paid for about 15 percent.<sup>39</sup> The peak years for the new currency were 1862 and 1863 when the Greenback paid for nearly 40 percent of the costs of the Civil War to the North.<sup>40</sup> In his December 1862 message to Congress, Lincoln explained the necessity of the action:

The suspension of specie payments by banks . . . made large issues of United States Notes [Greenbacks] unavoidable. In no other way could the payment of the troops . . . be so economically or so well provided for. The judicious legislation of Congress . . . has made them a universal circulating currency . . . saving thereby to the people immense sums in discounts and exchanges.<sup>41</sup>

This was the same message to Congress in which Lincoln said:

The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.<sup>42</sup>

Some historians insist the Greenback was not necessary because it never accounted for a majority of the funds used to carry on the war and that the government may have been able to sell its securities below par.<sup>43</sup> More persuasive are those like Leonard Curry, who concludes: “To leave the country dependent on a motley array of irredeemable, often counterfeited, frequently worthless bank paper was not only to invite, but to insure, disaster.”<sup>44</sup> Likewise, historian Robert Sharkey points out that a majority of the members of Congress “were not willing to subject the credit of the government to such a trial.”<sup>45</sup>

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<sup>38</sup> *Id.* at 133–34.

<sup>39</sup> *Id.* at 132–33, 139–40; Hummel, *supra* note 4, at 599, fig. 3. Ransom put the direct government expenditure costs to the North at \$2.7 billion and concluded that the Greenback accounted for about 18 percent of all government revenues. Ransom, *supra* note 21.

<sup>40</sup> HIXSON, *supra* note 4, at 132.

<sup>41</sup> *Id.* at 134.

<sup>42</sup> Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler ed., Rutgers Univ. Press, 1953) (1953).

<sup>43</sup> See DON C. BARRETT, THE GREENBACKS AND RESUMPTION OF SPECIE PAYMENTS, 1862-1879 25-57 (Harvard Univ. Press 1965) (1931); SHARKEY, *supra* note 4, at 32–33.

<sup>44</sup> LEONARD P. CURRY, BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS 197 (Vanderbilt Univ. Press 1968) (1968).

<sup>45</sup> SHARKEY, *supra* note 4, at 33.

In addition to the Greenback, Congress passed legislation in 1862 creating the National Banking System, providing for the chartering of federal banks that were required to purchase large amounts of federal bonds to hold as security against the national bank notes they would issue.<sup>46</sup> Although the National Banking System did not take the form of a central bank, it can still be seen as a forerunner of the Federal Reserve, also privately-owned and directed to support the federal government's fiscal needs by purchasing federal bonds.<sup>47</sup> While this was an improvement from the chaos that had preceded the National Banking Act, it was still lacking from the perspective of government finance when compared with the approach of the Federal Reserve during World War II, which kept interest rates near zero percent for federal government securities.<sup>48</sup>

For the Confederacy, the cost of the war was about \$2.25 billion, of which about \$250 million was raised in taxes and \$500 million was borrowed.<sup>49</sup> The rest, about \$1.5 billion, or nearly 60 percent of the Confederacy's war costs, was in printing press money.<sup>50</sup> The Confederate currency collapsed in value, the victim of a counterfeiting war strategy by the North.<sup>51</sup>

There has also been criticism of the inflation that coincided with the Greenback, with some claiming this was the result of not making the Greenback redeemable in gold.<sup>52</sup> But, as discussed above, the record shows a rather wise management by Congress, with the amount of paper currency issued limited to only about 12 percent of the total financing of the war and peaking at less than 40 percent in 1862 and 1863.<sup>53</sup> According to Roger Ransom, Northern wages did not keep pace with inflation, but fell by about 20 percent during the war.<sup>54</sup> Even this, Ransom concluded, was not as severe as it would seem since agriculture, not industry, was the largest economic sector in the North, and "farmers fared much [better] in terms of their income during the war than did wage earners in the manufacturing sector."<sup>55</sup>

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<sup>46</sup> Ransom, *supra* note 21.

<sup>47</sup> Committee for Monetary Reform v. Board of Governors of the Federal Reserve System, 766 F.2d 538, 540 (D.C. Cir. 1985) ("The Federal Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts.") (citing to 12 U.S.C. § 321).

<sup>48</sup> Richard H. Timberlake, *Federal Reserve System*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, 2008, <http://www.econlib.org/library/Enc/FederalReserveSystem.html>.

<sup>49</sup> HIXSON, *supra* note 4, at 148.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> FRIEDMAN, *supra* note 31, at 57.

<sup>53</sup> Hixson, *supra* note 4, at 132, 140.

<sup>54</sup> Ransom, *supra* note 21.

<sup>55</sup> *Id.*

The inflation in the North was less a function of any over-issuance of currency and more the result of a classic wartime boom with excess demand pulling up prices faster than manufacturing wages.<sup>56</sup> Public administration was at a rather rudimentary and unsophisticated stage of development at the time of the Civil War.<sup>57</sup> It would have to wait until the next century, after civil service reforms and the rise of a federal bureaucracy during World War II for the tools to contain such inflationary forces.

For instance, throughout World War II, the federal government found the means to finance an even more impressive military buildup and war effort. As a practical matter, the central bank lost its independence during the 1941–1951 period.<sup>58</sup> The Federal Reserve was required by political convention with the White House and Treasury to purchase government securities in any amounts and at any price needed to keep the yield on government debt pegged at near zero for short-term securities and barely two percent for long-term bonds, the functional equivalent of printing money for the war effort.<sup>59</sup>

With such an easy money policy during World War II, the federal government was able to increase wartime spending to nearly forty-five percent of Gross Domestic Product (GDP), nearly double today's levels of federal spending.<sup>60</sup> Some economists point to the easy money and heavy reliance on seigniorage during World War II to explain the end of the Great Depression.<sup>61</sup> Of course, easy money without federal spending would likely not have increased either the velocity of money or aggregate demand. While easy money in the 1930s brought some recovery from the Depression,<sup>62</sup> it was only the massive fiscal

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<sup>56</sup> GEORGE T. MCJIMSEY, *THE DIVIDING AND REUNITING OF AMERICA: 1848–1877* 87–89 (1981).

<sup>57</sup> *See Id.* at 196–97.

<sup>58</sup> *See* Timothy A. Canova, *American Wartime Values in Historical Perspective: Full-Employment Mobilization or Business as Usual*, 13 *ILSA J. INT'L & COMP. L.* 1, 13–14 (2006) [hereinafter Canova, *American Wartime Values*].

<sup>59</sup> *Id.* at 13.

<sup>60</sup> Timothy A. Canova, *Non-State Actors and the International Institutional Order: Central Bank Capture and the Globalization of Monetary Amnesia*, 101 *AM. SOC'Y INT'L L. PROC.* 469, at 470–71 nn.8–9 (2007) (citing to tables of the 1984 and 2007 Annual Reports of the Council of Economic Advisers).

<sup>61</sup> Hummel, *supra* note 4, at 605.

<sup>62</sup> Christina D. Romer, *What Ended the Great Depression?*, 52 *J. ECO. HISTORY* 757, 757–58 (Dec. 1992). Romer cites to a 1956 article by E. Cary Brown for support that fiscal policy “seems to have been an unsuccessful recovery device in the ‘thirties—not because it did not work, but because it was not tried.” *Id.* at 758.

stimulus, albeit accommodated by the central monetary authority that ended the Depression once and for all.<sup>63</sup>

The economy roared, with real growth rates of greater than fifteen percent for three consecutive years, the fastest economic growth in American history.<sup>64</sup> Yet, the federal government also managed to maintain price stability through a program of regulatory controls on prices, wages, and capital flows, and margin requirements on borrowing for private consumption, stock speculation, and housing construction.<sup>65</sup> In fact, consumer price inflation was less than three percent a year for the final three years of the war.<sup>66</sup>

The World War II model was actually extended for several years after the war, in large part because of the need for continued massive federal spending on the Marshall Plan reconstruction of Europe and Japan, the Korean War effort, and the G.I. Bill of Rights spending on education, health care, housing, and jobs for the sixteen million veterans of World War II (fully one-quarter of the U.S. work force).<sup>67</sup>

This followed a long tradition of federal government intervention to promote economic growth. For example, Alexander Hamilton, as Treasury Secretary, in his Report on Manufacturers, much of which was adopted by Congress, had called for subsidies to industry, paid for in part by tariffs on imports, to encourage the growth of manufacturing, as well as the building of roads and canals.<sup>68</sup> Decades later, Henry Clay would incorporate Hamilton's ideas into the "American System," which was adopted by Lincoln in his fiscal program of subsidies to encourage economic development, which could be seen as a

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<sup>63</sup> Bruce Bartlett, *The Real Lesson of the New Deal*, FORBES, Feb. 13, 2009 (arguing that "in terms of fiscal policy, Roosevelt's error [in the 1930's] wasn't that he spent too much, but that he didn't spend nearly enough.").

<sup>64</sup> Canova, *American Wartime Values*, *supra* note 58, at 5 n.12.

<sup>65</sup> *Id.* at 14–15, n.67.

<sup>66</sup> *Id.* at 16. Hummel seems to acknowledge that a central bank-dominated monetary regime is fully capable of producing high inflation and contributing less to economic growth than a monetary regime characterized by Treasury-issued currency when he writes that "during America's Great Inflation of the 1970s, seigniorage accounted for only 2 percent of federal revenue, which translates into less than half a percent of GDP." Hummel, *supra* note 4, at 607.

<sup>67</sup> Timothy A. Canova, *Closing the Border and Opening the Door: Mobility, Adjustment, and the Sequencing of Reform*, 5 GEO. J. L. & PUB. POL'Y 341, 393–94 (2007) [hereinafter Canova, *Closing the Border*].

<sup>68</sup> MICHAEL LIND, HAMILTON'S REPUBLIC: READINGS IN THE AMERICAN DEMOCRATIC NATIONALIST TRADITION 72–73 (1997).

modification of mercantilism and a precursor to Keynesian economic policies.<sup>69</sup>

To be sure, critics of this model will claim that the cure is worse than the disease, and that an easy money policy and active fiscal policy can work only if the federal government imposes controls which are said to be incompatible with a free-market economy, and that inflation is bound to return once the controls are lifted or relaxed.<sup>70</sup> But this line of argument understates the range of government regulations and interventions that are routinely imposed on any free-market economy, even during times of hard money. Further, it also ignores the moral and strategic context in which wartime controls have been imposed. If inflation is merely delayed, the question becomes what was gained during the interval of delay. The World War II era controls that suppressed and delayed inflation until the late 1940s and early 1950s provided the federal government with the breathing space and resources necessary to win a world war against fascist tyrannies in less than four years and then to rebuild war-torn Europe and Japan and integrate one-quarter of the U.S. work force.<sup>71</sup> Not a bad trade-off, indeed.<sup>72</sup>

Likewise, Lincoln used the resources of easy money for grand purposes. It took four bloody years of fighting but the scourge of

<sup>69</sup> MICHAEL LIND, *WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREATEST PRESIDENT* 23, 72–73 (2004); ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (Oxford U. Press, 1970) (1970).

<sup>70</sup> See MILTON FRIEDMAN & ANNA SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867–1960* 558 (1963). The authors argue:

The result was that “prices,” in any economically meaningful sense, rose by decidedly more than the ‘price index’ during the period of price control. The jump in the price index on the elimination of price controls in 1946 did not involve any corresponding jump in ‘prices’; rather it reflected largely the unveiling of price increases that had occurred earlier. *Id.*

See also Robert Higgs, *Wartime Prosperity? A Reassessment of the U.S. Economy in the 1940s*, 52 *J. ECO. HISTORY* 41, 54–55 (Mar., 1992), available at <http://www.independent.org/publications/article.asp?id=138>.

<sup>71</sup> See Canova, *American Wartime Values*, *supra* note 58, at 15–16.

<sup>72</sup> Hummel also argues that the World War II debt burden was reduced by high inflation after the war. Hummel, *supra* note 4, at 603. But inflation remained largely contained throughout the 1950s and 1960s, rising to significantly high levels only in the late 1970s. It is more accurate to conclude that the World War II debt burdens were reduced by maintaining low interest rates and high real economic growth rates which contributed to high tax revenues even while tax rates were being reduced. Hummel also repeats the claim of Robert Higgs that war always “ratchets up” post war spending and government intervention. *Id.* at 592, n. 3. First, it is instructive to point out that federal spending during World War II peaked at about forty-five percent of GDP; today it is about twenty-six percent of GDP. Moreover, it may be that, had U.S. and foreign governments spent and intervened far more in their economies prior to the 1930s, the global Great Depression and the cataclysm of World War II may very well have been averted.

slavery was finally lifted from the nation. Both wartime presidents, Lincoln and Roosevelt, understood they could ill afford to lose their wars or pass them on to future generations.<sup>73</sup>

As Justice Jackson would write in his concurrence in the so-called Steel Seizure case, *Youngstown Sheet & Tube Company v. Sawyer* (1952), “the power to legislate for emergencies belongs in the hands of Congress.”<sup>74</sup> National emergencies and war need not expand the powers of Congress and the President, but they do provide the opportunity for the elected branches to act to the full extent of their constitutional powers. This was the case with the constitutional legacy of the Legal Tender Acts that paved the way for other far-reaching monetary reforms during the New Deal.

In June 1864, after securing re-nomination and with the financial position of the Union in better shape, Lincoln accepted the resignation of his Treasury Secretary Salmon Chase.<sup>75</sup> Several months later, partly to placate the Radical wing of his party, Lincoln nominated Chase as Chief Justice of the Supreme Court. In one of history’s great ironies, when the Legal Tender Acts were challenged, Chase would twice vote to declare the Greenback unconstitutional.<sup>76</sup>

In *Hepburn v. Griswold* (1870), Chase refused to disqualify himself and in fact delivered the decision declaring the Greenback unconstitutional and ruling that Congress could not make the Greenback legal tender in payment of all debts, public and private.<sup>77</sup> As characterized by Milton Friedman and Anna Schwartz, Chief Justice Chase essentially convicted himself of having been responsible for an unconstitutional action in his prior capacity as Secretary of the Treasury.<sup>78</sup>

At issue before the Court in *Hepburn* was the validity of contracts made before the war.<sup>79</sup> The decision was applied also to contracts entered into after the war.<sup>80</sup> A major portion of the nation’s money supply was suddenly rendered worthless for the

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<sup>73</sup> See Timothy A. Canova, *The Mystical Roots of American Political Democracy: Social Justice and Religious Belief in a Newer World*, in RELIGION AS ART (Univ. of New Mexico Press 2009) (discussing the similarities between Lincoln and Roosevelt as mystical political leaders).

<sup>74</sup> 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

<sup>75</sup> CLARENCE EDWARD MACARTNEY, LINCOLN AND HIS CABINET 259–60 (Charles Scribner’s Sons, 1931).

<sup>76</sup> FRIEDMAN & SCHWARTZ, *supra* note 70, at 46–47.

<sup>77</sup> *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

<sup>78</sup> FRIEDMAN & SCHWARTZ, *supra* note 70, at 46.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 47.

satisfaction of debts.<sup>81</sup> But, then, two vacancies on the Court were filled by President Grant and amid charges of court-packing, the Legal Tender Acts came up once again before the new Court.<sup>82</sup> This time, in *Knox v. Lee* (1871), the Greenback was upheld as constitutional, reversing *Hepburn* by a 5-to-4 vote, this time with Chase in dissent.<sup>83</sup> The Court held in *Knox* that Congress did indeed have authority to reasonably decide what definition of legal tender would best serve the public interest.<sup>84</sup> Finally, in *Julliard v. Greenman* (1884), in a third Legal Tender case, the Court upheld the power of Congress to create legal tender currency in peacetime.<sup>85</sup>

During this time there were parallel Court decisions holding that the Legal Tender Acts were not intended to bar enforcement of private contracts requiring payment of debts in gold.<sup>86</sup> Such “gold clauses” were a device to protect creditors from repayment in depreciated currency, particularly until the Greenback became redeemable in gold in 1879.<sup>87</sup> Half a century later, by Executive Order in April 1933, President Franklin Roosevelt ordered the seizure of gold in an effort to forbid hoarding.<sup>88</sup> Gold clauses were once again used to protect creditors.<sup>89</sup> But later in 1933, Congress simply outlawed these gold clauses by joint resolution, and in 1935, the Supreme Court upheld the constitutionality of the joint resolution by a 5-to-4 vote, holding that Congress has authority to exert ultimate control in defining lawful media of exchange to satisfy debts, even for private contracts made prior to the legislation.<sup>90</sup>

The cumulative effect of the Legal Tender cases and the gold clause cases was to permit Congress to once again authorize the issuance of Greenbacks, this time during the Great Depression. According to Milton Friedman and Anna Schwartz, the Thomas Amendment to the Agricultural Adjustment Act of 1933 authorized the issuance of \$3 billion in United States Notes.<sup>91</sup> In addition, the amendment authorized the Treasury to revalue its gold holdings and realize a large “paper” profit; as a result, it

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<sup>81</sup> *Id.* at 48.

<sup>82</sup> *Id.* at 47 n.47.

<sup>83</sup> *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871).

<sup>84</sup> *Id.* at 553.

<sup>85</sup> *Julliard v. Greenman*, 110 U.S. 421, 450 (1884) (upholding an act of 1878 reissuing greenbacks and declaring them to be legal tender in payment of private debts).

<sup>86</sup> FRIEDMAN & SCHWARTZ, *supra* note 70, at 469.

<sup>87</sup> *Id.* at 468–69.

<sup>88</sup> *Id.* at 462–63.

<sup>89</sup> *Id.* at 463.

<sup>90</sup> *Id.* at 469.

<sup>91</sup> *Id.* at 470.

could print additional paper money titled “gold certificates” to a nominal value of nearly another \$3 billion.<sup>92</sup>

Within each of these lines of cases, the Legal Tender cases and the gold clause cases, urgent circumstances existed that initially justified the use of positive regulation to compel citizens to accept government paper as legal tender for payment of all debts, private and public. In both the 1860s and 1930s democracy and freedom were subject to the gravest of challenges. The responses of Congress and the President were similar. In each instance, the federal government asserted sovereignty over the currency and financial system, thereby empowering the government with enormous fiscal capabilities that helped mobilize the nation for war and develop the country’s economic resources for decades.

## II. EARLY AMERICAN HISTORY

Much like Lincoln’s Greenback, colonial governments issued paper currency that was not redeemable in gold and was declared by government fiat to be legal tender for the payment of debts.<sup>93</sup> The colonial currencies were lent into circulation through state-controlled land banks and were secured by mortgages on the borrowers’ property at low interest rates, usually five percent.<sup>94</sup>

According to historian James Ferguson, “[a] modern economist finds the tactics of colonial government analogous to those of the New Deal and in some ancestral relationship to present-day Keynesian doctrine.”<sup>95</sup> For instance, during the Great Depression, first under Hoover and then under Roosevelt, the Reconstruction Finance Corporation lent millions to U.S. industry.<sup>96</sup> Likewise, the federal Home Owners’ Loan Corporation, founded in 1933, offered mortgage loans directly to homebuyers at five percent with repayment periods of up to twenty-five years.<sup>97</sup> But the moneys for these New Deal lending programs were mostly borrowed by the Treasury Department through the sale of government bonds.<sup>98</sup> In contrast, some

<sup>92</sup> *Id.* at 470, 518 n.33.

<sup>93</sup> A. Barton Hepburn, *History of Currency in the United States* 71 (The Macmillan Co. 1915) (1915).

<sup>94</sup> E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790* 5 (Univ. of North Carolina Press 1961).

<sup>95</sup> *Id.*

<sup>96</sup> MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933–1965* 29 (Oxford Univ. Press 1975) (1975).

<sup>97</sup> C. LOWELL HARRISS, *HISTORY AND POLICIES OF THE HOME OWNERS' LOAN CORPORATION* 1 (National Bureau of Economic Research 1951).

<sup>98</sup> GELFAND, *supra* note 96, at 48.

colonial governments actually created the currency that was lent into circulation without incurring government borrowing costs.<sup>99</sup>

While Lincoln's Greenback was spent into circulation and earned no interest for the government, the colonial currencies were actually lent into circulation, thereby earning interest for colonial governments. In fact, in the middle colonies, "the loans served as a substitute for taxes," and the interest received by these colonial governments "was sufficient to pay most of the ordinary cost of administration."<sup>100</sup> While land banks were less successful in New England and the south, currency emissions in New York, New Jersey, Delaware, and Maryland were regarded as stable, and were never great enough in volume as to impair credit.<sup>101</sup>

According to Ferguson, historians agree that Pennsylvania's currency was held in universal esteem, a principal factor in the colony's growth and prosperity, and maintained "without fear of repudiation and to the manifest benefit of the province":

Pennsylvania managed a land bank almost continuously after 1723 without mishap. For more than twenty-five years before the French and Indian War, the interest received by the government supported expenses without the necessity of direct taxes. Relative freedom from taxation probably contributed to Pennsylvania's remarkable growth.<sup>102</sup>

None other than Adam Smith, the grandfather of classical economics, described the currency emissions in glowing terms:

The government of Pennsylvania without amassing any treasure [i.e., any stock of gold or silver] invented a method of lending, not money indeed, but what is equivalent to money, to its subjects. [It advanced] to private people at interest, upon security on land to double the value, paper bills of credit . . . made transferable from hand to hand like bank-notes, and declared by act of assembly to be legal tender in all payments from one inhabitant of the province to another.<sup>103</sup>

According to numerous historians, the price level in Pennsylvania during the fifty-two years prior to the American Revolution and while Pennsylvania was on a paper standard "was more stable than the American price level has been during

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<sup>99</sup> HIXSON, *supra* note 4, at 53.

<sup>100</sup> FERGUSON, *supra* note 94, at 5–6.

<sup>101</sup> *Id.* at 6–8.

<sup>102</sup> *Id.* 6, 13, 16. Hummel asserts, "No one needs to be reminded that government cannot create resources out of thin air." Hummel, *supra* note 4, at 597. The colonial experience suggests otherwise. Colonial governments created currency out of thin air, lent the currency into circulation, and the result was the bringing to market of real resources. See HIXSON, *supra* note 4, at 53–54.

<sup>103</sup> HIXSON, *supra* note 4, at 48–49 (words in brackets are Hixson's).

any succeeding 50 year period.”<sup>104</sup> This price stability was due in large part to the commonwealth’s wise management of its currency emissions. In *The Wealth of Nations*, published in 1776, Adam Smith wrote:

Pennsylvania was always more moderate in its emissions of paper money than any other of our colonies. Its paper currency accordingly is said never to have sunk below the value of the gold and silver which was current in the colony before the first emission of its paper money.<sup>105</sup>

Thomas Pownall, also writing during this period, concluded that there “never was a wiser or better measure, never one better calculated to serve the uses of an encreasing country . . . never a measure more steadily pursued, nor more faithfully executed for forty years together.”<sup>106</sup>

The British did not look favorably on the colonial practices, and the British Parliament passed the Restraining Act of 1764 forbidding enactment of such legal tender laws.<sup>107</sup> According to William Hixson, Parliament acted at the behest of British bankers who “wanted the colonies, rather than creating their own notes, to acquire a colonial money supply by borrowing banknotes in Britain (at interest payable in specie [i.e., gold or silver coin]).”<sup>108</sup> Protests immediately broke out in New York, Pennsylvania, Maryland, Virginia, and South Carolina, “colonies which were scarcely in the grip of leveling elements.”<sup>109</sup>

Benjamin Franklin fought enactment of the Restraining Act of 1764 and tried to get it repealed.<sup>110</sup> One of the main reasons for the alienation of the American colonies from the mother country, according to Franklin, was the restrictions on paper money.<sup>111</sup> Franklin wrote, “Every colony was ruined before it made paper money” as gold coin was drawn away by the purchase of imports from Britain.<sup>112</sup>

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<sup>104</sup> Richard A. Lester, *Currency Issues to Overcome Depressions in Pennsylvania, 1723 and 1729*, 46 JOURNAL OF POLITICAL ECONOMY 324, 325 (June 1938), (quoted in HIXSON, *supra* note 4, at 51.)

<sup>105</sup> ADAM SMITH, *THE WEALTH OF NATIONS* 356–57 (ed. Edwin Cannan 1994).

<sup>106</sup> THOMAS POWNALL, *THE ADMINISTRATION OF THE COLONIES*, 4th ed. (London 1768), at 185, (quoted in FERGUSON, *supra* note 94, at 16).

<sup>107</sup> FERGUSON, *supra* note 94, at 15.

<sup>108</sup> HIXSON, *supra* note 4, at 56.

<sup>109</sup> FERGUSON, *supra* note 94, at 15.

<sup>110</sup> *Id.* at 16.

<sup>111</sup> *Id.*

<sup>112</sup> HIXSON, *supra* note 4, at 47 (brackets omitted). According to Ferguson, there was significant popular unrest in New York which was “stilled only by the repeal of the Townshend duties, but also by a special act of Parliament which allowed the colony to issue paper money.” FERGUSON, *supra* note 94, at 16.

The monetary experiment continued during the American Revolutionary War, which was paid to a remarkable extent by issue of paper currency known as the "Continental" despite an acute shortage of specie.<sup>113</sup> But the paper money was issued and counterfeited in large quantities out of all proportion to increases in the output of goods and services.<sup>114</sup> Therefore the currency declined sharply in value in terms of gold and silver, and there was runaway price inflation during the war.<sup>115</sup>

Previously, in many of the colonies, counterfeiting was a serious problem that threatened and often did undermine the confidence and value of their currencies, particularly in the south and northeast colonies.<sup>116</sup> Pennsylvania's lieutenant governor, Patrick Gordon, in a speech to the state Assembly, warned:

It may not unjustly be compared to the Poisoning the Waters of a Country; the blackest, and most detestable Practice that is known, and which the Laws of Nations, and those of War condemn even in declared Enemies; for as that destroys the Lives of the innocent in taking their Natural Food, this would effectively overthrow all Credit, Commerce and Traffick, and the mutual Confidence that must subsist in Society, to enable the Members of it to procure to themselves and Families their necessary Bread.<sup>117</sup>

While most counterfeiting of colonial currencies had been carried on by private criminal gangs, with the advent of the open rebellion, the British made counterfeiting a wartime strategy.<sup>118</sup> According to historian Kenneth Scott, "for the first time in history, counterfeiting was resorted to by a government to undermine confidence in the currency, and thereby the credit, of the enemy."<sup>119</sup>

The Continental currency actually held its value during the first year or two of the Revolution even though it was not redeemable in specie.<sup>120</sup> But as early as the first week of January 1776, if not before, a printing press aboard the *H.M.S. Phoenix*, a British ship of forty-four guns lying in New York harbor, was turning out counterfeits of the thirty dollar bill of emission.<sup>121</sup> When New York fell to the British, it became and remained the

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<sup>113</sup> HIXSON, *supra* note 4, at 73.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 73–74.

<sup>116</sup> KENNETH SCOTT, COUNTERFEITING IN COLONIAL AMERICA 93 (Oxford Univ. Press 1957).

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* at 253.

<sup>119</sup> *Id.*

<sup>120</sup> FERGUSON, *supra* note 94, at 18.

<sup>121</sup> Scott, *supra* note 113, at 253.

chief source of counterfeits made by the British or with British sanction.<sup>122</sup>

The record is replete with evidence of a massive and largely successful counterfeiting effort by the British.<sup>123</sup> Franklin wrote that “immense quantities of these counterfeits, which issued from the British government in New York, were circulated among the inhabitants of all the States, before the fraud was detected.”<sup>124</sup> This, he said, depreciated the whole mass, “first, by the vast additional quantity, and next by the uncertainty in distinguishing the true from the false; and the depreciation was a loss to all and the ruin of many.”<sup>125</sup>

According to Scott, “[f]requently the colonies were put to the trouble and expense of recalling whole emissions. Sometimes trade was greatly hampered or, as in Virginia in 1773, came to a complete standstill.”<sup>126</sup> Moreover, the general depreciation of the Continental currency (hence the term, “not worth a Continental”) meant that the Continental Congress was forced to issue even more currency to pay for its war efforts. While the specie value of the currency emissions remained roughly steady in 1777 and 1778, a period of intense counterfeiting, the paper amounts of the currency issued rose sharply.<sup>127</sup> A vicious cycle set in. Previous counterfeiting and over-issuance was depreciating the currency so greatly while the demands of war remained so pressing “that money had to be printed every month, then every fortnight.”<sup>128</sup> In 1779, John Jay defended the issue of paper money and blamed depreciation on the widespread counterfeiting by the British.<sup>129</sup>

Gouverneur Morris, the person chiefly responsible for planning the use of paper money, had previously been opposed to the project.<sup>130</sup> But like others in the Continental Congress, he agreed that in a crisis, paper money was the only option available.<sup>131</sup> Without the power to tax, however, the Congress had no effective means of retiring its paper money from circulation after it had served its purpose of paying for war provisions.<sup>132</sup> Appeals were made to the states to tax a portion of

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<sup>122</sup> *Id.* at 253–54.

<sup>123</sup> *See id.* at 253–63.

<sup>124</sup> *Id.* at 260.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 262.

<sup>127</sup> FERGUSON, *supra* note 95, at 28.

<sup>128</sup> *Id.* at 29.

<sup>129</sup> HIXSON, *supra* note 4, at 78.

<sup>130</sup> DONALD R. STABLE, *THE ORIGINS OF AMERICAN PUBLIC FINANCE: DEBATES OVER MONEY, DEBT, AND TAXES IN THE CONSTITUTIONAL ERA, 1776–1836* 23 (1998).

<sup>131</sup> *Id.*

<sup>132</sup> HIXSON, *supra* note 4, at 86–87.

the paper money and send those back to Congress to retire the bills, but to no avail, the money was not forthcoming.<sup>133</sup> The states did not come through, and this defect in the allocation of taxing authority contributed further to the depreciation in the currency.<sup>134</sup>

Franklin was more sanguine than others about the currency depreciation which he viewed as “a kind of imperceptible tax” that was more progressive than other taxes:<sup>135</sup>

The general effect of the depreciation [of Continental and state bills] among the inhabitants of the states has been this, that it has operated as a gradual tax upon them. Their business has been done and paid for by the paper money, and every man has paid his share of the tax according to the time he retained any of the money in his hands and to the depreciation within that time. Thus it has proved a tax on money, a kind of property very difficult to be taxed by any other mode: and it has fallen more equally than many other taxes, as those people paid most, who, being richest, had most money passing through their hands.<sup>136</sup>

Franklin's defense of the inflation tax was probably a combination of putting the best face on a bad situation, along with a vestige of his general enthusiasm with paper money going back to the pre-Revolutionary experience in colonial Pennsylvania. While many were horrified by the depreciation and inflation, others believed the war could not have been fought and independence could not have been won without the issues of paper money.<sup>137</sup> According to the historian Donald Stabile, “Highly regarded leaders such as Thomas Paine and Alexander Hamilton looked at the issuance of paper money as a necessary and a reasonable substitute for taxes.”<sup>138</sup> Franklin stressed that when the war began, the colonies “had neither arms nor ammunition, nor money to purchase them or to pay soldiers” and it was the paper currency that allowed Congress to pay, clothe and feed the troops, fit out ships, and conduct the war.<sup>139</sup>

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<sup>133</sup> STABILE, *supra* note 130, at 23.

<sup>134</sup> *Id.* at 23–24.

<sup>135</sup> *Id.* at 24.

<sup>136</sup> HIXSON, *supra* note 4, at 79 (quoting BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 9:134–35 (Albert Henry Smith ed., 1907)). In another letter, Franklin wrote: “The currency as we manage it is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides victuals and ammunition: and when we are obliged to issue a quantity excessive, it pays itself off by depreciation.” *Id.* (quoting FRANKLIN, *supra* note 132, at 7: 294).

<sup>137</sup> STABILE, *supra* note 130, at 24.

<sup>138</sup> *Id.* As Stabile concluded, currency emissions during the Revolution were overlarge, but supported by many as “a necessary evil.” *Id.* at 33.

<sup>139</sup> HIXSON, *supra* note 4, at 77.

The numbers support these conclusions. According to Hixson, the total cost of war for the American side was about \$168 million and the original specie value of Continental currency issued was about \$46 million, or nearly 40 percent of the war's total costs to the colonies.<sup>140</sup>

After the war, the Articles of Confederation marked a period of weak federal authority. Class warfare between debtors and creditors broke out throughout the new nation during a time of such harsh treatment of debtors as debtor's prisons.<sup>141</sup> According to Hixson, "By the end of 1786, seven states had new issues of paper money in circulation—the size and legal-tender status of the various issues reflecting the balance of power between creditors and debtors of the particular states."<sup>142</sup> Not all state currencies were badly managed, but even where the legal tender bills were kept fairly steady, the problems of interstate commerce in a confederation with multiple currencies still existed.<sup>143</sup>

The Constitutional Convention settled the issue in favor of creditor interests by adopting Article I, Section 10, forbidding states from emitting bills of credit (paper money) or passing any law impairing the obligation of contracts, which included debt contracts.<sup>144</sup> In the drafting of the Constitution, creditor interests clearly had the upper hand. Early American history has since been skewed against paper money. As Ferguson concludes:

Upon reviewing the evidence, it appears that the impression of colonial public finance conveyed by later scholars gives a misleading background for a financial history for the Revolution. The efforts of the American provinces to create a medium of exchange, provide agricultural credit, and equip government with the means of incurring and discharging responsibilities, hardly constitute a "dark and disgraceful" picture, nor, on the whole, a record of failure. Most colonies handled their currency with discretion and were successful in realizing the purposes associated with its use.<sup>145</sup>

In creating the Greenback, Lincoln and the Civil War Congress had to overcome the traditional bias against a government-issued fiat currency. The multiple interconnected crises that they faced—political disintegration, economic stagnation, financial panic, and military exigency—suggest the

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<sup>140</sup> *Id.* at 74.

<sup>141</sup> *Id.* at 84–85.

<sup>142</sup> *Id.* at 85.

<sup>143</sup> *Id.*

<sup>144</sup> U.S. CONST. ART. I, § 10.

<sup>145</sup> FERGUSON, *supra* note 94, at 24.

nature of the sea change in conventional thinking. Necessity was once again the mother of invention.

### III. WHAT WOULD LINCOLN DO?

Some economists dismiss the significance of Treasury-issued fiat currency by pointing out facile similarities with today's system of Federal Reserve-issued fiat currency. For instance, Hummel argues that the two processes work out roughly the same financially.<sup>146</sup> The Fed creates money and loans it to the Treasury at interest; but after covering its operating expenses (several billion dollars), the Fed rebates around ninety percent of such interest payments (some tens of billions of dollars) back to the Treasury.<sup>147</sup> This ignores that the money rebated annually is in the tens of billions of dollars, while the Treasury must pay in the hundreds of billions of dollars in interest to its bondholders, both domestic and foreign, who happen to also own shares in the Federal Reserve banks that take part in deciding the interest rate that Treasury will pay to its bondholders.

Hummel makes an important concession about the difference between government issued currency and privatized currency issuance: "The one thing that does change under a central bank is who is in charge of issuing fiat money, and the resulting incentives."<sup>148</sup> Indeed. When Treasury issues currency and spends it into circulation, it pays no interest. When Treasury issues currency and lends it into circulation, it earns interest, and is thereby able to reduce the tax burden for taxpayers. When a central bank, like the Federal Reserve, issues currency and lends it to Treasury, it is that same central bank that now sets the rate of interest on all short-term Treasury borrowing, including the interest that Treasury pays to bondholders other than the Federal Reserve, such as the commercial banks and investment banks that hold trillions of dollars in Treasury debt and also happen to exercise formal and informal influence in the Federal Reserve's interest rate decisions.

History bears out certain advantages that Treasury-issued currency has over a regime dominated by an autonomous central bank. For instance, the Greenback allowed the North to issue currency and spend it into circulation without incurring interest charges. However, to the extent that Greenbacks were insufficient in the amount of United States Notes actually issued, the North had to finance much of the rest of its war effort by

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<sup>146</sup> Hummel, *supra* note 4, at 604.

<sup>147</sup> *Id.* at 604–05.

<sup>148</sup> *Id.* at 605.

borrowing banknotes at significant interest rates, thereby adding to the burdens of future taxpayers.<sup>149</sup>

Likewise, during World War II, the effect of central bank-issued money was ameliorated by the fact that the Federal Reserve was not functionally independent and interest rates on all government debt were essentially set by the Treasury.<sup>150</sup> As a result, the Treasury was able to borrow at near zero interest rates.<sup>151</sup> This was the so-called “pegged period” in which the Federal Reserve kept interest rates pegged at 3/8 of one percent on short-term Treasury debt and about 2 percent for longer-term Treasury bonds.<sup>152</sup>

By contrast, in more recent years, the Federal Reserve has set interest rates on all Treasury debt through decisions made by its Federal Open Market Committee (FOMC), a committee which includes the seven members of the Fed’s Board of Governors, as well as the twelve unelected and un-appointed presidents of the regional Federal Reserve Banks, which are privately owned by the same commercial banks that have profited by the higher interest rates set by the FOMC on Treasury securities.<sup>153</sup>

Several economists, including Nobel laureate Paul Krugman, have spoken of “cognitive regulatory capture” to describe the intellectual uniformity that has pervaded central bank thinking and led to the triumph of deregulatory ideology.<sup>154</sup> With regards to the Federal Reserve, the agency capture is not just cognitive capture, but a matter of institutional design. The presidents of the regional Federal Reserve Banks, though acting functionally as officers of a supposedly federal agency, are not appointed by the President of the United States and not subject to Senate confirmation.<sup>155</sup> The Federal Reserve System further evades

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<sup>149</sup> HIXSON, *supra* note 4, at 139–42. *See also* BERT W. REIN, AN ANALYSIS AND CRITIQUE OF THE UNION FINANCING OF THE CIVIL WAR 31–51 (Amherst C. Press 1962) (discussing the Union’s use of greenbacks and borrowing to finance the Civil War).

<sup>150</sup> Canova, *American Wartime Values*, *supra* note 58, at 13.

<sup>151</sup> *Id.*

<sup>152</sup> Timothy A. Canova, *Financial Liberalization, International Monetary Disorder, and the Neoliberal State*, 15 AM. U. INT’L L. REV. 1279, 1300 (2000) [hereinafter Canova, *Financial Liberalization*].

<sup>153</sup> *See* Canova, *American Wartime Values*, *supra* note 58, at 21–22; Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 116–18 (1989).

<sup>154</sup> Paul Krugman, *Nobel Laureate Paul Krugman on the Economy: The Return of the Depression Economics*, *The Washington Post* (Transcript, Dec. 15, 2008), <http://www.washingtonpost.com/wpdyn/content/discussion/2008/12/11/DI2008121102406.html>. (last accessed August 16, 2009).

<sup>155</sup> After Timothy Geithner stepped down as president of the New York Federal Reserve Bank to become Treasury Secretary, the New York Fed named William C. Dudley as its new president after a search headed by the chairman and deputy chairman of the board of directors of the privately-owned New York Fed. There was no formal

oversight by not relying on a penny of congressional appropriations, and by its exemption from various statutes such as the Federal Advisory Committee Act and certain provisions of the Freedom of Information Act.<sup>156</sup> Finally, the governors themselves serve for fourteen-year terms, longer than three presidential administrations and longer than any other officer of the federal government.<sup>157</sup>

Although the Federal Reserve rebates much of the interest it receives from the Treasury, it has traditionally set short-term interest rates much higher than during the 1941–1951 peg, while surrendering the long-term rate to market forces.<sup>158</sup> As a result, the Treasury's interest rate burdens have risen to enormous levels: net interest payments by the federal government have risen from about \$14 billion in 1970 to \$52 billion in 1980, \$184 billion in 1990, and approximately \$250 billion by 2008.<sup>159</sup>

To focus only on the interest payments rebated by the Federal Reserve to Treasury, while ignoring the Treasury's enormous interest payments to private bondholders misses key differences between a regime of Treasury-issued currency and a monetary regime dominated by central bank-issued currency. Of

involvement by the Obama administration or Congress in the search, and certainly no input from any other interests from civil society. Press Release, Federal Reserve Bank of New York, New York Fed Names William C. Dudley President, (Jan. 27, 2009), (on file with Chapman Law Review).

<sup>156</sup> In late 2008, the Federal Reserve refused a request by Bloomberg news to disclose information about the recipients of more than \$2 trillion in emergency loans from U.S. taxpayers made by the Fed and the assets the Fed is accepting as collateral. Bloomberg filed suit under the Freedom of Information Act and the Fed responded by asserting the Fed's express FOIA exemptions related to trade secrets and commercial information. Mark Pittman, *Fed Refuses to Disclose Recipients of \$2 Trillion (Update 2)*, BLOOMBERG NEWS, Dec. 12, 2008, <http://www.bloomberg.com/apps/news?pid=20601109&sid=apx7XNLnZZlc&refer=home>. The District Court rejected the Fed's argument and ordered the Fed to disclose the identities of the borrowers in several of its emergency lending programs. *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, No. 08 Civ. 9595 (LAP), 2009 WL 2599336 at \*17 (S.D.N.Y. Aug. 24, 2009) (Preska, C.J.). The Fed subsequently asked for a delay in enforcement of the disclosure order until the case can be heard by the U.S. Court of Appeals for the Second Circuit where it is presently pending at the time of this writing. Mark Pittman, *Federal Reserve Says Disclosing Loans Will Hurt Banks (Update1)*, BLOOMBERG, Aug. 27, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aAOhgVw78e3U>.

<sup>157</sup> See Canova, *American Wartime Values*, *supra* note 58, at 22. There have been numerous challenges to the constitutionality of the Federal Reserve System, on both private non-delegation and Appointments Clause grounds, but all have been dismissed by the U.S. Court of Appeals for the D.C. Circuit on narrow procedural grounds (lack of standing for private plaintiffs and a newly-created equitable discretion doctrine for congressional plaintiffs). Canova, *Closing the Border*, *supra* note 63, at 404.

<sup>158</sup> Canova, *American Wartime Values*, *supra* note 58, at 14–15, 21.

<sup>159</sup> Economic Report of the President: 2009 Report Spreadsheet Tables, Council of Economic Advisors, Table B-80, <http://www.gpoaccess.gov/eop/tables09.html> (last accessed March 4, 2009). Hummel seems to acknowledge the disadvantage of central-bank issued currency: "Such privately created money, even when its quantity expands, provides no seigniorage." Hummel, *supra* note 4, at 607.

course, in addition to the interest paid by Treasury to private bondholders must be added the trillions of dollars in hidden subsidies and guarantees made by the Federal Reserve to prop up U.S. financial institutions, interbank lending, and money markets. Last year, after the Federal Reserve subsidized J.P. Morgan's \$29 billion acquisition of Bear Stearns, former Fed Chairman Paul Volcker questioned the central bank's independence.<sup>160</sup> Since then the Fed has come to the rescue of other clients, including the American Insurance Group (AIG), Citigroup, and Bank of America, and creditors and counterparties of AIG such as Goldman Sachs and perhaps various favored hedge funds, while propping up financial markets for the same private financial interests.<sup>161</sup>

The Federal Reserve, now the model of autonomous central banks around the world, is not a disinterested entity, but is stacked with the representatives of financial institutions that have numerous interests that conflict with the interests of the Treasury Department and the taxpayer. The enormous transfers of wealth from the taxpayer to large financial institutions that are a central feature of a privatized system of money creation make little sense at any time, and particularly in a time of war, economic recession, or other national crisis. Such wealth transfers apparently made little sense to Lincoln or Roosevelt, both of whom found ways around the straight-jackets of so-called "sound money" and "sound finance."

Roosevelt followed Lincoln's wartime example by taking control of the commanding heights of finance to pay for the military effort in World War II.<sup>162</sup> During Lincoln's tenure, this meant having the Treasury issue currency directly into circulation, as authorized by Congress. During World War II, it meant bringing the Federal Reserve under the direction of the Treasury to lend freely to the federal government. In both of these models, the federal government asserted its financial and economic sovereignty to achieve the most important policy objectives of generations in crisis. It is certainly fair to ask what a comparable assertion of financial and economic sovereignty would or should look like today.

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<sup>160</sup> Pedro Nicolaci da Costa, *Former Fed Chair Volcker: Financial Crisis not Over*, REUTERS, Mar. 20, 2008, <http://www.reuters.com/article/telecomm/idUSN1933392020080320>.

<sup>161</sup> Andrew Ross Sorkin & Mary Williams Walsh, *A.I.G. Reports Loss of \$61.7 Billion as U.S. Gives More Aid*, N.Y. TIMES, Mar. 2, 2009, <http://www.nytimes.com/2009/03/03/business/03aig.html>.

<sup>162</sup> Hummel, *supra* note 4, at 593.

The present financial and economic crisis, the worst since the Great Depression, has raised a range of proposals, most of which involve the expenditure of large sums of federal revenue, including the \$787 billion fiscal stimulus, the \$700 billion Troubled Asset Relief Program (TARP) to assist financial institutions in distress, Treasury Secretary Geithner's proposal to spend up to another \$2 trillion of taxpayer money to purchase the toxic assets of failing banks in partnership with certain hedge funds deemed co-investors.<sup>163</sup> The programs already authorized will add significantly to the federal budget deficit, which now exceeds \$1.6 trillion and could soon approach \$2 trillion a year. As Hummel correctly points out, all of this additional debt, much of it foreign debt, raises the specter of a possible sovereign default by the U.S.<sup>164</sup>

The economic recovery of the 1930s, however insufficient in size, was spurred in large part by the monetary stimulus stemming from the devaluation of the dollar and inflows of gold.<sup>165</sup> It could be that a similar devaluation, if done in an orderly way, could help inflate our way partly out of this debt deflation. The experience of the 1940s suggests, however, that further fiscal stimulus may be needed to pull out of the present recession and keep the economy from falling into a deeper financial crisis and depression. If what is needed is federal spending of the magnitude of the 1940s (recall, 45 percent of GDP), then several questions are raised: (1) what would be the appropriate outlets for spending when it makes no sense to have assembly lines producing aircraft carriers, tanks, warplanes, and other armaments; and (2) how to pay for such a massive fiscal stimulus.

Perhaps a new G.I. Bill of Rights for the present generation would restore the purchasing power for the middle class to put the economy back on a growth path. Others point to the vast physical infrastructure needs of the public sector, which has been estimated in the trillions of dollars just to repair roads and

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<sup>163</sup> Mike Caggese, *Fed Announces \$800 Billion in Homeowner, CONSUMER AND SMALL BUSINESS AID*, Money Morning.com, Nov. 26, 2008, <http://www.moneymorning.com/2008/11/26/consumer-business-bailout/>; Pallavi Gogoi, Sue Kirchhoff, Barbara Hagenbaugh & Kathy Chu, *Bailout plan: Foreclosure issues still a major hurdle*, USATODAY, Feb. 13, 2009, [http://www.usatoday.com/money/economy/2009-02-10-bailout-details\\_N.htm](http://www.usatoday.com/money/economy/2009-02-10-bailout-details_N.htm).

<sup>164</sup> Hummel, *supra* note 4, at 611–12; see also Michael Pettis, *Is the US trade deficit sustainable? Is China's trade surplus?*, Jan. 13, 2009, <http://mpettis.com/2009/01/is-the-us-trade-deficit-sustainable-is-china%E2%80%99s-trade-surplus/>.

<sup>165</sup> Romer, *supra* note 62, at 759.

bridges, as well as water, sewage, and other capital improvements.<sup>166</sup>

One proposal that was rejected as an amendment to the 2009 fiscal stimulus package would have authorized the Treasury to issue bonds for spending on transit, water, highway, bridge, and road infrastructure projects by federal, state or local government.<sup>167</sup> One problem with this proposal, as with the entire stimulus package, is that it would have added to the federal deficit and national debt, made the U.S. more dependent on foreign borrowing, and possibly undermined the value of the dollar and stability of U.S. financial markets.

A somewhat different approach was proposed in 1999 by Representative Ray LaHood (like Lincoln, a Republican from Illinois), who introduced legislation to create \$360 billion in United States Notes to be lent interest-free to state and local governments over a five-year period to fund capital projects.<sup>168</sup> The bill, entitled the State and Local Government Empowerment Act, received about 22 cosponsors but never made it out of

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<sup>166</sup> See John Bacino, *Investing in Crumbling Infrastructure in the States Before It's Too Late*, PROGRESSIVESTATES.ORG, Aug. 9, 2007, <http://www.progressivestates.org/blog/650/investing-in-crumbling-infrastructure-in-the-states-before-its-too-late> (last visited Mar. 10, 2009).

<sup>167</sup> H.R. 852, which was introduced by Representative Loretta Sanchez (Democrat-California) and did not specify actual amounts to be appropriated, would have authorized the Secretary of the Treasury to issue bonds, to be known as "Re-Build America Bonds," for spending on transit, water, highway, bridge, and road infrastructure projects by any governmental unit. H.R. 852, 111th Cong. (2009) available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-852>. Congresswoman Sanchez is a 1982 graduate of Chapman University. Congresswoman Loretta Sanchez – About Loretta, [http://www.lorettasanchez.house.gov/index.php?option=com\\_content&task=view&id=18&Itemid=21](http://www.lorettasanchez.house.gov/index.php?option=com_content&task=view&id=18&Itemid=21) (last visited Mar. 10, 2009).

<sup>168</sup> H.R. 1452, the State and Local Government Empowerment Act, introduced April 15, 1999 in the 106th Congress, 1st Session. H.R. 1452, 106th Cong. (1999) available at <http://www.govtrack.us/congress/bill.xpd?bill=h106-1452>. The bill had at least twenty-two cosponsors and was referred to the House Banking and Financial Services Subcommittee on Domestic and International Monetary Policy, and the House Budget Committee. *Id.* In 2003, LaHood introduced apparently similar legislation, H.R. 4310 and H.R. 4371, to direct the Secretary of Commerce instead of Treasury to make noninterest bearing loans to state and local governments for capital projects. This time, the legislation had seven cosponsors, including Representative Rahm Emanuel (Democrat-Illinois), who is now President Obama's White House Chief of Staff. H.R. 4310, 4371, 108th Cong. (2004) available at <http://www.govtrack.us/congress/bill.xpd?bill=h106-1452&tab=related>.

committee.<sup>169</sup> Significantly, Mr. LaHood is now Secretary of Transportation in the Obama administration.<sup>170</sup>

Mr. LaHood's proposal was a variation of the Sovereignty Loan Proposal, an initiative drafted by a private Illinois citizen Ken Bohnsack, and like the Sovereignty Loan Proposal, was modeled on Lincoln's Greenback.<sup>171</sup> Under the LaHood proposal, the annual increase in the money stock would be well below the current levels of money growth, and therefore no more inflationary than privately-issued currency by the logic of monetarists.<sup>172</sup> In addition, the newly-issued currency could be removed from circulation when paid back to the Treasury, or circulated again in the form of new loans to state and local governments. Most importantly, the \$360 billion that would have been created under the LaHood proposal would not add a single penny to the federal deficit, the national debt, or foreign borrowing. The federal government would incur no interest or principal obligations.<sup>173</sup> Furthermore, if the issuance of these United States Notes were to lead to some devaluation of the dollar, perhaps that would provide some monetary stimulus to recovery.

In addition to the needs of state and local governments, and proposals for fiscal stimulus to restore economic growth, there is the problem of the financial system itself. The federal government has pumped nearly \$700 billion into the biggest commercial banks, which were sinking under the weight of their declining portfolios of mortgage-backed securities, unmarketable derivatives, and other asset-backed securities.<sup>174</sup> A number of

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<sup>169</sup> H.R. 1452, 106th Cong. (1999) available at <http://www.govtrack.us/congress/bill.xpd?bill=h106-1452>. According to Section 5 of the bill, every state, county, township, incorporated municipality, school district, and Indian tribe would have been entitled to obtain a loan in amounts based on resident population. Section 7 provided maturity periods of the loans to be between 10 and 30 years, and based on the estimated number of years of the useful life of the infrastructure financed by the loan. Upon repayment, the funds would be transferred to the U.S. government, presumably for use in future interest-free loans. *Id.*

<sup>170</sup> U.S. Department of Transportation / Ray LaHood <http://www.dot.gov/bios/lahood.htm>. LaHood has a record of supporting mass transit and transportation infrastructure construction and improvement. Adam Doster, "Ray LaHood? Really?", PROGRESS ILLINOIS, Dec. 17, 2008, <http://progressillinois.com/2008/12/17/ray-lahood-really>.

<sup>171</sup> Telephone Interview with Ken Bohnsack (Feb. 4, 2009). Bohnsack has recently suggested that the LaHood proposal should be revised from interest-free loans to outright grants to state and local governments for capital investment. *Id.*

<sup>172</sup> Monetarist Theory of Economics, <http://www.interzone.com/~cheung/SUM.dir/econthym1.html> (last visited March 14, 2009).

<sup>173</sup> H.R. 1452, 106th Cong. (1999) available at <http://www.govtrack.us/congress/bill.xpd?bill=h106-1452>.

<sup>174</sup> Dan Wilchins, *U.S. aid to banks seen exceeding \$700 billion*, REUTERS, Oct. 21, 2008 <http://www.reuters.com/article/ousiv/idUSTRE49K8OK20081021>.

commentators advocated nationalization of these banks to restore them to solvency, with an eye to privatizing or converting them into banking cooperatives in the future.<sup>175</sup> This might be one way to stop the financial hemorrhaging without having to spend billions or trillions more in taxpayer money.

Others have proposed having the federal government and/or state governments charter and capitalize new banks, publicly-owned and managed, to lend directly to U.S. businesses and consumers.<sup>176</sup> To the extent new banks are capitalized by the federal government, this would once again provide an opportunity to finance the new investment through the issuance of United States Notes. It could also suggest a return to the colonial model of public finance where the government itself lends money into circulation at interest, and with the interest earned thereby reducing the tax burden on ordinary citizens.

Likewise, the proposal by Senate Republicans, also rejected during the fiscal stimulus debate, to have the federal government offer 30-year fixed rate mortgages at 4 percent, would have required some outlay of public funds, and presumably significant federal borrowing to finance the plan.<sup>177</sup> If the federal government were to borrow at less than 4 percent, then its profit could be applied to pay for the difference between the new 4 percent mortgages and today's prevailing mortgage interest rate, which was estimated at above 5 percent.<sup>178</sup> Once again, although not proposed by the Senate Republicans, this could have also presented an opportunity for the federal government to issue and lend currency directly into circulation and thereby reduce tax burdens by hundreds of billions of dollars from the interest earned on a high volume of such refinancing transactions.

Finally, proposals to have state governments charter and capitalize their own banks would provide a way around the Article I, Section 10 prohibition against states emitting paper money.<sup>179</sup> For instance, in 1919, North Dakota established the

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<sup>175</sup> Interview by the Real News Network with Timothy Canova, Worst week ever on world markets (Oct. 11, 2008) available at [http://therealnews.com/t/index.php?option=com\\_content&task=view&id=31&Itemid=74&jumival=2557](http://therealnews.com/t/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=2557) (advocating nationalization model used by Sweden in the 1990s); Tunku Varadarajan, *Nationalize' the Banks: The Weekend Interview with Nouriel Roubini*, WALL ST. J., Feb. 21–22, 2009, at A9.

<sup>176</sup> Willem H. Buiter, *'Good Banks' Are the Cost Effective Way Out of the Financial Crisis*, WALL ST. J., Feb. 21–22, 2009, at A11.

<sup>177</sup> Jeanne Sahadi, *Stimulus: Senate's housing hope*, CNNMONEY, Feb. 2, 2009, [http://money.cnn.com/2009/02/01/news/economy/Senate\\_stimulus\\_housing/](http://money.cnn.com/2009/02/01/news/economy/Senate_stimulus_housing/).

<sup>178</sup> *Id.*

<sup>179</sup> Ellen Brown, *A Radical Plan for Funding a New Deal*, YES! MAGAZINE, Dec. 2008, <http://www.yesmagazine.org/article.asp?id=3162>.

Bank of North Dakota, the only state-owned bank in the nation, to lend funds to the private sector to encourage agriculture, commerce, and industry within the state.<sup>180</sup> Created with \$2 million of capital, today the Bank of North Dakota operates with more than \$160 million in capital, provides federally insured student loans, and draws on a deposit base that includes all state funds and funds of state institutions.<sup>181</sup> While the Bank of North Dakota does not actually create currency, like the land banks in colonial America it does provide credit and, with any interest earned, reduces the tax burdens on its citizens.

For the past generation, the economic orthodoxy has claimed that the Federal Reserve System, the model of an autonomous and largely unaccountable central bank, is the only alternative to allowing elected public officials exercise authority over currency and monetary policy. But these pretensions of economics as a science have led to wrong-headed conclusions that government is incapable of resolving our most important problems and competing claims. Today's collapsing financial bubble economy suggests that we pay a steep price when letting self-interested bankers and their chosen technocrats monopolize these monetary functions. Surely a central bank could be designed that ensures diversity of perspectives and a pluralism of interests while maintaining some degree of policy-making autonomy. We should ask why there is no room for industrial capital, perhaps the National Association of Manufacturers, and the representatives of industrial unions, public sector employees, and student debtors on the boards and committees deciding currency and monetary policy. Instead of a marketplace of ideas and a forum to test one's theories, our central banks have become echo chambers for flawed and outdated orthodoxies.

Perhaps the most important questions we face are not those of economic science or competing models of public finance and currency creation. Rather, perhaps they are political and strategic in nature and ultimately moral questions: whether we face existential challenges as great as did the generations of Americans who looked to Lincoln and Roosevelt for vision and leadership.

According to Lincoln, "The monetary needs of increasing numbers of people advancing toward higher standards of living can and should be met by the government. . . . The issue of

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<sup>180</sup> Bank of North Dakota, <http://www.banknd.nd.gov/bndhome.jsp>. (last visited Mar. 10, 2009).

<sup>181</sup> About Bank of North Dakota, <http://www.banknd.nd.gov/about.jsp> (last visited Mar. 10, 2009).

money should be maintained as an exclusive monopoly of the National Government.”<sup>182</sup> Lincoln’s approach to public finance, like Roosevelt’s, was one of populist economic sovereignty: the reassertion of democratic control of the financial system, as permitted under the Constitution, to empower the elected branches of government to meet the needs of the day in an hour of pressing need.

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<sup>182</sup> HIXSON, *supra* note 4, at 146 (quoting from GORHAM MUNSON, *ALLADIN’S LAMP* 124 (N.Y.: Creative Age Press 1945) (1945)).