

# CONSIDERING LAW AND MACROECONOMICS

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## I

### INTRODUCTION

The worst financial and economic crisis to hit the world's richest economies since the Great Depression inspired a flood of scholarship that straddled the disciplines of law and macroeconomics. With few exceptions, this crisis scholarship did not set out to build a new interdisciplinary movement and did not claim the legacy of earlier efforts to mine the intersection of law and macroeconomics.<sup>1</sup> What are we to make of this moment ten years on? Could Law and Macroeconomics (LawMacro) be an important new turn in legal and economic thought, a casual interdisciplinary tryst on the margins of a hundred-year flood, or, paraphrasing one commentator, this generation's Freudian pushback against the venerable Law and Economics movement?<sup>2</sup>

This symposium Issue of *Law and Contemporary Problems* offers a sampling of views from a September 2019 Conference at Georgetown Law on the prospects for LawMacro as a field of inquiry. Our principal goal for the Conference and this Issue has been to consider the scope for more systematic, sustained

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This project has been marinating for years. We have amassed debts of gratitude to many exceptionally kind colleagues; we cannot possibly list them all. Some indulged our LawMacro fantasies for hours, even as they had their doubts; others encouraged us on this quest a decade ago (and likely forgot by now); yet others did not discourage us hard enough. The Conference and this Issue would not have happened without them. We owe special thanks to the following, none of whom are responsible for our take on LawMacro or any of our mistakes: the wonderful *L&CP* editors, workshop and panel participants at Georgetown, Vanderbilt, Cornell, and the Canadian Law and Economics Association, participants at the Law and Macroeconomics Conference at Georgetown Law on September 27–28, 2019, and Jonathan Baker, Michael S. Barr, Lily Batchelder, Margaret Blair, Olivier Blanchard, Danny Bradlow, William W. Bratton, Chris Brummer, Neil H. Buchanan, Heather Casey, Jérémie Cohen-Setton, Peter Conti-Brown, Kevin E. Davis, Peter Diaz, Brent Futrell, Erik Gerding, Heather Gerken, Mitu Gulati, Sean Hagan, Robert Hockett, Rachel Jackson, Greg Klass, Yair Listokin, Patricia McCoy, John Mikhail, Saule Omarova, Katharina Pistor, Adam Posen, Randal K. Quarles, Heidi Schooner, Howard Shelanski, Leland Smith, David Snyder, Lawrence H. Summers, David Super, Daniel K. Tarullo, Joshua Teitelbaum, Edwin M. Truman, Nicolas Veron, Robin West, Janet Yellen, and Jeromin Zettelmeyer.

1. See *infra* Part II.

2. See Gregory Klass, Comments on Yair Listokin, *Law and Macro: What Took So Long?* at the Conference on Law and Macroeconomics at Georgetown University Law Center (Sept. 27, 2019).

engagement between law and macroeconomics, distilling post-crisis research trends, and identifying avenues for future collaboration.

We left the Conference convinced that such engagement was worthwhile and—equally—that defining the proper scope, place, and content of LawMacro was a work in progress. The ultimate prospects of LawMacro will depend on its ability to generate fresh insights about both law and macroeconomics, to identify good public policies, and to open new political possibilities for societies riven by extreme inequality, and grappling with demographic, technological, and climate shocks.<sup>3</sup>

Part I of this foreword briefly looks back at the Law and Economics movement (LawMicro), which reinvented itself in the 1960s and went on to transform U.S. law scholarship since the early 1970s. The movement's reach and influence have made it the presumptive reference point for any project that implicates law and economics in the United States and, to a lesser extent, in other legal traditions.<sup>4</sup>

Some contributions to the Conference and this Issue fit comfortably in the Law and Economics tradition; others challenge it. We see no need to stake out a position either way. Because LawMicro has ignored macroeconomics altogether until very recently, it has left ample room for gap-filling and extensions. Meanwhile, LawMacro presents an unusual opportunity to reconsider the interdisciplinary relationship in a more fundamental way.

Microeconomists study the behavior of people and firms in discrete markets, where price adjustment leads to equilibrium and where government is absent, except as a distortion or a fix for market failure. The threshold innovation of LawMicro was to claim law—all of it—as an object of economic analysis.<sup>5</sup> By definition, law (like agriculture or restaurant management) has nothing to say to microeconomics in this conversation.

Macroeconomists may share microeconomists' basic ideas about decision-making,<sup>6</sup> but they operate on a different scale and under different baseline

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3. Cf. PETER HALL, *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* 7 (Peter Hall ed., 1989) (“In some cases, [Keynesian ideas] . . . altered the terms of political discourse in such a way as to legitimate a variety of policies and make new combinations of political forces possible.”).

4. E.g., *THE ONLINE ENCYCLOPEDIA OF LAW & ECONOMICS* 13 (Boudewijn Bouckaert & Gerrit De Geest eds., 1999), <http://encyclo.findlaw.com/4800book.pdf> [<https://perma.cc/DL42-J6Z5>].

5. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* ix (1972); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29–30 (9th ed. 2014) (“[T]he hallmark of the ‘new’ law and economics . . . is the application of economics to the legal system across the board . . .”).

6. In the early years of the LawMicro revolution in the United States, *macroeconomic* models did not derive the behavior of aggregates from *microeconomic* models for individual and firm behavior. For its part, *microeconomics* had trouble accounting for persistent unemployment and other observed *macroeconomic* phenomena. A 1976 paper by Robert Lucas posed a foundational challenge for macroeconomic theory, arguing that people's expectations of economic policy intervention would prompt behavior changes and ultimately frustrate policy. Robert E. Lucas, Jr., *Econometric Policy Evaluation: A Critique*, in *THE PHILLIPS CURVE AND LABOR MARKETS* (Karl Brunner & Alan H. Meltzer eds., 1976). A succession of model revisions in response to the Lucas critique led to growing convergence between macro- and microeconomists' decision-making models; however, the project drew

conditions. Macroeconomists study the behavior of economies made up of multiple markets and political units. They focus on politically salient aggregates, such as unemployment, inflation, and growth.<sup>7</sup> In their world, prices are sticky, distortions and externalities are commonplace, and—whether they like it or not—governments manage the business cycle in the short run and output growth in the long run. Multiple, overlapping legal systems are at work in a macroeconomy, constructing actors and markets and mediating interactions among them.<sup>8</sup>

Because macroeconomic theories do not purport to explain all or even most human behavior, the scope for law as an object of macroeconomic analysis is relatively narrow. On the other hand, law—both public (for example, constitutional, administrative) and private (for example, contract, property)—has much to say about the structure and operation of economic systems. Law and macroeconomics have come to share a preoccupation with instability and stability, and crisis and crisis governance, which remains an awkward fit in LawMicro. LawMacro therefore holds out the possibility of a two-way exchange that could enrich both disciplines.

Part II considers examples of post-crisis law scholarship straddling law and macroeconomics that could portend a sustainable stream of LawMacro research. Much, but not all, of this work has clustered in the area of financial regulation and has understandably focused on financial stability. As the decade wore on, lingering effects of the crisis, including persistently sluggish growth, low wages, declining labor participation, visible wealth and income inequality, and the apparent limits of conventional fiscal and monetary policy in mature economies, led scholars—most notably Richard Posner and Gary Becker, pillars of the LawMicro movement—to revisit macroeconomics.<sup>9</sup> Simultaneously, prominent

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fresh criticism after the financial crisis that began in 2007. For a textbook overview, see OLIVIER BLANCHARD, *MACROECONOMICS* 501–08 (7th ed. 2017). At the time of this writing, the search for “microfoundations” of macroeconomics is far from over. For an accessible overview, see, for example, M.C.W. Janssen, *Microfoundations*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) and Jérémie Cohen-Setton, *Microfoundations in Macroeconomics*, BRUEGEL: BLOG (Mar. 9, 2012) <http://bruegel.org/2012/03/microfoundations-in-macroeconomics/> [<https://perma.cc/GCP4-DS86>] (summarizing the microfoundations debate). See also Olivier Blanchard, *Do DSGE Models Have a Future?* (Peterson Inst. for Int’l Econ. Policy Brief No. 16-11, 2016), <https://www.piie.com/system/files/documents/pb16-11.pdf> [<https://perma.cc/KG23-5TVP>]; Matthew O. Jackson & Leeat Yariv, *The Non-Existence of Representative Agents* (Ctr. for Econ. Policy Research Discussion Paper No. DP13397, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3302656](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3302656) [<https://perma.cc/ZM6C-E5BF>].

7. See Bruno Meyerhof Salama, *The Art of Law & Macroeconomics*, 74 U. PITT. L. REV. 131, 135 (2012) (describing macroeconomics as a field concerned with “aggregates that are politically salient”).

8. Randal Quarles, Vice Chair for Supervision, Fed. Reserve, Speech on Law and Macroeconomics: The Global Evolution of Macroprudential Regulation at the Law and Macroeconomics Conference at Georgetown University Law Center (Sep. 27, 2019), <https://www.federalreserve.gov/newsevents/speech/quarles20190927a.htm> [<https://perma.cc/J9LB-9LS6>] (observing that both law and macroeconomics “are centrally concerned with *systems*” beyond individual actor incentives).

9. See Gary S. Becker & Richard A. Posner, *The Future of Law and Economics*, 10 REV. L. & ECON. 235, 238–40 (2014) (pointing to “the emerging and exciting subfield of macro law and economics”

macroeconomists were reconsidering the legal underpinnings of macroeconomic institutions and policies.<sup>10</sup>

Part III suggests a taxonomy of approaches to LawMacro as a field, along with avenues for future scholarship represented at the Conference and in this Issue. These fit broadly under two rubrics: (1) macroeconomic analysis of law, and (2) legal analysis of macroeconomics. The first is an extension of LawMicro. The second expands on recent legal and interdisciplinary analysis of macroeconomic institutions and phenomena, and explicitly addresses the values and political choices at stake in macroeconomic policy decisions.

We conclude with a note on the challenges of inter and intra-disciplinary engagement in LawMacro.

## II

### LAWMICRO IN RETROSPECT

Scholars have drawn connections between the disciplines of law and economics since the early twentieth century.<sup>11</sup> LawMicro as a movement captured legal imaginations half a century ago, and proceeded to shape research, policy, and jurisprudence on subjects ranging from contracts to family, criminal, and constitutional law. The application of microeconomic reasoning to law in general—beyond discrete areas traditionally understood as “economic,” such as antitrust and public utility regulation—was a central contribution and an important predicate of its success. The seminal treatise in the field explains:

The law is divided into numerous fields ... traditionally studied in isolation from one another, and within each field the rules tend also to be studied as separate, often self-enclosed, bodies of thought. Yet a relative handful of economic doctrines ... can, by their repeated application across fields of law and legal rules, describe a great deal of the legal system and enable the student to develop a more coherent sense of the system—to grasp the relation of its parts and understand its essential unity, and having done so to deal competently with new issues as they arise.<sup>12</sup>

To be sure, LawMicro brought more than ambition and intellectual firepower to its imperial project. Yair Listokin writes in this Issue that the movement was at the outset a well-funded, brand-conscious interest group effort to mold law

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as a “major frontier” and citing economic research on interactions between legal systems for macroeconomic variables).

10. See, e.g., PAUL TUCKER, *UNELECTED POWER* 392 (2019) (“[W]e are clear that, intrinsically, central banks are *not guardians* of either the high values or integrity of the democratic rule-of-law state.”) (emphasis in original).

11. See generally John R. Commons, *Law and Economics*, 34 *YALE L.J.* 371 (1925). Scholars often trace the roots of Law and Economics to the utilitarianism of English philosopher Jeremy Bentham in the eighteenth and nineteenth centuries. See POSNER (2014), *supra* note 5, at 29; ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 98 (2011).

12. POSNER (2014), *supra* note 5, at xxi-xxii; see also Alain Marciano & Sophie Harnay, *Posner, Economics and the Law: From Law and Economics to an Economic Analysis of Law*, 31 *J. HIST. ECON. THOUGHT* 215 (2009) (describing the transformation of “law and economics” into “economic analysis of law” partly as a product of Posner’s collaboration with Gary Becker).

scholarship and legal institutions after a way of microeconomic thinking.<sup>13</sup> It specifically targeted laity—law professors, students, and ultimately law-makers, judges, and practitioners—for training in the basics of economic analysis, in order to organize the legal enterprise around the central goal of market efficiency and a strong presumption against government intervention.

The result was a singular triumph. Looking back, the movement’s early fervor, theoretical and ideological cohesion, non-technical orientation, and welcoming disposition feel vaguely Orwellian. LawMicro has mellowed over time. Growth brought an influx of PhD economists,<sup>14</sup> an increasingly empirical orientation, demand for methodological rigor, and a measure of ideological diversity, to the movement.<sup>15</sup> Competing approaches to interdisciplinary economic analysis of law emerged periodically; however, even critical interventions such as Law and Socio-Economics defined themselves by reference to LawMicro—reflecting its dominance while contesting virtually everything else about it.<sup>16</sup>

LawMicro’s hold on the Law and Economics label is impressive in light of its origins in an ideologically tinged slice of the discipline.<sup>17</sup> Its lifelong neglect of macroeconomics is a case in point. Every few years since the early 1990s, a law review article would emerge to comment on the macro gap in “Law and Economics,” and propose to fill it, to no avail.<sup>18</sup> Some of these articles tried to

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13. See Yair Listokin, *Law and Macro: What Took So Long?*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 141, 155–56.

14. POSNER (1972), *supra* note 5, at ix; Becker & Posner, *supra* note 9, at 239.

15. POSNER (2014), *supra* note 5, at 34.

16. See generally, e.g., Robert Ashford, *Introduction to Socio-Economics: An Ethical Foundation for Law-Related Economic Analysis*, 49 AKRON L. REV. 287 (2016).

17. *Id.*; see also ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 3 (1990) (“[W]hat generally passes under the rubric of economic analysis of law is, for our purposes, only one component of a much richer study of comparative perspectives . . .”).

18. See, e.g., Neil H. Buchanan, *Social Security, Generational Justice, and Long-Term Deficits*, 58 TAX L. REV. 275, 278 (2005) (“While the legal literature that relies on microeconomics has mushroomed over the last two decades or so, macroeconomics has remained largely in the background.”); John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Lifecycle*, 66 S. CAL. L. REV. 709, 709 (1993) (“For the past two decades the law and economics movement has been one of the most influential forces in the legal academy. Its practitioners have relentlessly sought to unleash microeconomic insights on formerly pristine areas of legal doctrine. This Article . . . represents a departure from the previous literature in that it considers the impact of macroeconomic phenomena . . .”); David Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost Benefit Analysis*, ECOLOGY L.Q. 546, 563–64 (1997) (“Traditionally, most law and economics scholarship has focused on microeconomic analysis. . . .”); Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1216 (1993) (“When legal scholars and law students discuss the impact of economics on their understanding of law, they invariably think about microeconomics, not macroeconomics.”); Douglas Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 1 (2005) (“Legal economic analysis has traditionally focused on the application of microeconomic theory to questions of legal import. Scholars have generally regarded macroeconomic effects of legal rules as lying beyond the purview of the legal decisionmaker’s jurisdiction.”); Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 520 (2003) (“The implication of this is the need to expand law and economics beyond mere microeconomic efficiency, which has been the near exclusive focus of law

explain why LawMacro had failed to take root.<sup>19</sup> Was it because macroeconomics was itself a messy, unsettled field in the formative years of Law and Economics? Because it did not produce explanatory theories that mapped onto law in general? Or because it sounded too complicated to the average law school graduate?

The “Law and” part of the “Law and Economics” label is similarly puzzling as to its claim to all of economics. LawMicro is not about law, but rather (following the title of Posner’s treatise) is an application of economic analysis. Theories, methods, and normative content in Law and Economics all come from microeconomics, supplying a frame to judge law from the outside. Economics anchors and disciplines law. In contrast to economics, law in LawMicro has no theory, method, or values of its own; it is a decision setting like agriculture or restaurant management, equally susceptible to the marginal cost-benefit calculus. LawMicro in the 1970s was cutting-edge law, but by definition could not be cutting-edge economics. To this day, LawMicro remains an application of economic principles to law with the goal of revealing something new about the law—not about economics. A Law and Economics chair is a far more exotic proposition for an economics department than for a law school.<sup>20</sup>

As LawMicro assimilated insights from other disciplines, such as finance, political science, and psychology, its relationship with law remained a one-way street. The behavioral revolution in economics qualified some LawMicro assumptions about information and human rationality. However, it did not create space in LawMicro for the more traditionally “legal” considerations of justice, equity, representation, or legal process. When legal thought and legal institutions assimilated norms from other fields, such as philosophy, psychology, or political science, LawMicro would subsume it all in the welfare calculus.<sup>21</sup>

LawMicro’s failure to recognize the many ways in which law constituted economic systems, combined with its focus on static efficiency and neglect of macroeconomics, left it unprepared for the biggest financial crisis since the 1930s. The crisis created an opening for scholarship that engaged with law and macroeconomics outside the traditional LawMicro paradigm.

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and economics within the legal academy—an expansion that explicitly recognizes the need to search for legal structures to support higher levels of macroeconomic performance.”).

19. See Kelman, *supra* note 18, at 1216–19 (considering obstacles to the emergence of Law and Macroeconomics as a field of study); Salama, *supra* note 7. In an ironic twist, the opening chapter of Posner’s seminal volume, *The Economic Analysis of Law*, tries to rescue lawyers’ perception of economics from the stereotype of a “forbiddingly mathematized study of . . . macroeconomic phenomena remote from the day-to-day concerns of the legal system.” POSNER (2014), *supra* note 5, at 3.

20. From this perspective, it is natural for law faculties to hire academic economists with no formal legal training and equally inconceivable for an economics department to hire a law scholar with no formal graduate training in economics.

21. See generally, e.g., Louis Kaplow & Steven Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEG. STUD. 331 (2003) (engaging with responses to their argument that welfare considerations alone should drive social policies, including “legal rules”).

## III

## A MACRO MOMENT

Financial crises in the United States and Europe that began in 2007, and the Great Recession that followed, made the importance of macroeconomics salient among law scholars, and focused economists' attention on the roles and limitations of legal institutions. Four discernible flavors of "macro-woke" law scholarship emerged in the post-crisis decade: (1) financial regulation and financial stability, (2) analysis of macroeconomic institutions, (3) international economic coordination, and (4) Law and Macroeconomics.

Newly-ubiquitous terms such as "macroprudential" and "financial stability" describe public intervention to prevent systemic financial crises and, less often, deep recessions—as distinct from traditional (now "microprudential") intervention to protect against individual firm failure. The term "macroprudential" first surfaced in a U.S. law review article in 1985 in connection with the international debt crisis that threatened to bankrupt the entire U.S. banking sector.<sup>22</sup> A few more isolated mentions followed; we found fewer than twenty articles in English-language law journals that used the term as late as 2008. Use of the term jumped to 100 articles in 2009, and peaked at approximately 150 in 2013.

Regulation of financial institutions, a relatively sleepy area of U.S. law scholarship at the start of the twenty-first century, became an epicenter of the financial stability revival. Securities and corporate law scholarship also saw a crisis-driven output spike. The research traced crisis transmission channels,<sup>23</sup> identified institutional design fragilities and regulatory failures,<sup>24</sup> and evaluated

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22. Charles F. Meissner, *Crisis as an Opportunity For Change: A Commentary on the Debt Restructuring Process*, 17 N.Y.U. J. INT'L L. & POL. 613, 616 (1985). The term "macro-prudential" appears to have circulated in official circles before it was first included in an official government release in 1986. Piet Clement, *The Term "Macroprudential": Origins and Evolution*, BIS Q. REV. 59 (Mar. 2010).

23. See generally, e.g., ERIK F. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION (2016); HAL SCOTT, CONNECTEDNESS AND CONTAGION: PROTECTING THE FINANCIAL SYSTEM FROM PANICS (2016); Anna Gelpern & Erik F. Gerding, *Inside Safe Assets*, 33 YALE J. ON REG. (2016); Kathryn Judge, *Fragmentation Nodes: A study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657 (2012); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539 (2011); Steven Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193 (2008); Sarah P. Woo, *Regulatory Bankruptcy: How Bank Regulations Cause Fire Sales*, 99 GEO. L.J. 1613 (2011).

24. See, e.g., Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed The "Business of Banking"*, 63 U. MIAMI L. REV. 1041 (2009) (tracing the relaxation of restrictions on banks dealing in derivatives). See also KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 13 (2011) (describing regulatory failures in the housing finance market and beyond); MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION 29 (2016) (pointing to short-term money-like debt outside the banking system as the cause of financial instability); Adam Levitin & Susan Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012) (proposing that the financial crisis was the result of both an excess of mispriced mortgage finance and a mortgage-finance supply glut); Arthur E. Wilmarth, *Reforming Financial Regulation to Address the Too-Big-To-Fail Problem*, 35 BROOK. J. INT'L L. 707 (2009) (examining the regulatory causes and consequences of too-big-to-fail financial conglomerates).

crisis response<sup>25</sup> and financial reform proposals.<sup>26</sup>

A second strand of post-crisis work has focused on the design and operation of macroeconomic institutions. Central banks, which had largely (and bizarrely) escaped legal scrutiny until that point, were the most notable post-crisis research subjects.<sup>27</sup> Tax law scholars produced a crop of articles assessing automatic fiscal stabilizers.<sup>28</sup> Studies of the budgetary process and U.S. budget institutions sometimes explicitly mentioned macroeconomic concerns, though this was not the norm.<sup>29</sup> Continued economic and political fallout from the Great Recession

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25. In an interesting and important twist, scholars drew parallels between legal decision-making in military and economic emergencies. Although it precedes the latest crisis, we are partial to the treatment in OREN GROSS & FIONNUALA NÍ AIOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 17–85, 242 (2006). For a post-crisis example, see generally Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009); see also Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to Financial Crisis*, 61 ADMIN. L. REV. 463, 502–03 (2009) (describing government-facilitated acquisitions of financial institutions as a (decidedly micro) mode of crisis intervention); Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. 1051 (2008–09) (describing a framework for government policy choices in response to a crisis).

26. See, e.g., DAVID SKEEL JR., *THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES* (2011) (criticizing post-crisis reforms and highlighting moral hazard risks); John Coates, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (questioning the viability of traditional cost-benefit analysis and its judicial review in financial regulation); Adam J. Levitin, *Prioritization and Mutualization: Clearinghouses and the Redundancy of the Bankruptcy Safe Harbors*, 10 BROOK. J. CORP. FIN. & COM. L. 129 (2015) (observing that clearinghouses perform the financial stability functions of certain bankruptcy safe harbors, and advocating for safe harbor repeal); Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1630 (2011) (proposing to institutionalize four types of “regulatory contrarians” as a check on administrative groupthink and a means of making financial regulation more nimble); Paolo Saguato, *The Ownership of Clearinghouses: When Skin in the Game Is Not Enough, the Remutualization of Clearinghouses*, 34 YALE J. ON REG. 601, 601 (2017) (considering the impact of ownership structure on systemic risk); Yesha Yadav, *The Problematic Case of Clearinghouses in Complex Markets*, 101 GEO. L.J. 387 (2013) (arguing that clearinghouses increase systemic risk from derivatives trading); Arthur E. Wilmarth, *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-To-Fail-Problem*, 89 OR. L. REV. 951 (2011) (criticizing Dodd-Frank for failing to end subsidies for large, systemically risky financial institutions).

27. See PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 254–61 (2016) (discussing the evolving structure and functions of the Federal Reserve system); see also ANNELISE RILES, *FINANCIAL CITIZENSHIP: EXPERTS, PUBLICS, AND THE POLITICS OF CENTRAL BANKING* (2018) (analyzing the political work of central banks); Morgan Ricks, John Crawford & Lev Menard, *Central Banking for All: A Public Option for Bank Accounts*, THE GREAT DEMOCRACY INITIATIVE (2018) (arguing for opening Federal Reserve for the public).

28. See Brian D. Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax as a Counter-Cyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187, 187 (2010) (“[W]e argue that policymakers should consider so-called “automatic” stabilizers, such as are found in the federal tax system . . . .”); see also Lily Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 23 (2010); David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 201, 201 (2017) (proposing automatic-adjustment mechanisms to diversify risk by establishing pre-set policy measures like Social Security, unemployment, and cap-and-trade as expanded countercyclical triggers).

29. The 2011 U.S. debt ceiling standoff between the Congress and President Barack Obama inspired a different sort of crisis law scholarship, explicitly addressing the checks and balances in the U.S. Constitutional system. See, e.g., Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112

has led some scholars to undertake a fundamental reassessment of the public and private law that shapes modern financial systems and their constituent institutions.<sup>30</sup>

When financial crises spill over national borders—as they often do—they pose additional policy and regulatory coordination challenges for governments. A third flavor of macro-woke scholarship concerns itself with such challenges. International economic law scholarship has shown an unusual level of macro awareness since long before the latest crisis, likely thanks to the experience of repeatedly confronting crisis coordination problems around the world. Influential writing on inflation and foreign exchange arrangements appeared in the 1980s in response to domestic and international financial turmoil.<sup>31</sup> More recent contributions in this area consider the form and output of soft law institutions such as the Group of Seven, the Group of Twenty and the Basel Committee for Bank Supervision;<sup>32</sup> exchange rate arrangements; the law’s contribution to sustainable development and long-term growth;<sup>33</sup> trade and investment regimes; and formal institutions charged with crisis management,

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COLUM. L. REV. 1175, 1178 (2012) (discussing the separation of powers problems associated with a President ignoring the debt ceiling); Howell E. Jackson, *The 2011 Debt Ceiling Impasse Revisited*, in *IS U.S. GOVERNMENT DEBT DIFFERENT* 55 (F. Allen et al. eds., 2012) (noting that some commentators believe that Section Four of the Fourteenth amendment prohibits debt ceiling increases). On the subject of budget institutions more broadly, see, for example, Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 *YALE L.J.* 2182 (2016) (discussing the historical consideration of macro alongside micro concerns by the Executive Office of the President).

30. See, e.g., RICKS, *supra* note 24, at 1 (“I argue that our existing monetary framework is outdated and defective . . . .”); Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 *CORNELL L. REV.* 1143, 1146 (2017) (recasting the financial system as a state franchise). See generally CHRISTINE DESAN, *MAKING MONEY: COIN, CURRENCY AND THE COMING OF CAPITALISM* (2015); KATHARINA PISTOR, *THE CODE OF CAPITAL* (2019).

31. See KEITH ROSENN, *LAW & INFLATION* xxxvii (1982) (describing legal responses to inflation based on the experience of Brazil in the 1980s); see also Kenneth Dam, *From the Gold Clauses to the Gold Commission: A Half Century of American Monetary Law*, *U. CHI. L. REV.* 504 (1983) (analyzing the legal and institutional implications of abandoning the gold standard in the 1930s and the gold exchange standard in the 1970s).

32. See generally, e.g., CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM* (2015) (explaining why and how “soft law” dominates international finance, but not other areas of international economic law); Michael S. Barr, *Who’s In Charge of Global Finance?*, 45 *GEO. J. INT’L L.* 971 (2014) (offering a critical overview of “international finance architecture”); Stavros Gadinis, *The Financial Stability Board: the New Politics of International Financial Regulation* 48 *TEX. INT’L L.J.* 157 (2013) (analyzing the Financial Stability Board as a political intervention opportunity); Daniel K. Tarullo, *Rules, Discretion, and Authority in International Financial Reform*, 4 *J. OF INT’L. FIN. REFORM* 613 (2001) (evaluating the tradeoffs between rules-based and discretionary administrative regimes in light of the “authority gap” in international economic policy coordination); Pierre-Hughes Verdier, *The Political Economy of International Financial Regulation*, 88 *IND. L.J.* 1405 (2013) (presenting a skeptical realist account of soft law in international finance).

33. See generally ALVARO SANTOS, *WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION* (2019); *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006). For a “microfoundations” perspective, see generally Gillian Hadfield & Barry Weingast, *Microfoundations of the Rule of Law*, 17 *ANN. REV. POL. SCI.* 21 (May 2014).

such as the International Monetary Fund.<sup>34</sup> Since 2009, scholars have also paid attention to developments surrounding central bank swap lines,<sup>35</sup> new or reformed institutions, such as the Financial Stability Board, and informal arrangements to manage particular shocks.<sup>36</sup>

Macro-aware and macro-curious post-crisis law scholarship in the United States drew primarily on the work of economists, weaving it together with established corporate, financial regulation, and LawMicro literatures.<sup>37</sup> This new work has steered clear of the Law and Macroeconomics label and of claiming roots in the earlier law literature expressly linking the two.<sup>38</sup> The works of Listokin and Salama are rare exceptions, and the best examples of the fourth strand of post-crisis scholarship, which explicitly embraces the Law and Macroeconomics label. Salama's contribution bridges domestic and international domains, incorporating comparative and Law and Development concerns.<sup>39</sup> Listokin's book, articles, and the related symposium in the *Yale Journal on Regulation*,<sup>40</sup> extend Law and Economics to the macroeconomic realm. Listokin's book considers the law's fiscal and monetary policy functions as part of its descriptive and normative project, but focuses its prescriptive energy on establishing law as a last-resort tool to stimulate aggregate demand in recessions.<sup>41</sup> Apart from the keynote by economist Jason Furman, who asks broadly what law could do for macroeconomics, the 2017 symposium articles follow Listokin to analyze the law as a countercyclical policy instrument.<sup>42</sup>

We see the "macro turn" in law scholarship as long-overdue and valuable. Lawyers benefit from understanding the impact of legal institutions and reform interventions on aggregate demand, supply, prices, and expectations, which

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34. See, e.g., Adam Feibelman, *Law in the Global Order: The IMF and Financial Regulation*, 49 N.Y.U. J. INT'L L. & POL. 687 (2017) (analyzing the International Monetary Fund as a universal regulatory institution with global reach).

35. See Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603 (2013) (analyzing Federal Reserve swap lines that gave foreign central banks access to U.S. dollars in crisis).

36. See Katharina Pistor, *Governing Interdependent Financial Systems: Lessons from the Vienna Initiative* (Columbia Law Sch., Ctr. for Law & Econ. Studies, Working Paper No. 396, 2011) (describing informal arrangements that kept foreign banks from leaving Eastern European countries in a financial and economic crisis).

37. See generally Judge, *supra* note 23.

38. See, e.g., Neil H. Buchanan, *Social Security, Generational Justice, and Long-Term Deficits*, 58 TAX L. REV. 275, 278 (2005) (acknowledging an overlap in analytical framework between the article and Law and Macroeconomics without embracing the term); Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1175 (2012).

39. See generally Bruno Meyerhof Salama, *Macroeconomic Analysis of Law Versus Law and Macroeconomics*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 181.

40. See generally Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REG. 791 (2017).

41. See generally YAIR LISTOKIN, *LAW AND MACROECONOMICS: LEGAL REMEDIES AND RECESSIONS* (2019).

42. See, e.g., Jonathan S. Masur & Eric A. Posner, *Should Regulation be Countercyclical?* 34 YALE J. ON REG. 857 (2017) (considering whether countercyclical regulation is desirable).

would help them formulate better arguments and design more effective policies. Nonetheless, we worry that when it comes to integrating macroeconomic and legal insights, the emerging literature is not ambitious enough, and potentially fragile. As it has developed thus far, the most expansive vision of LawMacro could be taken for an exotic subfield of LawMicro,<sup>43</sup> importing discrete bits of economic theory to support Keynesian stimulus, while missing opportunities to reconsider the relationship between law and economics to help both. We see contributions to this Issue as an experiment in going beyond this frame.

#### IV

##### IN SEARCH OF LAWMACRO

Microeconomics is *about* the behavior of people and firms in markets for goods and services; it is *for* efficient allocation of resources among them. In microeconomics, government is seen as either a source of distortion or a response to market failure, but mostly it is absent—all else equal. Early LawMicro took this basic insight and ran with it, supplying the intellectual basis for laissez-faire policies in the 1970s and '80s with funding from the ideologically-aligned Olin and Searle foundations.<sup>44</sup> It is unsurprising, then, that the original conception of LawMicro took the presence of regulation to mean that something was amiss in the cosmos.

In contrast, macroeconomics is *about* the behavior of economies, comprising multiple markets interacting in complex ways. It is *for* managing the business cycle—reducing the incidence, depth, and pain of economic downturns—and *for* long-run output growth. In macroeconomics, government is a central character; even the most politically conservative macroeconomists must contend with its role. Sound governmental intervention is the point. Macroeconomists surely care about welfare, incentives, and resource allocation; however, as we noted in Part I, they operate with different units of analysis. These units are neither natural nor uniform; they are a function of politics and legal design. Law constitutes national and regional economies and their governments, and sets the ground rules for decision-making within them. Law also governs individual markets and mediates the relationships among them. At any given time, multiple legal systems are at work in a macroeconomy and could affect its performance.<sup>45</sup> Many of these systems and their constituent institutions were not designed to solve economic problems; they reflect norms and political imperatives from a wide range of sources, with a heavy dose of historical accident. Law scholarship and law practice, each in its own way, are remarkably good at synthesizing theories and methods from different fields and translating these inputs into institutional

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43. See Becker & Posner, *supra* note 9, at 238 (stating that it is time for “an emerging and exciting subfield of macro law and economic”).

44. See Yair Listokin, *Law and Macro: What Took So Long?*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 141, 155–56; Klass, *supra* note 2.

45. See Quarles, *supra* note 8.

designs. The LawMicro project cabined the law's messy eclecticism, anchoring it in economic thought. In contrast, macroeconomists might find that eclecticism useful, particularly if they are dealing with novel public policy problems and are already amenable to considering law and institutions.

Macro-awareness among law scholars historically has coincided with periods of macroeconomic upheaval, beginning with the Great Depression and the birth of modern macroeconomics as a discipline in the 1930s.<sup>46</sup> Legislators, regulators, and practitioners at the time responded to the stock market crash, the banking crisis, and to economic shocks at home and abroad.<sup>47</sup> However, when the cycle turned, scholarly interest fizzled without coalescing around a set of research questions, or any theoretical or normative commitments.

Contemporary efforts to engage law and macroeconomics as a field of study came six decades after the Great Depression, in the 1990s. At the end of the twentieth century, macro-aware law scholarship sought to address traditional business cycle problems—such as shielding workers from economic downturns.<sup>48</sup> Just as before, no Law and Macroeconomics movement followed.

For those who think that some version of LawMacro is worth pursuing—as we do—contributions to the Conference and this Issue consider what it should do differently to become a sustainable field of inquiry. If LawMacro is to take root, what should it be *about*, and what should it be *for*? And if it were to be a more balanced, two-way proposition, what can LawMacro do for law and macroeconomics, respectively? The Articles in this Issue suggest two potential approaches to these questions: (1) macroeconomic analysis of law, and (2) law and macroeconomic policy.

#### A. LawMacro as Macroeconomic Analysis of Law

Extending LawMicro, macroeconomic analysis of law takes law as an object of analysis. The central research question is whether law makes sense from a macroeconomic standpoint: does it account for the business cycle? Does it promote growth,<sup>49</sup> or reduce instability? Paraphrasing Becker's 2014 framing, this version of LawMacro would study interactions between legal systems and macroeconomic variables,<sup>50</sup> and prescribe law reforms accordingly.

Several contributions to this Issue would fit such a model of LawMacro scholarship, as would Yair Listokin's book, discussed in Part II, advocating countercyclical legal stimulus as a tool of last resort, particularly in economic

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46. See generally Ramirez, *supra* note 18.

47. See Dam, *supra* note 31, at 504 (putting Roosevelt's dollar policy in the context of the domestic banking crisis and the global financial crisis).

48. See Kelman, *supra* note 18, at 1224 (considering the scope for protecting workers from macroeconomic downturns).

49. See generally RICHARD COOTER & AARON EDLIN, *THE FALCON'S GYRE: LEGAL FOUNDATIONS OF ECONOMIC INNOVATION AND GROWTH* (2014), <https://www.law.berkeley.edu/library/resources/cooter.pdf> [https://perma.cc/BQ43-U2PJ].

50. Becker & Posner, *supra* note 9, at 239–40.

downturns.<sup>51</sup> The Article by Patricia McCoy and Susan Wachter makes the case for macro-awareness in mortgage regulation, traditionally understood as a microeconomic endeavor.<sup>52</sup> The co-authors underscore the critical role of mortgage credit in monetary policy transmission and highlight variations in the regional impact of U.S. housing finance regulation. The upshot is a need for a macroeconomic, or at least macro-aware, mandate for the Consumer Financial Protection Bureau.

Contributions from former Federal Reserve Governor Daniel Tarullo and Erik Gerding similarly investigate the relationship between financial regulation, credit, and economic cycles.<sup>53</sup> Both take a cautious or downright skeptical view of countercyclical financial regulation. They push back at Listokin's thesis indirectly—the book explicitly carves out financial regulation from its argument for countercyclical legal stimulus—but offer potentially generalizable observations about the political economy of countercyclical regulation and the formidable information barriers to its effectiveness, among others.

These works ask the same broad question: what regulatory intervention is desirable from a macroeconomic perspective, and what is the best way to design it? A cross-cutting question here might address the law's effectiveness at anchoring expectations: for instance, would it change if the law explicitly varied over time, beyond already-implicit contextual variation?<sup>54</sup> Almost by definition, theories of time-varying regulation are hard to test empirically: cycles take time to run their course, while cross-country comparisons must contend with big legal and institutional differences. Formulating a workable empirical approach would itself be a valuable interdisciplinary project.

As in LawMicro, law in this version of LawMacro is the object of analysis and a tool in pursuit of economic policy outcomes. Law scholarship on this model should be relatively familiar and noncontroversial for the law audience, save for a threshold level of novelty or discomfort with macroeconomic concepts, ably addressed in Listokin's Article in this Issue,<sup>55</sup> as well as in his book.

## B. LawMacro as Legal Analysis of Macroeconomics

Another approach to LawMacro would zoom in on the legal, institutional, and political assumptions behind macroeconomic policies. Beyond this descriptive enterprise, it would strive to broaden the range of plausible institutional designs to satisfy macroeconomic policy and other societal objectives at the same time.

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51. See generally LISTOKIN, *supra* note 41.

52. See generally Patricia A. McCoy & Susan M. Wachter, *The Macroprudential Implications of the Qualified Mortgage Debate*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 21.

53. See generally Daniel K. Tarullo, *Time-Varying Measures in Financial Regulation*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 1; Erik F. Gerding, *Against Regulatory Stimulus*, LAW & CONTEMP. PROBS., no. 1, 2020, at 49.

54. See Salama, *supra* note 39, at 185 (discussing Brazil's anti-inflation initiative in the 1990s); see generally DAVID MOSS, *A CONCISE GUIDE TO MACROECONOMICS* 67–85 (2d ed. 2014).

55. See generally Yair Listokin, *supra* note 44.

The roundtable on financial crisis response at the Conference<sup>56</sup> illustrated the different priors that lawyers and economists can bring to a shared policy project. Lawyers and economists, practitioners and academics, all worried about stability, legitimacy, and commitment, but in different terms. Where some sought flexibility for a presumptively benevolent government in crisis, others worried more about legal regimes assimilating a permanent state of emergency. A call to harden legal constraints on governments known for chronic promise-breaking followed a discussion of governments deftly working around legal constraints. In his contribution to the Issue, Bruno Salama puts forward an “elasticity paradigm” to bridge such gaps, pointing to what could be a fruitful line of theoretical and comparative research.<sup>57</sup>

Definitional and, unexpectedly, measurement problems loom large in legal analysis of macroeconomics. Peter Conti-Brown highlights the threshold challenge of defining “institutions” in writing across movements and disciplines. His Article helps contextualize LawMicro, which emerged alongside other influential interdisciplinary movements relevant to legal and macroeconomic inquiry, raising the possibility of a LawMacro movement by another name unfolding in a distant corner of the academic universe.<sup>58</sup>

Daniel Hemel and Morgan Ricks highlight the stakes implicit in designing elements of macroeconomic institutions and policies that are often taken for granted.<sup>59</sup> Basic structural elements of payment systems, and equally basic approaches to measuring inflation, can have dramatic implications for stability, distribution, and ultimately for democracy. There is ample room for law *as such* to contribute to framing political debates and designing policies that are both just and effective.

Other Articles in this Issue illustrate the rich spectrum of legal institutions implicated in macroeconomic policy. Gina-Gail Fletcher’s contribution points to the possibility that private law—here, contracts—could become macro-relevant.<sup>60</sup> This too was a takeaway from the McCoy and Wachter Article on mortgage contracts discussed above.<sup>61</sup> Fletcher argues that manipulation in the derivatives markets could pose a risk to financial stability. Whether it does is an important question for legal, as well as economic, analysis. Whether traditional securities law safeguards against manipulation would work under the

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56. Olivier J. Blanchard, Thomas C. Baxter Jr., Monica B. de Bolle, Oren Gross, and Sean Hagan participated in this roundtable at the Conference.

57. See Salama, *supra* note 39, at 187–93. *But see* GROSS & NÍ AIOLÁIN, *supra* note 25 (distinguishing approaches to emergency law-making among legal traditions, notably in France and the United States).

58. See generally Peter Conti-Brown, *A New Study of Institutions: A Research Program for Law, Macroeconomics, and History*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 157.

59. See generally Daniel Hemel, *Indexing, Unchained*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 83; Morgan Ricks, *Money, Private Law, and Macroeconomic Disasters*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 65.

60. See generally Gina-Gail S. Fletcher, *Macroeconomic Consequences of Market Manipulation*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 123.

61. See generally McCoy & Wachter, *supra* note 52.

circumstances is a question of macroprudential regulation, along the lines we discussed in the immediately preceding Part. Both are important open questions.

Antitrust policy is another example of potentially macro-relevant legal intervention.<sup>62</sup> Antitrust law has increasingly become identified with a distinct set of microeconomic arguments, heavily invested in the workings of the price adjustment mechanism and ex post enforcement adjudication.<sup>63</sup> As a result, its political and macroeconomic effects can go unseen and unquestioned.<sup>64</sup> Legal analysis here could help identify structural and institutional factors with potential to affect long-term output,<sup>65</sup> as well as macroeconomic policy transmission channels, and could predicate ex ante regulatory intervention.

Structure also looms large in Morgan Ricks' contribution mentioned earlier,<sup>66</sup> and in Nadav Orian Peer's Article on so-called "public purpose finance"—government lending that is macroeconomically significant, but designed to minimize conventional channels of accountability, in the gray zone between government spending, credit, and taxation.<sup>67</sup> Orian Peer's argument goes to the perimeter of government and government decision-making; both are threshold issues for legal construction, definition, and measurement in countries around the world. Here, law creates a structure where high-stakes fiscal policy decisions can become invisible. The design challenge is to create alternative accountability channels that preserve the practical ability of the government to direct fiscal resources to sound, but potentially unpopular policy causes. Central bank accountability research, as well as the experience with government development banks around the world, offer useful lessons to that effect.

Structural interventions of this sort add more context for the emphasis on legal systems in the Conference remarks of Federal Reserve Governor Randal Quarles, and the conversation between Chair Janet Yellen and former Federal Reserve Governor Daniel Tarullo. Analyzing the structures and interactions of multiple overlapping rules systems is what lawyers do. Current and former Federal Reserve officials also shared different perspectives on the process norms implicated in financial regulation and supervision, pointing to another potential contribution for LawMacro: balancing values.

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62. Lina Khan and Howard Shelanski discussed the evolution of antitrust law in the United States and the relevance of antitrust law to economic growth and other macroeconomic variables in response to her presentation, "The Case for Unfair Methods of Competition Rulemaking," at the Conference (Sept. 28, 2019).

63. See, e.g., Lina Khan & Rohit Chopra, *The Case for Unfair Methods of Competition Rulemaking* 86 U. CHI. L. REV. (forthcoming 2020) (arguing in favor of ex ante regulation and against the adjudication model of antitrust enforcement).

64. Compare Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1978) with Jason Furman, *How Lawyers Can Help Macroeconomists in the Wake of Three Major Challenges*, 34 YALE J. ON REG. 709 (2017).

65. See generally COOTER & AARON EDLIN, *supra* note 49.

66. See generally Ricks, *supra* note 59.

67. See generally Nadav Orian Peer, *Public Purpose Finance*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 101.

The question of LawMacro’s normative content—what is it for?—is relatively straightforward in its first, more traditional version. While it makes sense to ask, following Salama and others, “which macroeconomics” might guide macroeconomic analysis of law, when the answer comes, it conveys the law’s marching orders. As we observed earlier, the law’s capacity to synthesize many disciplinary perspectives and to translate them into institutional designs is its unique strength as a scholarly field and as a practice. The second version of LawMacro, *Legal Analysis of Macroeconomics*, can leverage this strength to engage more explicitly in balancing moral and political values as part of economic policymaking. In this Issue, Saule Omarova’s Article on the purpose of finance and the contribution from Steven Ramirez framing the justice imperatives of LawMacro, reflect this perspective.<sup>68</sup> Both authors insist on orienting LawMacro to sustainable human development, beyond economic growth and microeconomic efficiency. Omarova starts from the economic literature on the relationship between finance and growth—which asks a subversive-enough question, whether too much finance could be bad—and points to the fact that we have yet to develop a robust vocabulary to judge the “macro-systemic” effects of financial innovation. Microeconomic virtues like market completion, diversification, and price discovery quickly fill the linguistic and theoretical gap, and become political fuel for more finance and more socialized risk. Ramirez takes a long historical view, a reminder that LawMacro is only the latest turn in the law’s periodic crisis-driven dance with macroeconomics. He cautions that LawMacro as a legal academic enterprise would “solve very little of consequence” if it fails to alter the course of lawmaking “to vindicate the role of law as a public good” and a force for human development.<sup>69</sup>

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The foregoing breakdown is simplified: as in all such endeavors, most of the Articles in this Issue fit into more than one category, some obviously so. The goal is not to pigeonhole contributions or show that the legal analysis approach has a lot on its plate, but to tease out a plausible set of questions for interdisciplinary research and sketch the contours of a possible research field. Such a sketch could, in turn, serve as a platform for a working paper series, further elaborating the field. Until then, we close with a few observations on interdisciplinary and intradisciplinary research in this area.

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68. See generally Saule T. Omarova, *What Kind of Finance Should There Be?*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 195; Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 LAW & CONTEMP. PROBS., no. 1, 2020, at 219.

69. Ramirez, *supra* note 68, at 220–21.

## V

## CONCLUSIONS

The LawMacro project has been underway for a long time, albeit without a hashtag. A giant wave of financial crisis scholarship amplified its academic and policy salience. This Issue—and the accompanying the Conference at Georgetown Law—aim to heighten awareness of cross-cutting preoccupations in law and macroeconomics, casting a wide net to define a nascent field and bring stakeholders from both disciplines under one umbrella. This approach inevitably (and deliberately on our part) yields a spectrum of views on the proper scope and content of LawMacro. We are comfortable letting the questions marinate in this community and beyond before forcing them into a unified frame. We want to avoid replicating the one-way disciplinary relationship between law and economics in LawMicro, because law can contribute to theory, policy, and political discourse in this area.

One's view of law's contribution naturally depends on their understanding of the law, of the place of law scholarship, and their definition of macroeconomics. The range of possibilities is immense. However, *intra*-disciplinary specialization may turn out to be a bigger obstacle to collaboration between law and macroeconomics. Law scholarship today is emphatically interdisciplinary, specialized, and paradoxically reluctant to engage in normative debates about big ideas like justice. In this sense, LawMicro is not exceptional: scholars tend to gravitate to a limited set of relatively technical questions, and try to answer them with theories and methods from other disciplines. As a result, those already engaged in a conversation with a certain subset of economists (the financial regulation and financial stability cohort) may be willing to consider macroeconomics. Those who study constitutional and administrative law—and could add the most on the subject of political organization, governance, and the structure of government decision-making—may not see the payoff. The same goes for researchers in other areas of regulation, corporate law, tax law, and mainstream Law and Economics, who may echo Judge Posner's intuition that topics such as output, inflation, and unemployment are simply too far removed from those "day-to-day concerns of the legal system."<sup>70</sup>

We are cautiously optimistic for two reasons. First, there is now a critical mass of macro-aware, macro-relevant, and macro-curious law scholarship—including both pre-and post-crisis contributions—and a community of researchers who find it interesting and worth pursuing. Second, substantive policy questions at the intersection of the two disciplines remain salient even after the crisis has passed. This is bad news for the world: persistently low output growth; environmental, health, and technological shocks; migration; and extreme inequality destabilize

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70. POSNER (2014), *supra* note 5, at 3. We heard echoes of intradisciplinary concern from macroeconomists: while inflation is a core concept in macroeconomics, inflation *measurement* is a matter for Public Finance, a separate subdiscipline.

societies and create demand for new policy tools just as established fiscal and monetary policy tools lose effectiveness.

Demand for new approaches to macroeconomic problems is growing, but should these be legal approaches? We think so. As we have observed throughout this Foreword, macroeconomic institutions are legal constructs, more often than not designed with multiple non-economic objectives in mind. For example, blocked fiscal policy channels in the United States are a function of constitutional design; monetary policy transmission depends importantly on financial regulation, supervision, and the legal structure of the Federal Reserve System. This particular form of fiscal federalism can yield destructive, pro-cyclical macroeconomic outcomes.<sup>71</sup> The value of legal analysis is even more salient in Europe, where macroeconomic controversies are litigated in constitutional courts, and in emerging market countries where economic emergencies are a regular occurrence. The fact that many of the controversies focus on longer-term structural features of the macroeconomy, and not just the business cycle, expands the potential scope for legal intervention.

In sum, the current “macro moment” looks like fertile ground for a broad-based engagement between law and macroeconomics. There is no telling where it might lead. We hope that this Issue and the conversations begun at the Conference help enrich lawyers’ and macroeconomists’ understanding of each other’s thinking and inform better theory and policy at this challenging time.

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71. See David Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2550 (2005) (noting that the transfer of countercyclical programs to state governments “is likely to undermine the effectiveness . . . of federal macroeconomic policy”).