

# THE EMERGENCE OF LAW AND MACROECONOMICS: FROM STABILITY TO GROWTH TO HUMAN DEVELOPMENT

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## I

### INTRODUCTION

The “untold trillions” in economic costs inflicted by the Great Financial Crisis of 2008,<sup>1</sup> accompanied by political and social disruptions, demand that lawmakers better comprehend the macroeconomic costs and benefits of legal outcomes, and create better legal and regulatory infrastructure to avert and mitigate such calamities in the future.<sup>2</sup> The idea of Law and Macroeconomics as a field of study has existed since lawyers began to address economic disruptions, such as the Panic of 1907 and the Great Depression, despite the lack of express recognition in the most influential sectors of the legal academy.<sup>3</sup> If the legal academy fails to both analyze the macroeconomic impact of its scholarly assessments of law and policy and train future legal leaders as guardians of law and policy, then it fails in its essential mission to foster better lawyering.<sup>4</sup> Law and Macroeconomics demands the attention of legal policymakers whether or not it enjoys express recognition or study within the legal academy.<sup>5</sup>

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1. YAIR LISTOKIN, *LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 1* (2019).

2. *See generally id.*

3. Thus, economists have recognized the importance of the Panic of 1907 in bringing about the Federal Reserve Act and the legal creation of a national monetary institution in the United States. *See, e.g.*, MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES 1867–1960*, at 138, 156–63 (1963). The Panic of 1907 resulted from the failure of a major New York bank, which triggered a series of cascading bank failures. *See id.* In the wake of the Great Depression, among many New Deal initiatives to legally restructure the economy, the Federal Reserve System saw its powers expanded and its independence enhanced. *Id.* at 445–92.

4. For example, Nobel laureate Robert Solow suggests that Law and Economics as proffered by Richard Posner displays an “overemphasis on minor gains in efficiency and neglect of first-order facts.” Robert M. Solow, *How to Understand the Disaster*, N.Y. REV. BOOKS (May 14, 2009), <https://www.nybooks.com/articles/2009/05/14/how-to-understand-the-disaster/> [<https://perma.cc/KZE5-8YJN>].

5. Indeed, Nobel laureate economist Gary Becker suggested:

[A] newer and also important research focus considers the interactions between legal systems and the macro economy. This research, pioneered by economists Daron Acemoglu and Andrei Shliefer, among others, analyzes the connections between legal systems and long-term rates of

In fact, entire fields of economics denominated Institutional Economics or Growth Theory concern themselves with how law and legal institutions, particularly law and regulation, affect macroeconomic performance.<sup>6</sup> Economists, such as Joseph Stiglitz, started writing years ago about the legal infirmities of the globalization model pursued by the United States and continue to highlight those legal flaws today.<sup>7</sup> Economists seemingly embrace the inevitability of Law and Macroeconomics while the legal academy dallies.<sup>8</sup> Relative to economists, legal scholars only embrace Law and Macroeconomics on the fringes of legal scholarship rather than as a mainstream component of Law and Economics, which almost invariably refers to the relationship of law to microeconomics.<sup>9</sup> This can only result in a ceding of authority and voice across a range of important policy issues.

Yet, the ineluctable emergence of Law and Macroeconomics within the legal academy solves very little of consequence for those living within the world's modern capitalistic economies. The emergence of Law and Macroeconomics presents at least three more pressing questions revolving around how it changes

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growth, the degree of economic inequality, aggregate investments, and other macroeconomic variables. To a lesser extent, this burgeoning literature also analyzes how macroeconomic developments affect the evolution of legal systems. . . . I expect the macro interaction between law and economics to become another major frontier as the discipline of law and economics pushes its boundaries and insights into uncharted territories.

Gary S. Becker & Richard A. Posner, *The Future of Law and Economics: Essays by Ten Law School Scholars*, U. CHI. L. SCH. ALUMNI MAG. (Oct. 11, 2011), <http://www.law.uchicago.edu/alumni/magazine/fall11/lawandecon-future> [<https://perma.cc/K5NF-NNT6>].

6. See PHILIPPE AGHION & PETER HOWITT, ENDOGENOUS GROWTH THEORY 1 (1999) (stating that “the intensity and direction of people’s innovative activities are conditioned by the laws, institutions, customs, and regulations that affect their incentive and their ability to appropriate rents from newly created knowledge,” and that “the purpose of endogenous growth theory is to seek some understanding of this interplay between technological knowledge and various structural characteristics of the economy . . . and how such an interplay results in economic growth”); Douglass C. North, *Institutions*, 5 J. ECON. PERSP., no. 1, Winter 1991, at 97, 97 (“Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights).”).

7. See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISITED 365–94 (2017) (discussing the need for new institutions to adapt to evolving changes as globalization continued).

8. See Bruno Meyerhof Salama, *The Art of Law and Macroeconomics*, 74 U. PITT. L. REV. 131, 136–43 (2012) (describing the initial economic theories of Law and Economics that were later adopted by legal scholars).

9. See, e.g., John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993); Erik F. Gerding, *Credit Derivatives, Leverage, and Financial Regulation’s Missing Macroeconomic Dimension*, 8 BERKELEY BUS. L.J. 29, 37, 38 (2011); Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215 (1993); Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1 (2001); Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. & SOC. SCI. 377 (2019) (“In truth law and economics should be called law and microeconomics.”); Atif Mian & Amir Sufi, *The Macroeconomic Advantages of Softening Debt Contracts*, 11 HARV. L. & POL’Y REV. (2017); Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J.L. & SOC. POL’Y 87 (2010).

the calculus of lawmaking.<sup>10</sup> First, can law mitigate the costs of economic recessions and depressions? Second, in an age of soaring economic inequality in the United States, can Law and Macroeconomics offer lawmakers better tools to vindicate the role of the law as a public good? Third, given declining poverty worldwide, can Law and Macroeconomics offer better tools to secure and expand the benefits of capitalism worldwide?

These three questions track the intellectual history this Article traces: lawyers in the past and present use macroeconomic analysis of law and outcomes of law to target stability, growth, and human development. Part II details the primary focus on stability in U.S. macroeconomic policymaking history. Part III highlights a shift in focus from macroeconomic stability to macroeconomic growth. Finally, Part IV suggests that the legal academy and the legal system generally should use macroeconomic analysis to focus on broadly-based and sustainable human development in the face of contemporary problems. This Article concludes that Law and Macroeconomics plays an inherent role in explaining, prescribing, and understanding the social impact of a wide variety of legal and regulatory frameworks. Simply stated, the stakes of Law and Macroeconomics transcend legal education and go to the core of law's mission to enhance human welfare.

## II

### TARGETING MACROECONOMIC STABILITY

This Part demonstrates that lawyers addressed the influence of law on macroeconomic outcomes throughout U.S. history with a specific focus on securing macroeconomic stability. Macroeconomic stability frequently appeared as a major concern of the legal system so that commerce and industry could proceed apace.

Perhaps the most conventional and longstanding Law and Macroeconomics frontier concerns the institutional design of monetary policy and other legal and regulatory measures designed to stabilize the economy.<sup>11</sup> Prior to the Constitutional Convention of 1787, the weakness of the Articles of Confederation left propertied interests and bondholders uneasy and at the mercy of factionalized state legislatures, which seemingly acted out of an excess of democracy.<sup>12</sup> The new Constitution arose from a need to achieve greater economic stability through the protection of property holders.<sup>13</sup>

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10. Conventional Law and Economics changed the calculus of lawmaking through a relentless focus on microeconomic efficiency. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 13 (5th ed. 1997).

11. See Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31, 75–77 (2004) (detailing the potential macroeconomic pains to be realized in the absence of such legal stabilization efforts).

12. See GORDON S. WOOD, *EMPIRE OF LIBERTY* 14–19 (2000) (describing the turbulent nature of state politics and foreign affairs that violated “the individual rights of creditors and other property-holders”).

13. *Id.* at 31–33.

The political and economic turmoil surrounding the Bank of the United States reflects the challenge of melding law and macroeconomics in U.S. constitutional design.<sup>14</sup> The creation of the Bank pitted those in favor of a powerful central government—such as the first Secretary of Treasury, Alexander Hamilton—against those in favor of a smaller federal government—such as the first Secretary of State, Thomas Jefferson.<sup>15</sup> In his own words, Hamilton argued that the Bank would augment “the active or productive capital” of the new nation and thereby “enlarge the mass of industrious and commercial enterprise.”<sup>16</sup> Hamilton’s arguments for the creation of the Bank ultimately rested on the notion that banks create more money for circulation through fractional reserve banking.<sup>17</sup> In the end, Jefferson’s vision of an agrarian economy gave way to Hamilton’s efforts to forge an advanced financial system to support a more industrial economy. Later, Hamilton’s macroeconomic rationale proved correct: when the Jackson Administration allowed the Bank of the United States to lapse, a depression ensued.<sup>18</sup>

Hamilton also successfully lobbied for the federal government to assume the debt incurred to fund the revolution.<sup>19</sup> To Hamilton, a lawyer, national debt was foundational to a functioning national economy—effectively the system policymakers achieved by the 1930s.<sup>20</sup> Hamilton’s prescient understanding of the role of credit, as well as the need to lower the cost of capital and expand its availability, warrants deeming him a founder of Law and Macroeconomics.

During the Civil War, President Abraham Lincoln, another lawyer, simply printed money—called “Greenbacks”—to fund the war.<sup>21</sup> Ultimately, the Greenback experiment succeeded in unleashing the productive capacity of the Union economy.<sup>22</sup> It stemmed the effects of the financial panic gripping the nation in the wake of a financial crisis caused by Union military setbacks in December of 1861, and provided cash to fund the war in advance of the Internal

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14. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 138–39 (2018).

15. *Id.*

16. *Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank)*, 13 December, 1790, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003> [<https://perma.cc/Z2XR-KJJ7>].

17. *See id.* (“[T]here never can be danger of an intermission of demand, or that the money will remain for a moment idle in the vaults of the Bank. This additional employment given to money, and the faculty of a bank to lend and circulate a greater sum than the amount of its stock in coin are to all the purposes of trade and industry an absolute increase of capital.”). Hamilton apparently presaged the impact of fractional reserve banking.

18. *See* ALASDAIR ROBERTS, *AMERICA’S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER* 34, 94 (2013). Of course, depressions always arise from complex factors.

19. *Report Relative to a Provision for the Support of Public Credit, [9 January 1790]*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001> [<https://perma.cc/U478-UT7Z>].

20. *See* RON CHERNOW, *ALEXANDER HAMILTON* 344 (2004). *See also, e.g.*, Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1218 (2017) (arguing that the government lies at the foundation of finance).

21. FRIEDMAN & SCHWARTZ, *supra* note 3, at 3–4.

22. *See* JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 443–47 (1988).

Revenue Act of 1862.<sup>23</sup> Then, the tax increase from the Internal Revenue Act mitigated the inflationary impact of printing money and provided revenue to stabilize government finances and preserve investor confidence.<sup>24</sup>

While the value of the Greenbacks varied wildly with the fortunes of the Union Army and led to high inflation, the period during which they formed the primary monetary basis of the U.S. economy (1862–1878) was marked by deflation and rapid economic growth.<sup>25</sup> Milton Friedman and Anna Schwartz suggest that the macroeconomic growth experienced during the Greenback Era was “destined to raise the United States to the first rank among nations of the world.”<sup>26</sup> Historians suggest that the collective steps—including, for example, the National Bank Acts<sup>27</sup>—that the Lincoln Administration took to finance the war propelled the nation towards a modern capitalistic financial system.<sup>28</sup> The quest for a stable monetary system would pause again until another macroeconomic crisis demanded legal solutions to macroeconomic problems.

Later, the Panic of 1907 led to the Federal Reserve Act of 1913.<sup>29</sup> The Panic resulted from a classic and sudden surge in fear—fear that a complex and unregulated financial system could leave savers penniless.<sup>30</sup> To alleviate this fear, the Act expressly sought a more elastic currency to meet the needs of a rapidly industrializing economy,<sup>31</sup> as well as enhance bank oversight.<sup>32</sup> Indeed, the full name of the Act spotlights its fundamental macroeconomic purpose: “An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States and for other purposes.”<sup>33</sup>

New Deal legislation that underpins the structure of the current U.S. financial system had macroeconomic stabilization as its primary objective: it sought to stabilize banks after a series of panics, which fueled economic contraction. For example, Congress enacted the Banking Act of 1933<sup>34</sup> and the Banking Act of

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23. *Id.*

24. *Id.* at 447–48.

25. FRIEDMAN & SCHWARTZ, *supra* note 3, at 15.

26. *Id.*

27. “The National Bank Acts of 1863 and 1864 created a new class of federally chartered ‘national’ banks that were authorized to issue a new form of paper money (national bank notes).” Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 813 (citing National Bank Act of 1864, ch. 106, §§ 5, 8, 22, 13 Stat. 99, 100-01, 105-06 (superseding the National Currency Act of 1863, ch. 58, 12 Stat. 665)).

28. MCPHERSON, *supra* note 22, at 443–47.

29. Donald P. Morgan & James Narron, *The Final Crisis Chronical: The Panic of 1907 and the Birth of the Fed*, FED. RES. BANK OF N.Y.: LIBERTY STREET ECON., (Nov. 18, 2016) <https://libertystreeteconomics.newyorkfed.org/2016/11/the-final-crisis-chronicle-the-panic-of-1907-and-the-birth-of-the-fed.html> [<https://perma.cc/BGX8-TNCP>].

30. ROBERT F. BRUNER & SEAN D. CARR, *THE PANIC OF 1907*, at 152–53 (2007).

31. *Id.* at 146.

32. FRIEDMAN & SCHWARTZ, *supra* note 3, at 192.

33. Federal Reserve Act, Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221–522 (2012)).

34. Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended at 12 U.S.C. §§ 1811–1832 (2000)).

1935<sup>35</sup> to enhance the Federal Reserve's (Fed's) independence and expand its power over the money supply.<sup>36</sup> More specifically, Congress acted to restore "business stability."<sup>37</sup> This legislation gave the Fed power to control the money supply<sup>38</sup> and exclusive power to conduct monetary policy.<sup>39</sup>

Similarly, Congress created the Federal Deposit Insurance Corporation (FDIC) to provide deposit insurance for bank depositors, which stabilized the banking system and lowered the cost of capital for banks by making deposits as safe as government bonds.<sup>40</sup> As such, its justification rests on macroeconomic grounds. Establishing the FDIC and the expansion of Fed powers implicitly created a federal fiscal backstop for all banks, even state-chartered banks, thereby turbo-charging Hamilton's nation-building project.<sup>41</sup> As such, law once again placed the U.S. capitalist system on a more stable foundation by providing legal solutions to macroeconomic crises.<sup>42</sup>

The New Deal also repaired the regulatory infrastructure governing U.S. securities markets using macroeconomic, not microeconomic, considerations.<sup>43</sup> Congress determined that stable securities markets required full disclosure of material facts so that investors could better and more confidently allocate capital, and therefore imposed full disclosure through the Securities Act of 1933<sup>44</sup> and the Securities Exchange Act of 1934.<sup>45</sup> In the words of Congress, it intended to address:

National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, [and] are precipitated, intensified, and prolonged

35. Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684 (codified at 12 U.S.C. § 228 (2018)).

36. See Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 540–43 (2003) (noting Congress gave the Fed control over the money supply to serve "the general public interest" rather than special interests).

37. H.R. REP. NO. 74-742, at 9 (1935).

38. See 12 U.S.C. § 248(d) (2018) (empowering the Fed "to supervise and regulate . . . the issue and retirement of Federal Reserve notes").

39. Ramirez, *supra* note 36, at 540.

40. *Id.* at 543–46. See also Laurie S. Goodman & Sherrill Shaffer, *The Economics of Deposit Insurance: A Critical Analysis of Proposed Reforms*, 2 YALE J. REG. 145, 146 (1984) ("Deposit insurance acts as a stabilizer by preventing bank runs and the dangerous reduction in the nation's money supply that large scale bank failures can cause.").

41. See *supra* text accompanying notes 14–20 (describing Hamilton's lobbying efforts).

42. See, e.g., *Gunter v. Hutcheson*, 674 F.2d 862, 870 (11th Cir. 1982), *cert. denied*, 459 U.S. 826, *reh'g denied*, 459 U.S. 1059 (1982) (finding policies behind FDIC are promoting stability of and confidence in nation's banking system); *Doherty v. United States*, 94 F.2d 495, 497 (8th Cir. 1938), *cert. denied*, 303 U.S. 658 (1938) (finding that Congress created FDIC to promote stability of banks and to aid government in discharging its fiscal transactions); *FDIC v. Godshall*, 558 F.2d 220, 221 (4th Cir. 1977) (finding that FDIC's primary function is to stabilize banks by providing deposit insurance).

43. "[I]nvestor confidence was so low before the enactment of the federal securities laws that the issuance of new corporate securities had plummeted from \$9.4 billion in 1929 to \$380 million in 1933." Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1066 n.35 (1999) (citing 1 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 216 (3d ed. 1998)).

44. Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77zz).

45. Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp).

by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.<sup>46</sup>

These words evince macroeconomic, not microeconomic, concern. Indeed, scholars protested the pro-defendant tilt of the interpretation and amendment of the federal securities laws on macroeconomic grounds.<sup>47</sup>

The above-discussed measures for stabilizing credit, and thus macroeconomic conditions, provide lessons on weaponizing capitalistic systems during war, which can instruct policymakers on efforts to maximize output. During the Civil War, the Union moved aggressively to finance the war and maximize macroeconomic output, which led to its victory.<sup>48</sup> Similarly, the Federal Reserve Act facilitated the financing of World War I.<sup>49</sup> Indeed, Friedman and Schwartz suggest that the Fed monetized the federal deficits during the war, effectively duplicating Lincoln's Greenback experiment.<sup>50</sup> These efforts and events not only formed the basis of modern monetary policy, but also gave the United States the best tools and means for financing war efforts.

Today, the economic realities implicit in high economic inequality, such as deflation, pose major challenges to the institutional design governing both countercyclical monetary and fiscal policy.<sup>51</sup> Creative mechanisms are needed to quell these powerful structural forces.<sup>52</sup> A solution may reside in the creation of a super-charged fiscal stimulus authorized in the form of "platinum coins."<sup>53</sup> As Friedman and Schwartz observed in the context of the Civil War, the Treasury could simply coin any denomination it wishes using platinum that could be the essential equivalent of Lincoln's Greenbacks.<sup>54</sup> Issuing such coins to meet government expenditures would not require the withdrawal of money from the economy in the form of either taxes or the sale of bonds.<sup>55</sup> It would simply inject more money into the economy which would quickly end any threat of sluggish growth, negative interest rates, or deflationary spirals.<sup>56</sup>

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46. 15 U.S.C. § 78b(4) (2018).

47. E.g., Marc I. Steinberg, *Curtailing Investor Protection Under the Securities Laws: Good for the Economy?*, 55 SMU L. REV. 347, 354 (2002).

48. See MCPHERSON, *supra* note 22, at 855 ("In economic resources and logistical capacity the northern advantage was even greater.").

49. ALLAN H. MELTZER, 1 A HISTORY OF THE FEDERAL RESERVE: 1913-1951, at 84-90 (2003).

50. FRIEDMAN & SCHWARTZ, *supra* note 3, at 216-17.

51. Economists struggle to reach consensus on the causes and solutions to global phenomenon such as negative and chronically low interest rates, sluggish growth and emerging deflation. See, e.g., Servaas Storm, *What Mainstream Economists Get Wrong About Secular Stagnation*, INST. FOR NEW ECON. THINKING: MACROECONOMICS (Dec. 21, 2017), <https://www.ineteconomics.org/perspectives/blog/what-mainstream-economists-get-wrong-about-secular-stagnation> [<https://perma.cc/5N37-B85V>].

52. Cf. Connor Simpson, *Why Is Everyone Talking About a Platinum \$1 Trillion Coin?*, THE ATLANTIC (Jan. 4, 2013) (explaining the reality of the platinum coin idea).

53. 31 U.S.C. § 5112(k) (2012).

54. FRIEDMAN & SCHWARTZ, *supra* note 3, at 216-17.

55. See LISTOKIN, *supra* note 1, at 3, 12.

56. See *id.* at 12 (noting "considerable evidence that fiscal stimulus was effective at stimulating the economy" after the financial crisis).

Currently, this power resides with the executive branch in unbridled form. This creates a compelling need for legal and regulatory infrastructure to cabin this power within appropriate political and economic bounds.<sup>57</sup> The power should probably rest with a politically-accountable organ of government, as it does now with respect to platinum coins, because of the risk of hyperinflation.<sup>58</sup> It should also require some degree of check beyond that which currently gives the Secretary of Treasury apparently boundless discretion.<sup>59</sup> All of the issues raised by control of monetary policy generally arise from this form of super-monetary policy or super-fiscal power to expand the money supply or pursue government expenditures without issuing debt—or in the parlance of some, the power to issue helicopter money.<sup>60</sup>

The next Part moves to a newer frontier of Law and Macroeconomics, and addresses the ability of law to spur macroeconomic growth.

### III

#### TARGETING MACROECONOMIC GROWTH

The Great Depression and the legal responses thereto created new approaches to the intersection of law and economics. In addition to using macroeconomics to stabilize the economy, the New Deal also commenced a search for legal innovations to enhance economic growth beyond mere countercyclical policies and legal institutions.<sup>61</sup> For example, the New Deal included initiatives expressly seeking to develop human capital such as the Civilian Conservation Corps and the GI Bill.<sup>62</sup> It also sought to rebalance power relations between labor and capital to ensure labor peace and increase wages to stoke demand.<sup>63</sup> The New Deal's efforts to use law to foster growth foreshadowed similar efforts to understand growth in the field of economics.

In fact, beginning in the 1990s, a steady stream of economic thinking and scholarship started to percolate in an entirely new arena of Law and Macroeconomics—the legal and regulatory frameworks undergirding superior macroeconomic performance and development.<sup>64</sup> Some scholars recognized that

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57. *Id.*

58. *See id.* at 88 (suggesting lawmakers have “taken steps to prevent such usurpation of political prerogatives by central banks” who hold such power).

59. 31 U.S.C. § 5112(k) (2012).

60. LISTOKIN, *supra* note 1, at 3, 12, 81–82, 88–89.

61. Ramirez, *supra* note 36, at 569–71.

62. *Id.* at 571 (“The New Deal spawned the first programs specifically designed to upgrade the quality of the American labor force.”).

63. *Id.*

64. *See, e.g.*, Pranab Bardhan, *Efficiency, Equality and Poverty Alleviation*, 106 *ECON. J.* 1344 (1996); Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others?*, 114 *Q.J. ECON.* 83, 95 (1999); Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *The Allocation of Talent: Implications for Growth*, 106 *Q.J. ECON.* 503 (1991).

sustained economic growth and social well-being depend on legal arrangements.<sup>65</sup> Others connected lower production costs with macroeconomic growth: economist Paul Romer demonstrated that if ideas foster growth then law should seek to foster ideas through the broadest and deepest development of human capabilities as possible, as the New Deal began to do long ago.<sup>66</sup>

At the same time, institutional economics—that is the study of the role of law and other means of regulation in fostering economic growth—reached an ascendant point in its ability to explain why some nations outperform others in terms of macroeconomic growth.<sup>67</sup> This explanation paved the way for using law to create conditions conducive to macroeconomic growth: institutional economists recognized that growth requires inclusive economic and political institutions to ensure that law does not permit elites to entrench themselves at the expense of innovation and creativity.<sup>68</sup>

Institutional economist Mariana Mazzucato highlighted that targeted U.S. government investment into new technology not only enables economic stability, but fosters long-term economic growth.<sup>69</sup> Government investments in basic research, education, and human capital formation drive economic growth by empowering individuals to exploit new ideas and technology,<sup>70</sup> and that the technologies should facilitate broad distribution of their benefits. Mazzucato's emphasis on the centrality of government research and investment to fostering growth directly dovetails with the robust use of fiscal policy to mitigate recessions, as discussed in Part II.

Law can further create platforms for growth through individual empowerment by the institutionalization of funding. For example, in response to the threat posed by the Soviet launch of Sputnik, Congress enacted the National Defense Education Act, declaring the nation's security "required the fullest development of the mental resources and technical skills of its young men and women."<sup>71</sup> The Act was a historic educational effort on a national scale to fund education broadly,<sup>72</sup> and demonstrated the federal government's commitment to

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65. See Listokin & Murphy, *supra* note 9, at 393 (stating that "sustained economic growth depends primarily on technological improvements, and one of the primary causes of differences in technology (and hence income) across countries is institutions (e.g., laws, enforcement of property rights). In short, legal arrangements appear to be paramount for social well-being").

66. See generally Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71 (1990).

67. See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2006, EQUITY AND DEVELOPMENT 1 (2005) ("Institutions and policies that promote a level playing field—where all members have similar chances to be socially active, politically influential, and economically productive—contribute to sustainable growth and development.").

68. See DAREN ACEMOGLU & JAMES ROBINSON, WHY NATIONS FAIL 429–31 (2012).

69. See MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE 1–2 (2015) ("From the internet to biotech and even shale gas, the U.S. state has been the key driver of innovation-led growth—willing to invest in the most uncertain phase of the innovation cycle and let business hop on for the easier ride down the way.").

70. *Id.* at 1, 207–13.

71. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, § 101 (1958) (codified at 20 U.S.C. § 401 (2012)).

72. Abbye Atkinson, *Race, Education Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1, 13–14 (2010).

directly foster innovation and technology—and by extension to institutionalize growth.

#### IV

#### TARGETING INEQUALITY-ADJUSTED HUMAN DEVELOPMENT AS A LEGAL GOAL

Parts II and III illustrated how macroeconomic considerations have been implicit in economic stability and growth policy throughout U.S. history. However, the metrics used to measure macroeconomic growth, both historically and today, fail to adequately capture human welfare. Targeting inequality-adjusted human development should be a goal of the legal system not only because macroeconomic growth and stability are tightly correlated to human development and political stability, but also because high economic inequality impedes long-term economic growth and subverts the rule of law.

The deficiencies of economic growth as the primary policy objective caused former French President Nicolas Sarkozy to create the Commission on the Measurement of Economic Performance and Social Progress (Stiglitz Commission) to assess GDP growth as an economic barometer and to consider alternative measures for assessing economic performance.<sup>73</sup> The concern driving Sarkozy revolved around why, despite impressive macroeconomic growth, many people felt lied to in a way that undermined democracy—economics had devolved into “a dialogue of the deaf.”<sup>74</sup> The Stiglitz Commission’s answer was that, despite increasing average GDP, people were actually worse off.<sup>75</sup>

Instead of focusing on GDP or even living standards alone, the Stiglitz Commission recommended broadening measures of well-being to include health, education, political voice, environmental sustainability, social relationships, and engagement such as employment.<sup>76</sup> The concept is straightforward: human well-being depends not only on material prosperity, however measured, but also upon quality of life indicators such as health, education, and happiness.<sup>77</sup>

The Stiglitz Commission also concluded that these broader elements and indicators of quality of life should enjoy wide distribution.<sup>78</sup> Inequality may operate to mean that only a small slice of a given society is enjoying rising standards of living while the mass of citizens stagnate. For example, no healthy

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73. JOSEPH E. STIGLITZ, MIS-MEASURING OUR LIVES: WHY GDP DOESN'T ADD UP ix, 1 (2010). The Stiglitz Commission included Nobel Prize winners Joseph Stiglitz, Amartya Sen, James Heckman, Daniel Kahneman, and Angus Deaton.

74. *Id.* at viii–xi.

75. *See id.* at xi (“One of the reasons that most people may perceive themselves as being worse off even though average GDP is increasing is because they are worse off.”).

76. *Id.* at 15.

77. *See id.* at 15 (“Quality of life depends on people’s objective conditions and capabilities. Steps should be taken to improve measures of people’s health, education, personal activities[,] and environmental conditions.”).

78. *Id.* at 16. “Inequalities in human conditions are integral to any assessment of quality of life across countries and the way that it is developing over time.” *Id.* at 94.

society would allow a legal system to persistently permit all economic growth to inure to the benefit of only the top one percent.<sup>79</sup> Indeed, under the Universal Declaration of Human Rights, “everyone has the right” to “social security” and “to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>80</sup>

Policymakers should combat economic inequality on independent macroeconomic grounds because it profoundly affects the economic well-being of a given society. Some economists attribute much of the current macroeconomic malaise plaguing the developed world to high economic inequality.<sup>81</sup> In addition, economists demonstrated long ago that highly-concentrated wealth erodes the rule of law and leads to more corruption.<sup>82</sup> More recently, researchers have shown that high economic inequality is associated with more domestic terrorism.<sup>83</sup> In general, high economic inequality is associated with unequal educational achievement and lack of social mobility as economic elites focus on educating their own children and limiting mass education.<sup>84</sup> For example, the efforts of financial elites to use their concentrated wealth to free themselves from legal and regulatory constraints drove the Great Financial Crisis.<sup>85</sup> Today, economists have clarified with great precision the degree to which subverting law and regulation in the United States—and only the United States—has reached dangerously high levels.<sup>86</sup> The severe economic problems associated with too much economic inequality further supports the conclusion that, among other values, the law must strive to control economic inequality in order to further broad-based human development. Consequently, the Stiglitz Commission

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79. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 206 (2012) (“Growing inequality, combined with a flawed system of campaign finance, risks turning America’s legal system into a travesty of justice. Some may still call it the ‘rule of law,’ but in today’s America the proud claim of ‘justice for all’ is being replaced by the more modest claim of ‘justice for those who can afford it.’”).

80. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), at art. 3 (Dec. 10, 1948).

81. See, e.g., STEPHEN BELL & MICHAEL KEATING, *FAIR SHARE: COMPETING CLAIMS AND AUSTRALIA’S ECONOMIC FUTURE* 509 (2018).

82. See generally Edward Glaeser & Andrei Schleifer, *The Injustice of Inequality*, 50 J. MONETARY ECON. 199 (2003).

83. Tim Krieger & Daniel Meierrieks, *Income Inequality, Redistribution and Domestic Terrorism*, 116 WORLD DEV. 125 (2019).

84. See Federico Cingano, *Trends in Income Inequality and its Impact on Economic Growth* 28 (Org. for Econ. Co-operation & Dev. Soc., Emp’t & Migration Working Papers No. 163), <http://dx.doi.org/10.1787/5jxrjncwxv6j-en> [<https://perma.cc/N9ZX-9QDA>] (“[B]ased on OECD PIAAC data suggests that one key channel through which inequality negatively affects economic performance is through lowering investment opportunities (particularly in education) of the poorer segments of the population.”).

85. STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE CASE FOR AN ECONOMIC RULE OF LAW* 4–5 (2013).

86. Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 Q.J. ECON. 553 (2018).

stands on sound economic science when calling for policymakers to lean against inequality.<sup>87</sup>

Economic law and policy can target inequality by using metrics developed by the United Nations (UN): the Human Development Index (HDI) and the Inequality-Adjusted Human Development Index (IHDI). The UN developed these metrics as a direct result of the above realities, and the UN uses these metrics to annually assess human development across the world.<sup>88</sup> Specifically, the HDI was developed “to emphasize that people and their capabilities should be the ultimate criteria for assessing the development of a country, not economic growth alone.”<sup>89</sup> It integrates “life expectancy at birth, . . . the mean of years of schooling for adults aged 25 years, . . . expected years of schooling for children of school entering age, . . . and gross national income per capita [GNI]” using “the logarithm of income, to reflect the diminishing importance of income with increasing GNI.”<sup>90</sup> The UN also adjusts the HDI for inequality, reflected in the Inequality-Adjusted Human Development Index (IHDI). The IHDI discounts each nation’s HDI for inequality in the distribution of the underlying factors constituting the HDI. Thus, the United States boasts an HDI of 0.924, ranking thirteenth in the world, but its IHDI discount lowers its ranking by eleven, to twenty-fourth.<sup>91</sup> This suggests that the U.S. legal system fails to advance the well-being of its people to the same extent as many other developed nations. Indeed, the HDI and IHDI were explicitly developed to spark discussion regarding human development disparities and the government policy priorities that potentially create or exacerbate them.<sup>92</sup>

Four reasons support higher IHDI as a goal for the legal system in the United States and beyond. First, the United States traditionally boasted a superior government and those efforts, including the elements discussed herein, materially advanced the human condition worldwide. Second, claims that the U.S. legal system provides justice for all or that law is a public good that serves the entirety of society are belied by an IHDI ranking that shows its legal system is yielding inferior outcomes relative to other legal systems. Third, individual empowerment, which plays a foundational role throughout U.S. history, expands with ever-increasing IHDI. Fourth, the current challenges facing humanity, most notably anthropogenic climate change, will test human capabilities like never before. Only a dramatic and immediate expansion of such capabilities will assure that humanity will meet those challenges. Both the history of the United States

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87. The report is addressed to “policymakers.” STIGLITZ, *supra* note 73, at 7.

88. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT INDICES AND INDICATORS: 2018 STATISTICAL UPDATE iii (2018).

89. U.N. DEV. PROGRAMME, *Human Development Index (HDI)*, HUMAN DEVELOPMENT REPORTS: DATA, <http://hdr.undp.org/en/content/human-development-index-hdi> [<https://perma.cc/47QN-3K8B>].

90. *Id.*

91. U.N. DEVELOPMENT PROGRAMME, *supra* note 88, at 30.

92. U.N. DEVELOPMENT PROGRAMME, *supra* note 89.

and its core values, as well as the needs of the future, demand that the legal system function to expand IHDI.

The U.S. legal system's failure to integrate macroeconomic analysis has enabled inequality to perpetuate and worsen. For example, allowing the widespread use of wealth-based funding for public education, such as property taxes, predictably leads to higher state funding to entrench the rich and powerful while ensuring that less powerful and disadvantaged minorities face perpetually constricted educational opportunities.<sup>93</sup> Similarly, overturning decades of law to the contrary and dramatically shortening the statute of limitations for securities fraudfeasors operates to both encourage more securities fraud upon dispersed investors and to entrench those in control of concentrated capital pools.<sup>94</sup> And allowing corporate titans to use shareholder wealth to engage in unlimited electioneering certainly expands the political power of corporate elites at the expense of more diffuse shareholders and citizens.<sup>95</sup> These judicial outcomes supply just a few of the examples where the judiciary fails to even address either the distributional outcomes of their decisions or the impact of their decision-making upon broad-based human development. As discussed above, high economic inequality is associated with a weaker rule of law and compromised macroeconomic performance, and these decisions failed to address the impact of the ruling on inequality. But these judicial outcomes can be reversed, and therefore directly targeting inequality-adjusted human development poses no difficult challenge to lawyers. These are just some of the legal issues that could benefit from a more macroeconomic analysis.

Thus, the judiciary facing these issues as well as the lawyers arguing these cases must comprehend these macroeconomic stakes. They need to comprehend the impact of law on inequality and human development across the range of law and regulation. While lawyers hold the power to translate IHDI into the legal system, their skills may not currently support such efforts. Certainly, legal scholarship addressing Law and Macroeconomics is nascent at best. IHDI does not meet even that level of development as a core legal value, as it barely warrants mention in extant legal scholarship. On the other hand, many tools used to evaluate human development did not exist until recently. Perhaps human development as the next frontier of Law and Macroeconomics can focus the legal academy and, by extension the legal system, on maximizing sustainable and broadly-distributed human development.

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93. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1975) (holding that the state may allocate educational funding upon property taxes notwithstanding the advantages to those holding property).

94. *Lampf v. Gilbertson*, 501 U.S. 350, 359 (1991) (holding that restricted statute of limitations should apply to securities fraud claimants in favor of those controlling corporations).

95. *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that the First Amendment requires that the government allow those in control of corporations to use shareholder wealth for electioneering expenditures).

## V

## CONCLUSION

As articulated in this Article, the field of Law and Macroeconomics ineluctably exists regardless of recognition within the legal academy. This is because macroeconomic considerations are inherently at play whenever laws or policies implicate economic stability, economic growth, efficiency, or human development. These are important values implicit in U.S. historic and current economic strategies. However, these legal and policy goals need to go further to explicitly and directly target human welfare; macroeconomic metrics that do not factor in human welfare risk creating a legal and regulatory system that spawns environmental misery and mass extinction. A reoriented legal system would focus on broad-based human empowerment and would be suspicious of concentrated power of in all forms. In this system, the government could orchestrate empowered citizens to meet existential threats such as climate change.

Given these considerations, the reality of Law and Macroeconomics suggests that law schools should train better-prepared lawyers and create more robust scholarship for an increasingly complex economy. This training and scholarship should use macroeconomic analysis to focus on broadly-based and sustainable human development in the face of contemporary problems. Law schools and scholars who ignore these macroeconomic stakes and insights do themselves, their students, and society a great disservice, as demonstrated most recently in the Great Financial Crisis.