MACROECONOMICS AND THE TRADITION OF LAW AND ECONOMICS

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ABSTRACT

This article examines the emergence of Law and Macroeconomics (LawMacro) and its departure from the Law and Economics (LawEcon) tradition. It challenges the prevailing view that LawMacro's innovation lies in introducing macroeconomic perspectives into legal discourse—something that has long existed. Instead, the article argues that LawMacro's distinctiveness stems from its embrace of Keynesian economics, marking a significant ideological shift from the classical liberal foundations of LawEcon. The article attributes this change to a growing trend among

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younger, revisionist scholars who increasingly question LawEcon's emphasis on market-based solutions and efficiency. It further contends that addressing macroeconomic issues does not necessarily require a Keynesian framework, emphasizing instead the value of a monetary constitution alongside stable legal frameworks, market coordination, and decentralized solutions, all in keeping with the LawEcon tradition.

INTRODUCTION

Law and Economics is undergoing rapid changes. The rise of a new generation of scholars equipped with formal training in economics has made the field more technical and empirical. At first glance, this shift appears to reflect a continuation of the enterprise, as scholars refine and build upon earlier insights. However, closer examination reveals more radical changes, including the emergence of Law and Macroeconomics (LawMacro),[1] a subfield that warrants closer scrutiny.

LawMacro explores the relationship between legal frameworks and large-scale economic phenomena, such as GDP growth, financial stability, inequality, unemployment, and aggregate demand. While it shares with traditional Law and Economics (LawEcon) a commitment to integrating economic analysis into legal reasoning, LawMacro departs significantly by emphasizing macroeconomic trends, particularly those inspired by Keynesian economics. This shift raises questions about its compatibility with LawEcon's classical liberal principles, which emphasize market coordination, clear legal rules, and decentralized solutions.[2]

The dominant view holds that:

1. LAW AND MACROECONOMICS, https://lawandmacroeconomics.com [https://perma.cc/GHJ5-F9UP] (last visited Apr. 18, 2025). Representative publications of LawMacro document the annual Conferences on Law and Macroeconomics.

2. *See* Anna Gelpern & Adam J. Levitin, *Considering Law and Macroeconomics*, 83 LAW & CONTEMP. PROBS. i (2020); *see also* Bruno Meyerhof Salama, *Macroeconomic Analysis of Law Versus Law and Macroeconomics*, 83 LAW & CONTEMP. PROBS. 181 (2020); Leonidas Zelmanovitz & Bruno Meyerhof Salama, *LawMacro and the Schism in Law and Economics*, LAW & LIBERTY (Oct. 29, 2020), https://lawliberty.org/how-money-could-revive-law-and-economics/ [https://perma.cc/4PAH-A43Y]; Steven A. Ramirez, *The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development*, 83 LAW & CONTEMP. PROBS. 219, 233 (2020); Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. & SOC. SCI. 377 (2019); Bruno Meyerhof Salama, *The Art of Law and Macroeconomics*, 74 U. PITT. L. REV. 131 (2012). For older articles addressing the topic of law and macroeconomics, see 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).

1. LawMacro complements LawEcon by introducing macroeconomic insights absent in the latter.
2. Its emergence is primarily a response to the 2008 Global Financial Crisis.
3. It relies on Keynesian approaches, particularly countercyclical policies, to inform legal frameworks.

In this article, I challenge these viewpoints.

First, I argue that LawMacro's key innovation lies not in incorporating macroeconomic perspectives into legal discourse—something that is nothing new—but in its ideological embrace of Keynesian economics.[3] This development reintroduces debates that were central to mid-20th-century economics and poses a fundamental challenge to the principles that have defined LawEcon for decades.

Second, while the 2008 Global Financial Crisis was an important catalyst for LawMacro, it does not fully explain the movement's rise. Its emergence reflects a broader ideological shift among legal scholars, particularly a younger generation increasingly skeptical of LawEcon's market-oriented solutions and efficiency-focused analyses. This shift spells out a growing preference for interventionist approaches that prioritize state involvement over decentralized market coordination.

Third, I propose that LawEcon offers an alternative framework for addressing macroeconomic issues without adopting the Keynesian principles that underpin LawMacro. Specifically, I argue for reviving the concept of a "monetary constitution"—a system of rule-based monetary governance that emphasizes stability, predictability, and transparency. This approach not only addresses contemporary challenges such as inflation and digital currencies but also preserves LawEcon's foundational principles, including its focus on fostering economic growth through decentralized, market-driven solutions.

I conclude that LawMacro's rise is not a necessary evolution of legal-economic thought but a significant ideological departure from the classical liberal foundations of LawEcon. Its embrace of Keynesian economics and interventionist policies challenges the principles of stability, predictability, and decentralized coordination that have long defined LawEcon. To remain

3. For an introduction to Keynesian economics, see Alan S. Blinder, *Keynesian Economics*, LIBR. ECON. & LIBERTY, https://www.econlib.org/library/Enc/KeynesianEconomics.html [https://perma.cc/3WQF-LU6Z] (last visited Feb. 17, 2025) (describing the "six principal tenets . . . central to Keynesianism"). *See also* Sarwat Jahan et al., *What Is Keynesian Economics?*, FIN. & DEV., Sep. 2014, at 53, 53 ("The central tenet of this school of thought is that government intervention can stabilize the economy.").

relevant, LawEcon must reaffirm its commitment to market-based solutions and stable legal frameworks while actively engaging with the challenges posed by LawMacro's ideological shift.

I. THE QUESTION OF NOVELTY

The LawEcon movement could aptly have been called "law and microeconomics," given its primary focus on microeconomic reasoning.[4] At first glance, the emergence of LawMacro might appear to be a natural evolution—broadening the scope of LawEcon by integrating macroeconomic insights to complement its micro-centric approach.[5] This interpretation suggests that LawMacro is merely an expansion of the original framework. However, such a perception fails to capture the profound ideological shift that lies at its core.

The true significance of LawMacro's rise is not its adoption of macroeconomic reasoning—an approach long intertwined with legal analysis—but its embrace of the doctrines of John Maynard Keynes. Keynesian principles, which emphasize state intervention and aggregate demand management, form the foundation of LawMacro. This marks a decisive departure from the anti-Keynesian orientation that has historically defined LawEcon. While LawEcon emerged as a response to the Keynesian dominance of mid-20th-century economic thought,[6] LawMacro represents a return to and a reimagining of these Keynesian doctrines within the legal field.

A. The Problem of Definitions

If LawMacro is defined as the study of law through the lens of macroeconomics, it is hardly a novel concept. Consider the common

4. *See* Yair Listokin, *Law and Macro: What Took So Long?*, 83 LAW & CONTEMP. PROBS. 141, 144–45 (2020) (citation omitted) ("Law and macroeconomics studies how law affects these aggregate variables of interest, and how fluctuations in these aggregate variables affect law. It offers a different perspective from conventional law and microeconomics. In microeconomics, a law that improves the functioning of an individual market is efficient and therefore desirable. In macroeconomics, however, the law's generalized effects must be considered.").

5. Iris H-Y Chiu, *Rethinking the Law and Economics of Post-Crisis Micro-prudential Regulation: The Need to Invert the Relationship of Law to Economics?*, 38 REV. BANKING & FIN. L. 639, 639 (2019) (referring to LawMacro as a "new and improved" version of LawEcon).

6. Steven Pressman, *The Role of the State and the State Budget*, *in* A NEW GUIDE TO POST KEYNESIAN ECONOMICS 102 (Richard P. F. Holt & Steven Pressman eds., 2001).

assumption[7] that macroeconomics began with John Maynard Keynes' *The General Theory of Employment, Interest, and Money* in 1936.[8] By that logic, LawMacro would have originated simultaneously, as Keynes' seminal work directly engages with legal concepts and considerations.

Keynes' *General Theory* deals with legal questions both implicitly and explicitly. Implicitly, for instance, in the discussion of nominal wage rigidity—workers' assumed reluctance to accept reductions in nominal wages, even as their real wages decrease through inflation.[9] Keynes analysis implies that this resistance stems partly from the legal principle of nominalism, which mandates that contractual obligations be fulfilled in fixed nominal terms, irrespective of currency devaluation.[10] This contrasts with the principle of valorism, where obligations adjust to maintain real value, as was often practiced under gold-standard economies.[11] Keynes' recommendation to address unemployment by raising inflation relies on nominalism remaining in effect; a legal shift toward valorism, as often occurs during hyperinflation,[12] would frustrate this strategy.[13]

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7. *See* Ben S. Bernanke, *The Macroeconomics of the Great Depression: A Comparative Approach*, 27 J. MONEY, CREDIT & BANKING 1, 1 (1995) (noting that the "Depression [gave] birth to macroeconomics as a distinct field of study"); Michel De Vroey & Pierre Malgrange, *The History of Macroeconomics from Keynes's* General Theory *to the Present* 1 (Institut de Recherches Économiques et Sociales de l'Université catholique de Louvain, Discussion Paper No. 28, 2011) (explaining "the emergence of modern macroeconomics as a new sub-discipline arising in the aftermath of John Maynard Keynes's *General Theory*").

8. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (Springer Int'l Publ'g AG 2018) (1936) [hereinafter KEYNES, THE GENERAL THEORY].

9. *Id.* at 9 ("Whilst workers will usually resist a reduction of money-wages, it is not their practice to withdraw their labour whenever there is a rise in the price of wage-goods.").

10. ARTHUR NUSSBAUM, MONEY IN THE LAW 249 (1939) ("Since a debt . . . is defined by its monetary unit, together with the figure that accompanies it, changes in the monetary field which have no bearing either upon such unit or figure do not affect the debt."); *see* CHARLES PROCTOR, MANN ON THE LEGAL ASPECT OF MONEY 253 (7th ed. 2012) ("In its essence, the principle [of nominalism] establishes that obligations expressed in money are to be treated as independent and self-standing measures of value; they are not liable to adjustment on the basis of factors which are extraneous to the monetary system or the unit of account." (alteration in original)).

11. NUSSBAUM, *supra* note 10, at 301 ("Before the appearance of the modern monetary systems, it was debasement or alteration in the tariffing of the coin contracted for that was feared.").

12. John P. Dawson & Frank E. Cooper, *The Effect of Inflation on Private Contracts: United States, 1861–1879*, 33 MICH. L. REV. 706 (1935); John P. Dawson, *Effects of Inflation on Private Contracts: Germany, 1914–1924*, 33 MICH. L. REV. 171, 184–85 (1934); Samuel A. Rea, Jr., *Inflation and the Law of Contracts and Torts*, 14 OTTAWA L. REV. 465, 467 (1982); *see* ELIYAHU HIRSCHBERG, THE NOMINALISTIC PRINCIPLE 73–74 (1971).

13. *See* KEITH S. ROSENN, LAW AND INFLATION 57 (1982) (explaining that the emergence of valorism happens as a "juridical reaction against rigid application of the nominalist principle, for nominalism presupposes a reasonably stable currency"); *see also* NUSSBAUM,

Explicitly, Keynes also addresses legal mechanisms in his analysis. A famous example is his advocacy of capital controls, which are laws that restrict the movement of capital across borders.[14] Another example is his advocacy of usury laws—statutory limitations on interest rates. Keynes believed that the tendency to save often outpaced the propensity to invest, which he identified as "the key to the economic problem."[15] Usury laws, by capping interest rates, would reduce the hurdle for investment in debt assets, thereby addressing this imbalance. Keynes emphasized that such laws should be coupled with moral suasion by the government to further reduce rates, fostering investment and economic growth.[16]

The claim that integrating macroeconomics and legal frameworks is a new development does not hinge solely on Keynes or his *General Theory*. Even if the origins of macroeconomics are traced to earlier thinkers, such as Adam Smith or David Ricardo, the essential connection between legal systems and large-scale economic policies remains.[17] Macroeconomic interventions—tariffs, tax policies, trade agreements, social security systems, minimum wage laws, and currency controls—are inextricably tied to legal frameworks. Thus, in a broad sense, macroeconomic policy has always been deeply intertwined with law.

Even monetary policy, which might appear independent from legal frameworks, operates within a structured and occasionally contentious legal environment.[18] To be sure, the Second Circuit once labelled the idea of court intervention in the Federal Reserve's decisions to increase or decrease interest rates as "grotesque."[19] But the Federal Reserve's dual mandate is

supra note 10, at 283–96; Steven G. Harman, *Alleviating Hardship Arising from Inflation and Court Congestion: Toward the Use of the Conditional Specific Performance Decree*, 56 S. CAL. L. REV. 795, 814–15 (1983).

14. KEVIN P. GALLAGHER, *Regaining Control: Capital Controls and the Global Financial Crisis*, *in* THE CONSEQUENCES OF THE GLOBAL FINANCIAL CRISIS: THE RHETORIC OF REFORM AND REGULATION 109–10 (Wyn Grant & Graham K. Wilson eds., 2012).

15. KEYNES, THE GENERAL THEORY, *supra* note 8, at 310.

16. *Id.* at 313.

17. *See* Robert W. Dimand, *Macroeconomics, Origins and History of*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 236, 237 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) ("But just as Molière's *bourgeois gentilhomme* spoke prose long before he knew he was doing so, economists wrote macroeconomics long before they called it by that name. Macroeconomics grew out of two long-standing traditions within economics: business cycle analysis and the theory of money.").

18. *See generally* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016) (discussing the legal constraints on the Federal Reserve).

19. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929); *see also* Steffi Ostrowski, Note, *Judging the Fed*, 131 YALE L.J. 726 (2021) (outlining the domains where the Federal Reserve has undergone scrutiny by the courts).

codified in law,[20] and legislative interventions often influence monetary decisions, such as during the COVID-19 pandemic.[21] Lawyers are also interested in the constitutional implications of the Federal Reserve's structure and its independence under Article II of the U.S. Constitution[22] and more broadly on the extent of its legal mandates.[23]

Besides that, monetary policy debates have historically found their way into the courts.[24] The legendary constitutional debates between Alexander Hamilton and Thomas Jefferson over the "money clause," repeatedly adjudicated by the Supreme Court in the 19th century, exemplify this interplay.[25] Similarly, the congressional nullification of gold clauses in 1933 and the subsequent Supreme Court ruling in 1935 illustrate the legal dimensions of monetary policy.[26] These examples underscore that monetary governance, far from existing outside the legal realm, is deeply embedded in legal structures and disputes.

Given this history, one might argue that the distinctive feature of LawMacro lies not in its subject matter but in its audience—that is, lawyers, instead of economists. However, this view is difficult to sustain. Judicial debates have long incorporated macroeconomic considerations, and legal scholars have engaged with such ideas for a long time—indicating that lawyers have always been participants in these discussions. This suggests

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20. 12 U.S.C. § 225a (2018) ("The Board of Governors of the Federal Reserve System . . . shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."); *see* Joy Zhu, *Federal Reserve Reform Act of 1977*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/fed-reform-act-of-1977 [https://perma.cc/CE5V-76DT] (quoting the 1977 Reform Act).

21. *See Legal Responses to Coronavirus (COVID-19)*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/coronavirus [https://perma.cc/G6PB-8NEC] (last visited Feb. 16, 2025).

22. *See generally* Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORNELL L. REV. 843 (2024); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2020).

23. *See, e.g.*, David T. Zaring & Jeffery Y. Zhang, *The Federal Reserve's Mandates*, 108 MINN. L. REV. 333 (2023).

24. For a discussion, see, for example, GERALD T. DUNNE, MONETARY DECISIONS OF THE SUPREME COURT (1960); RICHARD H. TIMBERLAKE, CONSTITUTIONAL MONEY: A REVIEW OF THE SUPREME COURT'S MONETARY DECISIONS (2013).

25. *See* DUNNE, *supra* note 24, at 23–64.

26. *See generally infra* Section III.B. *See also* Stefan Griller et al., *Financial Markets and Legal Challenges to Unconventional Monetary Policy*, EUR. ECON. REV. 1, 1 (2024).

that the emergence of LawMacro reflects a deeper conceptual or methodological departure from prior approaches.[27]

Furthermore, the LawEcon tradition itself has explored macroeconomic questions.[28] The "legal origins" literature, spearheaded by Rafael La Porta and his colleagues, exemplifies this engagement.[29] This body of work examined how the legal systems of different countries influenced their financial development and economic growth, with findings that highlighted macroeconomic patterns.[30] Although labeled as "law and finance" rather than "law and macroeconomics,"[31] discerning observers, such as Gary Becker, recognized its macroeconomic character.[32] Once a cornerstone of the

27. *See, e.g.*, Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J.L. & SOC. POL'Y 87, 89 (2010) ("[T]he [Supreme] Court's decisions throughout the first several decades of the twentieth century are filled with rhetoric, commentary, and dicta evincing considerable interest in the national economy, macroeconomic trends, and the economic effects of lawmaking more generally." (alteration in original)); *see also* Juan V. Sola, *The Influence of Keynesian Economics in Judicial Decisions* (Ctr. on Capitalism & Soc'y Colum. Univ., Working Paper No. 57, 2010), https://capitalism.columbia.edu/sites/default/files/content/docs/working%20papers/ccswp57_sola.pdf [https://perma.cc/H54U-HJ79].

28. *See* Bruno Meyerhof Salama, *Macroeconomic Analysis of Law Versus Law and Macroeconomics*, *supra* note 2, at 186 ("A trend in the field of law and economics that is intimately related to macroeconomics is a concern with economic growth."); *see also* Eric E. Johnson, *The Macroeconomics of Intellectual Property*, 100 WASH. U. L. REV. 1139 (2023).

29. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny have often been jointly referred to as "LLSV" and written many influential papers. *See, e.g.*, Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) [hereinafter LLSV]. These and many other papers attracted a large body of scholarly critique. *See, e.g.*, Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV. 460, 463 (2006); Ruth V. Aguilera & Cynthia A. Williams, *"Law and Finance": Inaccurate, Incomplete and Important*, BYU L. REV. 1413 (2009); Kensie Kim, *Mixed Systems in Legal Origins Analysis*, 83 S. CAL. L. REV. 693 (2010); Brian R. Cheffins et al., *Questioning "Law and Finance": US Stock Market Development, 1930–70* (Univ. of Cambridge Legal Studs. Rsch. Paper Series, Paper No. 14/2012, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079505 [https://perma.cc/9R64-245L].

30. *See* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

31. *See generally* LLSV, *supra* note 29.

32. *See, e.g.*, Gary S. Becker & Richard A. Posner, *The Future of Law and Economics*, *in* The OXFORD HANDBOOK OF LAW AND ECONOMICS: VOLUME 1: METHODOLOGY AND CONCEPTS 1, 5 (Francesco Parisi ed., 2017) ("[A] newer and also important research focus considers the interactions between legal systems and the macro economy. This research, pioneered by economists Daron Acemoglou and Andrei Shliefer, among others, analyzes the connections between legal systems and long-term rates of growth, the degree of economic inequality, aggregate investments, and other macroeconomic variables."); Paul H. Rubin, *Why*

LawEcon agenda, legal origins theory demonstrated the capacity of LawEcon to incorporate macroeconomic analysis, even if its prominence has waned over time.

Beyond legal origins theory, other streams within LawEcon—both empirical[33] and theoretical[34]—have directly engaged with macroeconomic issues. For instance, some scholars have examined the feedback loops between legal institutions and inflation.[35] Even the term "macroeconomic analysis of law" predates the rise of LawMacro as a movement.[36] These historical precedents make clear that the integration of macroeconomics and law is not the true innovation of LawMacro.

Instead, the distinctive feature of LawMacro lies in its embrace of Keynesianism. This ideological pivot toward state intervention and aggregate demand management, coupled with its rejection of LawEcon's market-centered approach, represents a fundamental shift. LawMacro's novelty is not its interdisciplinary nature but its specific ideological alignment, a point to which this article will now turn.

B. The Return to Keynesianism

The rise of LawMacro invites a critical question: what defines Keynesian economics in this context? Despite the never-ending debates surrounding John Maynard Keynes' intellectual legacy,[37] some general themes can clarify its interaction with legal theory, particularly as reflected in contemporary LawMacro scholarship.

A hallmark of LawMacro is the confidence its scholars place in the

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Was the Common Law Efficient?, *in* THE ORIGINS OF LAW AND ECONOMICS 383, 388 (Francesco Parisi & Charles K. Rowley eds., 2005) (framing the debate over legal origins as a discussion over "'macro' efficiency").

33. *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).

34. *See, e.g.*, Salama, *Macroeconomic Analysis of Law Versus Law and Macroeconomics*, *supra* note 2, at 186 (stating that discussions around law and growth economics often mirror endogenous growth theory, a subset of macroeconomics).

35. *See* Reuben A. Kessel & Armen Alchian, *Effects of Inflation*, 70 J. POL. ECON. 521 (1962); Ejan Mackaay & Claude Fabien, *Civil Law and the Fight Against Inflation – A Legal and Economic Analysis of the Quebec Case*, 44 LA. L. REV. 719 (1984); ROSENN, *supra* note 13.

36. ROSA MARÍA LASTRA, CENTRAL BANKING AND BANKING REGULATION 7 (1996).

37. *See* Axel Leijonhufvud, *Keynes and the Keynesians: A Suggested Interpretation*, 57 AM. ECON. REV. (PAPERS & PROC.) 401 (1967) (advising caution in applying the epithet "Keynesian"). A review of this topic geared to legal audiences can be found in Robert Hockett, *Bretton Woods 1.0: A Constructive Retrieval for Sustainable Finance*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 409–17 (2013).

potential of economics to enhance legal reasoning, a perspective it shares with the LawEcon tradition. However, LawMacro diverges from that tradition in two key ways: (a) its adoption of Keynesian economic models and (b) its ideological orientation. Together, these elements signal a fundamental shift in how legal scholars integrate economic theory into legal discourse.

LawEcon textbooks typically introduce straightforward, non-mathematical explanations of microeconomic principles, such as supply and demand curves, providing accessible tools for analyzing how legal rules shape behavior in specific markets.[38] LawMacro,[39] by contrast, frequently adopts Keynesian frameworks—especially the IS-LM model,[40] which emphasizes the interaction between interest rates and aggregate demand. This model highlights how fiscal and monetary policy tools influence short-term economic output, making it central to contemporary macroeconomic analysis.

Yair Listokin's *Law and Macroeconomics: Legal Remedies for Recessions* (2019)[41] exemplifies this approach. Although a definitive textbook on LawMacro has yet to emerge, Listokin's work serves as near-equivalent. He explores fiscal and monetary policies within and beyond liquidity traps, advocating for legal mechanisms to boost aggregate demand

38. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 11–54 (6th ed. 2012); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3–27 (9th ed. 2014). Notice however that the latest edition of Richard Posner's textbook contains concessions to Keynesian thinking. *See id.* at 627 (discussing "animal spirits," "irreducible uncertainties," and nominal wage rigidities), 682 (discussing monetary stimulus).

39. *See, e.g.*, Jonathan S. Masur & Eric A. Posner, *Should Regulation Be Countercyclical?*, 34 YALE J. ON REGUL. 857, 861–65 (2017); LISTOKIN & MURPHY, *supra* note 2, at 380–84 (referencing DANIEL MURPHY, A BRIEF INTRODUCTION TO MACROECONOMICS (2014)).

40. The IS-LM model purports to describe the interplay between interest rates and asset markets. The basic intuition is that fluctuations in spending and base interest rates significantly influence the economy's short-term output. According to the model, lower interest rates reduce the cost of borrowing, which in turn stimulates investment and consumption and boosts overall economic output. Concurrently, an increase in output elevates the demand for money. Under a constant money supply, this heightened demand can drive interest rates up. This dynamic, frequently reflected in business newspaper headlines when discussing fiscal and monetary policy, underscores the model's profound impact. Keynes never wrote down the IS-LM model; John Hicks and Alvin Hansen did it to represent Keynes discussions in *The General Theory*. *See* John R. Hicks, *Mr. Keynes and the "Classics"; A Suggested Interpretation*, 5 ECONOMETRICA 147 (1937); ALVIN H. HANSEN, A GUIDE TO KEYNES 140–53 (1953).

41. YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 23–80 (2019) [hereinafter LAW AND MACROECONOMICS]. See Bruno Meyerhof Salama, *Law and Macroeconomics as Mainstream*, 71 U. TORO. L.J. 274 (2021), for a review of Listokin's book *Law and Macroeconomics*.

during economic downturns. His analysis includes strategies tailored for lawyers and policymakers, with an appendix offering an introduction to the IS-LM model.[42] This underscores the centrality of Keynesian economics to the methodological framework of LawMacro.

This shift in modeling has far-reaching implications for legal applications and reasoning strategies. LawEcon typically focuses on equilibrium outcomes within specific domains, such as contracts, torts, or property law, analyzing how rules influence individual incentives.[43] In contrast, LawMacro emphasizes interdependencies across markets and their aggregate effects on the economy. Additionally, while LawEcon often implicitly assumes money neutrality—the idea that money does not affect real economic variables in the long run[44]—Keynesian economics challenges this assumption, reviving discussions about the active role of monetary policy in shaping economic outcomes.

This Keynesian perspective legitimizes interventions like rent controls, minimum wages, and usury caps, often criticized in LawEcon as distortive. Drawing on the theory of second-best economics, LawMacro argues that addressing imperfections in one market may necessitate introducing distortions in another to achieve broader economic objectives.[45] This approach challenges LawEcon's deep-seated (but often unstated) preference for first-best economics, which promotes the idea that laws should address inefficiencies in individual markets without considering cross-market impacts.[46]

Beyond its modeling choices, LawMacro's Keynesian foundations represent a sharp ideological departure from LawEcon. Emerging in the 1960s, LawEcon was rooted in classical liberalism, emphasizing free markets, decentralized decision-making, and the evolutionary logic of the

42. LAW AND MACROECONOMICS, *supra* note 41, at 205–16.

43. COOTER & ULEN, *supra* note 38, at 4 ("To give you a better idea of what law and economics is about . . . . First, we try to identify the implicit price that the legal rule attaches to behavior . . . .").

44. On the question of money neutrality, see *infra* Section III.A.

45. *See* Bruno Meyerhof Salama, *Macroeconomic Analysis of Law Versus Law and Macroeconomics*, *supra* note 2, at 182–84.

46. *See* John J. Donohue III, *Some Thoughts on Law and Economics and the General Theory of Second Best*, 73 CHI.-KENT L. REV. 257 (1998); Richard S. Markovits, *The Allocative Efficiency of Shifting from a "Negligence" System to a "Strict-Liability" Regime in our Highly-Pareto-Imperfect Economy: A Partial and Preliminary Third-Best-Allocative-Efficiency Analysis*, 73 CHI.-KENT L. REV. 11 (1998); Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3 (1998); Andrew P. Morriss, *Implications of Second-Best Theory for Administrative and Regulatory Law: A Case Study of Public Utility Regulation*, 73 CHI.-KENT L. REV. 135 (1998); Thomas S. Ulen, *Courts, Legislatures*, 73 CHI.-KENT L. REV. 135 (1998).

common law.[47] While ostensibly descriptive and neutral,[48] LawEcon's historical context, intellectual heritage, and normative underpinnings reflect a deep commitment to market-oriented principles.[49]

Keynesianism, by contrast, is defined by skepticism toward market mechanisms and a preference for regulatory intervention. Keynes himself famously advocated for state-led solutions to economic crises, emphasizing the role of government in managing aggregate demand. These ideas challenged the classical liberal paradigm long before the rise of LawEcon, and their resurgence within LawMacro signals a renewed contestation of those principles.[50] LawMacro, inspired by Keynesian economics, exhibits greater ambivalence toward free markets[51] and a willingness to experiment institutionally, often advocating for expansive welfare policies and administrative reforms.

Keynesianism's emphasis on distributional concerns further distinguishes it from LawEcon. Critics operating within the LawMacro framework have argued that LawEcon's efficiency-oriented approach

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47. *See, e.g.*, Henry G. Manne, *How Law and Economics Was Marketed in a Hostile World: A Very Personal History*, *in* THE ORIGINS OF LAW AND ECONOMICS 309, 326 (Francesco Parisi & Charles K. Rowley eds., 2005) ("No other intellectual paradigm in legal education could begin to match the power of law and economics . . . . As long as one law school in the country remained true to this intellectual lodestone, economics, and ultimately human freedom, would have to be taken seriously . . . .").

48. *See, e.g.*, COOTER & ULEN, *supra* note 38, at 3 ("Economics provided a scientific theory to predict the effects of legal sanctions on behavior. To economists, sanctions look like prices, and presumably, people respond to these sanctions much as they respond to prices. People respond to higher prices by consuming less of the more expensive good; presumably, people also respond to more severe legal sanctions by doing less of the sanctioned activity. Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) for analyzing the effects of the implicit prices that laws attach to behavior.").

49. Richard A. Posner, *The Law and Economics Movement: From Bentham to Becker*, *in* THE ORIGINS OF LAW AND ECONOMICS 328, 330 (Francesco Parisi & Charles K. Rowley eds., 2005) ("The deregulation movement, and the increased respectability of free-market ideology generally, owe something to the law and economics movement.").

50. Manne, *supra* note 47, at 311 (stating that a "serious hurdle to the development of law and economics as a recognized field of scholarship, was an ideological one" and namely "that market economics could have nothing useful to say, since in theory and fact markets had been proved never to work").

51. *See* Paul Krugman, *Introduction* to JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY, at xxvii (Springer Nature Switzerland AG 2018) ("[T]here is a sense in which free-market fundamentalists are right to hate Keynes. If your doctrine says that free markets, left to their own devices, produce the best of all possible worlds, and that government intervention in the economy always makes things worse, Keynes is your enemy.").

inherently disadvantages the poor.[52] While LawEcon scholars often invoke the notion of Kaldor-Hicks efficiency[53]—arguing that redistributive processes ultimately benefit most parties over time[54]—Keynesianism emphasizes the immediate benefits of redistribution.

For instance, Keynes noted in *The General Theory* that lower-income groups have a higher marginal propensity to consume.[55] Building on this concept, present-day LawMacro scholars often contend that protecting the incomes of the less affluent during downturns not only addresses distributional concerns but also enhances efficiency.[56] This perspective challenges the longstanding tradeoff between efficiency and distribution, a theme prevalent in economics generally[57] and in the LawEcon literature specifically,[58] by suggesting that both objectives might be attainable together.

The integration of Keynesianism into LawMacro introduces profound methodological and ideological shifts that distinguish it sharply from LawEcon. Where LawEcon prioritizes scarcity, choice, and individual incentives, Keynesian economics sidelines these concerns[59] and focuses instead on short-term aggregate outcomes and policy-driven interventions. This reflects a deeper ideological divide: Keynesianism's skepticism of market mechanisms and its advocacy for expanded government roles stand in stark opposition to the classical liberalism underpinning LawEcon.

By aligning with Keynesian principles, LawMacro embraces a worldview that frequently supports progressive agendas, challenges market-

52. Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1695 (2018); *see, e.g.*, Izhak Englard, *The Failure of Economic Justice*, 95 HARV. L. REV. 1162, 1176 (1982) (noting a similar earlier critique that "[w]here preferences backed up with money are sovereign, there is no room for indulgence toward those who lack the drive or the ability to maximize wealth"); Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFFS. 3 (1975).

53. *See, e.g.*, COOTER & ULEN, *supra* note 38, at 42.

54. J. R. Hicks, *The Rehabilitation of Consumers' Surplus*, 8 REV. ECON. STUD. 108, 111 (1941).

55. KEYNES, THE GENERAL THEORY, *supra* note 8, at 86 ("[A] higher absolute level of income will tend, as a rule, to widen the gap between income and consumption.").

56. Yair Listokin & Peter Bassine, *Better Rules for Worse Economies: Efficient Legal Rules over the Business Cycle*, 12 HARV. BUS. L. REV. 55, 84 (2022) ("Reducing inequality in recessions is not only good for its own sake, but it also increases efficiency.").

57. *See* A. C. PIGOU, THE ECONOMICS OF WELFARE pts. 1, 2 (4th ed. 1932).

58. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7–10, 119–30 (2d ed. 1989).

59. *See, e.g.*, Nina Shapiro, *The Revolutionary Character of Post-Keynesian Economics*, 11 J. ECON. ISSUES 541, 552 (1977) ("The problem of scarcity is absent in post-Keynesian economics. . . .").

driven solutions, and prioritizes immediate economic stabilization over the longer-term benefits of stable, predictable legal frameworks.[60] These differences underscore the paradigm shift LawMacro represents within legal and economic scholarship, posing a significant challenge to the foundational principles of LawEcon.

C. Applications

The traditions of LawEcon and Keynesian-inspired LawMacro share a common thread in their concern for economic outcomes: LawEcon prioritizes efficiency proper (whether defined as wealth maximization or welfare),[61] and LawMacro emphasizes economic growth and full employment.[62] Moreover, both approaches adopt a consequentialist perspective in legal discourse, often sidelining traditional legality and doctrinal reasoning. However, beyond their technical differences in legal recommendations and degrees of government intervention, they diverge in a fundamental way: their perspectives on the temporal performance of legal rules.

In the LawEcon tradition, legal rules are meant to be designed with a time-invariant orientation, aiming to promote efficiency consistently across both current and future contexts. This reflects a preference for stable, enduring norms—especially secure property rights—to provide predictable incentives, enabling individuals and businesses to plan confidently over the long term.[63] In contrast, LawMacro, rooted in Keynesian principles, views the economic effectiveness of legal rules as varying across the business cycle.[64] According to this perspective, rules that are advantageous during economic booms may be detrimental during downturns, and vice versa.[65] LawMacro, therefore, challenges the traditional LawEcon goal of crafting stable, optimal rules, advocating instead for flexible, time-variant norms that

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60. *See* SOLA, *supra* note 27, at 4 ("Keynes and the Keynesians must be seen as providing the scientific blessing for the American welfare and regulatory state.").

61. Robert D. Cooter, *Liberty, Efficiency, and Law*, 50 LAW & CONTEMP. PROBS. 141, 141 (1987) (contrasting "the principle that the law ought to maximize wealth" with "efficiency analysis of law").

62. *See, e.g.*, Jason Furman, *How Lawyers Can Help Macroeconomists in the Wake of Three Major Challenges*, 34 YALE J. ON REGUL. 709, 715, 742 (2017).

63. *See, e.g.*, COOTER & ULEN, *supra* note 38, at 108 ("Efficient property rights create incentives to maximize a nation's wealth.").

64. *See, e.g.*, Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REGUL. 791 (2017); Listokin & Bassine, *supra* note 56.

65. Listokin & Bassine, *supra* note 56, at 56 (noting that laws and regulations designed for robust economies often perform miserably in deep recessions).

dynamically respond to shifting economic conditions.

For instance, LawMacro scholars such as Yair Listokin propose "expansionary legal policies" designed to address macroeconomic fluctuations.[66] This framework operates in two ways. The first involves time-variant rulemaking, where laws or legal interpretations are routinely modified to mitigate economic recessions or temper overheating.[67] Examples include relaxing environmental regulations during downturns to stimulate construction[68] or forgiving student loans to boost consumer spending.[69]

The second approach focuses on time-invariant rules designed to function effectively across different phases of the business cycle,[70] such as automatic stabilizers like progressive taxation and unemployment benefits. Innovative proposals extend these stabilizers to areas such as bankruptcy and corporate law, shifting their focus from shareholder primacy to broader stakeholder considerations.[71] In the LawMacro framework, instead of being framed as progressive reforms, these measures are recast as technical tools to modulate aggregate demand and stabilize the economy.[72]

It is worth going back to the question of novelty to note that some LawEcon scholars did occasionally explore the relationship between macroeconomic variables and legal rules. These efforts included studies on how inflation impacted contract drafting and legislation in the 1970s and 1980s,[73] the influence of stagflation on American jurisprudence,[74] and how rising interest rates have shaped the use of contractual covenants in recent times.[75] However, these inquiries had limitations. Specifically, LawEcon has not developed a comprehensive theory linking legal frameworks to the ebbs and flows of business cycles or macroeconomic fluctuations. At the same time, this should not be seen as a shortcoming of LawEcon. Rather, it reflects the foundational beliefs of LawEcon practitioners, who generally do not

66. LAW AND MACROECONOMICS, *supra* note 41, at 129–38.

67. *Id.* at 175–97.

68. *Id.* at 63–65.

69. *Id.* at 19.

70. *See, e.g.*, Listokin & Bassine, *supra* note 56.

71. Yair J. Listokin & Inho Andrew Mun, *Rethinking Corporate Law During a Financial Crisis*, 8 HARV. BUS. L. REV. 349 (2018) (arguing that the shareholder value maximization principle, which dominates corporate law, fails in crisis situations).

72. *But see* Salama, *Law and Macroeconomics as Mainstream*, *supra* note 41, at 282 (critiquing this proposal).

73. *See, e.g.*, ROSENN, *supra* note 13, chs. 4–9.

74. *See, e.g.*, Chad G. Marzen & Michael Conklin, *Stagflation in American Jurisprudence*, 42 PACE L. REV. 1 (2021).

75. *See, e.g.*, Albert Choi & George Triantis, *Market Conditions and Contract Design: Variations in Debt Contracting*, 88 N.Y.U. L. REV. 51, 52–57 (2013) (discussing how covenant patterns evolve over time in response to changes in macroeconomic conditions).

adopt the Keynesian assumption of predictable business cycles as a core premise of their analyses.

Symptomatically, a 1999 entry in the *Online Encyclopedia of Law and Economics*, which addressed the then-unfamiliar topic of "Law and Macroeconomics,"[76] argued that enhancing regulation in nonfinancial markets was not a suitable method for stabilizing the economy.[77] This implied that areas such as Contract Law, Property Law, Bankruptcy Law, and private law more broadly should not be leveraged as instruments to moderate the business cycle.[78] But contrary to that advice against using the regulation of nonfinancial markets for macroeconomic objectives, much of what is currently recognized as LawMacro actively seeks to do just that. Accordingly, LawMacro scholars have proposed countercyclical legal strategies across various domains, including bankruptcy,[79] corporate governance,[80] labor,[81] and tax law.[82] Additionally, LawMacro encompasses a significant amount of work in financial regulation,[83] where the influence of

76. Richard L. Gordon, *Law and Macroeconomics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS 660 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

77. *Id.*

78. *Id.* at 661 ("[N]o clear macroeconomic benefits offset the microeconomic drawbacks of regulations of individual markets. . . .").

79. *See, e.g.*, Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461 (2016) (arguing that during economic downturns judges should use discretion to place more value on preserving employment rather than increasing value to creditors).

80. *See, e.g.*, Listokin & Mun, *supra* note 71; *see also* Aneil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 141 (2022) ("[C]orporate governance [is] a powerful tool for managing crises." (alteration in original)); *id.* at 180 ("[S]hareholder primacy should not be an obstacle to a shareholder implementation of countercyclical corporate governance. . . .").

81. *See, e.g.*, Hiba Hafiz, *Economic Analysis of Labor Regulation*, 2017 WIS. L. REV. 1115 (2017) (proposing to reform the National Labor Relations Board to include macroeconomic analysis into labor regulation).

82. *See, e.g.*, Yair Listokin, *Equity, Efficiency, and Stability: The Importance of Macroeconomics for Evaluating Income Tax Policy*, 29 YALE J. ON REGUL. 45, 54 (2012) ("Keynesian macroeconomic theory suggests that countercyclical fiscal policy, wherein the government makes expenditure decisions that lean against the shocks hitting the economy, is justified."); Adam H. Rosenzweig, *A Corporate Tax for the Next One Hundred Years: A Proposal for a Dynamic, Self-Adjusting Corporate Tax Rate*, 108 NW. U. L. REV. 1029, 1029 (2014) ("By explicitly incorporating both macro- and microeconomic considerations into fiscal policy, policymakers can transform the corporate income tax from a blunt and uncertain fiscal tool into a precise instrument robust enough to survive the next one hundred years."); Tianna Larson, Note, *Countercyclical Antitakeover Law*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 319, 321 (2021) ("This Note proposes countercyclical antitakeover law as a form of expansionary legal policy.").

83. *See, e.g.*, Daniel K. Tarullo, *Time-Varying Measures in Financial Regulation*, 83 Law

Keynesianism is again pronounced. This approach positions the legal system not just as a reactive entity but as a proactive tool in economic management.

However, the practicality of incorporating private law into countercyclical policies raises significant challenges. How would courts determine the current phase of the business cycle? Would judges rely on expert testimony, designated "law and macroeconomics 'czar[s]'," [84] or media reports? Furthermore, how should lawyers argue macroeconomic questions, such as whether a downturn is cyclical or structural? These practical considerations highlight the operational difficulties of applying macroeconomic theories to legal disputes, particularly in private law, where the potential for misalignment with aggregate economic goals is high.

Besides that, the alignment of many of these contemporary LawMacro proposals with Keynes' original ideas is debatable. Keynes described his general theory as "moderately conservative," [85] advocating the "socialisation of investment" without fully endorsing the Marxist idea of socializing the instruments of production.[86] His concerns centered on mitigating uncertainty and fostering stability,[87] which he saw as crucial in counteracting individuals' preference for liquidity and their willingness to invest or consume.[88] These ideas suggest Keynes valued stability and predictability in

& CONTEMP. PROBS. 1, 1 (2020) ("A macroprudential approach would additionally address financial cycles and vulnerabilities, rather than business cycles and macroeconomic vulnerabilities."); Jeremy C. Kress & Matthew C. Turk, *Rethinking Countercyclical Financial Regulation*, 56 GA. L. REV. 495 (2022) (criticizing Dodd-Frank's countercyclical approach and offering a blueprint for strengthening the United States' countercyclical framework going forward).

84. LAW AND MACROECONOMICS, *supra* note 41, at 124.

85. KEYNES, THE GENERAL THEORY, *supra* note 8, at 335. To be sure, as was typical of his writing style, he did leave room for different and more radical interpretations. For instance, he says:

> The State will have to exercise a guiding influence on the propensity to consume partly through its scheme of taxation, partly by fixing the rate of interest, and partly, perhaps, in other ways. . . . [T]he necessary measures of socialisation can be introduced gradually and without a break in the general traditions of society.

Id. at 378. Moreover, *The General Theory* was quite radical in other ways. *See, e.g.*, Krugman, *supra* note 51, at xxxiv ("*The General Theory* . . . is a work of informed, disciplined, intellectual radicalism. It transformed the way everyone, including Keynes's intellectual opponents, thought about the economy.").

86. It is not the ownership of the instruments of production which it is important for the State to assume. If the State is able to determine the aggregate amount of resources devoted to augmenting the instruments and the basic rate of reward to those who own them, it will have accomplished all that is necessary. KEYNES, THE GENERAL THEORY, *supra* note 8, at 336.

87. *See* Robert Skidelsky, *The Relevance of Keynes*, 35 CAMBRIDGE J. ECON. 1 (2011) (explaining the role of uncertainty in Keynes's theory).

88. KEYNES, THE GENERAL THEORY, *supra* note 8, at 148–49.

the legal system, emphasizing monetary and fiscal policy over granular interventions in private law. Incorporating the legal system into countercyclical policies, as proposed by many LawMacro scholars, raises practical challenges that even Keynes himself might have avoided.

Keynes envisioned a society increasingly overseen by government intervention, guided by expert-led economic management—a form of technocracy. Yet his focus was primarily on regulating the broader mechanisms of financial flows and money creation. This included areas such as banking, payments, foreign exchange transactions, taxation, and subsidies, rather than the detailed management of individual market transactions. Keynes's *General Theory* implies that countercyclical policies should be executed through impactful monetary and fiscal measures—targeting key economic levers like foreign exchange rates, base interest rates, and so on—and overseen by a relatively small group of well-informed and benevolent experts. Whether due to his personal convictions or the historical context of his time, Keynes appeared to believe that the bulk of what is generally categorized as "private law" should remain outside the ambit of the kind of technocratic management he otherwise strongly advocated.[89] We should remember that.

To be sure, while Keynes's ideas were framed in the context of early 20th-century economic realities, the post-Keynesian school of thought, which emerged in the 1960s, has diverged considerably. Often categorized as heterodox and aligned with the political left,[90] post-Keynesians have proposed far more interventionist policies than Keynes himself envisioned. Recent examples include advocating for strongest antitrust enforcement and price controls during the COVID-19 pandemic as well as suggestions to make drastic, government-mandated moves in many sectors, including housing, energy, and immigration.[91] These ideas exemplify a more

89. *See* Salama, *Law and Macroeconomics as Mainstream*, *supra* note 41, at 282.

90. *See* GEOFFREY M. HODGSON, IS THERE A FUTURE FOR HETERODOX ECONOMICS? vi–vii, at 10 (2019) ("[H]eterodox economists do not agree on their common theoretical core. In its stead, a left ideology has prevailed throughout: despite major theoretical disagreements, ideology unifies the majority of its adherents. . . . Many heterodox economists are socialists, playing their part in renewing the kind of full-blooded socialist ideology that had been prematurely declared dead in the 1990s. Heterodox economics was strongly associated with left politics in Cambridge in the 1960s and 1970s. This ideological affiliation persists."). *But see* John B. Davis, *The Nature of Heterodox Economics*, *in* ONTOLOGY AND ECONOMICS 83, 87 (Edward Fullbrook ed., 2008) ("Individuals in the new [heterodox] research programs . . . . do not consistently hold left-of-center political orientations, as do those traditionally known as heterodox (excepting neo-Austrians)." (alteration in original)).

91. *See, e.g.*, Joseph E. Stiglitz & Dean Baker, *Inflation Dos and Don'ts*, PROJECT SYNDICATE (July 8, 2022), https://www.project-syndicate.org/onpoint/us-inflation-supply-side-causes-and-solutions-by-joseph-e-stiglitz-and-dean-baker-2022-07

aggressive approach to using law as an economic tool,[92] further distancing post-Keynesianism—and, by extension, Keynesian-inspired LawMacro—from the classical liberal principles of LawEcon, which remain associated with the American Right.

II. THE QUESTION OF CAUSATION

Some economists argue[93] that the 2008 Global Financial Crisis and the conclusion of the period known as the Great Moderation[94] played a decisive role in spurring the development of LawMacro. This claim is not wholly false, but it oversimplifies the broader intellectual and institutional dynamics at play.

By the time of the crisis, LawEcon had already entered a period of introspection, with a younger generation of scholars questioning its foundational paradigms and exploring alternatives. Driven by ideological shifts and a desire for alternative frameworks, these scholars were already creating an environment receptive to Keynesian ideas. By 2008, LawEcon was no longer the unshakably confident discipline that had robustly countered its detractors in previous decades. Thus, the rise of LawMacro was not only a reaction to external events but also a product of internal debates within the LawEcon community, as ideological divisions and evolving political realities opened the door to new frameworks.

A. *The Legacy of the Global Financial Crisis*

The 2008 Global Financial Crisis, alongside contemporaneous developments such as the creation of Bitcoin, the initiation of quantitative easing policies, the passage of the Dodd-Frank Act, and the emergence of social movements like Occupy Wall Street and the Tea Party, shaped the intellectual landscape that gave rise to LawMacro. LawMacro, as a scholarly endeavor, should be understood as part of this larger historical moment—a response not only to the crisis itself but also to the broader ideological and institutional shifts it triggered.

[https://perma.cc/D67K-96MN].

92. *See, e.g.*, Rory Van Loo, *Inflation, Market Failures, and Algorithms*, 96 S. CAL. L. REV. 825 (2023).

93. *See* Listokin, *Law and Macro: What Took So Long?*, *supra* note 4.

94. *See generally* Craig S. Hakkio, *The Great Moderation*, FED. RSRV. HIST. (NOV. 22, 2013), https://www.federalreservehistory.org/essays/great-moderation [https://perma.cc/9NB4-72VV] (describing the contributing factors and monetary policy that characterized the period of economic stability known as the Great Moderation).

In the field of economics, the 2008 crisis primarily rekindled longstanding economic debates. For instance, it revived discussions on financial frictions, including how imperfections in financial markets could have cascading effects on broader economic outcomes.[95] These models emphasized the endogenous nature of crises, framing them as inherent to the functioning of financial systems rather than as anomalies caused by external shocks.[96] This reframing resonated deeply with LawMacro scholars, who sought to explore how legal frameworks could be adapted to address these systemic vulnerabilities.[97]

Central to these debates was the role of regulation. Should regulation be viewed primarily as a safeguard against market failures or as a potential source of inefficiency and instability? As financial markets unraveled and unemployment soared in 2008, two contrasting narratives emerged. One camp argued that misguided regulation and government interventions—particularly policies promoting consumer and housing credit—had exacerbated the crisis.[98] This perspective echoed traditional LawEcon views,[99] which extolled the evolutionary efficiency of the Common Law over the more direct and politicized methods of statutory regulation.[100]

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95. *See, e.g.*, Markus K. Brunnermeier, Thomas M. Eisenbach & Yuliy Sannikov, *Macroeconomics with Financial Frictions: A Survey* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18102, 2012).

96. *See, e.g.*, GARY B. GORTON, MISUNDERSTANDING FINANCIAL CRISES, at vii (2012) ("[F]inancial crises are inherent in the production of bank debt . . . and, unless the government designs intelligent regulation, crises will continue.").

97. *See, e.g.*, Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMPAR. ECON. 315 (2013).

98. *See, e.g.*, RAGHURAM G. RAJAN, FAULT LINES (2010) (describing the push for more widely-available housing credit in the United States as one of the factors that led to the economic crisis); Peter J. Wallison, *Cause and Effect*, AM. ENTER. INST. (June 1, 2009), https://www.aei.org/articles/cause-and-effect/ [https://perma.cc/6HXL-EJQ7] (stating that "well-intentioned government intervention in the private economy" led to the crisis); John A. Allison, *The Financial Crisis and the Bank Deregulation Myth*, FORBES, Dec. 10, 2012 ("The banking industry was misregulated, not deregulated."); *see also* THOMAS P. VARTAINIAN, 200 YEARS OF AMERICAN FINANCIAL PANICS (2021).

99. *See* Todd J. Zywicki & Joseph D. Adamson, *The Law and Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 78 (2009) (arguing that because new regulatory interventions will have costs as well as benefits, until the causes of the market's problems are better understood the best policy in the short-term may be to do little until well-tailored regulatory approaches are available); Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379 (2017); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009). *But see* Hossein Nabilou & Alessio M. Pacces, *The Law and Economics of Shadow Banking*, *in* RESEARCH HANDBOOK ON SHADOW BANKING: LEGAL AND REGULATORY ASPECTS 7 (Iris H.-Y. Chiu & Iain G. MacNeil eds., 2018) (arguing in favor of greater levels of regulation).

100. *See, e.g.*, Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The*

The opposing camp viewed the crisis as a consequence of excessive reliance on free-market principles and insufficient regulatory oversight.[101] This narrative framed the crisis as a failure of laissez-faire policies, calling for a reevaluation of LawEcon's core assumptions about market self-regulation. Advocates of this view argued that the crisis underscored the need for state-centered interventions and macroeconomic frameworks, aligning with the principles of Keynesian economics and, by extension, LawMacro.[102]

One of the crisis's most profound legacies was its impact on public and scholarly perceptions of financial institutions and their role in the broader economy.[103] The widespread use of complex financial instruments, such as collateralized debt obligations and credit default swaps, highlighted how regulatory gaps and market incentives could amplify systemic risks. LawMacro scholars saw these events as evidence of the legal system's failure to adequately govern financial markets, emphasizing the need for legal tools to complement monetary and fiscal policies. This view challenged the traditional LawEcon emphasis on the self-regulating capacity of markets, advocating instead for a more integrated approach to legal and economic governance.[104]

The intellectual upheaval sparked by the crisis also reinvigorated interest in the works of earlier economists. Figures like Friedrich Hayek and Ludwig von Mises gained renewed attention for their critiques of loose monetary policies,[105] which they argued led to speculative excesses and malinvestment.[106] However, the most significant resurgence was in the

Efficiency of the Common Law, Legal Origins, and Codification Movements, 2012 U. ILL. L. REV. 1443, 1443 (2012) ("The superior efficiency of the common law has long been a staple of the law and economics literature.").

101. *See, e.g.*, Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1, 3–4 (2011) (asserting the financial crisis was caused by "wholesale removal of centuries-old legal constraints" on certain financial products).

102. *See, e.g.*, Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327, 1329 (2009) (arguing that the crisis formed as a consequence of the deregulated mortgage and subprime home loan environment "both due to the lack of regulation of new instruments and lax enforcement of the regulations that remained").

103. LANE KENWORTHY & LINDSAY A. OWENS, *Political Attitudes, Public Opinion, and the Great Recession*, *in* RUSSELL SAGE FOUND. & STANFORD CTR. ON POVERTY & INEQ., RECESSION TRENDS (2012).

104. *See, e.g.*, David Min, *Understanding the Failures of Market Discipline*, 92 WASH. U. L. REV. 1421 (2015).

105. *See, e.g.*, Leonidas Zelmanovitz, *The Austrian Business Cycle Theory and the Recent Financial Crisis*, 9 CRITERIO LIBRE 23 (2011) (referencing both Hayek and von Mises in a discussion of the application of the Austrian Business Cycle Theory).

106. ROGER W. GARRISON, *The Austrian School: Capital-Based Macroeconomics*, *in* MODERN MACROECONOMICS: ITS ORIGINS, DEVELOPMENT AND CURRENT STATE 474, 474–92

theories of John Maynard Keynes and post-Keynesian thinkers like Hyman Minsky and Randall Wray.[107] These economists emphasized the structural and endogenous nature of financial crises, attributing them to speculative behavior, leverage, and systemic instability.[108] Their insights provided a theoretical foundation for LawMacro, which increasingly sought to address the legal dimensions of these macroeconomic vulnerabilities.

The transformative shifts within the economics profession profoundly influenced legal scholars who applied economic methodologies. Many who had previously aligned with the tradition of LawEcon underwent a significant change in perspective.[109] A particularly striking example of this shift occurred in 2009, when Richard Posner, the most prominent figure in LawEcon, publicly announced his embrace of Keynesianism.[110] This shift, combined with the emergence of a new generation of legal scholars critical of LawEcon's free-market stance and sympathetic to Keynesian ideas, set the stage for the development of LawMacro. This new cohort, too vast for its members to be listed individually, brought fresh perspectives and critiques that significantly diverged from traditional LawEcon views.

The crisis also revealed the hierarchical relationship between LawEcon and the economics profession at large. Historically, LawEcon has been more of an "imperial" endeavor,[111] where law—often presented in a simplified or

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(Brian Snowdon & Howard R. Vane eds., 2005), https://webhome.auburn.edu/~garriro/cbm.htm [https://perma.cc/4DW6-B6ZZ].

107. L. Randall Wray, *Minsky's Money Manager Capitalism and the Global Financial Crisis*, 40 INT'L J. POL. ECON. 5 (2011).

108. *See* HYMAN P. MINSKY, STABILIZING AN UNSTABLE ECONOMY (1986).

109. Not every change of heart was in the direction of interventionism and Keynesianism. *See, e.g.*, ROBERT COOTER WITH AARON EDLIN, THE FALCON'S GYRE: LEGAL FOUNDATIONS OF ECONOMIC INNOVATION AND GROWTH, at ix (2014) ("After years of parish work, a Catholic priest sat up in bed one morning and thought, 'Maybe the Pope is wrong and Buddha is right.' After years of teaching and writing about economic efficiency and the law, I sat up in bed one morning and thought, 'Maybe efficiency is wrong and innovation is right.' The effects on human welfare from inventing the tractor far exceed the effects from more efficient allocation of horses. Innovation causes compound growth that swamps static inefficiency like a tsunami swamps a scow. These facts compelled me to rethink previous work on law and economics, including my own.").

110. *See* Richard A. Posner, *How I Became a Keynesian*, THE NEW REPUBLIC (Sep. 23, 2009), https://newrepublic.com/article/69601/how-i-became-keynesian [https://perma.cc/2KPR-YWDX]. See RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2011), and RICHARD A. POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010), for more details on Posner's positions and thoughts on the financial crisis, its underlying issues, and policy responses.

111. *SEE* EDUARDO M. PEÑALVER, *Land Virtues*, 94 CORNELL L. REV. 821, 823 (2009); Robert D. Cooter, *Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books*, 29 UCLA L. REV. 1260, 1266 (1982).

stylized form—is subjected to economic analysis.[112] As a result, shifts in dominant economic paradigms inevitably influence LawEcon scholarship.[113] To their credit, leaders in the LawEcon tradition have acknowledged that the broader economics profession could benefit from legal insights,[114] spurring influential research in fields like neo-institutional economics.[115] Furthermore, some policymakers have benefited from LawEcon insights (consider, for instance, the involvement of economists in Antitrust Law).[116] Yet, for the most part, the application of economics to law has largely been a one-way exchange, with lawyers, judges, and legal scholars often positioned as recipients of economic wisdom. The Global Financial Crisis underscored this dynamic, as legal scholars began adopting insights from post-crisis economic debates, such as the unique systemic risks posed by financial institutions.

One critical area of reevaluation following the crisis was the governance and regulation of banks. Before 2008, it was common in LawEcon circles to view banks through the lens of Corporate Law, framing discussions around corporate finance issues.[117] For instance, Richard Posner, in collaboration with Fischer Black and Merton Miller, argued for minimal regulatory frameworks, suggesting that bank regulators could model their restrictions on banks after those used by private lenders on borrowers.[118]

112. *See* Magdalena Małecka, *Economics Imperialism in Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 664 (Alain Marciano & Giovanni Battista Ramello eds., 2019).

113. *See* Ejan Mackaay, *History of Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS, *supra* note 76, at 65, 66.

114. *See, e.g.*, COOTER & ULEN, *supra* note 38, at 9–10 ("Economists and lawyers can also learn techniques from each other. From economists, lawyers can learn quantitative reasoning for making theories and doing empirical research. From lawyers, economists can learn to persuade ordinary people. . . . Lawyers can describe facts and give them names with moral resonance, whereas economists are obtuse to language too often. If economists will listen to what the law has to teach them, they will find their models being drawn closer to what people really care about.").

115. Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 73 (1993).

116. *See* GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY 84–91 (2020).

117. *See, e.g.*, Jonathan R. Macey & Maureen O'Hara, *The Corporate Governance of Banks*, 9 ECON. POL'Y REV. 91 (2003). Textbooks also reflected a discussion of financial regulation largely around corporate finance puzzles. *See, e.g.*, RICHARD SCOTT CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 4–17 (7th ed. 2021). Some recently edited textbooks do not adopt that framework. *See, e.g.*, MICHAEL S. BARR ET AL., FINANCIAL REGULATION: LAW AND POLICY (3d ed. 2021).

118. Fischer Black, Merton H. Miller & Richard A. Posner, *An Approach to the Regulation of Bank Holding Companies*, 51 J. BUS. 379, 380 (1978).

However, the crisis exposed the limitations of this approach, as it became clear that banks and shadow banks were not merely corporations but critical pillars of economic stability and growth. Post-2008, a new generation of legal scholars began approaching bank regulation with a deeper understanding of financial frictions and their broader economic implications,[119] shifting the discourse from general Corporate Law and finance to the examination of banks and shadow banks as critical foundations for economic stability and growth.[120]

The crisis also normalized discussions of ex-post efficiency, marking a departure from the forward-looking approach typical of standard LawEcon. Traditionally, LawEcon focused on designing laws to incentivize desirable and honest behavior for the future.[121] Post-crisis, however, the emphasis shifted to evaluating laws based on their effectiveness in minimizing past losses or reducing taxpayer burdens in cases like government bailouts or expanded guarantees.[122] This transition—from preventing moral hazard to containing crises—represents a significant ideological and methodological shift.[123] The primary concern has become not just avoiding future crises but

119. *See* Kathryn Judge, *Information Gaps and Shadow Banking*, 103 VA. L. REV. 411 (2017); Andrew F. Tuch, *The Remaking of Wall Street*, 7 HARV. BUS. L. REV. 315 (2017); MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION (2016); Patrick M. Parkinson, *Lev Menand: The Fed Unbound: Central Banking in a Time of Crisis*, *in* 57 COLUMBIA GLOBAL REPORTS 235 (2022); *see also* Jonathan Macey, *Reducing Systemic Risk: The Role of Money Market Mutual Funds as Substitutes for Federally Insured Bank Deposits*, 17 STAN. J.L. BUS. & FIN. 131 (2011).

120. Chiu, *supra* note 5, at 643 (criticizing financial regulation based "pre-Crisis 'law and economics'").

121. *See* Saul Levmore, *The Ex-Middle Problem for Law-and-Economics*, 22 AM. L. & ECON. REV. 1, 2 (2020) ("Law-and-economics is driven by an *ex ante* perspective. . . . [This paper discusses] the conflict between *ex ante* and *ex post* viewpoints.").

122. Ettore Croci, Gerard Hertig & Eric Nowak, *Decision-Making During the Crisis: Why Did the Treasury Let Commercial Banks Fail?* (Eur. Corp. Governance Inst., Law Working Paper No. 281/2015, 2015) ("By comparing estimated funding and resolution costs we also show that bailing out more banks would have been cost-efficient.") (presented at the Twenty-Fifth Annual Meeting of the American Law and Economics Association in 2015).

123. *See, e.g.*, Anna Gelpern, *Silicon Rhymes with Savings and Loan (and It's a Ratchet)*, YALE J. ON REGUL. (Mar. 29, 2023), https://www.yalejreg.com/nc/silicon-rhymes-with-savings-and-loan-and-its-a-ratchet-by-anna-gelpern/ [https://perma.cc/ZR3L-TDZR] ("Moral hazard arguments in crisis have traction on the sidelines, or after containment succeeds. This is because moral hazard is about the future; crisis containment is about living to see the future. Few policy makers would take a medium-sized risk of systemic collapse today for the sake of aligning incentives tomorrow."); Lev Menand & Morgan Ricks, *Scrap the Bank Deposit Insurance Limit*, WASH. POST (Mar. 15, 2023), https://www.washingtonpost.com/opinions/2023/03/15/silicon-valley-bank-deposit-bailout/ [https://perma.cc/75T7-ZN9L].

managing their aftermath in ways that mitigate broader economic harm.[124]

B. Dissatisfactions within LawEcon

The development of LawMacro cannot be fully understood without considering the dissatisfactions that arose within the LawEcon tradition. Although LawEcon fundamentally transformed legal scholarship, its core premises and methods have faced increasing criticism from both external and internal sources. For a time, an abundance of literature celebrated the triumph of LawEcon.[125] However, what is less commonly discussed is the apparent waning of its dominance in recent times. Notably, Robert C. Ellickson, a prominent figure in the field, observed as early as 1988—two decades before the financial crisis—that "law and economics is no longer growing as a scholarly or curricular force within the leading American law schools" but, "[i]nstead, it is simply holding previously won ground."[126] This statement, made during a symposium on Post-Chicago Law and Economics, was strikingly not contested by Richard Posner, who participated as a discussant. Instead, Posner reflected on the reasons behind this stagnation.[127]

One significant instance of introspection within the LawEcon community is Eric Posner's 2002 article, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*.[128] Focused on Contract Law—a domain where LawEcon was presumed to have made substantial contributions—Eric Posner acknowledged that the field had seen "the steady

124. *See, e.g.*, Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 439 (2011); Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 411 (2012).

125. *See, e.g.*, Anthony T. Kronman, Dean, Yale L. Sch., Remarks at the Second Driker Forum for Excellence in the Law (Sep. 29, 1994), *in* 42 WAYNE L. REV. 115, 160 (1995) ("The law and economics movement [is] . . . the single most influential jurisprudential school in this country." (alteration in original)); PRIEST, *supra* note 116, at 1 ("Law and economics can be identified today as the dominant academic discipline in understanding the rule of law in the United States and, increasingly, around the world."); COOTER & ULEN, *supra* note 38, at 2 ("Economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law."); Hanoch Dagan & Roy Kreitner, *Economic Analysis in Law*, 38 YALE J. ON REGUL. 566, 567 (2021) ("Over the past half-century, the economic analysis of law has become one of the dominant modes of thinking about law and policy, and as such, one of the most important members in the family of discourses about law.").

126. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 26 (1989).

127. Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT L. REV. 57, 58–59 (1989).

128. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829 (2003).

accumulation of insights over time,"[129] akin to scientific progress, and experienced a "sense of forward movement."[130] Yet, he identified a halt in this progression and critiqued earlier models for their inability to predict real-world contract doctrine accurately. He argued that simpler models dominant before the 1990s failed to account for the complexities of legal doctrine,[131] while the more advanced models developed later relied on variables that were impractical to measure or implement.[132] His conclusion was striking: the economic approach, as it stood, neither adequately explained contract law nor provided a meaningful framework for its critique or reform.[133]

Eric Posner illustrated these limitations with the issue of unforeseen circumstances in contract law. These events—such as an unexpected war, a pandemic, or a ballerina's injury preventing a performance—fall outside the reasonable anticipation of contracting parties. Contract law must then determine whether the promisor can be excused from performance under the doctrines of impossibility or impracticability, which apply when fulfilling the contract becomes infeasible and the nonoccurrence of the circumstances was an implicit basis of the agreement. The objective of LawEcon in such cases is to determine when it is efficient to shift the costs of nonperformance to the promisee and when it is not.

The prevailing LawEcon approach assigns responsibility for nonperformance to the "superior risk-bearer"—the party best equipped to anticipate, prevent, or mitigate losses, or to distribute risks and costs.[134] This approach rests on the economic rationale that liability should fall on the party who can manage the risk of nonperformance at the lowest cost. However, in evaluating LawEcon's effectiveness in analyzing contract law, particularly in the context of unforeseen circumstances, Eric Posner raised deeper questions. He did not challenge the theoretical soundness of the risk-allocation principle but questioned whether actual court decisions reflect considerations of who the superior risk-bearer is and, if not, whether they should—or could realistically—do so. His conclusion was largely negative.[135] He argued that court decisions rarely align with these economic

129. *Id.* at 830.
130. *Id.* at 829.
131. *Id.* at 830.
132. *Id.*
133. *Id.*
134. As developed in Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977). *See also* George G. Triantis, *Unforeseen Contingencies. Risk Allocation in Contracts*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS, VOLUME I: THE HISTORY AND METHODOLOGY OF LAW AND ECONOMICS, *supra* note 76, at 108.
135. Posner, *Economic Analysis of Contract Law After Three Decades: Success or*

principles, and even when they do, it is often coincidental rather than intentional.[136] Subsequent publications built on and expanded Posner's critique.[137] The value of LawEcon successes would then irremediably be of a lesser extent than originally intended.

C. The Unease Over Efficiency

There is a fundamental difference between encountering difficulties in developing a scientifically grounded, microeconomic solution to complex legal issues and debating the ethical merits of such a "scientific" solution, even if achievable. The former challenge lies in the realm of positive inquiry, aiming to objectively determine what is or could be. In contrast, the latter engages with normative questions, delving into what ought to be and drawing upon longstanding debates in applied ethics. From a positive perspective, the goal of LawEcon has been to identify legal rules and doctrines that enhance efficiency. On the normative front, however, the central issue becomes whether efficiency should be prioritized as the guiding criterion in legal decision-making.

Many scholars within the LawEcon tradition, likely even a majority, have acknowledged that efficiency is an insufficient ethical criterion for resolving legal cases.[138] Objections to efficiency as the adequate evaluative criterion are diverse and vary in relevance across legal fields, but they have been raised consistently since the inception of LawEcon.[139] Early critics argued that legal systems were inherently value-driven and that efficiency, often seen as neutral, fell short as a foundational principle.[140] Others highlighted that efficiency overlooked the initial distribution of rights and resources, potentially perpetuating injustices.[141] Some critics further equated the emphasis on efficiency with utilitarianism, arguing that it inherited the ethical weaknesses of that framework, such as its indifference to inequality

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Failure?, *supra* note 128, at 830.

136. *Id.* at 830.

137. *See, e.g.*, SHAWN BAYERN, THE ANALYTICAL FAILURES OF LAW AND ECONOMICS 3 (2023) (developing an "internal" critique of LawEcon because "legal-economic arguments would not reach their goals on their own terms.").

138. Eric A. Posner, *The Boundaries of Normative Law and Economics*, 38 YALE J. ON REGUL. 657, 658 (2021).

139. *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 389 (1981).

140. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 194 (1980).

141. Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 524 (1980).

or individual rights.[142]

These ethical concerns gained prominence in the 1980s, when Richard Posner championed the "wealth maximization principle," effectively elevating the efficiency-of-the-law theory into a moral philosophy. This principle, which Posner promoted as a unifying framework for LawEcon,[143] quickly gained traction and was incorporated into many foundational texts in the field.[144] However, resistance soon emerged, driven by theoretical limitations in the principle itself and by the influence of more moderate voices such as Guido Calabresi,[145] who emphasized broader considerations. Legal scholars, often cautious by training and temperament, were reluctant to fully endorse such overarching moral theories. By 1990, even Posner had distanced himself from the wealth maximization principle, pivoting instead to a redefined form of legal pragmatism.[146]

Despite these internal debates, efficiency remained a dominant, albeit occasionally contested,[147] framework within LawEcon. For many scholars, efficiency continues to serve as a guiding objective, relegating distributional concerns to secondary status—though this may be changing. The prevailing stance, as articulated by Louis Kaplow and Steven Shavell, argues that redistributive objectives should primarily be pursued through the tax-and-transfer system, which they view as the least distortive mechanism.[148]

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142. Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORO. L.J. 307, 318 (1980).

143. Original formulation in Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979) and in Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980). These articles were then rewritten for a book. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1983).

144. *E.g.*, COOTER & ULEN, *supra* note 38, at 7–8 (discussing "The Primacy of Efficiency Over Distribution in Analyzing Private Law").

145. *See* PRIEST, *supra* note 116, at 51–60 (explaining Calabresi's emphasis on risk and wealth redistribution instead of simply efficiency).

146. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 375 (1990) ("The normative theory [of Law and Econ] has been highly contentious in its own right. Most contributors to the debate over it conclude that it is a bad theory, and although many of the criticisms can be answered, several cannot be . . . ." (alteration in original)); *see* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1573 (2003).

147. Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1054 (2016) ("If the political acts required to achieve a desired distributive result were understood to be costly while the transactions required to achieve a desired allocative result were deemed to be trivial, the standard prescription would flip: now addressing distribution would become the priority, and efficiency the afterthought. In fact, both sets of costs are significant, both matter to welfare, and neither can be defensibly ignored.").

148. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the*

Consequently, LawEcon scholarship has largely maintained its focus on efficiency,[149] with notable exceptions in areas like tax law,[150] where distributional goals are explicitly addressed.

Yet, criticism of confining redistribution to tax law has persisted.[151] Critics point to factors such as the presence of non-income sources of inequality,[152] unobservable differences within income groups,[153] and the uncertainty and costs associated with legislative and administrative processes.[154] Rent-seeking behavior and other inefficiencies further complicate this approach.[155] Such critiques[156] have long fueled unease with LawEcon's prioritization of efficiency and have created openings for alternative frameworks like *LawMacro* to emerge.

Thus, unease with the prioritization of efficiency is not new within

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Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667, 667 (1994) (stating that redistribution through legal rules offers no advantage over redistribution through the income tax system and is typically less efficient); *see also* Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 821–22 (2000) (qualifying the argument); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993 (2001) ("[M]any legal rules probably have little effect on the distribution of income."). For an earlier exposition of this argument, see RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 18 (1959) ("[A] mechanism must be provided by which corrections in the state of distribution can be made in an orderly fashion and in a way that does the least damage to an efficient functioning of the economy. Such a mechanism is given by the tax and transfer system of the Distribution Branch. . . . From the economist's point of view there is . . . an a priori preference for the budgetary approach.").

149. *See, e.g.*, COOTER & ULEN, *supra* note 38, at 7 ("[W]e will focus on efficiency rather than distribution.").

150. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24 (1970) ("First, [the law] must be just or fair; second, it must reduce the costs of accidents." (alteration in original)).

151. *See, e.g.*, Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1, 3 (2005) (challenging the "division of labor" between legal rules and the tax and transfer system).

152. Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 167–68 (2003).

153. Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 798 (2000).

154. Daniel S. Goldberg, *Tax Subsidies: One-Time vs. Periodic—An Economic Analysis of the Tax Policy Alternatives*, 49 TAX L. REV. 305, 328–30 (1994).

155. J. Mark Ramseyer & Minoru Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155, 1171–72 (1989).

156. Mariana Pargendler, *Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs*, 45 J. CORP. L. 953, 969–71 (2020) (critiquing the modular structure of contemporary LawEcon and arguing that corporate governance arrangements produce macroeconomic and political effects that transcend traditional agency-cost analysis).

LawEcon. The emergence and increasing prominence of LawMacro reflect these longstanding concerns, which existed well before the 2008 crisis. A pivotal realization that has fueled this shift—although not a novel insight—is that macroeconomic interventions, particularly monetary policy, can affect stealthy redistribution more rapidly than tax law can overtly achieve.[157] This recognition has significantly influenced the development of LawMacro and has resonated with a younger generation of scholars who entered academia after the end of the Great Moderation's more stable economic period.

III. FUTURE PROSPECTS

The perceived necessity of LawMacro often arises from the belief that LawEcon neglects macroeconomic considerations, particularly the role of monetary issues. However, this assumption overlooks the historical engagement of LawEcon with monetary and inflation-related topics, which were significant during its rise in the 1970s. In fact, LawEcon has a foundation in addressing money-related issues that inherently involve macroeconomic analysis. Reinvigorating these earlier studies within the framework of LawEcon presents a promising avenue for bridging the gap between microeconomic precision and macroeconomic relevance—a task yet to be fully realized but whose foundational contours are already discernible. In an era marked by inflation resurgence and the advent of digital currencies, revisiting these foundational principles offers a pathway to address modern monetary challenges through the lens of LawEcon.

A. Coase versus Keynes on Pigou

Systematizations of LawEcon often begin with a discussion of Arthur Pigou, the early 20th-century British economist renowned for his work in welfare economics.[158] Pigou gained prominence in LawEcon circles largely through the critiques of Ronald Coase, one of the discipline's founders. In 1960, Coase published a ferocious, albeit arguably exaggerated,[159] critique

157. Adrien Auclert, *Monetary Policy and the Redistribution Channel*, 109 AM. ECON. REV. 2333, 2333–36 (2019) (arguing that redistribution is a core mechanism of monetary policy, which shifts resources across households more rapidly and subtly than tax policy).

158. *See, e.g.*, DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 28–46 (2001).

159. Herbert Hovenkamp, *The Coase Theorem and Arthur Cecil Pigou*, 51 ARIZ. L. REV. 633 (2009) (discussing how "[m]uch of what we today characterize as the Coase Theorem," including the relevance of transaction costs, externalities, and bilateral monopoly, "was either stated or anticipated in Pigou's work").

of Pigou's treatment of externalities.[160] Pigou advocated using taxes to address negative externalities and subsidies to encourage positive ones, aiming to reconcile private and social net outcomes through government intervention[161]—a view Coase found inadequate.

Coase redefined externalities as reciprocal in nature.[162] For instance, while a noisy factory imposes an externality on its neighbor, the neighbor's insistence on quietness also imposes an externality on the factory. Coase argued that policymakers should focus not on assigning blame but on identifying the party best positioned to mitigate the externality at the lowest cost. Moreover, in scenarios with low transaction costs, Coase demonstrated that the specific legal rule—whether favoring the factory or the neighbor—would not affect efficiency, as parties could negotiate to allocate rights to the lower-cost avoider. This principle, now famously known as the Coase Theorem, became a cornerstone of LawEcon by showing that well-defined property rights and market-based solutions often outperform government intervention.

Coase's authority in legal circles partly stemmed from his assertion that English common law judges intuitively grasped the reciprocal nature of externalities better than economists did.[163] The Coase Theorem, though never formally articulated by Coase himself, demonstrated that decentralized decision-making under low transaction costs often surpasses regulation in addressing externalities.[164] Examples such as noise, pollution, or lighthouse services, Coase argued, should not automatically be seen as market failures requiring corrective government action. Instead, robust property rights and market mechanisms could efficiently address these issues. This perspective reinforced the LawEcon tradition's preference for market solutions over government intervention.

Less appreciated in academic circles is that Keynes's *General Theory* also opens with a substantial critique of Pigou, albeit from a very different

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160. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

161. PIGOU, *supra* note 57, pt. 1.

162. Coase, *supra* note 160, at 2 ("The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.").

163. Coase, *supra* note 160, at 8–12 (discussing Sturges v. Bridgman (1879) 11 Ch. D. 852 (UK)).

164. Elodie Bertrand, *George Stigler, The First Apostle of The "Coase Theorem," in* GEORGE STIGLER: ENIGMATIC PRICE THEORIST OF THE TWENTIETH CENTURY 445 (Craig Freedman ed., 2020) ("Counterintuitive it may be, but we owe the 'Coase theorem' not to Ronald Coase himself but to George Stigler.").

angle. While Coase criticized Pigou for his interventionist approach to market failures, Keynes targeted Pigou as a representative of the "classical" economics tradition.[165] Keynes rejected the classical notion that money is a neutral veil, affecting prices but not real variables like output or employment. He argued that this belief in money neutrality, though more explicitly articulated by John Stuart Mill,[166] was implicitly embraced by Pigou and underpinned his broader economic framework.[167]

Keynes thus accused Pigou of assuming that production and employment could be analyzed through "real" exchanges, with money treated as an afterthought.[168] As Keynes wrote in *The General Theory*:

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165. KEYNES, THE GENERAL THEORY, *supra* note 8, at 3 n.1 ("'The classical economists' was a name invented by Marx to cover Ricardo and James Mill and their *predecessors*, that is to say for the founders of the theory which culminated in the Ricardian economics. I have become accustomed, perhaps perpetrating a solecism, to include in 'the classical school' the *followers* of Ricardo, those, that is to say, who adopted and perfected the theory of the Ricardian economics, including (for example) J. S. Mill, Marshall, Edgeworth and Prof. Pigou.").

166. *Id.* at 17 ("In J. S. Mill's *Principles of Political Economy* the doctrine is expressly set forth: What constitutes the means of payment for commodities is simply commodities. Each person's means of paying for the productions of other people consist of those which he himself possesses. All sellers are inevitably, and by the meaning of the word, buyers. Could we suddenly double the productive powers of the country, we should double the supply of commodities in every market; but we should, by the same stroke, double the purchasing power. Everybody would bring a double demand as well as supply; everybody would be able to buy twice as much, because every one would have twice as much to offer in exchange.").

167. *Id.* at 18 ("It is true that it would not be easy to quote comparable passages from Marshall's later work or from Edgeworth or Professor Pigou. The doctrine is never stated today in this crude form. Nevertheless it still underlies the whole classical theory, which would collapse without it." (footnote omitted)).

168. *Id. The General Theory* devotes a whole appendix (239–48) to refute Pigou's theory of unemployment described by Keynes as implicitly and wrongly assuming "that there is no involuntary unemployment in the strict sense, i.e. that all labour available at the existing real wage is in fact employed," that "the rate of interest always adjusts itself to the schedule of the marginal efficiency of capital in such a way as to preserve full employment," and "*that any rise in the cost of living, however moderate, relatively to the money-wage will cause the withdrawal from the labour market of a number of workers greater than that of all the existing unemployed*." *Id.* at 242, 243, 245. *See also* Mark Skousen, *This Trumpet Gives an Uncertain Sound: The Free-Market Response to Keynesian Economics*, *in* DISSENT ON KEYNES: A CRITICAL APPRAISAL OF KEYNESIAN ECONOMICS 9, 13 (Mark Skousen ed., 1992) ("Pigou refuted the liquidity-trap hypothesis and vindicated the classical belief in the ultimate adjustment to full employment by pointing out that deflation automatically increases the real value of cash holdings."). *But see* PAUL KRUGMAN, *supra* note 51, at xxxii ("Keynes confronts naïve beliefs about how a fall in wages can increase employment, beliefs that were prevalent among economists when he wrote, but play no role in the model we now call 'classical.'"). For a summary of the concept of money neutrality, see James Tobin, *Money*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 1–10 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

> The conviction, which runs, for example, through almost all Professor Pigou's work, that money makes no real difference except frictionally and that the theory of production and employment can be worked out (like Mill's) as being based on "real" exchanges with money introduced perfunctorily in a later chapter, is the modern version of the classical tradition.[169]

This critique underscores a fascinating tension: Coase's rejection of Pigou's interventionism laid the foundation for LawEcon's emphasis on property rights and market efficiency, while Keynes's critique formed the intellectual bedrock for LawMacro's focus on active government intervention to address economic instability. Noticeably, Coase and Keynes opposed Pigou for entirely different reasons. Coase rejected Pigou's interventionist solutions for market failures, aligning with LawEcon's preference for decentralized, property-rights-based approaches. Conversely, Keynes critiqued Pigou as emblematic of classical economics, particularly its assumptions about money neutrality and the capacity of markets to achieve full employment without active government intervention. Keynes famously quipped, "*[i]n the long run* we are all dead,"[170] rejecting the classical focus on eventual equilibrium as insufficient for addressing immediate economic crises.[171]

Keynes's divergence from Pigou's framework was profound. He rejected money neutrality and argued that recognizing money's active role in the economy would cause the classical tradition to collapse like a house of cards. Keynes criticized Pigou and the classical tradition for overlooking the multiplier effect,[172] failing to address the possibility of involuntary unemployment,[173] and dismissing inflation as a tool for reducing unemployment.[174] For Keynes, inflation was not inherently an evil but a

169. KEYNES, THE GENERAL THEORY, *supra* note 8, at 18.

170. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1932).

171. On the spirit of this quote, see Paul Krugman, Opinion, *On Not Reading Keynes*, N.Y. TIMES (May 1, 2011) ("[The quote is] an assertion that macroeconomics is grossly incomplete if it can't say anything about short-run dynamics. It is not an assertion that the long run doesn't matter." (alteration in original)).

172. KEYNES, THE GENERAL THEORY, *supra* note 8, at 245 ("Professor Pigou rejects . . . the theory of the multiplier by assuming that the rate of real wages is given, i.e. that, there being already full employment, no additional labour is forthcoming at a lower real wage." (citation omitted)).

173. *See* Jacob Viner, *Mr. Keynes on the Causes of Unemployment*, 51 Q.J. ECON. 147 (1936), https://doi.org/10.2307/1882505.

174. Since there was, in Keynes's view, a sizeable volume of unemployment for which a reduction in real wage was a cure, but a reduction in the money wage was not. *See* KEYNES, THE GENERAL THEORY, *supra* note 8, at 9 ("Whilst workers will usually resist a reduction of money-wages, it is not their practice to withdraw their labour whenever there is a rise in the

policy instrument for addressing economic challenges. By advocating fewer restrictions on government's ability to control inflation and manipulate money, Keynes sought to expand the state's role in economic planning, aligning with the foundational principles of LawMacro.

This divergence in their critiques of Pigou reflects the broader ideological divide between LawEcon and LawMacro. While Coase and LawEcon sought to curtail government planning, emphasizing property rights and market solutions, Keynes and LawMacro advocate for expanded government intervention to address economic instability and unemployment. The differing critiques of Pigou by Coase and Keynes help illuminate the profound disagreements between the LawEcon tradition and the contemporary practice of LawMacro.

B. Money in LawEcon

The discussion above might suggest that the key difference between Keynesian-inspired LawMacro and the LawEcon tradition is the former's emphasis on monetary issues and the latter's perceived indifference to them. However, this perception overlooks at least one significant moment in LawEcon's engagement with monetary matters. This moment was the 1975 conference organized by Henry Manne and Roger LeRoy Miller at the University of Miami's Center for Studies in Law and Economics, later documented in a book titled *Gold, Money and the Law*.[175] This inaugural event revisited the 1933 U.S. federal legislation that prohibited private ownership of gold—an incident now largely forgotten by both economists and lawyers.[176] The conference featured contributions from prominent figures like James Buchanan, Nicolaus Tideman, Milton Friedman, and Gerald Dunne, providing a vital exploration of the legal and economic dimensions of monetary governance.

The conference centered on the circumstances leading to President Roosevelt's issuance of Executive Order 6102, which in the year of 1933 severed the United States from the gold standard.[177] In anticipation of this

price of wage-goods.").

175. Henry G. Manne & Roger LeRoy Miller, *Introduction* to GOLD, MONEY AND THE LAW 1, 5 (Henry G. Manne & Roger LeRoy Miller eds., 1975); *see* PRIEST, *supra* note 116, at 317 (referring to Roger Leroy Miller as merely the "nominal co-founder of the Center").

176. For a rare exception within economists, see SEBASTIAN EDWARDS, AMERICAN DEFAULT: THE UNTOLD STORY OF FDR, THE SUPREME COURT, AND THE BATTLE OVER GOLD (2018). Notable legal books on the topic include GERALD T. DUNNE, MONETARY DECISIONS OF THE SUPREME COURT 87–98 (1960) and ARTHUR NUSSBAUM, A HISTORY OF THE DOLLAR 174–208 (1957).

177. Exec. Order No. 6102, 3 C.F.R. 1094 (1938) (signed on Apr. 5, 1933) (forbidding

move—already implemented in England two years earlier[178]—creditors had incorporated gold clauses in contracts to hedge against inflation. These clauses allowed creditors to demand repayment in gold or its equivalent value, protecting their interests if the gold standard were abandoned and inflation ensued. As a result, gold clauses became a standard feature in both commercial contracts and government debt instruments.[179]

Gold clauses illustrate early intersections of legal frameworks and monetary policy. They acted as a restraint on government-induced inflation, serving as a check against the implicit default risk posed by currency devaluation. However, in 1933, Roosevelt's administration prioritized inflation as part of its reflationary strategy to combat the economic crisis.[180] Backed by a Democratic Congress, Roosevelt nullified gold clauses through a joint resolution and established Federal Reserve-issued dollar notes as legal tender.[181] Citizens and banks were compelled to surrender their gold at the official rate of $20.67 per ounce, and monetary gold possession was criminalized.[182] Shortly after, the government devalued the dollar to $35.00 per ounce—a move that some, like Sebastian Edwards, have described as the "American default."[183]

The retroactive nullification of gold clauses triggered legal challenges, culminating in three landmark 1935 Supreme Court decisions.[184] The Court upheld Congress's authority to regulate currency and enforce a unified monetary system, ruling that private contracts could not obstruct this

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the hoarding of "all gold coin, gold bullion, and gold certificates"). This Executive Order was issued under the authority of the Trading with the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (as amended by the Emergency Banking Act, Pub. L. No. 73-1, 48 Stat. 1 (1933)).

178. EDWARDS, *supra* note 176, at 34 ("[W]hen England went off gold, the pound sterling had been devalued by a hefty 30 percent.").

179. *Id*. at xii ("[W]ith time gold clauses came to be considered a 'normal' component of debt contracts; it became customary to include them in corporate and utilities bonds, and in many mortgage contracts.").

180. *Id.* at xiii ("[W]hen FDR was inaugurated as president, the gold clauses stood in the way of a devaluation of the dollar.").

181. Joint Resolution No. 10, 48 Stat. 112 (1933).

182. EDWARDS, *supra* note 176, at 42 ("[O]n April 5 . . . . 'individuals, partnerships, associations and corporations' were required to sell all their gold holdings to the Federal Reserve at the official price of $20.67 an ounce. Those who failed to deliver their metal by the May 1 deadline were subject to a fine of not more than $10,000 and a prison term of 'not more than 10 years.'").

183. *Id.* at 116.

184. Perry v. United States, 294 U.S. 330 (1935) (nullification of gold clauses in federal bonds); Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240 (1935) (nullification of gold clauses in private contracts); Nortz v. United States, 294 U.S. 317 (1935) (determining whether redemption of a gold certificate should be at the international market price or the newly devalued federal government price).

sovereign power.[185] This decision, reminiscent of earlier rulings in the late 19th century,[186] affirmed that monetary policy was an inherent attribute of national sovereignty.

At the 1975 conference, Buchanan and Tideman revisited these historical developments in their essay, observing that "'[l]aw and money' offers one of the most challenging interfaces between law and economics."[187] This insight challenges the misconception that monetary issues are irrelevant to the LawEcon tradition. In their analysis, Buchanan and Tideman identified the lack of a "monetary constitution"[188] as a critical gap in monetary governance. Their analysis remains prescient, particularly as contemporary monetary frameworks grapple with questions of stability and predictability in the face of technological disruptions and evolving financial systems.

Buchanan and Tideman's analysis underscored the U.S. government's failure to maintain money's value as a stable foundation for economic activity. Rather than revisiting longstanding debates over the constitutionality of fiat money,[189] they focused on the practical need for a robust monetary framework.[190] As envisioned by LawEcon scholars, a monetary constitution would anchor monetary policy in the rule of law, emphasizing predictability and transparency.

This vision for a monetary constitution remains largely unrealized. Recent developments—such as inflation resurgence and digital currencies—underscore the enduring relevance of monetary governance. These emerging challenges call for a renewed focus on stable frameworks, a topic further

185. *See Norman*, 294 U.S. at 304–06 ("Contracts, however express, dealing with a subject-matter which lies within the control of the constitutional authority of Congress, cannot fetter such authority."). The Court upheld Congress's power to regulate currency and explicitly affirmed its authority to nullify private gold clauses that obstructed federal monetary policy.

186. *See* Legal Tender Cases, 79 U.S. 457 (1871) (holding that Congress has the authority to create legal tender money for obligations arising before or after the legal tender enactment); Julliard v. Greenman (*Legal Tender Case*), 110 U.S. 421 (1884) (holding that Congress can enact peacetime tender law applying to reissued greenbacks).

187. James M. Buchanan & T. Nicolaus Tideman, *Gold, Money and the Law: The Limits of Governmental Monetary Authority*, *in* GOLD, MONEY AND THE LAW, *supra* note 175, at 10; *see* Leonidas Zelmanovitz, *Consequences of the Anachronism of Fractional Reserve Arrangements*, *in* JAMES M. BUCHANAN: A THEORIST OF POLITICAL ECONOMY AND SOCIAL PHILOSOPHY 1031 (Richard E. Wagner ed., 2018) (explaining Buchanan's approach to monetary matters).

188. Buchanan & Tideman, *supra* note 187, at 43.

189. For an overview, see, for example, DUNNE, *supra* note 24, at 10–16; RICHARD SYLLA & DAVID J. COWEN, ALEXANDER HAMILTON ON FINANCE, CREDIT, AND DEBT 171–84 (2018).

190. Buchanan & Tideman, *supra* note 187, at 58 ("The tragedy of the 1930s lies in the New Deal's own failure to 'seize the day' and to institute those reforms that might have fulfilled the meaningful constitutional objectives for monetary order.").

explored in the next section.

However, the recent embrace of Keynesianism by many lawyers interested in economics has tempered enthusiasm for pursuing a monetary constitution. Keynesian approaches, which prioritize active fiscal and monetary intervention, often conflict with the rule-based frameworks central to Buchanan and Tideman's vision and characteristic of LawEcon. However, as later debates on monetarism and rule-based frameworks reveal, the implementation of such a vision has proven to be fraught with both theoretical and practical challenges, as explored in the next section.

C. The Contours of a Monetary Constitution

The pursuit of a monetary constitution in the United States has evolved through subsequent challenges and debates. As discussed earlier, the 1935 Supreme Court decision and subsequent economic developments silenced debates over the gold standard for decades, until stagflation in the 1970s revived interest in monetary policy frameworks. The inflationary surge of the 1970s, coupled with high unemployment, shattered the Keynesian promise that higher inflation would reduce unemployment—a promise supported in earlier decades by the identification of a tradeoff between unemployment and inflation.[191] The phenomenon of stagflation set the stage for an intellectual assault on Keynesianism and catalyzed a broader pro-market, anti-regulation agenda that championed entrepreneurship and commercial values. This ideological shift provided fertile ground for the ascent of LawEcon.

Stagflation also resurrected interest in monetarism, a reinterpretation of the "classical" economics that Keynes had critiqued. Monetarists like Milton Friedman acknowledged that money could have short-term, non-neutral effects on real economic variables like growth and employment.[192] However, they argued that in the long run, money was indeed neutral,[193] contradicting

191. *See* A. W. Phillips, *The Relation Between Unemployment and the Rate of Change of Money Wage Rates in the United Kingdom, 1861–1957*, 25 ECONOMICA 283 (1958) (documenting a negative correlation between money wage changes and unemployment).

192. A curiosity: Milton Friedman's first academic article was also a discussion of Arthur Pigou's work. *See* Milton Friedman, *Professor Pigou's Method for Measuring Elasticities of Demand from Budgetary Data*, 50 Q.J. ECON. 151 (1935).

193. Mathematically, in the long-run the Phillips Curve is vertical. Milton Friedman, *The Role of Monetary Policy*, 58 AM. ECON. REV. 1 (1968); Edmund S. Phelps, *Money-Wage Dynamics and Labor-Market Equilibrium*, 76 J. POL. ECON. 678 (1968). *But see* Hielke Van Doorslaer & Mattias Vermeiren, *Beyond Normal Central Banking? Monetary Policy After the Pandemic* 8 (Eur. Trade Union Inst., Working Paper No. 2022.19, 2022) ("The Phillips curve – the negative short-term correlation between unemployment and inflation as posited by the

Keynes—who thought that monetary factors could potentially have lingering real effects.[194] According to monetarists, monetary interventions advocated by Keynesians would ultimately prove inconsequential at best and harmful at worst. Robert Lucas, a pioneer of "new classical macroeconomics," expanded on this by asserting that the positive effects of monetary shocks depended on their unpredictability.[195] If market participants anticipated such shocks, they would adjust prices to hedge against them, neutralizing the effects of active monetary policy even in the short term.

In essence, monetarists and new classical economists—collectively often referred to as neoclassical economists—concluded that active monetary policy was futile. Whether anticipated or not, monetary interventions would ultimately result in inflation without reducing unemployment or fostering real output growth. This perspective reframed Buchanan and Tideman's 1975 call for predictability and rule-based monetary governance[196] as part of a broader movement to constrain discretionary monetary policy. The goal became to design monetary systems that could neutralize policy-driven fluctuations in output, employment, and growth.[197]

One possible solution involved reintroducing metal-backed currency into the monetary system, such as reviving the Gold Standard Act of 1900. Under this system, the dollar would be defined by a specific weight of gold, and the Treasury would exchange paper currency for gold coin upon demand.

New Keynesian models adopted by central banks – appears to have flattened over the past few decades.").

194. In his General Theory, Keynes left open the possibility that monetary factors could have persistent effects beyond the short run. *See, e.g.*, KEYNES, THE GENERAL THEORY, *supra* note 8, at 273 ("So far, we have been primarily concerned with the way in which changes in the quantity of money affect prices in the short period. But in the long run is there not some simpler relationship? This is a question for historical generalisation rather than for pure theory."); *see also* Paul Davidson, *Sensible Expectations and the Long-Run Non-Neutrality of Money*, 10 J. POST KEYNESIAN ECON. 146, 147 (1987) ("Keynes indicated that he believed that his *General Theory* would provide a detailed analysis of an economy where money was *never* neutral.").

195. *See* Robert E. Lucas, Jr., *Expectations and the Neutrality of Money*, 4 J. ECON. THEORY 103 (1972); Robert E. Lucas, Jr., *Nobel Lecture: Monetary Neutrality*, 104 J. POL. ECON. 661, 679 (1996) ("Anticipated monetary expansions have inflation tax effects and induce an inflation premium on nominal interest rates, but they are not associated with the kind of stimulus to employment and production that Hume described. Unanticipated monetary expansions, on the other hand, can stimulate production as, symmetrically, unanticipated contractions can induce depression.").

196. Buchanan & Tideman, *supra* note 187, at 129.

197. *See generally* IN SEARCH OF A MONETARY CONSTITUTION (Leland B. Yeager ed., 1962); DAVID GLASNER, FREE BANKING AND MONETARY REFORM (1989) (on the idea of a monetary constitution).

Advocates of this approach argued that it would restore constitutional fidelity by curbing inflationary temptations.[198] A related, yet distinct, proposal called for the privatization of money issuance, drawing inspiration from Friedrich Hayek's[199] advocacy of "free banking."[200] These proposals share a deep skepticism toward government-managed monetary systems, aligning with LawEcon's tradition of limiting state intervention in favor of market-driven solutions. Their proponents argue that central banks, unless restrained by a monetary constitution, inevitably foster financial instability and inflation.[201]

During the mid-20th century, such ideas were relegated to the fringes of American economic policy, overshadowed by Keynesian dominance. However, the collapse of the Bretton Woods system in the early 1970s, combined with the ineffectiveness of Nixon's price controls, reignited debates on monetary governance. Although some called for a return to the gold standard, reform efforts instead focused on establishing binding rules for central banks within the existing fiat money system.[202]

The failure to establish a monetary constitution left monetary policy vulnerable to discretionary actions, prompting economists like Milton Friedman to propose rule-based frameworks. One such proposal, the "K-Percent Rule," gained prominence in the 1970s and 1980s. The rule sought to stabilize inflation by requiring the Federal Reserve to increase the money supply at a fixed, predetermined percentage annually, regardless of short-term changes in real GDP.[203] While initially embraced by institutions like the Federal Reserve and the Bank of England, the K-Percent Rule faced significant challenges. Its rigidity often resulted in interest rate volatility and failed to account for the complexities of real-world monetary dynamics, leading to its eventual abandonment.

Friedman's assumption of a stable relationship between money supply

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198. *See, e.g.*, EDWIN VIEIRA, JR., PIECES OF EIGHT (1983); Christopher P. Guzelian, *Dollars That Devalue Are Unconstitutional*, 54 ST. MARY'S L.J. 85 (2023). *Contra*, Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017 (2008).

199. F. A. HAYEK, DENATIONALISATION OF MONEY (1976).

200. On the U.S. "free banking era," see CARNELL ET AL., *supra* note 117, at 23–24. *See also* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA 572–604 (1957). *But see* GEORGE A. SELGIN, THE THEORY OF FREE BANKING: MONEY SUPPLY UNDER COMPETITIVE NOTE ISSUE 144–63 (1988) (questioning the qualification of this period of U.S. history as "free banking" proper).

201. For a recent rendition of this argument, see GEORGE SELGIN, MONEY: FREE AND UNFREE 22–35 (2017).

202. *See* Robert J. Barro, *United States Inflation and the Choice of Monetary Standard*, *in* INFLATION: CAUSES AND EFFECTS 99, 106–09 (Robert E. Hall ed., 1982).

203. For a detailed explanation, see Richard T. Selden, *Stable Monetary Growth*, *in* IN SEARCH OF A MONETARY CONSTITUTION, *supra* note 197, at 322–56.

growth and real GDP oversimplified the intricacies of monetary policy. In practice, money demand fluctuates due to factors such as changes in financial markets and consumer behavior. Additionally, private-sector innovations in money substitutes, such as financial derivatives and shadow banking instruments, can offset Federal Reserve actions, undermining the predictability of monetary outcomes. These limitations highlight the inherent difficulties of rule-based systems, particularly when applied in dynamic economic environments.

As criticisms of both Keynesian policies and the K-Percent Rule mounted, alternative frameworks emerged to guide monetary policy. One notable example was the Taylor Rule, which automated Federal Reserve decisions using a formula that adjusted interest rates based on inflation and GDP deviations from their targets.[204] Unlike rigid monetary rules, the Taylor Rule allowed for some flexibility in response to economic conditions but remained formula-based. However, ensuring compliance with such non-legislated algorithms proved challenging, raising the perennial issue of "who watches the watchmen."

In response, scholars like Finn Kydland and Edward Prescott argued that time inconsistency made rules more credible than discretion, and proposed legislated solutions, such as delaying the implementation of monetary rules by two years, aimed to make "discretionary policy all but impossible."[205] However, practical constraints such as urgent crises, war financing, and political pressures have often rendered these rule-based proposals unworkable in practice.

By the 1990s, central banks, including the Federal Reserve, shifted toward inflation targeting as their primary monetary policy approach.[206] This marked a concession by neoclassical economists to certain Keynesian concerns about stabilizing inflation expectations and economic fluctuations. Initially, neoclassical thinkers had opposed flexible rules like inflation targeting, fearing they would enable short-term inflationary policies for political gain.[207] Over time, however, the focus shifted from rigid rules to the

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204. John B. Taylor, *Discretion Versus Policy Rules in Practice*, 39 CARNEGIE-ROCHESTER CONF. SERIES ON PUB. POL'Y 195 (1993).

205. Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473, 487 (1977).

206. *See* Frederic S. Mishkin, Inflation Targeting: True Progress or Repackaging of an Old Idea? 1, 13 (Jan. 1, 2006) (unpublished manuscript) (on file with Columbia Business School) ("In 1990, a new monetary strategy was born, inflation targeting. . . . Since the initial adoption of inflation targeting in early 1990 by New Zealand, inflation targeting has grown in popularity . . . .").

207. *See* Marvin Goodfriend & Robert G. King, *The New Neoclassical Synthesis and the Role of Monetary Policy*, *in* 12 NBER MACROECONOMICS ANNUAL 1997, at 231, 239–41 (Ben

governance structures of central banks, with an emphasis on defending their independence.[208]

The rationale for central bank independence was to shield monetary policy from political pressures and electoral cycles, which could incentivize short-term, populist measures. This perspective became a cornerstone of modern monetary governance, even as dissenting voices, like Milton Friedman, argued for greater accountability.[209] Friedman envisioned a central bank operating under legislated rules, subject to democratic oversight, rather than insulated from public scrutiny.

The field of economics has long been divided between those who, like Keynes, advocate for active monetary policy to address evolving economic conditions and those who, like Buchanan and Tideman, Friedman, and others operating in the tradition of LawEcon, emphasize constraining policymakers to ensure stability and predictability. These opposing perspectives remain central to ongoing debates about monetary governance. Scholars interested in reviving the LawEcon tradition must grapple with these tensions to craft a modern approach to monetary policy.

A monetary constitution, as envisioned from within the LawEcon tradition, would prioritize transparency, accountability, and predictability, making it particularly suited to challenges such as inflation and digital currencies—and importantly, would address the question of fiscal sustainability. For instance, in an era of inflationary pressures, a monetary constitution could anchor expectations by committing central banks to fixed rules, such as inflation targeting or money supply growth limits, thereby mitigating the political temptations of short-term monetary manipulation. This approach would ensure that monetary policy decisions remain insulated from electoral cycles, fostering trust in the stability of the currency.

Similarly, the advent of digital currencies—whether issued by central banks or decentralized networks—introduces new complexities to monetary governance. A monetary constitution could provide clear legal guidelines for integrating these technologies into the broader monetary system. For

S. Bernanke & Julio J. Rotemberg eds., 1997) ("Distrustful of discretionary and activist monetary policy, [monetarists] sought to formulate simple fixed rules for policy." (alteration in original)).

208. *See* Rosa María Lastra, *The Institutional Path of Central Bank Independence*, *in* RESEARCH HANDBOOK ON CENTRAL BANKING 296, 301 (Peter Conti-Brown & Rosa M. Lastra eds., 2018) ("Central bank independence has been the preferred institutional arrangement to promote monetary stability since the end of the 1980s and beginning of the 1990s. . . . Central banks around the world have become by law less subordinate to the dictate of political authorities.").

209. Milton Friedman, *Should There Be an Independent Monetary Authority?*, *in* IN SEARCH OF A MONETARY CONSTITUTION, *supra* note 197, at 224–39.

example, it could delineate the regulatory boundaries for digital assets, ensuring their compatibility with existing financial systems while preserving monetary sovereignty. By establishing predictable rules for their issuance, use, and taxation, such a framework could harness the benefits of digital currencies—such as increased efficiency and financial inclusion—without compromising the stability of the broader economy.

The pursuit of a monetary constitution remains a critical task for those seeking to balance economic flexibility with constitutional constraints. As digital currencies and global inflation reshape the monetary landscape, the principles outlined by Buchanan and Tideman provide a vital blueprint for addressing these emerging challenges through a rule-based framework grounded in constitutional values.

IV. THE BATTLE OF PARADIGMS

LawEcon emerged in the 1950s and 1960s as an intellectual movement grounded in the Chicago School's commitment to free-market principles, rational choice theory, and microeconomic analysis. Over the decades, it has evolved into a diverse and influential tradition, yet its central focus has remained the use of economic reasoning to explain and improve legal systems. Today, however, LawEcon faces a relevant challenge from LawMacro, a movement rooted in Keynesian economics that prioritizes addressing macroeconomic instability, inequality, and the need for state intervention.

Far from being a mere variation of LawEcon, LawMacro represents a fundamental paradigm shift. Drawing on Robert Cooter's framework in *Maturing into Normal Science: The Effect of Empirical Legal Studies on Law and Economics*,[210] LawMacro could be viewed as an intellectual "revolution." Cooter observed that earlier developments like game theory, endogenous preferences, and behavioral economics had influenced LawEcon but failed to fundamentally disrupt its paradigm.[211] By contrast, LawMacro's adoption of Keynesian macroeconomics now directly challenges not only the economic models used in LawEcon but also its ideological foundation, built on classical liberalism and a respect for market coordination.

Keynesianism's emphasis on inequality and redistribution may resonate with contemporary academic trends, but its reliance on state-led

210. Robert Cooter, *Maturing into Normal Science: The Effect of Empirical Legal Studies on Law and Economics*, 2011 U. ILL. L. REV. 1475 (2011).
211. *Id.* at 1477–78.

interventions raises concerns about the stability and predictability needed for sustained economic growth. LawMacro's centralized approach contrasts sharply with foundational LawEcon principles, including the concept of a "monetary constitution." This rule-based framework for monetary policy aims to stabilize expectations, curb inflation, and shield the economy from politicized interventions. By promoting clear and predictable rules, the monetary constitution not only fosters economic growth but also protects individual freedom, mitigating the risks of overreach and unintended consequences associated with centralized control.

The rise of LawMacro reflects a deeper tension about the role of law in shaping economic outcomes. While LawEcon upholds the benefits of stable, predictable rules that enable individuals and businesses to plan, innovate, and thrive, LawMacro's Keynesian foundations emphasize flexibility and state control to address cyclical downturns and social inequalities. These approaches, while seemingly complementary, frequently lead to conflicting prescriptions for legal and economic policy.

To remain relevant in this evolving landscape, LawEcon must articulate its enduring value while addressing the challenges posed by LawMacro. By reaffirming its commitment to market-based solutions and decentralized decision-making, LawEcon offers a powerful alternative to the reactive, interventionist tendencies of Keynesian-inspired policies. Its long-term orientation, rooted in fostering legal stability and promoting individual agency, provides a necessary counterbalance to the short-term focus of LawMacro.

Ultimately, the continued relevance of LawEcon lies in its ability to integrate economic principles with legal reasoning in ways that empower individuals, promote innovation, and drive sustainable economic growth. While LawMacro's emphasis on inequality and instability may resonate with the zeitgeist in academic circles, LawEcon's enduring focus on creating environments that enable voluntary exchange and coordinated expectations remains a more reliable guide for shaping effective legal systems.