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THE LAW AND MACROECONOMICS OF THE NEW DEAL AT 70

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Recent turbulence in the financial markets, first as a result of September 11, 2001, and then as a result of the realization in the summer of 2002 that corporate America was plagued by pervasive corruption, once again has shown that capitalism needs government intervention to thrive.[1] The crisis in investor confidence in the summer of 2002 in particular refocused attention on the seventy-year-old regulatory infrastructure imposed upon the economy as part of the New Deal.[2] In both instances, the federal government jumped to the rescue of so-called free markets that seemed to be spinning into the abyss of serious adverse macroeconomic dysfunction.[3] It wasn't always so.

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1. One example of the strength of the consensus supporting massive government involvement in our nation's economy was the swift response of the government to address the economic consequences of the September 11, 2001 attack on the World Trade Center in New York City. On September 17, 2001, the Federal Reserve Board (the "Fed") cut rates for the eighth time that year in order to stabilize financial markets worldwide. Richard W. Stevenson, *Fed Cuts Rate by Half-Point in an Attempt to Aid Stocks*, N.Y. TIMES, Sept. 18, 2001, at C1. By the end of September, in order to stem the imminent collapse of some carriers and the cascading losses that would have hit the banking industry, the government injected $5 billion in cash into the airline industry and stood ready to guarantee another $10 billion in loans. Barbara A. Rehm & Laura Mandaro, *U.S. Bailout for Airlines Looks Good for Lenders*, AM. BANKER, Sept. 27, 2001, at 1. On the regulatory front, the Fed injected billions of dollars into the banking system and the Federal Deposit Insurance Corporation (FDIC) acted to encourage banks to take greater risks in lending to customers suffering adverse consequences from the disaster. E. Scott Reckard & James S. Granelli, *Lenders Look for Economic Equilibrium*, CHI. TRIB., Sept. 28, 2001, § Business, at 3. Congress quickly acted to extend unemployment benefits to the ever increasing army of laid-off employees in the aftermath of the attack. Delroy Alexander, *Surge in Layoffs Vaults Claims to 9-Year High*, CHI. TRIB., Sept. 28, 2001, § Business, at 1. Ultimately, the federal government undertook to act as insurer of last resort with respect to the risks of terrorism, for $100 billion. Christopher Oster, *Terrorism Bill Boosts Insurers' Risk*, WALL ST. J., Nov. 27, 2002, at C9. Little protest from laissez-faire enthusiasts arose in response to these actions.

2. *See* Robert Kuttner, *Today's Markets Need a Whole New Set of Rules*, BUS. WK., July 29, 2002, at 26 (stating that reforms designed to stem pervasive wrongdoing during the late 1920s are inadequate to stem wrongdoing today and that "laissez-faire" and "market fundamentalism" had proven once more to be a "disgrace").

3. For example, when President Bush signed the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.), he specifically compared the new Act to the New Deal, stating that it contained "'the most far-reaching reforms of American business practices since the time of Franklin

Once upon a time, mainstream economic thought held that government should have a highly restricted economic role.[4] Indeed, Calvin Coolidge once said that "'[i]f the Federal Government should go out of existence, the common run of people would not detect the difference in the affairs of their daily life for a considerable length of time.'"[5] The view was that government simply should not try to regulate because markets were self-correcting.[6] Government can never spend as wisely as the markets can so government should tax little and keep a balanced budget to avoid crowding out private investment and destabilizing the currency.[7] During this era of laissez-faire economics, business cycles would come and go, some even severe, but eventually the inherently self-adjusting economy would correct itself without the need for government "intrusion."[8] Then came the Great Depression.[9]

Delano Roosevelt.'" Mike Allen, *Bush Signs Corporate Reforms into Law; President Says Era of 'False Profits' Is Over*, WASH. POST, July 31, 2002, at A04. For a review of the crisis in investor confidence gripping the markets in the summer of 2002, see generally Press Release, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Opening Statement of Senator Paul S. Sarbanes (D-MD), House-Senate Conference on the Public Company Accounting and Investor Protection Act of 2002 (July 19, 2002), *available at* http://banking.senate.gov/prel02/0719oscf.htm.

4. JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, at 185 (1997) (stating that the prevailing economic doctrine of the late 1920s and early 1930s constituted a "rejection of both fiscal . . . and monetary policy" and therefore "amounted precisely to a rejection of all affirmative government economic policy").

5. DAVID M. KENNEDY, FREEDOM FROM FEAR 30 (1999) (citing 1 ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT 57 (1956)).

6. *See* Herbert Hoover, Annual Message to the Congress on the State of the Union (December 8, 1931), *in* THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HERBERT HOOVER 1931, at 580, 583 (1976) (stating that "private initiative and local and community" action had been taken to address economic problems, allowing an "orderly readjustment of costs, inventories, and credits" with the "least possible Government entry into the economic field"); *see also* WILLIAM J. BARBER, FROM NEW ERA TO NEW DEAL: HERBERT HOOVER, THE ECONOMISTS, AND AMERICAN ECONOMIC POLICY, 1921-1933, at 4 (1985) ("Standard textbook teaching typically held that economic life was governed by laws of production, distribution, and exchange and that cyclical fluctuations in aggregate income and output were a normal and inevitable part of the economic system's behavior. . . . [I]t was heretical to suggest that" humans could repeal these laws).

7. *See* Herbert Hoover, Address to the Senate on the National Economy (May 31, 1932), *in* THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HERBERT HOOVER 1932-33, at 243, 243-44 (1977) (stating that in light of the economic emergency and "continued downward movement in the economic life of the country" government needed to impose a "[d]rastic reduction of expenditures" and increase taxes, in order to balance the federal budget and stabilize the dollar).

8. Herbert Hoover, Address to the American Bankers Association in Cleveland, Ohio (Oct. 2, 1930), *in* THE PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HERBERT HOOVER 1930, at 391, 400 (1976). In this address, President Hoover stated that "readjustments in prices, which were . . . inevitable, [were] far along their course" and that "these commodities [prices] [were] below the level at which sufficient production [could] be maintained . . . and, therefore, sooner or later [had to] recover." *Id.* at 393. He also

This cataclysmic event forever changed the federal government's role in the economy. No longer would government allow presumptively efficient free markets to operate free of supervision; instead, the government would manage macroeconomic performance—gross domestic product (GDP or output), unemployment, inflation or deflation, and productivity growth.

In the face of this unprecedented and intractable calamity, President Franklin D. Roosevelt (FDR) experimented with many forms of government action.[10] FDR had some hits, some errors, and some rainouts.[11] Still, this Article posits that FDR's New Deal ultimately took a giant leap forward in demonstrating the proper role of the government in a modern-industrial state. FDR undertook massive investment in physical infrastructure, typically a uniquely governmental function. FDR, however, went well beyond physical infrastructure. The New Deal revolutionized government by creating a regulatory infrastructure, social infrastructure, and human infrastructure that would spur growth and stability for decades. In the final analysis, FDR used the legal system to redefine the political economy of the United States—from free market capitalism to a form of capitalism that was fundamentally subject to social management and social responsibility. The thesis of this Article is that the law and macroeconomics of the New Deal was ultimately a search, or at least the beginning of a search, to find the optimal legal structures to facilitate free market operation and provide a foundation for achieving greater economic growth and output, and other macroeconomic objectives. As such, the New Deal

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emphasized that government should avoid "intrusion" in the economy, and that "[a]ny recession" was only "temporary." *Id.* at 399-402.

9. Theodore Rosenof noted the following change in thinking that had been inspired by the Great Depression:

> It had taken the devastation of the Great Depression to inspire powerful challenges to orthodox theory, most notably that of Keynes. Orthodoxy had held that the economic "system" or "mechanism" was inherently self-correcting, that downturns were necessarily followed by cyclical upswings, that institutional "imperfections" or external "shocks" were mere aberrations, and that government intervention would only impede and delay normal and natural readjustment and recovery. The Great Depression undermined such assumptions and led to the New Deal's enhanced role for government.

THEODORE ROSENOF, ECONOMICS IN THE LONG RUN: NEW DEAL THEORISTS AND THEIR LEGACIES, 1933-1993, at 5 (1997).

10. *See infra* Part II (discussing many of the key New Deal programs).

11. FDR himself openly admitted the experimental basis of the New Deal. *See* Franklin D. Roosevelt, The Second "Fireside Chat" (May 7, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 160, 165 (1938) (stating "I have no expectation of making a hit every time I come to bat. . . . Theodore Roosevelt once said to me: 'If I can be right 75 percent of the time I shall come up to the fullest measure of my hopes.'").

serves to furnish policy lessons for using law to enhance today's macroeconomic performance.

The New Deal strived to provide a firmer framework for the success of a market-based economy.[12] Consequently, it was a conservative approach to the economic malaise of the 1930s, for even Adam Smith had long ago recognized that government needed to provide the necessary infrastructure for free markets to succeed.[13] The New Deal simply updated the Adam Smith vision of the government's role to comport with a modern, industrialized economy. For example, the New Deal imposed a regulatory infrastructure that included elements from Adam Smith's theory, such as the need for regulation of fraud and the regulation of banking.[14] The New Deal's massive investment in physical infrastructure is also a page from Adam Smith's playbook.[15] Even the New Deal's emphasis on a more economically sound social and human infrastructure is an extension of traditional capitalistic thinking.[16] In the end, FDR's legacy is a conservative approach to political economy—one that continues to allow markets to harness individual initiative to the maximum extent possible and to respond to individual tastes. Instead of blind adherence to laissez-

12. Franklin D. Roosevelt, the Fourth "Fireside Chat" (Oct. 22, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 421 (discussing efforts to build legal structures to support a "sound economic life").

13. 2 ADAM SMITH, THE WEALTH OF NATIONS 244 (Edwin Cannan ed., The Univ. of Chi. Press 1976) (1776) (asserting that the government is duty bound to provide "public institutions and . . . public works, which, . . . may be in the highest degree advantageous to a great society," but which are not profitable to any individual economic actor because of diffusion of benefits); *see also* COLIN GORDON, NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920-1935, at 4 (1994) (stating "[t]his study contributes to a broad stream of interpretation that has stressed the primacy of business interests in the formulation of U.S. public policy and the essential conservatism of the New Deal").

14. Herbert Stein, *Board of Contributors: Remembering Adam Smith*, WALL ST. J., Apr. 6, 1994, at A14 (reviewing the expansive view of government support of free market economy from *The Wealth of Nations* and updating the view for a modern economy).

15. 2 SMITH, *supra* note 13, at 245-46.

16. *See* 2 *id.* at 302-09 (discussing government's duty to provide minimum education to all citizens). Modern macroeconomists now recognize the critical importance of economic infrastructure to macroeconomic performance. *See, e.g.*, Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output Per Worker than Others?*, 114 Q. J. ECON. 83, 95, 113-114 (1999) (stating that successfully fostering economic growth requires appropriate "social infrastructure," meaning "the institutions and government policies that provide incentives for individuals and firms in the economy," beyond that needed just to create free markets). More economists, after studying macroeconomic growth across nations, have concluded that law can enhance economic growth. *See* Joseph E. Stiglitz, *Some Lessons from the East Asian Miracle*, 11 WORLD BANK RES. OBSERVER 117, 151 (1996) (showing that economic growth is frequently accompanied by government intervention designed to create environments in which markets can thrive). Macroeconomics is not just about fiscal or monetary policy anymore.

faire efficiency, the New Deal recognized government's ability to place capitalism upon a firmer foundation for delivering extraordinary growth and stability to society.[17] This Article will seek to define the most durable elements of the New Deal's legacy, in terms of how law can further economic output and other macroeconomic goals. Moreover, in light of that legacy, this Article will highlight methods of using law to secure a more powerful political economy.

Part I of this Article will review economic thought on the Great Depression, attempting to convey the raw human carnage that was the Great Depression. A natural part of this analysis requires an understanding of just how efficient,[18] from a neoclassical perspective, our economy was in 1929, just before economic calamity set in.[19] Part II will explore the most durable and seemingly successful elements of the New Deal, in terms of building a serviceable economic infrastruc-

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17. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 74, 249 (2002) (noting that pre-Depression laissez-faire economic policies did not work and that the onset of government management of macroeconomic performance has resulted in fewer and shorter economic downturns and longer expansions).

18. Efficiency as used by most law and economics scholars has a vague, indeterminate, and subjective meaning. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (5th ed. 1998) (defining efficiency as the "allocation of resources in which value is maximized," but describing its limitations and how some economic theorists only define efficiency in terms of voluntary transactions). It has definite meaning in the world of microeconomics; but only as a theoretical construct. *See* EDWIN MANSFIELD & GARY YOHE, MICROECONOMICS 565 (10th ed. 2000) (stating that "[o]ne of the most . . . fundamental findings of microeconomics is that a perfectly competitive economy in equilibrium satisfies the . . . conditions for economic efficiency"). This is because microeconomists recognize that no economy is ever perfectly competitive. *Id.* at 270. Perfect competition rests upon theoretical assumptions that are never fulfilled—such as the requirement that all market participants possess perfect information of the past, present, and future. *Id.* Perfect competition also requires zero transaction costs so that assets can move via market action to their highest and best use unimpeded. *Id.* Thus, perfect competition militates in favor of *de minimus* government intervention because government action implies some additional transaction costs.

19. Recently, for example, economists have highlighted the relative efficiency of the very critical labor markets of the 1930s. Theoretically, labor markets should have adjusted to the large unemployment at the beginning of the Depression by lowering wages and thereby inducing higher demand for workers. Some economists previously argued that "sticky-wage[s]" were responsible for the lack of market adjustment. *See* Ben S. Bernanke & Kevin Carey, *Nominal Wage Stickiness and Aggregate Supply in the Great Depression*, 111 Q.J. ECON. 853, 855-56 (1996). Bernanke and Carey, for example, stated:

> During the 1930s many forces that . . . economists commonly point to as conducive to slow wage adjustment appeared relatively weak in most countries: union power was at a low ebb; government's role in labor markets was generally more limited than today; price declines were too large . . . for money illusion to be widespread; and the existence of an army of the unemployed must have . . . reduced workers' bargaining power.

Id. at 855.

ture.[20] FDR experimented with a variety of potential solutions in trying to stem the pain of the Great Depression.[21] The National Industrial Recovery Act (NIRA),[22] for example, was a conservative stab at a self-regulated economy that largely failed and furnished no meaningful legacy. Other elements, however, were economic hits—not because they instantly resolved the Depression, but because each formed an integral part of the New Deal. Overall, these elements succeeded in placing the American economy on a more durable, stable, and dynamic foundation. These are the elements that may hold lessons for using law to manage the economy of today.[23] Finally, Part III attempts to place the law and macroeconomics of the New Deal in its proper historical perspective; that is, as a superior normative approach to legal issues relating to macroeconomic infrastructure.[24] The implication of this is the need to expand law and economics beyond mere microeconomic efficiency, which has been the near exclusive focus of

20. ROBERT J. GORDON, MACROECONOMICS G4 (9th ed. 2003) (defining infrastructure as public investment in "roads, sewers, airports, and, more broadly, education" that "provide[s] widespread benefits to consumers and raise[s] the return on private investment"). For purposes of this Article, I extend this definition of infrastructure to include the means by which the legal system can enhance the operation of free markets by raising the return on capital or lowering the cost of capital. This is in full accord with the fundamental point of economist Joseph Stiglitz. *See* Stiglitz, *supra* note 16, at 157 (stating that Asian Tigers enhanced macroeconomic performance through government intervention that "used, complemented, regulated, and indeed created, markets rather than supplanted them"). Simply stated, government supplied infrastructure should be designed to enhance free market performance.

21. *See infra* Part II (summarizing many of the key New Deal programs).

22. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The U.S. Supreme Court found various portions of the NIRA to be unconstitutional. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (holding that discretion of the President under Section 3 of the NIRA was an unconstitutional delegation of legislative power); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (invalidating section 9(c)).

23. I admit to selecting, from an economic perspective, only the most successful New Deal initiatives. It is justified cherry picking, however, for two reasons. First, the New Deal proceeded while the very idea of macroeconomics was essentially subject to prohibition in mainstream economic thought. Second, this Article does not argue the merits of the New Deal overall, but instead only focuses on the instructive elements of the New Deal, which naturally excludes an assessment of the New Deal's failures. *See supra* notes 4, 6, 9, and 11 and accompanying text (discussing the Great Depression and the restricted role that government should play in regulating the economy).

24. Legal scholars have previously studied the New Deal from a variety of different legal perspectives. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (assessing the New Deal as part of a theory of informal constitutional evolution); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1361 (2000) (reviewing the New Deal origins of the NLRB and showing that the Board "has come 180 degrees from its origins"); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999) (assessing the state of learning and thought on the so-called constitutional revolution of 1937). However, no legal scholar has assessed the New Deal in terms of its teachings on using law to enhance macroeconomic performance.

law and economics within the legal academy[25]—an expansion that explicitly recognizes the need to search for legal structures to support higher levels of macroeconomic performance.[26]

In general, law and macroeconomics has not been well-developed in the legal academy. As one commentator has stated: "When legal scholars and law students discuss the impact of economics on their understanding of law, they invariably think about *microeconomics*, not macroeconomics."[27] The problem with this focus, as will be discussed

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25. Emblematic of the current law and economics curriculum is Judge Posner's fifth edition of *Economic Analysis of Law*. In it, for example, Judge Posner states that "macroeconomic performance, that is output, production, unemployment, and inflation, are "mysterious macroeconomic phenomena." POSNER, *supra* note 18, at 3. Indeed, while Judge Posner identifies numerous elements of law that he deems "efficient," at no point does he posit that such efficiency will somehow lead to more jobs, greater GDP, more economic stability or less inflation. *See id.* at 12-17 (defining efficiency and explaining its limitations); *see also* Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1005 (2001) (stating that, "[l]aw and economics' exclusive focus on efficiency continues to lack justification even within the limited purview of modern economic reasoning").

26. Some legal scholars are heavily engaged in this search. *See* Steven A. Ramirez, *The Professional Obligations of Securities Brokers Under Federal Law: An Antidote for Bubbles?*, 70 U. CIN. L. REV. 527, 527-32, 539-67 (2002) (arguing that courts should more explicitly enforce the professional obligations of securities brokers because of important federal economic policies designed to stem "speculative bubbles"); Charles R.P. Pouncy, *Contemporary Financial Innovation: Orthodoxy and Alternatives*, 51 SMU L. REV. 505, 590 (1998) (concluding that "[a]t the least, policy intervention by regulation . . . also should address the heterodox concern that sectoral processes have the ability to unfavorably impact the entire economy"); Steven A. Ramirez, *The Chaos of 12 U.S.C. Section 1821(k): Congressional Subsidizing of Negligent Bank Directors and Officers?*, 65 FORDHAM L. REV. 625, 686-88 (1996) [hereinafter *The Chaos of 12 U.S.C. Section 1821(k)*] (arguing that huge macroeconomic losses from the bank crisis of the late 1980s militated in favor of holding directors liable for failure to exercise ordinary care); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 621-25 (1988) (discussing potential political problems in administering fiscal policy in a democracy); Johan Deprez, Comment, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1252-53 (2001) (concluding that "Posnerian views on efficiency, prices, valuation, decision making, and justice cannot be sustained in the real world where true uncertainty dominates"). Additional legal analyses based upon macroeconomic considerations are cited in this Article in discussions of various elements of the New Deal. *See infra* Parts II-III.

27. Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1216 (1993); *see also* John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation over the Business Cycle*, 66 S. CAL. L. REV. 709, 710 (1993) (noting that "law and macroeconomics is quite novel in the legal academic literature"). Some literature explores the impact of macroeconomic performance upon legal phenomena such as crime rates. *See, e.g.*, Llad Phillips et al., *Crime, Youth, and the Labor Market*, 80 J. POL. ECON. 491, 502-03 (1972) (reaching the conclusion that a lack of economic opportunity significantly contributed to a high youth crime rate). To a large extent, it is understandable that there is only a scanty focus on law and macroeconomics. Economists only recently started to study the determinants of macroeconomic growth beyond traditional fiscal and monetary policy, an area in which economists histori-

in detail, is that many of the issues that concern microeconomics are relatively trivial in terms of their influence on macroeconomic output.[28] Moreover, the "continued acceptance of efficiency, but not its premises, has produced a dissonance within law and economics that, depending on how closely one chooses to listen, can be piercing to the ear."[29] This Article shows that the New Deal implemented basic legal changes in our economic infrastructure that contributed in a significant way to macroeconomic performance. This conclusion means that law can influence macroeconomic performance in a fundamental and powerful way by providing a more optimal macroeconomic infrastructure. Thus, this Article seeks to reveal not only that there is a law and macroeconomics, but also that the basic elements of the successful use of law to facilitate macroeconomic performance can be distilled from the bootleg economics of the New Deal.

I. THE GREAT DEPRESSION

The Great Depression challenged American society as never before.[30] It was longer and more intense than any in the earlier parade of economic depressions, panics, and disruptions spawned by

cally have focused more on macroeconomic stability instead of growth. *See supra* note 16 and accompanying text (discussing evolution of macroeconomic theory). Thus, the need for legal structures to implement the new teaching of macroeconomic growth theory has been somewhat limited.

28. Professor Kelman illustrates this point through the example of unemployment: "Social losses from cyclical increases in unemployment almost certainly dwarf losses from other forms of inefficiency." *See* Kelman, *supra* note 27, at 1285. Indeed, the government estimated in 1939 that the foregone output from the severe unemployment of the 1930s was $200 billion (in 1939 dollars). DONALD S. HOWARD, THE WPA AND FEDERAL RELIEF POLICY 795 (Da Capo Press 1973) (1943).

29. Sanchirico, *supra* note 25, at 1007. Professor Sanchirico concludes that the latest efforts at justifying the focus of law and economics on efficiency have failed. *Id.* at 1069. As Joseph Stiglitz has observed with respect to the efficiency premise of perfect information: "The analytic propositions are clear: whenever there is imperfect information or markets (that is always), there are, in principle, interventions by the government—even a government that suffers from the same imperfections of information—which can increase the markets' efficiency." STIGLITZ, *supra* note 17, at 219 (emphasis omitted).

30. II ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL 3 (1958). Schlesinger wrote:

> It was now not just a matter of staving off hunger. It was a matter of seeing whether a representative democracy could conquer economic collapse. It was a matter of staving off violence, even (at least some so thought) revolution.
>
> Whether revolution was a real possibility or not, faith in a free system was plainly waning. Capitalism, it seemed to many, had spent its force . . . .

Id.

laissez-faire capitalism.[31] The laissez-faire approach held that federal government intervention should be kept to an absolute minimum[32] and, therefore, was a close corollary of the neoclassical efficiency[33] dogma that dominates law and economics today.[34] Indeed, except in the area of legal scholarship, the laissez-faire approach to the issue of the law's role in structuring economic relationships and its neoclassical companion of economic efficiency have long since passed away—at least as a matter of political reality.[35] Business elites, for example,

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31. *See* MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, NAT'L BUREAU OF ECON. RESEARCH, A MONETARY HISTORY OF THE UNITED STATES 1867-1960, at 299 (1963) (discussing the gravity of the 1929 to 1933 economic collapse).

32. BARBER, *supra* note 6, at 4 (describing how the economy has traditionally been regulated "by laws of production, distribution, and exchange").

33. Professor Pouncy has described neoclassical economics, or orthodox economics, with great clarity:

> Neoclassical economics describes the economy as a state of equilibrium, in which the forces of supply and demand interact to achieve optimal allocation of society's resources. The focus of neoclassical economics is on the decision-making activity of entrepreneurs, households and firms. It assumes that economic decision-making is voluntary, [perfectly] informed and rational (i.e., utility maximizing). The models used in neoclassical economics are based on transactions occurring in exchange (i.e., barter) markets, in which perfect competition prevails. . . . The market becomes the instrument of allocation, and individual self-interested economic decisions collectively achieve an optimal societal equilibrium.

Pouncy, *supra* note 26, at 540-42 (footnotes omitted).

34. Ironically, many of today's most prominent "law and economics" scholars argue in favor of rolling back many of the pro-growth New Deal programs on efficiency grounds. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357-63 (1983) (invoking law and economics in support of the conclusion that New Deal labor legislation "is in large measure a mistake" with no mention of macroeconomic considerations); Jonathan R. Macey & Elizabeth H. Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 YALE J. ON REG. 215, 215-20, 239 (1988) (suggesting that the regulatory framework needs to be modified so that bank depositors are exposed to financial risk because "[microeconomic] theory suggests that depositors exposed to risk of loss will discipline excessively risky banks . . . through contractual devices[,] . . . higher risk premiums and . . . withdrawals"); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2427-28 (1998) (advocating the abandonment of the current mandatory disclosure regime of federal securities regulation in favor of a regime of "competitive federalism," with no mention of the impact on investor confidence and no reference to macroeconomic considerations). One commentator notes that, "[e]conomic orthodoxy provides the foundation for the Law and Economics school of thought. Its key practitioners are central advocates of imposing extreme limits on government regulation . . . ." Deprez, *supra* note 26, at 1223 (footnotes omitted). Efficiency need not be a long road to laissez-faire, but it too often is brandished to justify a throwback to the failed economic regime of yesteryear.

35. Indeed, the inability of the neoclassical theory to account for known macroeconomic phenomenon like unemployment or durable stagnation has been called a "major scandal" of economic theory. *E.g.*, Peter Howitt, *Macroeconomics: Relations with Microeconomics*, *in* 2 THE NEW PALGRAVE: THE WORLD OF ECONOMICS 394, 394 (John Eatwell et al. eds., 1991) (internal quotation marks omitted). A growing body of legal scholars

have long recognized the role of government in providing a rationalized business environment for facilitating economic growth and stability.[36] This political consensus that government must be massively involved in the management of the economy has strengthened with each passing economic trauma.[37]

In the wake of what was recently considered a new economic paradigm, in which low inflation and low unemployment may co-exist indefinitely, it is hard to comprehend the trauma of the Great Depression. "Unemployment went from 3.2% in 1929 to 25.2% in 1933 and stayed above 10% until 1941. Real Gross National Product plunged from $709.6 billion in 1929 to $498.5 billion in 1933. The economy did not return to 1929 levels until 1939." Investor confidence was so devastated before the New Deal that the issuance of new corporate securities declined from $9.4 billion in 1929 to $380 million in 1933.[38]

This precipitous loss of confidence caused gross domestic investment to decline more than 80% from 1929 to 1933.[39] The Depression arguably endured until just before World War II. In 1938, unemployment was still 20% and production did not exceed 1929 levels until

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have thus recognized the inherent limitations, contradictions, and indeterminacy of efficiency. *E.g.*, Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 470 (2000) (stating that efficiency "will be radically indeterminate in the vast number of cases where there are two available efficient rules with different distributive consequences"); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1216 (1991) (questioning efficiency as a normative legal standard because the set of efficient "changes which would make no one worse off and at least one person better off must ex ante be a void set").

36. *E.g.*, GORDON, *supra* note 13, at 4; *see also* BARBER, *supra* note 6, at 193 ("By 1933 a number of business leaders who had defected from Hoover's camp . . . had come to accept much of the diagnosis offered by the dissenters from the microeconomic orthodoxy of the 1920s," in particular, "that visible hands were needed to 'balance' supply and demand in . . . the economy.").

37. Professor Peter Temin maintains that the New Deal ushered in an era of democratic socialism that has waxed and waned in response to economic performance. PETER TEMIN, LESSONS FROM THE GREAT DEPRESSION 134-37 (5th prtg. 1996). I agree with Professor Temin that the New Deal marked the beginning of a new system of political economy, but would select different terminology for the dynamic because of the absence of any significant degree of government ownership or control of productive capital. There is no doubt that after the Great Depression government is expected to supervise and manage the macroeconomy. *See supra* notes 1-3 and accompanying text (discussing the recent need for government intervention). I term this social supervision of the macroeconomy, "social capitalism."

38. Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1066 n.35 (1999) (citation omitted).

39. Helen A. Garten, *A Political Analysis of Bank Failure Resolution*, 74 B.U. L. REV. 429, 454 (1994).

1941.[40] Home foreclosures more than tripled from pre-Depression levels to 1932, and by 1933 one thousand homes per day were subject to foreclosure.[41] Home lending evaporated and construction of new homes fell to 10% of 1929 levels;[42] this was partially due to a cascade of five thousand bank failures between 1929 and 1933, triggered by panic-stricken depositors.[43] Economists were at a loss to explain the duration of the stagnation and the classical view of free markets as inherently self-regulating suffered a fatal blow.[44]

The numbers alone, however, do not convey the depths of despair. The length and depths of the Great Depression destabilized our democracy and the nation's basic commitment to capitalism. In 1932, a "Bonus Army" of impoverished World War I veterans, 20,000 strong, descended upon Washington, D.C. to demand early payment of a bonus that the government had promised would be paid to the veterans in 1945.[45] President Herbert Hoover unleashed the United States Army upon this Bonus Army causing the death of three people (including an infant) and injuring thousands more.[46] Labor unrest proliferated. In 1934, San Francisco devolved into near "insurrection" with 130,000 workers out on strike.[47] Violence and bloodshed began

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40. GALBRAITH, *supra* note 4, at 168. This Article takes no position on the degree to which the New Deal immediately resolved the Great Depression, but focuses instead upon its long-term impact. Naturally, the New Deal did not restore the speculative excesses of the late 1920s that initially gave rise to the Depression. However, by 1935 industrial production increased 45% over 1933 levels, factory employment was up 35%, car sales increased 157%, and electric production expanded 18%. Franklin D. Roosevelt, Address at San Diego Exposition (Oct. 2, 1935), *in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 405, 410 (1938); *see also* Temin, *supra* note 37, at 100 ("It is clear that the recovery in the United States began shortly after Roosevelt's inauguration and that it was led by investment. It was a rapid response to the new policy regime introduced by the new President.").

41. Franklin D. Roosevelt, A Message Asking for Legislation to Save Small Home Mortgages from Foreclosure (Apr. 13, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 135, 136.

42. *Id.*

43. KENNEDY, *supra* note 5, at 132-33 (describing the flood of bank closings in 1933).

44. ROSENOF, *supra* note 9, at 8. Professor Theodore Rosenof illustrated this economic dichotomy:

> The continued descent of 1932 belied [claims] of a timely return to "normal" conditions. Similarly, it contradicted the prevailing wisdom of the 1920s that "business cycles" were merely oscillations within a rhythmical pattern and led to an early readjustment via the economic "mechanism." The way was now open to heterodox concepts and proposals, such as those advanced during the 1932 campaign by Franklin D. Roosevelt's "Brains Trust."

Id.

45. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 381-82 (rev. and updated ed. 1995).

46. *Id.* at 382.

47. *Id.* at 386-87.

to accompany foreclosures of farms and homes.[48] Thirteen died as a result of labor unrest that originated in the South Carolina textile industry.[49] This unrest spread throughout the South and into New England until 421,000 workers were on strike.[50] The Memorial Day Massacre in Chicago took ten lives.[51] The Communist Party successfully organized 22,000 workers into "Unemployed Councils" in Chicago alone.[52] The Socialist Party garnered 884,000 votes in the presidential election of 1932; the Communist Party received 102,000 votes.[53] Thus, whether or not one agrees with Howard Zinn that capitalism "was still in 1929 a sick and undependable system,"[54] many citizens living in that system had that very perception.

All of this unrest somewhat predictably gave rise to a series of demagogues and radicals. Upton Sinclair, a life long socialist, captured the Democratic nomination for Governor of California.[55] He advocated confiscating idle factories and transferring ownership to workers.[56] Senator Huey Long ultimately proposed a radical plan of wealth redistribution, whereby "he would make 'every man a king' by confiscating large fortunes" and guaranteeing a large income to every family, while at the same time "promis[ing] . . . shorter working hours."[57] Father Charles Coughlin, a ratings hit on 1930s talk radio,[58] called for nationalizing key industries.[59] Coughlin formed a political party, The National Union for Social Justice, that attracted an estimated eight million members.[60] Compared to these far more radical leaders, FDR was certainly a moderate, if not a conservative.

The genesis of the Depression had its roots in the speculative stock market boom of the 1920s.[61] In an efficient environment including low transaction costs and the ability to negotiate for informa-

48. *See id.* at 379 (discussing a number of violent incidents prompted by foreclosures).

49. *Id.* at 387-88.

50. *Id.*

51. *Id.* at 392.

52. *Id.* at 385.

53. KENNEDY, *supra* note 5, at 221-22.

54. ZINN, *supra* note 45, at 378.

55. KENNEDY, *supra* note 5, at 225-26.

56. *Id.* at 226.

57. *Id.* at 238. Long also promised "educational subsidies for the young, and pensions for the elderly." *Id.* However, Long could only deliver on his promise of a guaranteed income of $2500 per year by taxing to such an extent that no person could earn more than $3000 per year. *Id.* at 238-39.

58. *Id.* at 229.

59. *Id.* at 232.

60. *Id.*

61. *See id.* at 34-37 (stating that "[m]ost ominous of all was that Hoover bluntly labeled the 'orgy of mad speculation' that beset the stock market beginning in 1927").

tion,[62] the market devolved into a speculative bubble. What little regulatory structure that did exist,[63] was easily co-opted. For example, in 1927, in the face of mounting evidence that a speculative boom was developing, the Federal Reserve cut rates and injected more liquidity into the market.[64] This served only to feed the speculative frenzy, and has been termed "'one of the most costly errors'" in the Fed's history.[65] Conversely, in 1931, when the speculative frenzy had ceased and the economy was in desperate need of monetary stimulus, the Fed more than doubled the discount rate in the late fall in order to stem the outflow of gold.[66] It appears that the Fed was influenced by politics rather than sound policy.[67] Economists still debate the precise causes of the Great Depression, but all agree that the central failure was the volume of investment—and it is clear that there were few tools available to policymakers to counter this essential fact.[68]

No economist predicted the extent of the economic carnage. Professor Irving Fisher of Yale University wrote after the 1929 crash that "for the immediate future . . . the outlook is bright."[69] The au-

62. *See* Burton G. Malkiel, *Efficient Market Hypothesis, in* THE NEW PALGRAVE: THE WORLD OF ECONOMICS, *supra* note 35, at 211, 211 (declaring that "a capital market is said to be efficient if it fully and correctly reflects all relevant information in determining security prices"). There is substantial empirical support for the proposition "that if the flow of information is unimpeded" and transaction costs are low, a high degree of efficiency may be achieved. *See id.* at 211-18 (discussing various aspects of the "Efficient Market Hypothesis"). Malkiel concludes, however, that "the history of fads and excesses in speculative markets . . . gives me doubts that we should always consider the current tableau of market prices represents the best estimates available of appropriate discounted present value." *Id.* at 216. Thus, the best that can be said about the efficient market hypothesis is that it often holds true, particularly in its less strong forms. *Id.* at 215-16.

63. *See* KENNEDY, *supra* note 5, at 36-37 (describing the equity market landscape in the late 1920s).

64. *Id.* at 35-36; *see also* GALBRAITH, *supra* note 4, at 32 (asserting that the Fed was willfully "helpless" and could have done much to restrain the escalating bubble developing on Wall Street).

65. GALBRAITH, *supra* note 4, at 10 (quoting Adolph C. Miller, Member, Federal Reserve Board, Testimony Before the Senate Committee) (internal footnote omitted).

66. BARBER, *supra* note 6, at 126.

67. *See* GALBRAITH, *supra* note 4, at 10 (recounting that the Federal Reserve Bank of New York, in particular, had responded to pleas of foreign central bank leaders to lower rates in order to stem the flow of capital to the United States during the 1920s).

68. *See generally* MICHAEL A. BERNSTEIN, THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-1939, at 1-20 (1987) (reviewing several theories on the causes of the investment failure of the 1930s). Recently, economists have reached a "new consensus" about the source of the Great Depression, specifically: "[T]hat the proximate cause of the world depression was a structurally flawed and poorly managed international gold standard" that led to a monetary shock that contracted the world money supply. Bernanke & Carey, *supra* note 19, at 853; *see also* TEMIN, *supra* note 37, at 38 (claiming that the attempt to preserve the gold standard caused the Great Depression).

69. IRVING FISHER, THE STOCK MARKET CRASH—AND AFTER 269 (1930).

gust Harvard Economic Society[70] fared no better than Professor Fisher. In late 1930, the Society concluded that the Depression was nearly over when it actually was just beginning.[71] In fact, it would have been impossible to predict the extent of devastation to come; not only was it completely unprecedented, the economic doctrine of the day held that it could not endure for as long as it endured.[72] President Hoover predicted a speedy recovery.[73] President Hoover's optimism, without any justifiable basis in hindsight, was not at the time misguided. Indeed, it was President Hoover's job to be optimistic.

Mainstream economics of the day offered few tools to meet the problems of the Depression. Economic orthodoxy held that markets should be allowed to adjust and that wages in particular should be allowed to fall so that a new economic equilibrium could be established.[74] The dogma of the day was laissez-faire.[75] The dogma of the day also required a balanced budget, which effectively stripped the government of fiscal policy.[76] The gold standard meant that the money supply was relatively inelastic, which stripped the government of monetary policy.[77] The gold standard was accepted without condition by most economists and the Federal Reserve, and consequently, the money supply was linked to the nation's gold reserves.[78] Indeed, modern theories of fiscal policy and monetary policy hardly existed.[79] To the extent the government had such tools available, their proper use was not well understood, as is evidenced by the botching of mone-

70. *See* GALBRAITH, *supra* note 4, at 71 (describing the Harvard Economic Society).

71. *Id.* at 145.

72. *See supra* notes 9 and 44 and accompanying text (describing how contemporary economic theory did not initially believe a depression of such magnitude was upon the nation).

73. *See* BARBER, *supra* note 6, at 83-84 (quoting Hoover as stating in May 1930 that "'we have now passed the worst and with continued unity of effort we shall rapidly recover'").

74. *See* ROSENOF, *supra* note 9, at 89 (noting the failure of the laissez-faire economic approach and its "faith in private economic self-correction").

75. *See id.*

76. FDR castigated Hoover in the 1932 Presidential campaign for failing to balance the budget. BARBER, *supra* note 6, at 192.

77. President Hoover, for example, took for granted "America's commitment to gold convertibility at an established exchange rate." *Id.* This prevented the government from engaging in "monetary manipulation" such as expanding the money supply to stimulate growth. *See id.* (asserting that President Hoover would not have engaged in extensive "monetary manipulation," even if he had such power, if it would have endangered the value of gold).

78. BARBER, *supra* note 6, at 59.

79. *E.g.*, *id.* at 23-27 (summarizing deficiencies in monetary policy under the pre-New Deal Federal Reserve Board, including "considerable confusion" over monetary control instruments and lack of control over Federal Reserve District Banks).

tary policy both before and after the market break by the Fed.[80] Hoover's approach was largely psychological; his aim was to enhance business confidence.[81] Hoover's view was that "[g]overnment should not coerce, but it could and should cajole."[82]

Without any real tools and without any real diagnosis, economics provided precious little insight regarding the economic breakdown. Hoover, again reflecting the learning of the day, claimed the problem was largely an international one that had its cause in events beyond the control of the United States.[83] President Hoover's Secretary of Treasury, Andrew Mellon, counseled against any intervention and advised the President to allow the economy to "liquidate labor, liquidate stocks, liquidate the farmers, [and] liquidate real estate."[84] This would allow prices to fall and markets to function in a way that would stabilize the economy.[85] In the end, Hoover did more than any of his predecessors in attacking the calamity at hand.[86] He was, however, hopelessly hemmed in by doctrine, tradition, and his own view of the role of the federal government.[87]

In light of this fundamental confoundment, President Hoover seems more like a person in the wrong place at the wrong time than a conservative ideologue trapped in capitalist laissez-faire mythology.[88]

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80. Phillip Cagan, *Monetarism*, *in* THE NEW PALGRAVE: THE WORLD OF ECONOMICS, *supra* note 35, at 449, 451. Furthermore, as Cagan states:

> The monetarist proposition that monetary changes are responsible for business cycles was [initially] widely contested, but by the end of the 1960s the view that monetary policy had important effects on aggregate activity was generally accepted. The obvious importance of monetary growth in the inflation of the 1970s restored money to the centre of macroeconomics.

Id. at 451; *see also* FRIEDMAN & SCHWARTZ, *supra* note 31, at 686-95 (describing actions taken by the Federal Reserve System that resulted in changes in output).

81. BARBER, *supra* note 6, at 80-84 (detailing efforts of President Hoover to stimulate capital spending by business and state and local governments).

82. *Id.* at 82.

83. Hoover, *supra* note 8, at 392-93.

84. BARBER, *supra* note 6, at 82.

85. *Id.*

86. *Id.* at 191 (noting that "Hoover did move the federal government a considerable distance into domains that had formerly been held to be reserved for the private sector or for state and local authorities").

87. *Id.* at 190.

88. Indeed, one scholar has shown that President Hoover understood the shortcomings of laissez-faire economics "better than did most of the economists in that period." *Id.* at 189. Instead, Hoover was constrained by the "political and cultural environment of the times." *Id.* at 190. His political view that the federal government was constitutionally limited in its ability to intervene in the private economy hamstrung federal economic policy. *Id.* at 190.

As expressed, the Great Depression was unprecedented.[89] As will be shown, FDR's New Deal was the beginning of the modern Fed.[90] Even FDR and the Democratic Party were enamored with the dogma of a balanced budget.[91] Thus, Hoover is not to be faulted for his economics. FDR distinguished himself from Hoover not by his depth of economic understanding, but rather by his willingness to take action, to deviate from laissez-faire economics as a matter of federal policy, and to experiment.[92] Much of the vigor that distinguished FDR from Hoover was only possible in the wake of almost four years of unrelenting economic meltdown.[93] Before this calamity, no leader of the federal government could have mustered the political wherewithal to support massive government involvement in the economy.[94]

All of this transformed the election of 1932 into a national referendum on the role of the federal government in the economic life of the nation.[95] FDR's vision of an active government, responsible for managing and regulating the economy,[96] soundly defeated Hoover's more hide-bound and austere role for the federal government.[97] This victory has never been repudiated, and this paper posits that laissez-faire economics perished in the election of 1932.[98] The federal gov-

89. *See supra* notes 69-73 and accompanying text (describing how economists failed to recognize the devastation that the Depression would bring).

90. *See infra* notes 174-201 and accompanying text (demonstrating the evolution of FDR's New Deal policies into the Federal Reserve Board of today).

91. II SCHLESINGER, *supra* note 30, at 9-10 (stating that FDR adhered to the "orthodox" view that government must maintain a balanced budget, and that one of FDR's first actions was to cut government spending).

92. BARBER, *supra* note 6, at 192 (quoting FDR as promising "bold, persistent experimentation").

93. *See supra* note 9 and accompanying text (describing how the devastation of the Great Depression turned economic theory on its head).

94. Michael D. Bordo et al., *The Defining Moment Hypothesis: The Editors' Introduction* to THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 7 (Michael D. Bordo et al. eds., 1998).

95. KENNEDY, *supra* note 5, at 92-103 (noting that the Depression foretold Hoover's presidential loss in 1932).

96. *See infra* notes 100-105 and accompanying text (describing FDR's campaign economic promises).

97. FIONA VENN, THE NEW DEAL 22 (1998) (stating that FDR garnered 472 electoral votes, while Hoover won only 59).

98. The birth of laissez-faire is often associated with the classical economics of Adam Smith, David Ricardo, John Stuart Mill, and other early pioneers of economic thinking. *See* THOMAS SOWELL, CLASSICAL ECONOMICS RECONSIDERED 20-24 (1974). However, these pioneers actually recognized a significant role for government within the context of a free market economy. *Id.* at 21 (stating "[t]he classical economists were not rigidly opposed to all government intervention in the market"). Indeed, the suspicion most classical economists harbored with respect to government power was rooted in recognition that "government intervention in the economy was conceived of as intervention on behalf of the wealthy and powerful." *Id.* at 23. Part II of this Article will show that the New Deal severed

ernment's massive role in the life of our economy has instead been institutionalized.[99] Massive government presence is now a permanent reality. The challenge to the legal system implicit in this reality is how to rationally organize this massive presence in light of its macroeconomic objectives.

II. THE LAW AND MACROECONOMICS OF THE NEW DEAL

FDR broadly articulated the general economic content of his New Deal proposals throughout the campaign of 1932.[100] He rejected the idea that an "uncontrolled" economy "ever can mean prosperity."[101] Instead, he believed that government should dedicate itself to the conviction that "every one of our people is entitled to the opportunity to earn a living, and to develop himself to the fullest measure consistent with the rights of his fellow men."[102] FDR wanted to reconstitute the structure of our economy to make that structure more "serviceable" and to bring "our individual lives . . . to more perfect fulfillment."[103] FDR rejected the theory that with time the economy would correct itself; FDR tacitly recognized the famed John Maynard Keynes expression that in "the long run . . . 'we are all dead.'"[104] In the end, the New Deal was nothing less than a commitment to use the government to forge a "better ordered system of national economy."[105]

FDR left plenty of maneuvering room in leaving the specifics for later development. The very fact that the government would act beyond the Hoover tokenism and economic psychotherapy is what caused Americans to elect FDR.[106] Government management of macroeconomic performance, widespread government regulation, and stimulatory government expenditures had never really been tried before in a market-based economy;[107] consequently, the maneuvering

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monetary policy from special interest influence. Thus, government regulation or intervention need not be invariably accompanied by special interest domination.

99. For example, the modern Fed is expected to manage the economy and to cool inflationary pressures or to stimulate growth in the face of slowdowns. *See* 12 U.S.C. § 225a (2000).

100. *See* Franklin D. Roosevelt, Campaign Address at Madison Square Garden, New York City (Nov. 5, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 860, 860-65 (1938).

101. *Id.* at 861.

102. *Id.*

103. *Id.* at 862.

104. ROSENOF, *supra* note 9, at 20.

105. Roosevelt, *supra* note 100, at 864.

106. *See supra* notes 100-103 and accompanying text (quoting FDR's campaign promises for a strong economy).

107. KENNEDY, *supra* note 5, at 376 (describing FDR's revolutionary embrace of economic regulation during the New Deal).

room ultimately proved helpful in terms of allowing the New Deal to evolve in an experimental manner. Nevertheless, FDR did offer many specific program initiatives.[108] FDR specifically campaigned on a platform that recognized the government's power to cultivate "purchasing power in order that goods may be sold."[109] FDR adhered to the view that a competitive economy may mean that government regulation is necessary, at least as a "last resort."[110] FDR also recognized the need for government to protect individual "rights of personal competency" so as to allow each individual's power to be limited only by his ability.[111] Finally, under FDR's vision, government is obligated to prevent depressions[112] by managing its expenditures on public works and pursuing countercyclical economic policies.[113] In all, FDR outlined a new vision of the government's role in the economy in the election of 1932.

At the roots of FDR's vision was a skepticism regarding whether free markets alone could assure adequate macroeconomic performance.[114] The NIRA, for example, was nothing less than a government effort to eliminate market competition.[115] Thus, while FDR talked

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108. *See infra* notes 109-113 (describing FDR's economic initiatives during the campaign of 1932).

109. Franklin D. Roosevelt, Campaign Address on a Program for Unemployment and Long-Range Planning, Boston, Mass. (Oct. 31, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 100, at 842, 847.

110. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club, San Francisco, Cal. (Sept. 23, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 100, at 755.

111. *Id.*

112. *Id.* at 756.

113. Roosevelt, *supra* note 109, at 850.

114. *See* 15 U.S.C. § 78b(4) (2000) (providing the need for the Fed's intervention in financial systems). As the drafters of the Securities Exchange Act of 1934 stated:

> National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to the burden the national credit.

Id. From the point of view of today, this is no less than a stunning rebuke of laissez-faire free markets in the financial sector. From the point of view of 1934, it was simply a reality.

115. *See* Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2402 (2000). Seth Waxman, the former Solicitor General of the United States, has undertaken an excellent summary and analysis of the NIRA:

> The centerpiece [of the first New Deal statutes] was the National Industrial Recovery Act, or NIRA. It was modeled after the country's successful economic mobilization efforts during the First World War. The NIRA called for industry representatives to create what were known as "Codes of Fair Competition." Representatives of the oil industry, for example, would meet to establish standards

about regulation as "a last resort," regulation was a first resort of the New Deal, and part of the famous One Hundred Days, for those markets that had a long history of economic dysfunction.[116] As Justice Breyer has stated, after the New Deal the question regarding government regulation is not "'whether,' but 'how much.'"[117]

The political legacy of the New Deal regarding government responsibility for macroeconomic performance and stability has been powerful and durable. In 1980, Ronald Reagan clearly reaffirmed the responsibility that our political leaders bear for economic performance when he invited voters to ask a simple question: "Are you better off than you were four years ago?"[118] Bill Clinton used the same tactic in his campaigns, which were famous for their simplistic but effective approach: "It's the economy, stupid."[119] No president can today afford to ignore the economy with the hope that self-regulating markets will invariably produce politically acceptable levels of macroeconomic performance.

To a large extent, this political reality has been institutionalized. For example, the Federal Reserve Board exists to manage, even micromanage, business cycles.[120] Even this regulatory mechanism is a product of the New Deal.[121] Similarly, the sheer presence of the federal government in our economy has expanded dramatically.[122] In 1929, the federal government's budget consumed three percent of GNP and by the close of the century the government accounted for

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> and rules regarding wages for oil workers, rates of oil production, oil prices, and the like. The President would then review and approve each industry's Code, thereby giving it the force of law. The NIRA also gave the President broad powers with respect to specific industries, including, for example, the power to prohibit the interstate transportation of oil in excess of state production limits.

Id. The NIRA was a broad-based piece of legislation, encompassing many of America's industries. *Id.*

116. *See supra* note 110 and accompanying text (discussing FDR's campaign for minimal economic regulation in 1932).

117. Stephen Breyer, *Afterword*, 92 YALE L.J. 1614, 1614 (1983).

118. David Broder, *The Social Agenda Could Spoil the Party*, WASH. POST, Nov. 23, 1980, at C7 (internal quotation marks omitted). President Reagan was elected in response to both economic and social pressures. *Id.* The social agenda included constitutional amendments regarding pornography, abortion, and school prayer. *Id.* Reagan gave priority to the economic agenda and largely abandoned the social agenda.

119. Thomas L. Friedman, *Foreign Affairs; Domestic Affairs*, N.Y. TIMES, June 12, 1997, at A29 (noting that economic performance had shielded President Clinton from the political costs of personal scandal) (internal quotation marks omitted).

120. *See infra* notes 180-201 (describing the evolution of the Fed's powers during the New Deal).

121. KENNEDY, *supra* note 5, at 367 n.7.

122. *Id.* at 366-70.

twenty percent of the economy.[123] Post-New Deal, the buck stops at the White House if the economy disappoints, whether or not the President bears responsibility.[124] This has created constant political pressure for lawmakers to search for an ideal legal infrastructure to support economic performance. The New Deal marks the beginning of this search for an optimized legal infrastructure.

A. *Regulatory Infrastructure*

FDR made clear from the beginning of the New Deal that modern capitalism required significant regulation in order to function in a stable and rational manner, particularly in the financial sector.[125] While deeply wedded to free markets, the Great Depression convinced FDR that a laissez-faire policy was no longer sustainable.[126] In this respect, there had long been a creeping suspicion that a modern industrialized economy was subject to bouts of ruinous market volatility;[127] indeed, even business leaders had searched throughout the early twentieth century for a more rationalized market system.[128] Laissez-faire rhetoric was good politics, but business leaders had learned from panics in 1873, 1893, 1904, 1907, and 1921, that it was terrible economics.[129]

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123. *Id.* at 55.

124. *See* ROSENOF, *supra* note 9, at 11 (noting that the government can no longer take a passive role in regulating the economy).

125. *See* WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, at 41-42 (1963) (outlining FDR's initial executive actions, such as declaring a bank holiday and treating the economic crisis as if it were a war).

126. Recently, economists have recognized the folly of deregulated financial markets in the context of globalization. *See* STIGLITZ, *supra* note 17, at 139, 183 (stating that securities regulation and deposit insurance are critical to the success of market capitalism).

127. *See generally* CHARLES P. KINDLEBERGER, MANIAS, PANICS, AND CRASHES 70-71 (4th ed. 2000) (discussing various economic crashes throughout history). As Kindleberger states:

> In the United States, which was without a central bank after 1837, the major banks in New York were in a bind between their roles as profit seekers, which made them contributors to the instability of credit, and as possessors of country deposits against whose instability they had to guard.

Id. at 71.

128. *See id.* at 147-49 (discussing the establishment of clearinghouse certificates as a response to panics, prior to the creation of the Federal Reserve System).

129. *See id.* at 70-71. There is also strong evidence that many innovative regulatory reforms from the Progressive Era of the early twentieth century ultimately benefited the powerful interests that were supposedly the target of regulation. *See* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM, A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 3 (1963); *see also* LEUCHTENBURG, *supra* note 125, at 56-57 (discussing the influence of companies like General Motors and other powerful businessmen on the drafting on the National Industrial Recovery Act).

No less than three major financial regulatory acts were passed as part of the first one hundred days of the New Deal.[130] Some of the New Deal's first major regulatory initiatives were doomed from almost the very beginning. One prominent example is the National Industrial Recovery Act.[131] This Act commanded mandatory self-regulation of virtually all of American business.[132] One purpose of the Act was to regulate free markets across a wide range of products, including the regulation of prices and output.[133] Ultimately, the heart of the Act was declared unconstitutional and has not formed any significant part of the New Deal legacy.[134] The real legacy of the New Deal's regulatory initiatives lies in innovations designed not to quell but to facilitate market action, as the New Deal was fundamentally designed to do.[135] Thus, these aspects of the New Deal were specifically designed to assist markets to do what markets do best—allocate resources in accordance with supply and demand and thereby unleash individual initiative.[136]

1. The Securities Act of 1933[137] *and the Securities Exchange Act of 1934.*[138]—The key to the New Deal's approach to the Wall Street debacle boils down to one word—disclosure.[139] Disclosure would inspire investor confidence and investor confidence would, in turn, revive investment.[140] The Depression decimated investment, and investment is a key component of the GDP, as well as a key source of macroeconomic instability.[141] In addition, the then recent speculative excesses of the 1920s imposed severe macroeconomic conse-

130. *See* LEUCHTENBURG, *supra* note 125 and accompanying text (listing the bank bill, the economy measure, and FDR's amendment to the Volstead Act).

131. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

132. *See id.* § 1, 48 Stat. at 195.

133. *Id.*

134. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (finding Section 3 of the National Industrial Recovery Act invalid as an unconstitutional delegation of legislative law-making power).

135. *See* VENN, *supra* note 97, at 3 (characterizing the New Deal as a formalization of the political and economic status quo rather than as a base reform measure); *see also* KENNEDY, *supra* note 5, at 370-80 (noting the drastic increase in privately owned housing since the New Deal).

136. KENNEDY, *supra* note 5, at 374.

137. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2000)).

138. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78mm (2000)).

139. *See* H.R. REP. No. 73-85, at 1 (1933) (describing the purpose of the bill as the "full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails").

140. *Id.* at 1-2.

141. GORDON, *supra* note 20, at 38, 501-10.

quences.[142] Congress was keenly aware that "[a] rise in the security markets stimulates economic activity in all lines of business, a fall in the market precipitates a decline"[143] and that securities markets "uncontrollably accentuated natural moderate fluctuations . . . into mad booms and terrible depressions."[144] FDR similarly focused on repairing and maintaining investor confidence as a means of enhancing macroeconomic performance.[145] The federal securities laws were enacted with macroeconomics at the front and center of political and public consciousness.

Thus, today, the federal securities laws impose disclosure obligations upon issuers of securities[146] and publicly held companies,[147] and sanction fraudulent disclosures made in connection with securities.[148] In addition, the federal securities laws impose minimum professional obligations upon broker-dealers,[149] and these obligations also impose truthful disclosure obligations for the benefit of customers.[150] The theory behind the legislation was that through disclosure, inherently unstable financial markets could be stabilized because an informed investing public would have a high degree of confidence and panics and bubbles could be averted.[151] Consequently, this confidence

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142. *See* H.R. REP. NO. 73-1383, at 1-5 (1934).

143. *Id.* at 4.

144. *Id.* at 3. Modern economists also recognize the risks posed by unregulated financial markets. *See* KINDLEBERGER, *supra* note 127, at 220-21 (stating that panics and crashes are realities that simplistic economic theories like the efficient capital markets theory fail to explain).

145. *See* H.R. REP. NO. 73-85, at 1-2 (providing FDR's message to Congress on March 29, 1933). The Securities Act took specific aim at the laissez-faire approach that prevailed prior to the New Deal. *Id.* at 3. Incidentally, one half of the new securities issued in the speculative frenzy of the 1920s were ultimately of no value. *Id.* at 2.

146. *E.g.*, 15 U.S.C. § 77e(a) (2000) (requiring registration statements of securities to be filed in sales or deliveries of securities through interstate commerce).

147. *E.g.*, *id.* § 77j (setting forth the information that companies must include in prospectuses).

148. *E.g.*, *id.* § 78j (making it unlawful to make and use deceptive devices that have been purchased or sold in connection to the National Securities Exchange).

149. *See id.* § 78h (setting forth various restrictions on brokers and dealers with respect to borrowing and lending).

150. *See id.* § 78h(b) (prohibiting brokers or dealers from lending a customer's securities without prior approval from the customer); *see also generally* Steven A. Ramirez, *The Professional Obligations of Securities Brokers Under Federal Law: An Antidote for Bubbles?*, 70 U. CIN. L. REV. 527 (2002) (providing an overview of the self-regulatory regime which imposes professional obligations upon securities brokers).

151. In this vein, the House Report accompanying the Securities Exchange Act of 1934 stated:

> Unless constant extension of the legal conception of a fiduciary relationship—a guarantee of "straight shooting"—supports the constant extension of mutual confidence which is the foundation of a maturing and complicated economic system, easy liquidity of the resources in which wealth is invested is a danger rather than a

would serve to quell panics and to encourage investment as perceptions of market fairness increased.[152] Only a perception of fairness[153] and rationality would revive and stabilize Wall Street.[154]

So, how has the New Deal approach fared?[155] The federal securities laws have been a success. For six decades after their promulgation, panics have largely disappeared and American capital markets have successfully fueled the demand for start-up capital, thereby aiding the economy's ability to generate continued growth through innovation.[156] The market disruptions that have occurred have not damaged the economy and have been temporary in nature.[157]

> prop to the stability of that system. When everything everyone owns can be sold at once, there must be confidence not to sell. Just in proportion as it becomes more liquid and complicated, an economic system must become more moderate, more honest, and more justifiably self-trusting.

H.R. REP. No. 73-1383, at 5 (1934).

152. *Id.*

153. *See id.* (emphasizing the importance of investor confidence to the stability of our economic system); *see also* 15 U.S.C. § 78b(3) (stating that securities markets are "frequently" subject to "manipulation . . . excessive speculation, . . . and unreasonable fluctuations" causing national economic emergencies).

154. H.R. REP. No. 73-85, at 2 (1933) (quoting FDR's message to Congress on March 29, 1933) (stating that truthful securities dealings should result in increased public confidence).

155. Much debate surrounds the efficacy of the federal securities laws. However, the period of 1935 (the first full year after the enactment of the Exchange Act) to the present has been marked by steady economic growth. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, CURRENT-DOLLAR AND "REAL" GROSS DOMESTIC PRODUCT 1929-2002, *at* www.bea.gov/bea/dn/gdplev.xls (last visited Mar. 25, 2003); *see also* Irwin Friend & Edward S. Herman, *The S.E.C. Through a Glass Darkly*, 37 J. BUS. 382, 386 (1964) (noting that "since the advent of the S.E.C. the stockmarket has had no debacle corresponding to that in the early 1930's"). The empirical record is most consistent with the conclusion that the federal securities laws have enhanced investor confidence and helped reduce the risk premiums demanded by investors enhancing macroeconomic investment, as well as microeconomic allocative efficiency. H.R. REP. No. 88-1418, at 4 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3013, 3016. Recent lessons from the shortcomings of globalization have also led economists to suggest that sound securities regulation is critical regulatory infrastructure for the success of free markets. STIGLITZ, *supra* note 17, at 139. *Compare* George J. Stigler, *Public Regulation of the Securities Markets*, 37 J. BUS. 117, 124 (1964) (asserting that "studies suggest that the S.E.C. registration requirements had no important effect on the quality of new securities sold to the public"), *with* Friend & Herman, *supra*, at 389 (expressing doubt over whether "any person reasonably well acquainted with the evolution of stock-market practices between the pre- and post-S.E.C. periods could lament or underrate the success of the new legislation in eradicating many of [the] weaknesses in our capital markets").

156. *See* S. REP. No. 104-98, at 8 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679 (stating that "[t]he United States securities markets are the most liquid and deep in the world . . . [which is] . . . largely the result of a high level of investor confidence in the integrity and efficiency of our markets").

157. *See Market Reform Act of 1989: J. Hearings Before the Subcomm. on Sec. of the Sen. Comm. on Banking, Hous., and Urban Affairs*, 101st Cong. 8 (1989) (statement of Sen. Gramm) (noting that the market shock of October 19, 1987 did not damage the economy).

America's financial system has served as a model for the world.[158] Nothing like the terrible speculation and subsequent crash of the 1920s has ever stricken Wall Street since the New Deal.[159] Here, Congress seems to have rejected notions of laissez-faire efficiency in favor of establishing "fair" markets in order to inspire investment and enhance macroeconomic performance.[160] Congress, for one, has long been a constant supporter of federal securities regulation.[161] Each time Congress materially amended the securities laws, it reaffirmed this goal.[162] Even recently, when Congress restricted investor rights

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158. *See, e.g.*, Arthur Levitt, Remarks at 22d Annual Securities Regulation Institute (Jan. 25, 1995), *in* 1 SWEEPING REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAW 300, 304 (1996) (explaining that "[o]ur markets are the best in the world, partly because our securities laws are the best in the world"); Gerhard Wegen, *Congratulations from Your Continental Cousins, 10b-5: Securities Fraud Regulation from the European Perspective*, 61 FORDHAM L. REV., S57, S74 (1993) (inviting Rule 10b-5 to "visit" both Western and Eastern Europe); *Going for the Golden Egg*, ECONOMIST, Sept. 28, 1996, at 89-90 (stating that "America has been much better than Europe at hatching small firms" and detailing European efforts to imitate American securities markets).

159. *See* H.R. REP. NO. 73-85, at 2 (1933) (stating that between 1920 and 1930 about one-half of the $50 billion of new securities issued were "worthless"); 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 216 n.124 (Aspen Law & Bus. 3d ed., vol. 1998) (1951) (noting that new securities issues increased six-fold between 1933 and 1935 and over ten-fold between 1933 and 1936).

160. *See, e.g.*, 15 U.S.C. § 78b (2000) (stating that trading in securities is "affected with a national public interest" demanding the maintenance of "fair and honest markets" because unfair markets can lead to "national emergencies" resulting in "widespread unemployment" and "dislocation of trade").

161. *See, e.g.*, H.R. REP. NO. 88-1418, at 4 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3013, 3016. The House Report stated:

> The Securities Act of 1933, relating to truthful disclosure of information about new securities offerings; the Securities Exchange Act of 1934, relating to disclosure of information about listed securities and regulating practices in exchange and over-the-counter operations; and succeeding legislation which is administered by the Securities and Exchange Commission, represent legislation of which this committee and the Congress are justly proud. These statutes have gone a long way in the mitigation and elimination of undesirable practices in the securities field, in the restoration of confidence in securities markets, and in the protection of the investing public.

162. Congress has emphasized investor protection and investor confidence as an important, even compelling, policy objective. H.R. REP. NO. 94-123, at 43-44 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 220-222; *see also* S. REP. NO. 91-1218, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5254, 5256 (stating that the purpose of the amendment to S. 2348 is "[t]o provide greater protection for customers of registered brokers and dealers and members of national securities exchanges"); H.R. REP. NO. 88-1418, at 6-7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3013, 3019-20 (demonstrating congressional determination to maintain investor protection). In fact, each of the above legislative reports relates to legislation specifically designed to enhance the investor protection elements of the federal securities laws. *See* Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 97 (codified as amended in scattered sections of 15 U.S.C.) (expanding SEC oversight of self-regulatory organizations that supervise broker-dealers); Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636, 1637 (codified as amended at 15 U.S.C. §§ 78aaa-78lll

under the federal securities laws,[163] in response to special interest pressure,[164] the fundamental disclosure obligations imposed by the New Deal remained intact,[165] as did Congress's commitment to protecting investor confidence.[166] "It is a basic teaching of this nation's financial history that continued economic health fundamentally depends upon the maintenance of investor confidence."[167] From a macroeconomic point of view, investor confidence is central to stimulating investment and hence maximizing GDP;[168] microeconomic views of the federal securities laws often fail to even mention such considerations[169] or even the term "investor confidence."[170] In the end, these regulatory acts lowered the cost of capital and stabilized financial markets.

2. *The Banking Act of 1933 and the Banking Act of 1935.*—The prostrate banking industry was nearly brain dead in 1933 under conditions of laissez-faire efficiency.[171] The New Deal attacked the laissez-faire devastation on several fronts. The most durable elements of the

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(2000)) (establishing the Securities Investor Protection Corporation); Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 565, 565 (codified as amended in scattered sections of 15 U.S.C.) (extending the regulatory power of the federal securities laws and the SEC to over-the-counter markets).

163. *See* Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.) (reforming private litigation claims for suits arising under the Securities Act of 1933).

164. *See, e.g.*, Ramirez, *supra* note 38, at 1087 n.156 (showing special interest influence in the enactment of the Private Securities Litigation Reform Act of 1995).

165. *See, e.g.*, H.R. REP. NO. 104-369, at 47 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 746 (setting forth that auditors are required to disclose fraud by their corporate clients).

166. In fact, according to the Statement of Managers in the Conference Report accompanying the PSLRA, "Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets." *Id.* at 31.

167. H.R. REP. NO. 94-123, at 43-44.

168. *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 64-65 (2001) (stating that empirical data "does fairly suggest that securities markets cannot grow or expand to their full potential under a purely voluntary legal regime" and that mandatory law is needed to stem market "crashes").

169. Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1028-34 (2000) (discussing the benefits of the mandatory disclosure requirement of the federal securities laws and failing to link "vague notions of investor confidence" to macroeconomic performance).

170. *See* Romano, *supra* note 34, at 2427-28 (arguing against any mandatory federal disclosure regime for securities but neglecting to discuss investor confidence).

171. *See* VENN, *supra* note 97, at 24 (noting that "[b]y the time of [Roosevelt's] inauguration, the governors of 34 states had closed their states' banks, leaving millions of Americans facing the prospect of coping without access to money").

New Deal reforms were federal deposit insurance and the perfection of modern monetary policy.[172]

a. *Modern Monetary Policy.*—The innovation of modern monetary policy, complete with a high degree of political independence for the Federal Reserve Board, is a key element of macroeconomic infrastructure. The legacy of the New Deal here is twofold: the creation of the modern Fed and the elimination of a money supply rigidly limited by the Gold Standard.[173]

Originally, the Secretary of the Treasury and the Comptroller of the Currency, both executive officers, served on the Fed, but the Banking Act of 1933[174] terminated their membership.[175] The Banking Act of 1933 also set the tenure of the Fed governors at twelve to fourteen years,[176] and further centralized the control of monetary policy in the Board.[177] The purpose of the Banking Act of 1933 was to endow the Fed with more political insulation so that it could exercise its control over monetary policy in a way that represented the "general public interest" and did not operate in accordance with "a majority of special interests."[178] The Banking Act was an essential part of FDR's economic recovery plan and he intervened personally to assure its passage.[179] The Banking Act represents the commencement of the Fed's modern existence in that the Banking Act definitively vested monetary policy in the Fed and assured that the Fed was endowed with a high degree of independence.

Due to the New Deal, the Fed is also now remarkably independent of the appropriations process. The Fed has the power to assess member banks to supply funds for its operating expenses.[180] In 1933, Congress declared these funds not to be "[g]overnment funds or appropriated moneys."[181] As a result, the expenditure of these funds is

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172. *See* FRIEDMAN & SCHWARTZ, *supra* note 31, at 12 (discussing the impact of the Treasury and the Federal Reserve System after 1936).

173. *See* KENNEDY, *supra* note 5, at 136, 274 (relaying some of the positive effects of monetary policy).

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

175. *Id.* § 6, 48 Stat. at 166.

176. *Id.* § 6, 48 Stat. at 166-67.

177. *See, e.g.*, *id.* § 8, 48 Stat. at 168 (creating the Federal Open Market Committee, which partly consists of members of the Board, and whose functions include regulating open-market operations for all Federal Reserve Banks).

178. H.R. REP. NO. 74-742, at 1, 6 (1935).

179. *See* JEFFREY WORSHAM, OTHER PEOPLE'S MONEY 45 (1997) (explaining that "[p]residential intervention was instrumental to secure passage of the [Banking] act").

180. 12 U.S.C. § 243 (2000).

181. *Id.* § 244.

essentially free of congressional oversight.[182] Similarly, the Fed has the power to determine freely the compensation of its employees without being restricted by government service pay scales.[183] All of this insulation from political influence has prompted Professor Alfred Aman to state that "[t]he Fed is one of the most powerful and independent federal agencies engaged in economic regulation."[184] This may be somewhat of an understatement; the Fed is the only regulatory agency that is totally self-funded and free from the appropriations process.[185] Occasionally, the Fed has been subject to government budgetary review and audit,[186] but the general rule is that it need not annually submit its budget to Congress for approval.[187]

The reasons why Congress created the Fed and endowed it with such extraordinary independence and power seem clear. The primary reason given for the Federal Reserve Act of 1913[188] was to "furnish an elastic currency."[189] Although modern economic theory associates money supply manipulation with monetary policy,[190] in 1913 an "elastic currency" referred to a more basic economic need.[191] Specifically, Congress was far more concerned with "seasonal" currency needs and the mobility of reserves (or liquidity) to meet the

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182. *See id.* §§ 243-244 (granting to the Fed the power to decide how to spend the money collected from member banks).

183. *See id.* § 243 (allowing the Fed to assess member banks as a means of funding the salaries of Fed employees).

184. Alfred C. Aman, Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837, 838-39 (1989); *see also* JOHN T. WOOLLEY, MONETARY POLITICS: THE FEDERAL RESERVE AND THE POLITICS OF MONETARY POLICY 1 (1984) (identifying the Federal Reserve as the highest ranked institution among powerful governmental institutions).

185. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1999 app. 1165 (1998) (stating that the Fed's operations are not included in the budget and its budget is not reviewed by the President).

186. *See* ACCOUNTING & INFO. MGMT. DIV., U.S. GOV'T ACCOUNTING OFFICE, REP. NO. GAO/AIMD-96-5, FEDERAL RESERVE BANKS: INTERNAL CONTROL, ACCOUNTING, AND AUDITING ISSUES (1996) [hereinafter GAO REP.] (reporting the results of a GAO audit of the Dallas Federal Reserve Bank).

187. *See* 12 U.S.C. § 244. The Government Accounting Office has reviewed the Federal Reserve's operations. *See Fed Chief Takes Exception to GAO's Critical Report*, WALL ST. J., Apr. 17, 1996, at C22 (reporting Chairman Greenspan's response to the GAO report finding that the Fed suffered from lax internal controls); *see also* GAO REP., *supra* note 186; John R. Wilke, *Showing Its Age: Fed's Huge Empire, Set Up Years Ago, Is Costly and Inefficient*, WALL ST. J., Sept. 12, 1996, at A1 (summarizing the GAO's findings of budgetary excesses at the Fed).

188. *See* Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at various sections of 12 U.S.C. (2000)).

189. H.R. REP. NO. 63-69, at 1 (1913).

190. FRIEDMAN & SCHWARTZ, *supra* note 31, at 533 (discussing change in the intellectual climate and political opinions regarding government intervention in economic activity post-1929).

191. *See id.* at 189-96.

cyclical agricultural demand for money.[192] These seasonal disruptions in currency demand caused panics and bank runs that, in turn, triggered severe economic contractions in 1873, 1884, 1890, 1893, 1896, and 1907.[193] By the time of the passage of the Banking Act of 1935, Congress explicitly understood the relationship between money supply and output and re-conceived the Fed's role from mere currency "accommodation" to protector of "business stability."[194] The independence Congress extended to the Fed must be viewed as a recognition of the dangers of political influence over monetary policy. Commentators have long demonstrated that politicians face an irresistible urge to inflate currencies for political gain.[195]

With respect to the gold standard, the New Deal took important steps to allow the money supply to expand independently from the nation's gold supply. The abandonment of the gold standard was enacted as part of the one hundred days, on April 19, 1933.[196] This innovation thereby freed the money supply from the shackles of the gold standard. Combined with the reform of the Fed, the New Deal secured a depoliticized monetary policy mechanism, one which has served to stabilize economic growth throughout the post-World War II era.[197]

So, how has the New Deal's creation fared? According to the vast majority of mainstream commentators, it has been an unconditional success.[198] While the modern Fed has certainly had its critics, there seems to be little doubt that the pre-New Deal Fed was dominated by narrow, short-sighted special interests that exercised power to exacer-

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192. *See* H.R. REP. No. 63-69, at 5-6 (recognizing the immediate currency needs of the financial and business world at that time); *see also* FRIEDMAN & SCHWARTZ, *supra* note 31, at 192 (discussing the need for cyclical liquidity).

193. *See* H.R. REP. No. 63-69, at 3-4 (discussing the general background of banking and currency that called for H.R. 7837).

194. H.R. REP. No. 74-742, at 9 (1935).

195. *See* Geoffrey P. Miller, *An Interest Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433, 436-45 (1998) (discussing the rent-extraction motivation for inflation).

196. II SCHLESINGER, *supra* note 30, at 20.

197. *See supra* note 155 (detailing the tracking of GDP by Bureau of Economic Affairs).

198. *See, e.g.*, Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 553 (2000) ("The historical and empirical record suggests that the Fed has not exercised its power over monetary policy for the benefit of special interests."). This is not to say that the Fed is completely insensitive to politics. No organ of American government is immune from political pressure. *Id.* at 545-46; *see also* Tony Caporale & Kevin B. Grier, *A Political Model of Monetary Policy with Application to the Real Fed Funds Rate*, 41 J.L. & ECON. 409, 423 (1998) (finding that Presidents and Congressional leaders may influence whether monetary policy is restrictive or expansionary, but not showing any indication of special interest influence).

bate the Depression.[199] Even former President Hoover praised the modern Fed for its "many excellencies" in managing monetary policy.[200] Today, it would be inconceivable to have modern economy without monetary policy and the accompanying legal "infrastructure" needed to assure political independence.[201] The creation of a politically independent monetary authority, within the bounds of the Constitution, is exemplary of the power of the law to further macroeconomic ends.

b. *Deposit Insurance.*[202]—Congress created the Federal Deposit Insurance Corporation (FDIC) in order to stem the massive disintermediation caused by a cascade of bank failures in the early 1930s.[203] Panics were pervasive and bank runs were proliferating.[204] Deposit insurance was designed to make bank deposits as safe as government bonds in order to stem bank runs and protect communities from the economic shock of bank failures.[205] The aim was to restore depositor confidence to prevent the withdrawal of funds from the

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199. Scholars have found that under this regime, the Fed allowed the interests of the banking industry to dominate monetary policy—even to the extent of causing tight monetary policies in the depths of the Great Depression, which greatly exacerbated that calamity. *See* Gerald Epstein & Thomas Ferguson, *Monetary Policy, Loan Liquidation and Industrial Conflict: The Federal Reserve and the Open Market Operations of 1932*, 44 J. ECON. HIST. 957, 982-83 (1984) (concluding that the Fed tightened money supply in 1932 to 1933 to enhance bank profits from government securities while disregarding the detrimental effect on the rest of the economy).

200. U.S. COMM'N ON ORG. OF THE EXECUTIVE BRANCH OF GOV'T, THE HOOVER COMMISSION REPORT App. N at 109 (1949) [hereinafter HOOVER COMMISSION REPORT].

201. Jerry L. Jordan, *Hayekian Economic Infrastructure as a Foundation for Sustained Prosperity*, 19 CONTEMP. ECON. POL'Y 20, 26 (2001) (stating that "economic infrastructure plays a major role in determining economic prosperity" and that the ideal infrastructure includes a credible monetary authority).

202. Banking Act of 1933, ch. 89, § 8, 48 Stat. 162, 168 (codified as amended at 12 U.S.C. §§ 1811-1832 (2000)). The Federal Savings and Loan Insurance Corporation (FSLIC), a savings and loan corollary to the FDIC, was formed in 1934. National Housing Act, ch. 847, § 402, 48 Stat. 1255, 1256 (1934) (codified at 12 U.S.C. § 1724).

203. *See* Laurie S. Goodman & Sherrill Shaffer, *The Economics of Deposit Insurance: A Critical Analysis of Proposed Reforms*, 2 YALE J. ON REG. 145, 146 (1984) (stating that "[d]eposit insurance acts as a stabilizer by preventing bank runs and the dangerous reduction in the nation's money supply that large scale bank failures can cause" and that its "major justification" rests on "macroeconomic grounds" (footnote omitted)).

204. KENNEDY, *supra* note 5, at 132-33.

205. Congressman Steagall commented during a debate on deposit insurance:

> [T]he purpose of this legislation is to protect the people of the United States in the right to have banks in which their deposits will be safe. They have a right to expect of Congress the establishment and maintenance of banks in the United States where citizens may place their hard earnings with reasonable expectation of being able to get them out again upon demand.

77 CONG. REC. 3837, 3840 (1933) (remarks of Rep. Steagall).

banking system.[206] Once deposits returned freely to the banking system, liquid assets could be transformed into loans so as to unleash consumption and investment supported by bank loans.[207] Bank failures, thus, had macroeconomic consequences because failures would result in a contraction of the money supply.[208]

Of course, the presence of federally guaranteed deposit insurance also lowered the cost of funds for insured banks.[209] FDR stated that the purpose was not just "to protect depositors, but to make more serviceable the whole banking system."[210] This in turn, would enhance the ability of the banks to fund economic expansion.[211] Similarly, because panic-induced runs ultimately threaten even sound banks, the presence of deposit insurance relieves the entire industry of the need to maintain protective reserves to guard against deposit demands arising from problems associated with competitor banks.[212]

The New Deal abolished macroeconomically significant bank runs as a result of this regulatory innovation.[213] Deposit insurance also greatly reduced the relative frequency of bank failures.[214] Econo-

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206. Helen A. Garten, *Still Banking on the Market: A Comment on the Failure of Market Discipline*, 5 YALE J. ON REG. 241, 250 n.40 (1988) (noting the desirability of having a stable banking system).

207. Congress passed the 1933 provisions "[i]n order to provide against a repetition of the present painful experience in which a vast sum of assets and purchasing power is 'tied up.'" S. REP. NO. 73-77, at 12 (1933).

208. *See* Kenneth E. Scott & Thomas Mayer, *Risk and Regulation in Banking: Some Proposals for Federal Deposit Insurance Reform*, 23 STAN. L. REV. 857, 858-59 (1971) (discussing the effects of deposit insurance in terms of macroeconomics).

209. Marie T. Reilly, *The FDIC as Holder in Due Course: Some Law and Economics*, 1992 COLUM. BUS. L. REV. 165, 200 (discussing the FDIC's ability to pool risk and therefore lower cost).

210. Franklin D. Roosevelt, Letter and Statement Formulating a Plan to Admit Non-Member State Banks to the Deposit Insurance Fund from Franklin D. Roosevelt to Jesse Jones, Chairman of the Reconstruction Finance Corporation (Oct. 23, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 433, 437.

211. *See* Scott & Mayer, *supra* note 208, at 858-59 (asserting that uninsured bank failures would sharply reduce U.S. money supply).

212. *See id.* at 859, 867 (stating that even sound banks are subject to debilitating runs and noting that failures come in groups so that large reserves are needed just when times are adverse).

213. KENNEDY, *supra* note 5, at 366 (noting that bank failures dropped from a rate of hundreds per year before the Depression to less than ten per year after 1933).

214. Macey & Garrett, *supra* note 34, at 215 (showing that the number of bank failures after the advent of deposit insurance did not reach 1933 levels for over fifty years). One commentator has remarked: "The deposit insurance system turned out . . . to be one of the most brilliant and successful of the accomplishments of the Hundred Days." II SCHLESINGER, *supra* note 30, at 443 (noting that total bank failures for the period of 1934 to 1940 were less than any year during the 1920s and no more than 8% of the total from 1933). Others have stated that "[a]ll in all, government deposit insurance is a brilliant solution to a very difficult problem." Scott & Mayer, *supra* note 208, at 867.

mists from Milton Friedman to John Kenneth Galbraith have remarked upon the success of the FDIC.[215] It is certainly the case that in the 1980s and 1990s a massive wave of failures hit the banking industry.[216] I have previously explained that this was a direct result of ill-conceived neoclassical calls for deregulation and a pervasively irrational regulatory environment.[217] Indeed, even as early as 1985, industry insiders were calling for "enhance[ed] bank supervision" in the wake of deregulation of bank powers.[218]

It is also the case that neoclassical theorists continue to maintain that deposit insurance should be rolled back so that depositors can exercise discipline over excessively risky banks. As Professor Garten has shown, however, any theoretical argument that depositors have sufficient resources and expertise to impose discipline on banks cannot be squared with reality.[219] First, most depositors will control risks through easier methods than analyzing the level of risk a bank is exposed to, including simply keeping lower balances in the banking system.[220] This would have serious macroeconomic consequences, as FDR's goal of strengthening the banking system to fuel growth would be undermined, particularly in bad times.[221] Second, Professor Garten has shown that the neoclassical claims that depositors can be empirically shown to exert discipline over bank managers are logically inconsistent, because such evidence only shows that deposit insurance has not eliminated market discipline.[222] In sum, in a world of infinite distractions there is little reason to think that depositors will pay attention unless events trigger wholesale panic; this was precisely the reality that FDR faced when deposit insurance was enacted.[223] Such a reality is macroeconomically unsound. Mainstream macroeconomists now recognize the risk that mass bank failures, by reducing buying power

215. William M. Isaac, *The Role of Deposit Insurance in the Emerging Financial Services Industry*, 1 YALE J. ON REG. 195, 198 (1984).

216. Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 564-70 (2000).

217. *Id.* at 567-68.

218. Goodman & Shaffer, *supra* note 203, at 149. Both Goodman and Shaffer earned Ph.Ds from Stanford University. *Id.* at 145. Goodman became a Senior Economist with Citibank, while Shaffer became a Senior Economist with the Federal Reserve Bank of New York. *Id.*

219. Garten, *supra* note 206, at 248.

220. *Id.*

221. *Id.*

222. *Id.* at 241.

223. *See* Scott & Mayer, *supra* note 208, at 860 (commenting that "[t]he only practicable way the small depositor can find out that a depository institution is unsafe is to have it suspend payment, and by that time it is too late"). Depositors cannot detect frauds or evaluate financial information at a reasonable cost. *Id.*

and contracting the money supply, pose to macroeconomic performance.[224] Thus, the law and macroeconomics of the New Deal again served to endow our economy with a critical part of an optimized regulatory infrastructure.

B. *Social Infrastructure*

Social unrest can lead to political instability. This in turn can lead to economic instability as political risks become manifest.[225] This implies a higher cost of capital and therefore macroeconomic contraction. Similarly, social fear can lead to a loss of confidence, a drag on consumption and trigger a credit-crunch (or a liquidity trap), which in turn leads to macroeconomic contraction.[226] A socially secure consumer is a consumer ripe for maximum exploitation by entrepreneurs and business people. Therefore, government should provide social conditions that curb political instability, protect citizens from exogenous sources of fear, and support a prosperous and secure consumer.

1. *Social Security Act.*—One of the most durable and significant elements of the New Deal was the Social Security Act.[227] Like many New Deal initiatives the Social Security Act was challenged constitu-

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224. *See* Galbraith, *supra* note 4, at 191-92 (stating that deposit insurance remedied a "grievous defect" of laissez-faire economics and that "[r]arely has so much been accomplished by a single law"); GORDON, *supra* note 20, at 221 (explaining the causes of the Great Depression and concluding that "after September 1931, the [macroeconomic] contraction was caused mainly by monetary factors, including the enormous loss of lifetime savings in bank failures").

225. Neoclassicists recognize that the market does not correctly price political risk. *See* Claire A. Hill, *How Investors React to Political Risk*, 8 DUKE J. COMP. & INT'L L. 283, 312-13 (1998). Investors have a difficult time assessing political risk. *Id.* at 286. Thus, the government's ability to stem such risk will enhance economic performance. *See* Michael K. Young, *Lessons From the Battle Front: U.S.-Japan Trade Wars and Their Impact on the Multilateral Trading System*, 33 GEO. WASH. INT'L L. REV. 753, 761 n.16 (2001) (describing political stability as an important prerequisite to the continued growth of the U.S. economy).

226. When actors are exceedingly pessimistic about economic prospects, an expansive monetary policy fails to lead to output gains because both consumption and investment are stilted by the belief that prices will decline if expenditures are deferred. Or, investors can become so risk averse that money balances remain high despite interest rate cuts. In such a context, monetary policy can become impotent. Indeed, according to a well-known vernacular, trying to stimulate an economy through monetary policy alone can be like "pushing on a string." GORDON, *supra* note 20, at 213-14, 565. Thus, monetary policy cannot always be a trusted means to stem economic instability. The New Deal, as previously mentioned, marks the birth of monetary policy.

227. Social Security Act, Pub. L. No. 74-271, § 202(a), 49 Stat. 620, 623 (1935). Today, Social Security remains a hot political topic. Jonathan Barry Forman, *Federal Tax Policy in the New Millennium: Universal Pensions*, 2 CHAP. L. REV. 95, 110 (1999). However, it is noteworthy that no politician has openly called for the abolition of the system.

tionally and like many of the New Deal's most prominent long-term successes it survived the challenge.[228] In part, this reflects the death knell of judicial laissez-faire, which corresponds to the economic, political, and social death of laissez-faire during the same era.[229]

FDR signed the Social Security Act into law with the aim of enhancing macroeconomic stability.[230] The Act provided unemployment insurance, pensions for retired workers, aid to dependent children, and other social insurance programs.[231] To FDR, the Act consequently created a "cornerstone" in a "structure" that was specifically designed to diffuse any depressions that might arise in the future.[232] The Act was not just about "human needs" but also about placing the American economy upon a firm foundation.[233] Certainly, assuring that workers had an income stream during periods of unemployment would stimulate consumption in times of economic hardship.

Nevertheless, there were other macroeconomic objectives to Social Security. For instance, government can raise the propensity of consumers to consume by placing them on a more secure economic footing.[234] Moreover, the Act also would encourage workers to exit the workforce upon reaching retirement age.[235] This would shrink the labor pool and raise wages, allowing business to tap an enhanced pool of potential consumption to fuel profitability and innovation.[236]

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228. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 583, 585 (1937) (upholding a tax imposed by Title IX of the Social Security Act of 1935 because its impositions "conform[ed] to the canon of uniformity" required by the Constitution); Helvering v. Davis, 301 U.S. 619, 640 (1937) (stating that the scheme of social security benefits created by the provisions of Title II of the Social Security Act of 1935 did not reach past the limitations imposed by the Tenth Amendment).

229. *See* William Lasser, *Justice Roberts and the Constitutional Revolution of 1937—Was There a "Switch in Time"?*, 78 TEX. L. REV. 1347, 1347 (2000) (stating that the "judicial doctrine of laissez-faire" was the "victim" of the Supreme Court's change in judicial philosophy and it has never resurfaced).

230. Franklin D. Roosevelt, Presidential Statement upon Signing the Social Security Act (Aug. 14, 1935), *in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN ROOSEVELT, *supra* note 40, at 324 (stating that the Social Security Act will level the highs and lows of deflation and inflation).

231. *Id.*

232. *Id.*

233. *Id.*

234. Raising the propensity to consume is a central tenet of Keynesian economics, which emphasizes government expenditures as a means of mitigating the drag on the economy caused by foregone consumption. *See* GORDON, *supra* note 13, at 272 ("Haphazardly and . . . ineffectively, the SSA reflected long-standing business concerns. Retailers and consumer-goods firms hoped to buttress aggregate demand.").

235. KENNEDY, *supra* note 5, at 371.

236. *Id.*

The federal Social Security Act also was an effort by the business community to eliminate cut-throat competitors (i.e., those having the ability to avoid providing security to employees) and to eliminate inconsistent state laws.[237] Thus, Social Security would operate to create more secure, confident, and prosperous consumers—even in good times.[238] It also allowed business the ability to operate in a more rational environment by smoothing out inter-state differences and giving businesses the ability to pay fairer wages without fear that other competitors would undercut the more progressive employers.[239] In fact, a key Senate supporter stated that the "chief merit" of the Social Security System is the "stabilization of industry."[240]

Has it worked? William Leuchtenberg has concluded that the bill was so pro-business that it was "an astonishingly inept and conservative piece of legislation."[241] This may be so, but the focus of this Article concerns the government's ability, under law, to foster macroeconomic growth, not further any liberal goals.[242] On the macroeconomic front, the Act most certainly socialized the costs of unemployment and old age and removed those burdens from the shoulders of business, state law notwithstanding.[243] There is also little doubt that Social Security contributed to rising wage levels, as intended.[244] To this extent, then, Social Security was an economic success. It was also a success to the extent that the laissez-faire microeconomic prediction that Social Security would destroy individual initiative proved to have no basis in reality.[245] Given the perform-

237. GORDON, *supra* note 13, at 271.

238. The enhancement of buying power was a cornerstone of the New Deal. *See supra* note 109 and accompanying text (noting FDR's campaign platform of the government's authority to cultivate purchasing power).

239. "The SSA . . . was, in essence, a business bill. . . . The SSA . . . reflected the efforts of [business] to rationalize disparate experiments in state and private welfare and to spread the costs of these experiments among all competing states and firms." GORDON, *supra* note 13, at 278-79.

240. GORDON, *supra* note 13, at 279.

241. LEUCHTENBERG, *supra* note 125, at 132.

242. The advent of the Social Security payroll tax in 1937 created a $2 billion fiscal drag and, according to some commentators, triggered a sharp recession in 1937. KENNETH S. DAVIS, FDR THE NEW DEAL YEARS 1933-1937, at 523 (3d ed. 1986).

243. Paula E. Berg, *Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 34 n.168 (1999) (citing social security laws as an example of legal provisions that socialize costs).

244. The Social Security Act promoted stability by imposing "obligatory retirement by age sixty-five, statutorily shr[inking] the size of the labor pool and therefore, reduc[ing] wage competition." KENNEDY, *supra* note 5, at 371.

245. Conservatives attacked Social Security on familiar neoclassical grounds by stating: "[I]t would discourage thrift, encourage shiftlessness, destroy individual initiative, and in general raise hell with the moral character of the citizenry." DAVIS, *supra* note 242, at 461.

ance of the economy before Social Security and its performance since,[246] there is no evidence that any of these dire predictions have transpired. Finally, the Act does appear to both encourage early retirement and enhance the propensity to consume, each of which has positive macroeconomic impact by diminishing unemployment and stimulating consumption.[247]

2. *The Wagner Act (The National Labor Relations Act).*[248]—The National Labor Relations Act (NLRA), another New Deal innovation, rests on an explicit recognition that capitalism works best when capitalists have the ability to exploit a prosperous consumer base. Bill Gates can sell more software on the North Shore of Chicago than in Bangladesh. When sponsor Senator Robert Wagner introduced the NLRA in 1935, he explicitly stated that the NLRA was designed to create a vibrant middle class, with higher wages, as a means of stimulating economic growth.[249] The role of income distribution in economic performance is still controversial today[250] and was controversial

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246. *See supra* note 155 (detailing the tracking of the GDP by the Bureau of Economic Analysis).

247. Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J. L. & PUB. POL. 633, 653 n.102 (2000) (illustrating that Social Security encourages early retirement and enhances consumption by diminishing savings).

248. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)). Another important legacy of the New Deal is the changes in constitutional doctrine left in its wake. An important part of those doctrinal changes is the result of constitutional challenges to the Wagner Act. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). In the course of these cases, the Court stated: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.*; *see also* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (upholding the Agricultural Adjustment Act of 1938 against the challenge that federal power to regulate commerce did not extend to a farmer who produced and consumed wheat he never marketed); United States v. Darby, 312 U.S. 100, 115-17 (1941) (upholding the application of the Fair Labor Standards Act of 1938 to the hours and wages of workers in a Georgia lumberyard, whose operations were exclusively intrastate).

249. 79 CONG. REC. 7572 (1935) (address by Sen. Wagner introducing the National Labor Relations Act, May 15, 1935). Senator Wagner explained:

> When wages sink to low levels, the decline in purchasing power is felt upon the marts of trade. And since collective bargaining is the most powerful single force in maintaining and advancing wage rates, its repudiation is likely to intensify the maldistribution of buying power, thus reducing standards of living, unbalancing the economic structure, and inducing depression with its devastating effect upon the flow of commerce.

Id.

250. *See, e.g.*, FOLKE DOVRING, INEQUALITY: THE POLITICAL ECONOMY OF INCOME DISTRIBUTION 146-48 (1991) (arguing that the United States should take a more active role in achieving full employment).

in the past as a suspected cause of the Great Depression.[251] Separate and apart from the macroeconomic impact of income distribution, even conservative business voices recognize the economic desirability of a prosperous middle class to support a prosperous consumer base.[252]

A second goal of the NLRA was to quell rising labor unrest.[253] Much violence accompanied labor relations in the era of laissez-faire.[254] As Dean Verkuil has highlighted, the NLRA was enacted at a time when "labor-management relations and the economy were at a low ebb."[255] Moreover, "[t]here were strikes and violence which, according to historical reports, amounted to civil war in many communities."[256] This industrial unrest undoubtedly disrupted macro economic output.[257]

Congress attacked the problems of labor unrest and income inequality by imposing a mandatory scheme of collective bargaining, as a matter of federal law.[258] The central provisions of the NLRA are sec-

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251. *See* SHELDON DANZIGER & PETER GOTTSCHALK, AMERICA UNEQUAL 1-14 (1995) (showing that income inequality is greater now than at any time other than immediately before the Great Depression).

252. *Does Inequality Matter?*, Economist, June 16, 2001, at 9 (arguing that the elimination of poverty is more important than the elimination of income or wealth inequality). In popular historical accounts from the era immediately following the Depression, inequality figured prominently as a suspected cause. *E.g.*, ALLAN NEVINS & HENRY STEELE COMMAGER, A POCKET HISTORY OF THE UNITED STATES 415 (9th rev. ed. 1992).

253. The drafters of the NLRA found that the economic consequences of poor labor relations were significant, including:

> The inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151 (2000) (internal numbering omitted).

254. *See supra* notes 45-54 and accompanying text (describing the violence and bloodshed associated with labor unrest in the early 1930s).

255. Paul R. Verkuil, *Whose Common Law for Labor Relations?*, 92 YALE L.J. 1409, 1409 (1983).

256. *Id.*; *see* Paul Weiler, *Striking New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 370 (1984) (noting that labor strikes are costly and may lead to unacceptable losses in output and employment).

257. Weiler, *supra* note 256, at 370.

258. 29 U.S.C. § 151 (2000). The Fair Labor Standards Act also supported this goal by imposing a minimum wage, limiting working hours, and abolishing child labor. *Id.* §§ 206, 207, 212. These actions are consistent with a well-ordered scheme of social capitalism, and probably have had positive macroeconomic effect. Nevertheless, because the Act sought to impose market outcomes directly, instead of facilitate market action, it transcends the focus of this Article, which posits that the main thrust of the New Deal was to create an environment to unleash markets. In this respect, the Act is much like the Agricultural Adjustment Act. *See supra* note 20 (discussing the use of government-created infrastructure

tions 8(a)(5) and 8(b)(3), which make it an unfair labor practice for an employer or a union to "refuse to bargain collectively."[259] Section 8(d) defines collective bargaining as a "mutual obligation" for both employer and employee representatives to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[260] As could be expected, these general statutory terms have given rise to a complex body of interpretative case law.[261]

Professor Paul Verkuil's conclusion is that the NLRA was "a successful attempt to mediate among competing social values in a time of unprecedented upheaval."[262] As of 1983, the NLRB was handling over 60,000 cases annually.[263] Thus, the New Deal brought industrial peace with the NLRA.[264] Other commentators go much further. Historian David Kennedy states that the NLRA shifted labor conflict from the streets to hearing rooms.[265] Labor unrest after the NLRA "largely disappeared" from the American economic landscape.[266] Moreover, while income distribution may not have changed dramatically since the Great Depression,[267] certainly the NLRA's goal of increasing worker buying power has been achieved.[268] As Kennedy highlights, "[u]nions made a difference" on this point, as wages for union workers rose "in measurably greater degree than in unorganized sectors."[269]

3. The Tennessee Valley Authority.[270]—Joe W. McCaleb has summarized well the plight of the South before the New Deal:

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to enhance the free market). I take no position in this Article on the circumstances that justify government action to directly change market outcomes, as opposed to enhancing market action in a macroeconomically significant way. Thus, for example, deposit insurance changed one element of a typical bank transaction; it thus facilitated innumerable deposits into banks.

259. 29 U.S.C. § 158.

260. *Id.* § 158(d).

261. *See generally* DOUGLAS L. LESLIE, LABOR LAW (2000) (providing in-depth coverage of labor jurisprudence).

262. Verkuil, *supra* note 255, at 1410.

263. *Id.* at 1414.

264. *Id.*

265. KENNEDY, *supra* note 5, at 320.

266. *Id.*

267. *Id.* at 364. However, economist John Kenneth Galbraith has explained that by the 1950s the distribution of income had improved. GALBRAITH, *supra* note 4, at 191.

268. KENNEDY, *supra* note 5, at 320.

269. *Id.* Macroeconomists generally credit the New Deal and the NLRA in particular, with raising hourly wages. GORDON, *supra* note 20, at 222.

270. The Tennessee Valley Authority is a corporate body created by the Act of Congress of May 18, 1933, ch. 32, 48 Stat. 58 (codified as amended at 16 U.S.C.).

> In the 1930's, the South was a poverty-stricken section of America that had escaped the wealth accumulated in other regions of the country. In 1933, for example, the per capita income in the Tennessee Valley was only 45 percent of the national average. Thousands of rural southern people had no electricity, or running water, suffered failing crops year after year from depleted and eroding soils and lived in abject poverty. Additionally, the large timber companies had cut the best timber using the common practice of "high-grading" and clear-cutting. The nation as a whole was reeling from the devastating impacts of the Great Depression, and the South, particularly, the rural South, was in a desperate struggle for survival.[271]

FDR responded with an unprecedented use of federal power. In fact, one court specifically held that the Tennessee Valley Authority (TVA) amounted to a "social experiment" in government ownership that violated the Tenth Amendment of the Constitution.[272] FDR designed the TVA to be "a corporation clothed with the power of the government" while retaining the "flexibility and initiative of a private enterprise."[273] FDR's plan for the TVA was an ambitious program of federally sponsored and supervised investment to create "better opportunities and better places for living for millions of yet unborn."[274] The Tennessee Valley Authority Act mandated that the TVA undertake, throughout the Tennessee Valley, the following programs: (a) flood control; (b) development of the Tennessee River for navigation purposes; (c) generation of electrical power; (d) development of marginal lands; (e) reforestation; and (f) securing the economic and social well-being of people within the Tennessee Valley.[275] Congress and the President endowed the TVA with vast powers to pursue these objectives.[276] The vastness of the TVA's authority is highlighted by the

271. Joe W. McCaleb, *Stewardship of Public Lands and Cultural Resources in the Tennessee Valley: A Critique of the Tennessee Valley Authority*, 1 RES COMMUNES: VERMONT'S ENVTL. L.J. 2 (1999).

272. Ashwander v. Tennessee Valley Auth., 9 F. Supp. 965, 966 (N.D. Ala. 1935), *overruled on other grounds*, 297 U.S. 288 (1936).

273. Franklin D. Roosevelt, A Suggestion for Legislation to Create the Tennessee Valley Authority (Apr. 10, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 122, 122.

274. Franklin D. Roosevelt, Informal Extemporaneous Remarks at Miami, Fla., Immediately Preceding Attempted Assassination of the President Elect (Feb. 15, 1933), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 100, at 889 (extemporaneous remarks, January 21, 1933).

275. 16 U.S.C. § 831v (1994).

276. *E.g.*, *id.* § 831c (empowering the TVA to acquire lands through exercising eminent domain and to convey property).

fact that it covers all of Tennessee and parts of six other states.[277] The TVA was an unprecedented regional development initiative.[278]

Scholars have generally recognized that the TVA succeeded in its goal of developing a chronically depressed South by providing cheap electricity to support industrialization.[279] In fact, by 1944 the TVA was the largest electricity producer in the nation and as recently as 1972 the TVA produced ten percent of the nation's power.[280] In the long run, the TVA's ability to supply cheap electricity spurred economic growth.[281] Yet, the success of the TVA has never been institutionalized in our system, and huge areas of economically deprived citizens continue to fester despite the promise of the TVA.[282]

C. *Physical Infrastructure*

In 1776, Adam Smith wrote that among the duties of the sovereign is the establishment and maintenance of "public works," which though they may be most advantageous to society, are however, of such a nature that "the profit could never repay the expense to any individual."[283] In 1936, John Maynard Keynes argued that a program of "socialisation of investment" was necessary in order to stimulate an economy suffering from secular unemployment due to inadequate consumption.[284] Ironically, one of the earliest Keynesians was Her-

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277. McCaleb, *supra* note 271, at 13.

278. KENNEDY, *supra* note 5, at 153; *see also* DAVIS, *supra* note 242, at 94 (calling TVA a "truly revolutionary" initiative).

279. KENNEDY, *supra* note 5, at 379.

280. JORDAN A. SCHWARZ, THE NEW DEALERS 319 (1993).

281. *Id.* After its initial success in spurring economic development in a previously underdeveloped region of the country, the TVA suffered from a number of organizational infirmities that culminated in a disastrous nuclear energy program. *See* ERWIN C. HARGROVE, PRISONERS OF MYTH: THE LEADERSHIP OF THE TENNESSEE VALLEY AUTHORITY 1933-1990, at 195-241 (1994) (discussing political tensions and managerial turmoil at the TVA). Commentators have concluded that the TVA's early success lead directly to its subsequent failures. *Id.* at 281-305 (concluding that "persistence in the face of success" and "institutional hubris" led to the decline of the TVA). An assessment of the aspects of its initial structure that gave rise to these failures and possible remedies to stem such failures is beyond the scope of this work. For purposes of this Article, it is only necessary to show that government can undertake macroeconomically successful regional development initiatives.

282. The problems of community economic development are complex and perplexing. The TVA demonstrates that government can succeed in developing previously impoverished areas. Unfortunately, the history of fighting urban blight and inner-city ghettos has proven problematic. *See* Audrey F. McFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 350-54 (1999) (comparing the Empowerment Zone approach to development to prior efforts and concluding that such efforts too often benefit "business elites").

283. 2 SMITH, *supra* note 13, at 208-09.

284. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 378 (Prometheus Books 1997) (1936). New Keynesians posit that all government

bert Hoover—who before being elected President, produced a "Report of the President's Conference on Unemployment" articulating the value of a countercyclical public works program, complete with an analysis of what Keynes would later call the multiplier effect.[285] Hoover, however, was skeptical of expanding federal power;[286] FDR did not share this compunction and consequently executed upon Hoover's idea.

One of the first acts of the first one hundred days of the New Deal was a Federal Act for Relief of Unemployment through Public Works.[287] Title II of the NIRA authorized the President to create the Public Works Administration and provided $3.3 billion in initial funding.[288] This was an exponential increase in the amount of public works outlays under the Hoover Administration.[289] Congress approved expanded amounts for public works annually from 1934 to 1938.[290] This public works initiative "marked the first clear recognition of the Federal Government's responsibility to . . . administer a nationwide program of public works."[291]

The legacy of the New Deal with respect to public works as a means of intelligently enhancing macroeconomic performance has been a mixed bag. During his campaign, FDR advocated a program of counter-cyclical public works spending that originated in a report drafted by none other than Herbert Hoover.[292] Hoover specifically

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spending is not created equal in terms of its beneficial impact on macroeconomic growth, particularly when an economy is approaching full-employment levels. *See* W. Mark Crain & Lisa K. Oakley, *The Politics of Infrastructure*, 38 J.L. & ECON. 1, 1-2 (1995) (linking government spending with macroeconomic growth). Instead, spending on physical infrastructure has been shown to expand output on the supply side if the productivity of public investments in infrastructure are sufficiently high. *Id.* Commentators have focused, appropriately, on the role of the law in structuring and organizing such investments in a way that assures that the political process does not operate to deprive such investments of their associated productivity enhancements. *See id.* at 15 (stating that "the marginal productivity of public capital across political jurisdictions and over time depends in part on the interplay between existing institutional arrangements and the strategic use of infrastructure").

285. BARBER, *supra* note 6, at 15-22.

286. *Contra id.* at 41. Hooverites were "eager to expand the agenda of the state." *Id.*

287. National Industrial Recovery Act, Pub. L. No. 23-5, 48 Stat. 22 (1933).

288. Franklin D. Roosevelt, Note, *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 250, 250.

289. BARBER, *supra* note 6, at 183.

290. JOHN KENNETH GALBRAITH, THE ECONOMIC EFFECTS OF THE FEDERAL PUBLIC WORKS EXPENDITURES 1933-1938, at 14-15 (1940).

291. Franklin D. Roosevelt, Note, *in* 2 THE PUBIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 250, 250.

292. Franklin D. Roosevelt, Campaign Address on a Program for Unemployment and Long-Range Planning in Boston, Mass. (Oct. 31, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 100, at 850.

accounted for the multiplier effect[293]—the now mainstream macroeconomic idea that increases in spending spur further increases in spending.[294] While the New Deal certainly expanded public works spending, this counter-cyclical concept has never been institutionalized.[295] The best that can be said of the New Deal is that it was a beginning, and has doubtlessly supported future public works successes at the federal level. For example, FDR began a highway initiative during World War II that ultimately led to the Interstate Highway System.[296] Despite this central political failing, the New Deal public works program "enhanced" the "national productive plant," had an "impressive" impact on employment, and delivered a secondary fiscal stimulus to a depressed economy in the form of the multiplier effect.[297]

D. *Human Infrastructure*

Government has a compelling economic interest in developing the talents of its citizens to the maximum productive extent possible. Such initiatives will increase tax revenues, provide a lower cost of human capital to business and entrepreneurs, enhance productivity growth and innovation, and reinforce the social infrastructure of an economy by increasing the stakes individuals have in an economy and increasing consumer buying power.

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293. BARBER, *supra* note 6, at 18-19.

294. GORDON, *supra* note 20, at 72-73 (explaining how a $500 billion increase in government expenditures can lead to a $2 trillion dollar increase in national income).

295. GALBRAITH, *supra* note 290, at III (transmittal letter to President Roosevelt, from Frederic A. Delano).

> The continued existence of unemployment as the central economic problem of the United States makes evident the need for planning a public works program on a long-range basis. . . . But even if unemployment should cease to be a major national problem, the need for a continuing program of public works construction would not disappear. Orderly, administration, economical expenditure of public funds and the sound development of the public plant are all frustrated by annual "emergency programs."

See also Steven A. Ramirez, *Fear and Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31, 70-74 (2002) (showing problems with a politicized fiscal policy function and proposing a depoliticized investment and fiscal function).

296. Louis Jacobson, *Driving Force*, June, 1996, at 19-21.

297. GALBRAITH, *supra* note 290, at 6, 56, 116-17. Of course, notwithstanding the fact that the provision of physical infrastructure enhances productivity, such investments may also enhance macroeconomic performance in terms of human infrastructure and social infrastructure. *See* HOWARD, *supra* note 28, at 777 (listing benefits of public works to include: "the preservation and improvement of skills and work habits" of otherwise unemployed workers; "the preservation of public order"; and the "maintenance of economic stability and purchasing power").

1. *The Civilian Conservation Corps.*—The Public Works Bill gave the President authority to employ citizens, who are unemployed, in public works on government land.[298] The Act specified that the work relate to conservation or recreation purposes.[299] By Executive Order, FDR exercised this authority to create the Civilian Conservation Corps (CCC).[300] The CCC was governed by a director and an advisory council, consisting of the Secretary of War, the Secretary of Agriculture, the Secretary of Labor, and the Secretary of Interior.[301]

The CCC's structure reflected its mission; it was more than a mere jobs program, and its organization reflected that fact. The War Department was given the job of organizing and managing the conservation camps.[302] The Department of Labor was in charge of selecting enrollees.[303] The Department of Agriculture and Department of the Interior planned and supervised the conservation projects.[304] The CCC was part boot camp, part job program, and part nature camp.

In order to enroll, workers needed to be unemployed, unmarried, between the ages of eighteen and twenty-five, and of "good character."[305] Enrollees were required to send the bulk of their earnings home to their families.[306] The majority of the enrollees came from congested cities. The program included an educational and skills training element.[307] By 1935, the enrolled strength of the CCC was over 500,000.[308] This was human development on a vast scale.

Because the program was more than a jobs program, it delivered more benefits than just jobs. These youths learned teamwork, started to take pride in their work and learned skills.[309] They learned to drive trucks, pour concrete and build bridges.[310] In the CCC, youths "reclaimed and developed themselves."[311] Pride, work ethic, and skills no doubt helped the enrollees for years to come; but perhaps the greatest benefit an enrollee enjoyed was the opportunity to leave deso-

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298. *See also* Act of March 31, 1933, ch. 17, 48 Stat. 22 (codified as repealed at 16 U.S.C. §§ 585-587 (2001)).

299. *Id.*

300. DAVIS, *supra* note 242, at 77-79.

301. *Id.* at 78.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. KENNEDY, *supra* note 5, at 144.

307. II SCHLESINGER, *supra* note 30, at 339.

308. *Id.*

309. *Id.* at 338-39.

310. *Id.* at 338.

311. *Id.* at 338-39.

late environments, like the East Side of New York, for places like Mount Hood or Glacier National Park.[312] FDR's program literally diverted human capital from prison or worse to productive use.[313]

2. *The Servicemen's Readjustment Act of 1944 (the "GI Bill").*—The GI Bill[314] was the New Deal redux. After World War I, four million veterans strained the economy, leading to three years of civil unrest.[315] During World War II, sixteen million Americans were in the armed services; by the end of 1946, only three million remained in uniform.[316] Pessimism reigned. The economy's ability to absorb thirteen million veterans while faced with a rapidly decelerating level of defense expenditures portended an economic "Pearl Harbor."[317] The Labor Department projected an unemployment rate of well over twenty percent.[318] The end of the war severely tested the American economy in general and the New Deal social-capitalism framework in particular. As a result, unemployment climbed only to four percent by 1948, and no major macroeconomic setback occurred.[319] This was a stunning vindication of the New Deal and the GI Bill.

On June 22, 1944, FDR signed the GI Bill.[320] FDR originally proposed such a program in late 1943 and his goal was to economically empower the nation's human resources to the maximum extent possible.[321] The GI Bill provided veterans with funds for vocational training and higher education, subsidized mortgages for housing, and created low interest business loans.[322] The GI Bill is a real novelty insofar as government programs are concerned. Like the Interstate Highway System or the Space Program, it is difficult to find any critics of the GI Bill. On the other hand, the supporters of the Bill, and its impact on our economy's macroeconomic performance, seem to struggle for ways to express the extent of their positive views of the legislation. Peter Drucker, the famed business management analyst,

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312. *Id.* at 339.

313. *Id.* Professor Schlesinger termed the CCC "unquestionably one of the most fortunate of New Deal inventions." *Id.* at 340.

314. Servicemen's Readjustment Act of 1944, ch. 268, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.).

315. MICHAEL J. BENNETT, WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA 3-4 (1996).

316. *Id.* at 4-5.

317. *Id.* at 194.

318. *Id.*

319. *Id.* at 195.

320. *Id.* at 192.

321. Franklin D. Roosevelt, Statement on Signing the G.I. Bill of Rights (1944), *reprinted in* THE ESSENTIAL FRANKLIN DELANO ROOSEVELT 309, 310-11 (John Gabriel Hunt ed., 1995).

322. KENNEDY, *supra* note 5, at 786-87.

identifies the GI Bill as one of the transformative events in history, ushering in a "shift to the knowledge society."[323] Drucker believes that the GI Bill propelled our economy into a new era, just as the steam engine did in the eighteenth century, and that this transformation will likely continue until 2010 or 2020.[324] He concludes that the GI Bill so reshaped our economic landscape that historians may well identify it as "the most important event of the twentieth century."[325] Other scholars agree with Drucker.[326] The GI Bill is the "law that worked" and that it not only paid for itself but yielded dividends as well.[327]

David Kennedy states that the GI Bill had the effect of "propelling an entire generation along an ascending curve of achievement and affluence that their parents could not have dreamed."[328] Compelling evidence supports these views.

In 1942, about 200,000 college degrees were awarded nationwide.[329] By 1950, that number soared to roughly 500,000.[330] The educational benefits also spurred the creation of many new colleges and universities, including the entire State University of New York system.[331] Nearly half of the eligible veterans took advantage of the Bill's educational benefits, at a total cost of $14.5 billion. The Department of Labor found that the additional income earned as a result of the enhanced education would generate increased tax revenues sufficient to pay the costs of education several times over.[332] These tax benefits have been calculated to amount to between five and twelve times the cost to the government.[333] All of this enhanced educational opportu-

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323. PETER F. DRUCKER, POST-CAPITALIST SOCIETY 3 (1993).

324. *Id.*

325. *Id.*

326. *See* BENNETT, *supra* note 315, at x-xv (explaining the significance of the GI Bill in transforming American society and helping millions of ordinary Americans make their dreams come true); KENNEDY, *supra* note 5, at 787 (stating that the GI Bill "stood out as the most emblematic of all World War II-era political accomplishments").

327. *See* BENNETT, *supra* note 315, at 317. Michael Bennett writes:

> The GI Bill . . . was the law that worked, the law that paid for itself and reaped dividends because it made the American dream come true for so many. It enabled millions of working-class people to make a middle-class way of life for themselves. It did it by giving them an educational grubstake and a homesteader's claim on the New Frontier—but left the rest to them.

Id.

328. KENNEDY, *supra* note 5, at 787.

329. BENNETT, *supra* note 315, at 242.

330. *Id.*

331. *Id.*

332. *Id.*

333. *See* John Gillingham, Editorial, *GI Bill: The First Voucher Plan*, ST. LOUIS POST-DISPATCH, Jan. 30, 1996, at 11B; Mark Shields, *America's Investment in the G.I. Bill Paid Huge*

nity for veterans and spurred decades of enhanced labor productivity and innovation.

The New Deal inaugurated the federal government's role in human capital formation. The New Deal meant that, for the first time in history, the government began to invest in its human resources. Again, however, the New Deal failed to institutionalize this concept. Government involvement in assuring human capital formation is today uneven and chaotic, in large part because lawyers have failed to propose appropriate legal institutions to facilitate appropriate human capital formation.

E. *Home Owners' Loan Act and National Housing Act*

Perhaps the most transformative New Deal Acts were the revolutionary Home Owners' Loan Act (HOLA)[334] and the creation of the Federal Housing Administration (FHA).[335] These Acts permanently enhanced the nation's housing stock, stabilized the nation's social fabric by increasing home ownership, and created a labor force with increased productivity incentives that only a thirty-year mortgage obligation can provide.[336] As such, this program enhanced the regulatory infrastructure, social infrastructure, human infrastructure, and physical infrastructure supporting the nation's economy.[337] The vigor of the New Deal in addressing the housing crisis wrought by the Great

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Dividends, SEATTLE POST-INTELLIGENCER, May 22, 2000, at A7. This is consistent with studies showing that government expenditures on education do not cost—they pay. *See* GEORGES VERNEZ ET AL., CLOSING THE EDUCATION GAP: BENEFITS AND COSTS 78 (1999) (undertaking a detailed study of costs and benefits of education spending and finding that closing the education gap for "blacks and Hispanics . . . would clearly pay for itself in the form of long-term savings in income transfer and social programs, increased tax revenues, and increased disposable income for the individuals involved"); Edward P. St. John & Charles I. Masten, *Return on the Federal Investment in Student Financial Aid: An Assessment for the High School Class of 1972*, J. STUDENT FIN. AID, Fall 1990, at 4, 19 (stating "we conclude that the net present value of each dollar invested in student aid during the 1970s was about $4.30"). Even these analyses may be stilted. Economists have identified educational investments as a key element of macroeconomic growth. *See* Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002, 1002-04 (1986) (showing that knowledge may be an input that defies the law of diminishing marginal returns and may support increasing marginal productivity, thus explaining persistent divergent growth across nations).

334. Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128 (codified as amended at 12 U.S.C. § 122a (2000)).

335. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203 (1985) (noting that "[n]o agency of the United States Government has had a more pervasive and powerful impact on the American people over the past half-century than the Federal Housing Administration").

336. *Id.* at 203-04.

337. *See id.* at 203-05.

Depression[338] is to be contrasted with the approach of the Hoover Administration. In July of 1932, Hoover signed the Federal Home Loan Bank Act.[339] This Act established a credit reserve for mortgage lenders to increase the supply of credit to the housing market.[340] Within the first two years of the law's operation, 41,000 homeowners applied for loans and three were approved.[341]

Within a few weeks of inauguration, FDR announced a "national policy" that would impose "special safeguards" to facilitate home ownership, as a "guarantee of social and economic stability."[342] The Home Owners Loan Corporation (HOLC) injected over $3 billion into the savings and loan system for new loans immediately, and authorized the purchase of distressed mortgages from lenders.[343] The purchase of distressed mortgages greatly enhanced the position of lenders and assisted borrowers by refinancing the obligations for lower rates and at extended maturities.[344] This effectively "introduced, perfected, and proved in practice the feasibility of the long-term, self-amortizing mortgage."[345] The HOLA was followed by the National Housing Act which created the FHA to insure home loans.[346] By 1937, over 250,000 mortgages were insured.[347] FHA insured loans eventually allowed buyers to purchase homes with less than ten percent down.[348] The government guarantee drove interest rates on FHA mortgages down by two or three percentage points.[349] Thus, extended mortgage maturities, lower down payments, and lower interest rates made home ownership more realistic for more Americans than ever before.[350]

Proof of the New Deal's success seems convincing. Under the pre-New Deal laissez-faire approach, housing markets could deliver home ownership to only forty percent of Americans; four decades af-

338. For example, by the spring of 1933, half of all home mortgages in the U.S. were in default. *Id.* at 193.

339. *Id.* at 194.

340. *Id.*

341. *Id.*

342. Franklin D. Roosevelt, A Message Asking for Legislation to Save Small Home Mortgages from Foreclosure (Apr. 13, 1933), *in* 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 11, at 135.

343. JACKSON, *supra* note 335, at 196.

344. *Id.* at 196-97.

345. *Id.* at 196.

346. National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. §§ 1701-1703 (2000)).

347. 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, at 235 (1938).

348. JACKSON, *supra* note 335, at 204.

349. *Id.* at 205.

350. *See id.* at 204-06.

ter the New Deal, sixty-six percent of Americans owned their own homes.[351] Before the New Deal maturities on home mortgages ran five to ten years, and afterwards thirty-year mortgages became the norm.[352] Housing starts rose from 93,000 in 1933, to 332,000 in 1937, and to 458,000 in 1939.[353] From a macroeconomic point of view, the New Deal housing market interventions were a great success.[354] As one commentator has recognized: "This New Deal 'reform' proved not to have checked or intimidated capital as much as liberated it."[355]

III. THE NEW DEAL: THE BIRTH OF LAW & MACROECONOMICS?

As the foregoing establishes, the New Deal was a bold attempt to influence the macro economy on a broad range of fronts and through the use of a variety of legal initiatives. One can, in fact, search the legislative and executive branch histories of the key New Deal initiatives and find little or no reference to efficiency or other microeconomic concerns. Instead, the entire effort focused on buying power, political stability, employment, investment, output and productivity[356]—all elements of macroeconomic performance.[357] Macroeconomics was the aim of the law, from the federal securities laws to the Wagner Act to the TVA.[358] The New Deal was an attempt born of economic desperation to place the American economy on a

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351. KENNEDY, *supra* note 5, at 370.

352. *Id.*

353. JACKSON, *supra* note 335, at 205.

354. However, the New Deal had other adverse effects in this area, including the invention of racial red-lining. *See id.* at 197 (describing HOLC's neighborhood rating system).

355. *Id.* at 205; *see also* II SCHLESINGER, *supra* note 30, at 298 (stating that HOLC "averted the threatened collapse of the real estate market and enabled financial institutions to begin to return to the mortgage-lending business" as well as strengthening the stake of thousands of Americans in the U.S. economy).

356. *See supra* note 12 and accompanying text (explaining the New Deal's desire to achieve economic growth and output while also achieving other macroeconomic objectives).

357. *See* GORDON, *supra* note 20, at 3 ("Macroeconomics is concerned with the big economic issues that determine your own economic well-being as well as that of your family and everyone you know."); MANSFIELD & YOHE, *supra* note 18, at 1 (explaining that macroeconomics concerns itself with "the behavior of economic aggregates"). In the context of the West's failed globalization efforts of the 1990s, Nobel laureate Douglass North stated well the difference between macro and micro economics. SILK ET AL., MAKING CAPITALISM WORK 175 (1996) (citing Douglass C. North, Economic Performance Through Time, Prize Lecture in Economic Science in Memory of Alfred Nobel (Dec. 9, 1993)). He pointed out that micro is about how markets operate and macro is about how an economy grows, develops, and can be managed. *Id.* According to North, globalization policy focused too much on how markets operate (i.e., efficiency analysis) and not enough on how to develop markets. *Id.*

358. *See supra* Part I.

more stable and productive foundation. At its most basic economic level, the New Deal created legal structures, like deposit insurance and securities regulation, to stabilize the investment channels that fed industry.[359] It created legal structures to stabilize employment markets.[360] The New Deal was the first federal initiative to invest massively in human and physical infrastructure.[361] It created a whole new kind of housing market to support long term economic growth and stability.[362] All of this amounted to the first wide-ranging government initiative to restructure the economic system in the name of macroeconomic management.[363]

The New Deal also went further. It created the tools of modern conventional macroeconomic policy—fiscal and monetary policy. Without the legal innovations endowing the Fed with a high degree of political independence, it would be difficult to imagine government utilizing monetary policy in such a way.[364] While no similar structures were institutionalized with respect to fiscal policy, the New Deal began a discussion along those lines. The great illusion of the New Deal is that it fully inaugurated Keynesian economics.[365] In fact, Keynesian fiscal policy has never been instituted. Government has never really engaged in any organized effort to achieve the "socialisation of investment."[366] Nevertheless, the New Deal at least shows the potential of this function as a lesson that is sorely needed in today's economic environment. Keynes is famous for the innovation of economic stimulus

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359. *See supra* Parts II.A.1 and II.B (discussing the roles of securities regulation and the FDIC in fueling the economy).

360. *See supra* notes 283-291 and accompanying text (explaining the need for stimulation in the economy in order to reduce unemployment and the institution of the NIRA).

361. *See supra* Parts II.D and II.E (discussing the need for physical and human infrastructures to contribute to growth of the economy and society).

362. *See supra* notes 340-350 (observing that the HOLA and National Housing Act allowed more people than ever before to buy and insure homes).

363. Great Britain also undertook significant improvements to its macroeconomic infrastructure in the 1930s, in response to its own macroeconomic difficulties. For example, the British moved off the gold standard in 1931, two years before the United States and thereafter allowed monetary expansion to stem the economic contraction. VENN, *supra* note 97, at 107. Also, the British expanded government assistance to the housing sector. *Id.* Both of these initiatives were key elements of the New Deal. However, Great Britain was already ahead of the U.S. in many other areas of macroeconomic infrastructure, including financial market regulation, labor legislation, and social security, before the onset of the Great Depression. *See id.* at 108-09.

364. *See supra* notes 173-189 and accompanying text (explaining how the independence of the Fed led to the elasticity of currency and the emergence of modern monetary policy).

365. KENNEDY, *supra* note 5, at 357-62 (stating that the New Deal did not intentionally undertake deficit spending in an effort to stimulate the economy until April, 1938, and even then it was a modest degree of stimulus).

366. KEYNES, *supra* note 284, at 378.

through the use of fiscal policy.[367] One famous quote attributed to Keynes is a rhetorical flourish in support of the need to manage government spending to add stimulus when needed: "If the Treasury were to fill old bottles with bank-notes, bury them at suitable depths in disused coal-mines . . . and leave it to private enterprise . . . to dig up the notes again . . . there need be no more unemployment and . . . real income . . . would probably become a good deal greater."[368] Keynes spoke in 1936 about a very specific reality: governments that failed to manage fiscal policy to countercyclical contractions.[369] Keynes never advocated endless deficit spending without regard to the productive return of such spending. This, in essence, is what caused so-called Keynesianism to hit the wall in the 1970s.[370] This kind of Keynesianism run amok increases tax burdens and distorts investment resources in a negative manner.[371] Unless government spending is productively deployed, the principle of conservation of energy applies to fiscal stimulus—without productivity gains, increased tax burdens make deficits a zero-sum game in the long run. This is why Keynes was so focused on investment management as central to fiscal policy.[372]

Investment means payback with dividends, with a modicum of risk.[373] Although studies are difficult to come by, this is the distinguishing feature of the New Deal.[374] FDR seemed to be groping around this idea throughout the course of the New Deal. This is an essentially capitalist view of the role of government in a market economy—dating back to Adam Smith.[375] The New Deal was not about spending for spending sake—FDR intuitively understood that not all federal spending is created equal.[376] This is also a central lesson from

367. *Id.*

368. *Id.* at 129. Keynes also stated, "It would, indeed, be more sensible to build houses and the like." *Id.*

369. *See* Louis Menand, *Buried Treasure; The Impish Brilliance of John Maynard Keynes*, NEW YORKER, Jan. 28, 2002, at 82 (noting Keynes's disdain for laissez-faire economics).

370. GORDON, *supra* note 20, at A4 to A6 (showing that the United States generally ran budget deficits from 1970 to 1997).

371. Ramirez, *supra* note 295, at 70-71.

372. *See* KEYNES, *supra* note 284, at 378; *see also* KENNEDY, *supra* note 5, at 357 (quoting letter from Keynes to FDR in 1937 stating, "[D]urable investment must come increasingly under state direction").

373. KEYNES, *supra* note 284, at 375.

374. *See* SCHWARZ, *supra* note 280, at xi (explaining that the New Deal represented a "massive governmental recapitalization for purposes for economic development").

375. *See supra* note 16 (describing the importance of government policies in creating an infrastructure to promote economic growth).

376. For example, FDR stated that work relief must be based upon useful tasks, in the sense that the work would provide "permanent improvement in living conditions or . . . create[ ] new wealth for the nation." DAVIS, *supra* note 242, at 464.

the New Deal: Policymakers should create infrastructure that benefits the economy by creating a more stable and prosperous consumer base, a more productive and skilled labor force, a physical infrastructure that lowers costs to business, and regulation that makes markets more stable or lowers capital costs. This is the framework for law and macroeconomics that the New Deal provides.

For all of its prodigious successes and prodigious failures, the New Deal appears to have been highly successful in fostering economic growth and stability.[377] Since the Great Depression, the economy of the United States has been one of the most successful in global history.[378] While correlation and causation are different, the role of the New Deal in fostering this success enjoys a strong theoretical basis that ultimately has its roots in Adam Smith as well as John Maynard Keynes and the new macroeconomics that has emerged since 1990—some sixty years after FDR inherited a comatose American economy. In the end, the New Deal is simply about providing free markets the kind of economic infrastructure to facilitate the maximum success of capitalism. Indeed, recently, prominent economists, including Nobel Laureate Joseph Stiglitz, have shown that the central failing of globalization has been a failure to impose the kind of legal infrastructure promulgated under the New Deal.[379] Thus, experience, theory, and common sense all counsel that the New Deal's law and macroeconomics have fostered enhanced growth and stability.[380] Certainly, it would be helpful to have detailed empirical analyses of the economic conse-

377. In 1920 to 1922, the economy contracted 17.3%. In 1907, the economy contracted 7.4%. In 1929 to 1933, the economy contracted 33%. Since then there has not been a single contraction of the same magnitude as these three contractions. Thus, from 1907 to 1929, a period of twenty-two years, the economy suffered three significant contractions. In seventy years since the beginning of the New Deal, no contraction of similar magnitude has occurred. Since the end of the Depression in 1938, there has only been one year of negative economic growth. In 1949, the economy suffered a contraction of 0.8%. The laissez-faire record of stability and growth pales in comparison to the post-New Deal record. *See* GORDON, *supra* note 20, at A1 to A2; *see also id.* at 15 (graphing economic volatility before and after the New Deal).

378. *See id.* at 312 (demonstrating how the U.S. has lead most of the industrialized world in growth since the Great Depression); SCHWARZ, *supra* note 280, at 344 ("Overall the New Dealers built the world's largest middle-class society by . . . respond[ing] adroitly and speedily to the exigencies of the Great Depression."); *see also* GALBRAITH, *supra* note 4, at 191-93 (concluding with respect to the New Deal that "[a]n angry god may have endowed capitalism with inherent contradictions. But at least as an afterthought he was kind enough to make social reform surprisingly consistent with improved operation of the system.").

379. STIGLITZ, *supra* note 17, at 55, 139, 155, 249.

380. Recently, economists including Nobel Prize winner Robert Lucas have empirically studied economic growth and worked to develop an exogenous growth theory that explains the dynamics of technical innovation—a topic sorely unexplained by neoclassical

quences of a wide variety of infrastructure investments. In fact, sometimes these studies are available.[381] However, in the absence of empirical studies on point, all that is available today is experience, theory, international comparative analysis,[382] and common sense.

The methodology is not precise and the proof is less than ideal. These are, however, inherent conditions of lawmaking. It necessarily proceeds in an environment of imperfect information. One commentator, in fact, claims that "there is far less professional consensus about the working of the macroeconomy than about microeconomics."[383] Nevertheless, too often the efficiency obsession underlaying law and economics fails to even address the impact of law upon unemployment, output, GDP, inflation, productivity, growth, or any other macroeconomic aggregates. Micro-analysis is no more determinative, objective, or clear than macro-analysis, at least as a normative talisman. Even if this is not correct, however, microeconomics still asks all the wrong questions. At least macroeconomics asks the correct questions. Specifically, macroeconomics queries how to increase output, enhance productivity, and stabilize the economy.[384]

Further, the impact of the law on the macroeconomy is unavoidable. The New Deal shows that legal scholars must think about law and macroeconomics. Lawyers and lawmakers are constantly involved in law and macroeconomic analysis even if they blatantly ignore it. Given this central reality, it is time to find and secure (through law-

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theory. *E.g.*, Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3 (1988).

381. For example, the Congressional Budget Office compiled a study of the macroeconomic effect of the savings and loan crisis and concluded that it cost over $500 billion in foregone GDP alone. Ramirez, *The Chaos of 12 U.S.C. Section 1821(k)*, *supra* note 26, at 629. Similarly, every economic analysis of education expenditures shows that the expenditures are investments, in that they yield enhanced tax revenues that exceed the amounts of investment and they yield dividends to the economy in the form of an enhanced stock of human capital. *E.g.*, BENNETT, *supra* note 315, at 242.

382. Economists have recently engaged in detailed comparative analysis of economic growth. *See, e.g.*, Robert J. Barro, *Economic Growth in a Cross Section of Countries*, 106 Q. J. ECON. 407, 437 (1991) (finding that human and physical capital, as well as political stability, are positively associated with growth). Great Britain furnishes an excellent comparative analysis that suggests that the New Deal enhanced macroeconomic performance. Great Britain came out of the economic contraction "far sooner" than the U.S., and did not suffer as deeply as the U.S. VENN, *supra* note 97, at 106-07. Great Britain already had much of the macroeconomic infrastructure that the New Deal constructed. *Id.* at 108-09. Great Britain's GDP grew 18% from 1929 to 1937; while the U.S. grew only 6%. *Id.* at 107. However, long-term factors allowed the U.S. to greatly outperform Great Britain from 1870 to 1998. GORDON, *supra* note 20, at 312-33.

383. Kelman, *supra* note 27, at 1217.

384. *See* SOWELL, *supra* note 98, at 71-72 (describing macroeconomists as being primarily concerned with growth).

making) a more ideal macroeconomic infrastructure, and a more objective and precise basis for identifying elements of the more ideal infrastructure. At the very least, the obsession with laissez-faire efficiency must end.[385] Laissez-faire is dead; it died in the parade of economic disruptions and depressions that hit the American economy with great regularity in the early part of the twentieth century. The only issue remaining is not the extent of government involvement in the economy, but the nature of government involvement. Instead of using government resources to build infrastructure (in every dimension), spending is driven primarily by politics—and special interests in low saliency areas.[386] Government presence is still massive, and is just corrupted by politics and laissez-faire rhetoric.[387] The question for law and macroeconomics is how to rationalize this massive presence.[388]

One measure of the massive presence of the federal government in our economy is the proportion of GNP that is consumed by the government. In the pre-New Deal Era the federal government spent about three percent of GNP, and today it spends about twenty percent.[389] The Social Security and Medicare Program each represent social infrastructure enhancements that touch nearly all Americans

385. The obsession with efficiency has infected the stunted efforts of the West to achieve economic globalization. *See* SILK ET AL., *supra* note 357, at 167-68 (offering different views of the American economic ideology). Basically, since the Great Depression, social responsibility for macroeconomic performance, as expressed in law, has largely been successful. *Id.* at 172. Similarly, developing countries would be better served by shifting "support from stabilization to public works and social service programs, as happened in the United States during the New Deal." *Id.* at 78. Nevertheless, the "economic doctors . . . in thrall to free-market ideology" could not get beyond laissez-faire. *Id.* at 174-75. More work needs to be done to explore the role that global social capitalism can play in facilitating a more powerful globalized world economy. *See* Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization as Exhibit B in the Case for a New Law and Economics*, 24 MICH. J. INT'L L. (forthcoming 2003) (reviewing JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002)) (showing that globalization has been plagued by the same market fundamentalism that dominates the law and economics movement and arguing that law and economics is in danger of being so removed from economic science that it may be termed law and pseudo-economics).

386. Ramirez, *supra* note 198, at 555-59.

387. *See generally id.* at 559-79 (assessing how politics interacted with and undermined financial regulation over the last seventy years).

388. Economists desperately need the legal profession to provide adequate "legal, moral, and institutional foundations" to enhance economic growth. *Cf.* SILK ET AL., *supra* note 357, at 174 (noting the need for these same foundations for economic rebuilding after World War II). For example, the New Deal provided adequate institutional foundations for modern monetary policy. *See supra* Part II.A.2.a.

389. KENNEDY, *supra* note 5, at 55.

and cost billions of dollars per year.[390] Expenditures for physical infrastructure, human infrastructure, and regulatory infrastructure similarly occupy large claims on the federal budget.[391] This upsurge in government spending represents a dramatic increase in the presence of the federal government that commenced with the New Deal.[392]

However, government spending understates the role of the government in the economy. The Fed, in its modern manifestation, consumes zero dollars of the federal budget.[393] Yet, it holds a commanding position in the economy, thanks in large part to the innovations of the New Deal in putting monetary policy on a firmer basis.[394] This innovation is a permanent feature of the American capitalist system and any effort to repeal it or cut back the role of the Fed in our economy would surely lead to economic catastrophe.[395] Capitalism, on a world-wide basis, would insist on a depoliticized central bank to maintain the integrity of American monetary policy and particularly to control inflation and stem downward spirals.[396] Consequently, the Fed is a permanent feature of our political economy that will continue to wield tremendous influence over virtually all aspects of our economic life. Here again, the New Deal legacy manifests itself.

Even with the massive economic influence of the Fed accounted for, there is still more intervention. The entire financial system of our economy is a highly regulated industry as a result of the New Deal.[397] Much of this regulation has been aimed at securing investor confidence.[398] With respect to deposit insurance, the cost of investor confi-

390. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2002, at 17 (2002) (showing that combined spending on Medicare and Social Security is projected to be approximately $675 billion in 2002).

391. *See id.* at 15-18 (providing government expenditure figures for a variety of programs).

392. KENNEDY, *supra* note 5, at 55.

393. *See supra* notes 185-187 and accompanying text (explaining that the Federal Reserve Board is self-funded and its operations are not included in the United States' budget).

394. For example, shortly after the Twin Towers Tragedy of September 11, 2001, the Fed cut rates for the eighth time of the year. Stevenson, *supra* note 1.

395. *See* Ramirez, *supra* note 198, at 530 n.145 and accompanying text (stating that the Fed's political independence is a key element to its success).

396. *See id.* at 547 n.266 and 549 n.279 (finding that the Fed's political independence enables it to curb inflation).

397. *See supra* Part II (describing the affect of law and macroeconomics on the New Deal).

398. *See supra* Part II.A (describing the new legislation enacted by Congress in the New Deal era to bolster investor confidence).

dence has been huge subsidies to the entire banking industry.[399] Beyond the financial system, however, the Social Security Act and the Wagner Act touch every significant employer and virtually all employees.[400] Each of these acts represent a regulatory effort to build a firmer social infrastructure that has served as a platform for more economic growth and economic stability for seven decades.

With respect to government investment, yet another element of massive intervention must be accounted for. Government spending is not equal in terms of expected benefits. Some forms of government spending are more productive than others. The GI Bill, the Interstate Highway Act, and the Space Program all appear to be productive government spending. The start of this kind of federal productivity enhancing spending began with the New Deal, particularly with respect to investment in human capital.[401] These programs show that rational government investment can enhance macroeconomic growth.[402]

Given the reality of the government's massive presence in the economy and the legal structures around which that intervention orbits, a scholar may ask why so little legal analysis is focused on how the law organizes these efforts at economic growth and stabilization.[403] One answer is that law and economics is dominated by scholars fixated on efficiency and microeconomic analysis.[404] This focus is problematic. This efficiency focus generally leads to market fundamentalism;[405] indeed, it is rare that efficiency alone is a justification for effective government policy beyond recognition of property rights and enforcement of contracts. Market fundamentalism, in turn, has been shown to be bad economics at best, in terms of delivering

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399. To the extent the government guarantees the deposits of banks, banks can attract cheaper funds.

400. *See* II SCHLESINGER, *supra* note 30, at 314 (commenting that "[n]o government bureau ever touched the lives of so many millions" as the Social Security Board).

401. *See supra* Part II.E (discussing government initiatives to stimulate growth in human capital).

402. *See* DRUCKER, *supra* note 323, at 166 (identifying one of the aims of fiscal policy as "encourag[ing] . . . [the] investment in knowledge and in human resources, in productive facilities in business, and in infrastructure").

403. *See supra* notes 25-34 and accompanying text (describing how past legal scholars focused on efficiency and not on supporting greater macroeconomic performance).

404. Judge Posner, for example, states that efficiency is "the main thing that students of public policy do or should worry about." POSNER, *supra* note 18, at 13.

405. Market fundamentalism involves an extreme ideological insistence on free markets unfettered by significant government action and with little regard to economic science. *See* STIGLITZ, *supra* note 17, at xi-xii, xiii, 12, 35, 36, 58, 139, 219 and 221.

economic growth and stability.[406]

The New Deal macroeconomic legacy is ultimately quite profound. It shows that legislation and executive power can be used to secure a more powerful political economy, and it suggests that courts need to keep macroeconomic considerations in mind when interpreting such laws. Ultimately, the New Deal begs a critical question: if our economic system rested upon macroeconomically optimized legal structures (legislative, judicial, and regulatory), how much additional potential growth would be accessible to our society? The New Deal suggests that a fully rationalized economy would markedly outperform our current system.

CONCLUSION

After the New Deal, it is clear that maximum macroeconomic performance is a function of free markets *and* optimal legal infrastructure. Beyond this, the New Deal teaches much more.

First, never again can any administration or Congress ignore economic conditions or economic policy analysis. The days of laissez-faire government are forever gone because the days of a laissez-faire economic mind set among the American body politic are forever gone. Voters demand economic growth and will hold political leaders responsible for economic failings. Leaders may debate the precise role of government and whether less regulation, less taxation, or less government involvement is desirable. However, in the end, the New Deal marks the beginning of an era where government is *expected* to manage the economy. Thus, the question is not how much macroeconomic influence the federal government has; rather, it is how can law best rationalize government's influence.

Second, the New Deal began government management of economic aggregates in the United States through regulation of fiscal policy and monetary policy. The New Deal showed the power of fiscal policy to stimulate the economy to achieve accelerated growth. Ever since the New Deal, lawmakers in the executive and legislative branches must reckon with the fiscal consequences of their lawmaking functions and the impact of government finances on macroeconomic performance. Perhaps more importantly, the New Deal created the regulatory infrastructure necessary to support the functioning of modern monetary policy instruments. After the New Deal, it became ap-

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406. STIGLITZ, *supra* note 17, at xiii and 250 (stating that market fundamentalism should be replaced with a more balanced consideration of market failures as well as government failures).

parent that the Chair of the Federal Reserve Board was one of the most important figures in the American economic system because of the power of monetary policy within the regulatory framework largely provided by the New Deal. Here too, the New Deal legacy is permanent. It is inconceivable in a modern industrialized economy for government ever to abandon fiscal and monetary policy tools. The law's task is to find methods to ideally institutionalize these macroeconomic policy tools. The law has only partially discharged this task.

Third, the New Deal was the beginning of an experimental exercise in trying to find the optimal macroeconomic regulatory infrastructure for a modern capitalistic economy. The New Deal's most notable successes appear to be federal deposit insurance and the federal securities laws. While both of these initiatives have been subject to neoclassical attacks and tinkering, both enjoy an enviable track record in terms of supporting long term growth and stability.[407] The New Deal was an attempt to place capitalism on a firmer regulatory foundation. Again, given the modern state-business coalition that manages the economy and their efforts in rationalizing the business environment, there appears to be little likelihood that the form of capitalism launched (or at least greatly extended) by the New Deal will ever be completely reversed. The search has begun for a macroeconomically optimal legal infrastructure.

Fourth, lurking behind the New Deal was an important new economic idea: the government acting as investor of last resort. The New Deal's public works programs sought to elevate government sponsored investment to a macroeconomically significant degree. Here, the New Deal legacy is more ambiguous. Government seems to have great difficulty in rationalizing its approach to providing physical infrastructure. Since the New Deal's efforts to stimulate the economy through government managed investment, there has been no systematic means of identifying investment projects and managing economic aggregates through government investment. Not all government expenditures are created equal. However, it seems to be only a matter of time before cost-justified productivity enhancing government investment is recognized as a means of institutionalized government involvement in the economy.

Fifth, the New Deal marked the beginning of the government's efforts to engineer a more economically optimal social infrastructure. The TVA showed that massive federally sponsored community devel-

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407. Scott & Mayer, *supra* note 208, at 858-59 (extolling the stabilizing effect of deposit insurance).

opment programs can invest in areas left behind by market forces in a cost-effective manner.[408] Social Security and the NLRA represent the first wave of government initiatives designed to create a social structure that can support an enhanced consumer market for superior exploitation by successful businesses and entrepreneurs. The creation of the NLRB was specifically aimed at extending greater bargaining power to labor in order to enhance middle class buying power.[409] HOLA was specifically designed to create a strong home-owning middle class that ultimately came to support much of the consumer culture of the latter part of the twentieth century.[410] While government has not generally managed social infrastructure in a rational fashion since the New Deal, it is hard to imagine that the federal government will ever exit this arena completely.

Sixth, the New Deal tried to create a system for developing sufficient human infrastructure to facilitate the success of capitalism. The CCC was more than just a jobs program; it was a quasi-military socialization program that gave workers marketable skills.[411] Indeed, most of the New Deal's permanent initiatives took a pronounced workfare approach over a relief approach for the very reason that FDR did not believe it helped the dispossessed to give them only money.[412] The GI Bill fueled decades of growth through education expenditures that significantly improved the quality of the nation's human capital.[413] The New Deal spawned the first programs specifically designed to upgrade the quality of the American labor force.

After the New Deal's massive government management, massive government regulation and massive government expenditures in support of economic growth and stability became the norm.[414] Some

408. *See* McCaleb, *supra* note 271, at 18 (stating, "TVA was created in the New Deal era and worked as an efficient mechanism for over 60 years contributing significantly to the rural South's rise from economic despair to prosperity").

409. *See* National Labor Relations Act, ch. 372, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

410. *See* Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128, 128 (1933) (codified as amended at 12 U.S.C. § 122a (2000)) (stating the purpose of the Act as "[t]o provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, [and] to extend relief to the owners of homes occupied by them").

411. Act of Mar. 31, 1933, ch. 17, 48 Stat. 22 (codified as repealed at 16 U.S.C. §§ 585-587 (2000)) (stating that the purpose of the Act was to relieve unemployment through the use of public works projects).

412. *See* DAVIS, *supra* note 242, at 464 (highlighting excerpts from FDR's 1935 State of the Union address that focused on work relief and the theory behind it).

413. *See* BENNETT, *supra* note 315, at 7 (stating that "[t]he GI Bill was the catalyst creating our present postcapitalist society").

414. *See* Bordo et al., *supra* note 96, at 10 (explaining that the New Deal initiated a huge expansion in the size of the federal government).

may debate the details of the government's role, and some may clothe their approach in more free-market rhetoric,[415] but no serious politician really argues in favor of removing the government from the economic system in a manner similar to the pre-New Deal regime. Politicians debate how much to spend on defense and how the tax burden should be allocated, but government is always tacitly held responsible for economic performance, and the government's expenditures always remain huge.[416] Indeed, so entrenched is the massive government role, that it is reasonable to conclude that the New Deal marked the end of capitalism and left a new system of political economy in its place; a system where all of society has a voice in the how to manage the business of business. Although free-market rhetoric still attracts votes, and some significant scholarly support,[417] it seems the New Deal is destined to ultimately reshape the debate over the proper role of government. Eventually, the body politic is bound to understand that the debate is no longer a contest of free-market solutions versus government solutions; instead, it is how government should most rationally manage the economy given its massive role. From the New Deal on, the economy was managed through a coalition of business elites and society generally, speaking through political and academic elites. Capitalism thereby became social capitalism. And social capitalism implies a central role for law and macroeconomics—that is lawyers rationally organizing, through law and regulation, the massive role of government to further the twin goals of macroeconomic stability and growth.

415. *See generally* 2 SMITH, *supra* note 13 (setting forth the free-market theory).

416. *See* OFFICE OF MGMT. & BUDGET, *supra* note 390, at 18 (estimating that the mandatory outlays for the 2002 United States budget will exceed $1.2 trillion).

417. *See, e.g.*, 2 SMITH, *supra* note 13 (setting forth the free-market theory).