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Lessons from the Great Depression

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THERE IS A VIRTUAL CONSENSUS among economists both that the United States is in the middle of the worst economic crisis since the Great Depression and that the Federal Government should take some action to stimulate the economy. There are, however, sharp disagreements as to the exact role the Government should play in stimulating the economy.

Not surprisingly, the question of the proper role of the Federal Government in stimulating the economy was also debated during the Great Depression, and nowhere was that debate more heated than in the area of industrial organization. On one side of the debate, producers, both large and small, argued that their declining fortunes were caused by too much competition, and that the Government's role should be to help them form cartels so that their industries could reduce output and increase price, which they argued would allow them to pay higher wages. On the other side of the debate, consumer groups argued that growth was stifled in part by the anticompetitive practices of monopolists, and that the Government should bust the trusts, leading to increased output, which in turn would lead to the creation of more jobs.

Given the strength of these opposing sides' interests and the fact that both phrased the benefit of their preferred policy in terms of preserving employment, it is perhaps not surprising that FDR simultaneously pursued contradictory economic policies. Specifically, FDR used the National Industrial Recovery Act (NIRA) to establish industrial codes that were expressly designed to limit output and price competition, while at the same time ratcheting up antitrust enforcement and in the end attacking the very codes established by the NIRA.

It is likely that these same opposing forces will again be at play during the Obama administration, with consumer groups seeking more aggressive antitrust enforcement and producer groups seeking less. Indeed, the Wall Street and automobile bailouts will likely spur requests by other manufacturers that the Federal Government protect them from the competitive process.

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Because these arguments were also made during the Great Depression, policy makers would be wise to consider the empirical impact of New Deal industrial organization policy in making policy decisions.

The Worst Economic Crisis Since the Great Depression

There is little question that we are in the middle of a global economic contraction. The stock market has fallen over 46 percent, from a close of 14,164 on October 9, 2007, to a close of 7,552 on November 20, 2008.[1] Other statistics are equally distressing: for example, between January and December 2008, industrial production has declined almost 8 percent[2] and unemployment has increased by almost 47 percent,[3] both of which are among the largest annual changes since the Great Depression. And perhaps of even greater concern, the Consumer Price Index (CPI) has declined by over 4 percent between July and December 2008, the largest five-month decline since October 1929 to March 1933.[4] This decrease raises significant concerns about the possibility of long-term deflation, one of the hallmarks of the Great Depression.

Despite the seriousness of today's economic slowdown, however, it is important to note that we are still a far distance from the economic stagnation of the Great Depression. For example, while there is valid concern about deflation, the more than 4 percent decline in the CPI between July and December 2008 pales in comparison with the approximately 27 percent decline in the CPI between November 1929 and March 1933.[5] Similarly, the 6 percent decline in industrial production, while troublesome, bears little resemblance to the more than 53 percent decline in industrial production between July 1929 and July 1932.[6] Finally, the unemployment rate, which as of December 2008 is measured at between 7.2 percent (excluding underemployed) and 13.5 percent (including underemployed),[7] is a far cry from the unemployment rate of between 20 percent (excluding those working part time in the WPA) and 25 percent (including WPA workers) in 1932.[8]

That said, it is important to note that the Great Depression did not occur overnight. To the contrary, the economic contraction was quite slow. For example, the 53 percent decline in industrial production from 1929 to 1932 started with a decline of only 7 percent in 1929.[9] Similarly, unemployment was 8.9 percent in 1930, before rising to 15.9 percent in 1931 and 23.6 percent in 1932.[10] And perhaps most

surprisingly, the stock market crash of 1929, including Black Thursday (October 24, 1929), Black Monday (October 28, 1929), and Black Tuesday (October 29, 1929), only resulted in a decline of roughly 76 points, or 25 percent of the value of the Dow Jones Industrial Average.[11] It took three further years for the Dow to lose approximately 200 more points to close at slightly over 41 on July 8, 1932.[12]

In other words, just because we have not yet seen the sort of economic decline exemplary of the Great Depression does not mean that we should not study the economic policies of the New Deal. Now is the time to pay particular attention because we want to prevent the adoption of policies that might exacerbate the current economic state of affairs. Indeed, this is precisely what many economists believed occurred at the tail end of the Hoover Administration (1929–1933), which not only failed to explore more expansionist fiscal policies,[13] but also pursued protectionist policies in the form of the Smoot-Hawley tariff.[14] The question that this article will explore is whether the industrial organization policies adopted by FDR had a similar negative effect on the economy.

Roosevelt's Industrial Organization Policies

There is little question that the Roosevelt Administration took aggressive action to change the industrial organization policies of the United States. Unfortunately, the aggressive policies that were adopted were internally inconsistent, with the Roosevelt Administration[15] simultaneously adopting policies designed to drive up price by allowing competitors to collude, as well as pursuing (more) aggressive antitrust enforcement designed to drive down price by breaking up industrial cartels. Not surprisingly, it is unclear whether, on balance, these contradictory policies did much, if anything, to improve the economic condition of the nation, and there is some empirical evidence that suggests that these policies actually worsened the economic condition.

The National Industrial Recovery Act. As economic conditions worsened in the early 1930s, firms began to reduce price in order to drive volume. Predictably, this led many businessmen to petition the government for government-sponsored cartels of the sort that had existed during World War I. Gerald Swope, for example, promoted a vision of a cartelized economy run by trade associations, an idea that Hoover castigated as "the most gigantic proposal of monopoly ever made in history."[16]

Roosevelt, however, was more receptive to the concept of industrial codes than Hoover and, by the end of his "First 100 Days," on June 16, 1933, signed the National Industrial Recovery Act into law. In its most basic form, the NIRA allowed competitors to meet and propose industrial codes of "fair competition" which would then be approved by code administrators.[17] Sold to the public as a way to protect workers and preserve employment,[18] industry-adopted NIRA codes were portrayed as a form of patriotism, and firms that adhered to them proudly displayed a Blue Eagle emblem on their stores.[19]

The codes that were adopted by the individual industries, however, went far beyond agreements to pay a minimum wage or to eliminate child labor. For example, 444 codes adopted open price systems, which were designed to stabilize prices and reveal price mavericks, 61 codes included limitations on machine or plant hours, and 30 industries contained restrictions on productive capacity, such as limiting the construction of new capacity, preventing the opening of closed plants, or the shifting of production from one market to another.[20]

In order to enforce the codes, code administration and enforcement bodies were formed to interpret code provisions, grant code exceptions, and punish code violations.[21] Significantly, code authorities were made up almost exclusively of businessmen.[22] Indeed, less than 10 percent of code authorities had labor members and less than 2 percent had consumer representatives.[23]

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The NIRA also contained two provisions designed to address antitrust concerns. First, Section 3 of the NIRA provided that the President (or his designee) could approve a code only if the industrial group proposing the code was open to all competitors and the code was not designed to permit monopolies or to harm small competitors.[24] Second, once approved, the provisions of the code were deemed the "standards of fair competition" for the trade or industry concerned; and any violation of such standards in any transaction in or affecting interstate or foreign commerce was deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act.[25]

Together these provisions, of course, only exacerbated the inherent conflict between the NIRA and the antitrust laws. Specifically, the first provision, while designed to protect against the exclusion of smaller competitors from cartels, only increased the competitive harm by ensuring that potential mavericks joined cartels and benefited from the restrictions in output. The second provision was even more perverse, by not only exempting industrial codes from Section 5 of the Federal Trade Commission Act, but also attempting to turn the Federal Trade Commission from protector of the free market to enforcer of distortions of it.

Not surprisingly, there was vocal opposition to the NIRA from both consumer groups and antitrust enforcers themselves. Farmers complained that rising industrial prices were canceling out the efforts of the farm program.[26] Similarly, Harold Ickes, the man in charge of the Public Works Admin-

istration and the Petroleum Administration, believed that NIRA codes were promoting monopoly and were responsible for the increased number of identical bids on public works contracts.[27] Additionally, the FTC, despite the NIRA provisions designed to divest it of its charge to prevent anticompetitive practices, attempted to challenge particular codes, arguing, for example, that the steel code was a means of fixing prices and avoiding the FTC's order against basing-point pricing.[28]

Given the opposition to the codes, the Federal Government issued Office Memorandum 228 on June 7, 1934, which stated that the purpose of the NIRA was to establish a free market, not, as many codes did, to eliminate competition.[29] Thus, Office Memorandum 228 made clear that destructive price cutting was unfair only if it imperiled small enterprise, impaired labor standards or tended to promote a monopoly. The business community, not surprisingly, immediately objected to the Memorandum and on June 8, 1934, the Administration retreated, making clear that Office Memorandum 228 only applied to new codes.[30] As a result, the 459 codes then in existence, covering over 90 percent of all industries subject to the NIRA, remained in effect.[31]

The End of the NIRA. Despite opposition to the NIRA, there was widespread speculation that it would be renewed by Congress on May 28, 1935. Just one day before Congress was set to vote, however, the NIRA was struck down by the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*.[32] A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market, the two largest suppliers for kosher poultry in Brooklyn, had been investigated by the Department of Justice for violating the Live Poultry Code, which set standards for wages and hours in the poultry industry.[33] Based upon the evidence collected by Walter Rice of the DOJ, the four Schechter brothers were found guilty of nineteen counts of violating the poultry code, including allowing workers to work more than forty hours a week, failing to publish prices, and allowing retailers to select individual chickens as opposed to requiring them to purchase chickens only by grade, as required by the code.[34] The circuit court upheld the conviction on seventeen of the counts, but not on two counts charging violations of wage and minimum hours of labor commitments.[35] The Government, using the case as a test for the constitutionality of the NIRA, appealed the case to the Supreme Court.[36]

On May 27, 1935, Chief Justice Charles Evans Hughes noting that "extraordinary conditions do not create or enlarge constitutional power,"[37] held that Section 3 of the NIRA violated Article 1 of the Constitution because, *inter alia*, the legislative powers delegated to the President by the NIRA were without effective limitation.[38] Specifically, the Court noted that the Act did not define "fair competition" and, indeed, permitted the President, without notice or hearing, to approve certain practices that the FTC, after notice and hearing, had already determined constituted "unfair methods of competition."[39] Thus, "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, [wa]s virtually unfettered . . . [and] an unconstitutional delegation of legislative power."[40]

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New Deal Antitrust Enforcement. At the same time the President was approving codes that limited competition, antitrust enforcers within the Administration attempted to outlaw the very codes that had been adopted by industries.

For example, Harold Ickes, the Secretary of the Interior and head of the Public Works Administration, charged that the basing-point systems adopted by both the cement and steel manufacturers led to the Public Works Administration receiving identical bids at least 257 times.[41] When, in Fall 1935, Ickes received uniform bids for steel pilings on a series of projects, including the Triborough Bridge in New York, that were 20 percent higher than the prices offered by foreign manufacturers, Ickes ordered the steel from a German manufacturer.[42] Although the President, in response to an outcry by domestic steel producers, rescinded the purchase of German steel, FDR ordered the antitrust authorities to investigate whether the identical bids were the result of collusion.[43] However, in Spring 1937, the Attorney General announced that the steel industry would not be prosecuted.[44]

Also in 1937, the Antitrust Division began to significantly increase antitrust enforcement through a series of important cases, including a challenge to interlocking directorates used in the steel industry, a challenge to the merger of Republic Steel and Corrigan, and a suit to force Columbia Gas and Electric system to divest itself of its interest in the Panhandle Eastern Pipeline.[45] Most significantly, in 1937, the Antitrust Division brought suit to break up the Aluminum Company of America, which had been long regarded as one of the principal examples of monopolies in the country.[46]

Ironically, some of the enforcement actions taken by the DOJ targeted the very practices approved by the NIRA. For example, in 1937, the DOJ sued, and a jury convicted, 16 corporations and 30 individuals representing 85 percent of the oil business in ten Midwestern states of a conspiracy to rig prices of petroleum in Madison, Wisconsin.[47] As reported by *Time Magazine* at the time, "Far from denying such charges, oilmen plaintively asserted that this was merely what they had been directed to do by the New Deal and N[I]RA. [The b]est summary yet of the situation from the oilman's point of view was the remark of one executive: 'The oil industry feels like a small boy spanked by mamma for doing something papa told him to do.'"[48]

In 1938, Thurman Arnold, the newly appointed head of the Antitrust Division, made explicit the link between competitive markets and economic recovery, arguing that "if, through the application of the Antirust Laws . . . we can restore price competition . . . we will have gone a long way toward solving one of the major problems of the recession."[49] Ignoring his own role in fostering cartels, FDR sent a message to Congress on April 29, 1938, that the American economy had become a "concealed cartel system" and that the disappearance of price competition was "one of the primary causes of our present difficulties."[50]

Under the direction of Arnold, the DOJ significantly increased antitrust enforcement, bringing indictments against the leading milk distributors in *United States v. Borden*[51] for preventing the entry of independent distributors through dirty practices, such as arson, flogging, and stench bombing.[52] Arnold also brought suit against block-booking in *United States v. Paramount Pictures*[53] and against the American Medical Association for attempting to block the formation of a health maintenance organization by the employees of the Home Owners' Loan Corporation.[54]

The Antitrust Division also took action against the housing industry, bringing 99 criminal actions and 22 civil suits.[55] It also brought action in 1939 against 18 major tire manufacturers for collusive bidding, and against the misuse of patents by the glassware and glass container industry.[56] In sum, between 1939 and 1941, the Antitrust Division filed 180 cases, and, by the time Arnold left office in 1943, he was responsible for nearly half of all proceedings instituted under the Sherman Act since 1898.

The Empirical Evidence. There are at least two important questions to ask when examining what impact New Deal industrial organization policies had on the economy. The first is to examine the impact of both the NIRA and increased antitrust enforcement on consumers, and the second is to examine the impact of these policies on the recovery from the Great Depression.

The first question is relatively easy to answer. It seems clear the NIRA increased prices just as antitrust enforcement lowered them. For example, Jason Taylor found that NIRA cartels led to a 10 percent reduction in monthly output.[57] Cole and Ohanian found that monthly industry level price changes between March 1933 and June 1934 rose from 16 percent in the iron and steel industry to 53 percent in the petroleum industry.[58] Consistent with economic theory, it appears that codes were most potent in highly concentrated industries, with 75 percent of complaints about code violations coming from just 25 codes covering industrial sectors dominated by a few firms.[59]

On the other side of the ledger, the evidence appears to be that the more aggressive antitrust enforcement reduced prices to consumers. Specifically, the DOJ at the time claimed that its suits against the construction industry saved consumers over $300 million in building costs.[60] Similarly, the DOJ claimed that its investigation into anticompetitive practices in the dairy industry reduced the price of milk by more than 30 percent.[61]

The second question is more difficult to answer, but the empirical evidence suggests that cartelization through the NIRA was at least partly to blame for how long it took to recover from the Great Depression. For example, Christina Romer, now the Chair of President Obama's Council of Economic Advisors, has concluded that the NIRA diminished the responsiveness of price to output and thus "prevented the economy's self-correction mechanism from working."[62] Similarly, Cole and Ohanian have written that cartelization through the NIRA coupled with policies that encouraged high wages in cartelized industries reduced the GNP by 27 percent below what it otherwise would have been, lengthening the Great Depression by seven years.[63]

The conclusion that cartelization is unlikely to lift the nation out of economic stagnation certainly makes intuitive sense. Allowing competitors to restrict output and increase price above a competitive level may allow these firms to pay higher wages to their workers, but it does so at a significant cost, by restricting output at a time when the economy needs to expand. Moreover, firms in cartelized industries are unlikely to innovate, especially where such innovation leads to new products and competitors that are likely to challenge incumbents. Thus, it is perhaps not surprising that according to one study, there were few, indeed, almost no, new products introduced in the late 1920s and 1930s that could drive increases in consumer spending or investment.[64] Seen in this light, protecting firms from the competitive process does not increase employment; it simply protects existing jobs at the cost of new ones.

Could This Happen Again?

One might hope that we have learned enough over the last century to avoid a return to cartelization as a mechanism to combat deflation and unemployment. But this optimism must be tempered by the realization that our current economic situation was caused, in part, by repeating many of the mistakes, especially the lack of financial regulation, that led in part to the Great Depression. Thus, it would not be surprising if there is pressure to repeat many of the same mistakes that lengthened the Great Depression.

Indeed, although it is relatively early, there are already signs that this might occur. In a recent article in *The New York Times*, David Boies argued that "preserving jobs and economic stability will be perceived as more important than preserving competition."[65] More significantly, *New York Times* columnist Paul Krugman's blog has a number of articles justifying the NIRA policies.[66] And Adam Cohen, in an editorial also in *The New York Times*, contended that firms should reduce hours instead of employment.[67] While this would not be problematic if implemented unilaterally, a single firm may be unlikely to reduce output without assurances that competitors would not seek to capture additional sales. For this reason, calls to reduce hours may be a precursor to

calls for industry agreements to restrict output in the name of preserving employment, which is precisely what led to the NIRA.

Conclusion

Although there is some disagreement among economists on the exact causes of the severity and duration of the Great Depression, the leading culprits all have something in common: they represent distortions of the competitive market. For example, the absence of securities regulation allows the principal-agency problem inherent in financial markets to cause buyers of financial products to pay more than they would if they were fully informed.[68] The Smoot-Hawley tariff allowed domestic producers to charge more for products than they would in a competitive market, and also decreased the incentives of domestic producers to innovate to compete with foreign producers. Additionally, the Gold Standard had the effect both of limiting the ability of the Federal Reserve to allow monetary supply to react to significant changes in the aggregate demand for money and to link national markets that otherwise would pursue fiscal policies that were tailored to their own economic conditions.[69] Given this context, it would seem counterintuitive to expect economic recovery to occur by enacting policies that exacerbate rather than address underlying market imperfections.

Put another way, the current economic crisis may provide evidence that markets are not inherently self-correcting,[70] but it does not provide evidence that markets do not work. They do and in the following predictable manner: competitive markets distribute resources in an efficient manner; markets that suffer from significant market imperfections—whether caused by externalities, information asymmetries, collusion, or too much concentration—do not. This basic distinction has been the foundation of the antitrust laws for nearly a century, and it has led to the general view that government intervention should be limited to markets that suffer from market imperfections, and even then, it should be limited in scope. So, for example, the antitrust agencies generally intervene only where market conditions are such that coordinated interaction or predation is likely, and limit their intervention to divestitures and narrowly tailored conduct remedies, stopping short of imposing remedies that set price or limit output. The NIRA ignored this limitation on market intervention. If we do the same, we will not have learned from the mistakes of history, and instead will be condemned to repeat them.

This is not to suggest that counsel seeking merger clearance should ignore changed circumstances caused by the current fiscal crisis. They may, for example, want to argue that the firm being acquired satisfies the requirements of the failing firm defense or, citing *General Dynamics*,[71] argue that historical market shares do not accurately reflect a firm's future competitive significance. And, certainly, merging parties will have to take account of imperfections in capital markets that may make entry less likely. But counsel should be wary of arguing that the merged entity must obtain market power in order to profitably operate in the current economy. Antitrust enforcers should be equally wary of such arguments, as such mergers are likely to exacerbate the current economic crisis rather than address it. In short, while some may argue that aggressive antitrust enforcement is a luxury that can only be afforded during good economic times, the importance of aggressive antitrust enforcement only increases when economic times are bad. ■

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1 See Yahoo! Finance, Dow Jones Industrial Average Historical Prices, http://finance.yahoo.com/q/hp?s=%5EDJI.

2 See Bd. of Governors of the Federal Reserve System, Industrial Production Index (Jan. 16, 2009), http://research.stlouisfed.org/fred2/data/INDPRO.txt.

3 See U.S. Dep't of Labor, Civilian Unemployment Rate (Jan. 9, 2009), http://research.stlouisfed.org/fred2/data/UNRATE.txt.

4 See U.S. Dep't of Labor, Consumer Price Index: All Urban Consumers (Jan. 16 2009), ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.

5 *Id.*

6 See Industrial Production Index, *supra* note 2.

7 Until 1994, the unemployment rate measured both unemployed (U3) plus those who have "given up" looking ("marginally attached") and those who work part time for economic reasons (as opposed to those working part time by choice). While the U3 is now the "official" unemployment rate, the Bureau of Labor Statistics continues to publish both rates. U.S. Dep't of Labor, Alternative Measures of Labor Underutilization, http://www.bls.gov/news.release/empsit.t12.htm.

8 Emergency workers employed in public works projects were counted as "unemployed" during the Great Depression. When these workers are included, the corrected unemployment rate declines by up to 20 percent in some years. Michael R. Darby, *Three-and-a-Half Million U.S. Employees Have Been Mislaid: Or, an Explanation of Unemployment*, 1934–1941, 84 J. POL. ECON. 1, 7–9 (1976).

9 See Industrial Production Index, *supra* note 2

10 Robert VanGiezen & Albert E. Schwenk, *Compensation from Before World War I Through the Great Depression*, COMPENSATION AND WORKING CONDITIONS, Jan. 30, 2003, http://www.bls.gov/opub/cwc/cm20030124ar03p1.htm.

11 See Dow Jones Industrial Average Historical Prices, *supra* note 1.

12 *Id.*

13 Milton Friedman and Anna Schwartz contend in their classic *Monetary History of the United States* that the wave of bank failures beginning in late 1930 occured because the Federal Reserve System "failed to exercise the responsibilities assigned to it in the Federal Reserve Act to provide liquidity to the banking system." MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960, at 52 (1963). Some economists have criticized Friedman and Schwartz for confusing correlation with causation and for failing to take account of the effect of deflation. See *generally* PETER TEMIN, DID MONETARY FORCES CAUSE THE GREAT DEPRESSION? 13–31, 170 (1976).

14 Douglas Irwin, for example, argues that 22 percent of the 40 percent decline in imports during the Great Depression was created by the rise in the effective tariff caused by the combined effect of Smoot-Hawley plus deflation. See Douglas A. Irwin, *The Smoot-Hawley Tariff: A Quantitative Assessment*, 80 REV. ECON. & STAT. 326, 333 (1998).

[15] Roosevelt served three terms (1933–37, 1937–41, 1941–45) and died in 1945, as he was beginning his fourth term.

[16] ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 42 (1995).

[17] National Industrial Recovery Act, 15 U.S.C. § 703 (repealed 1935); HAWLEY, *supra* note 16, at 53.

[18] Commitments to minimum wages and maximum hours of work were conditions for code approval.

[19] HAWLEY, *supra* note 16, at 53.

[20] *Id.* at 59–61.

[21] *Id.* at 61.

[22] *Id.*

[23] *Id.*

[24] National Industrial Recovery Act § 3(a), 15 U.S.C. § 703 (repealed 1935); HAWLEY, *supra* note 16, at 31.

[25] National Industrial Recovery Act § 3(b), 15 U.S.C. § 703 (repealed 1935).

[26] HAWLEY, *supra* note 16, at 67. The farm program, formed under the Agricultural Adjustment Act, was designed to re-establish the purchasing power of farmers through restrictions in farm production. The hope was that restrictions in output would increase farmers' incomes and reestablish their purchasing power for industrial products. *Id.* at 191; Agricultural Adjustment Act of 1933 § 2(1), Pub. L. No. 73-10 (1933).

[27] HAWLEY, *supra* note 16, at 73 (citing LEWIS L. LORWIN & A. FORD HINRICHS, NATIONAL ECONOMIC AND SOCIAL PLANNING 164–69 (1935)).

[28] *Id.* at 94.

[29] *Id.* at 101.

[30] *Id.*

[31] *Id.*

[32] 295 U.S. 495 (1935).

[33] HAWLEY, *supra* note 16, at 127.

[34] *Id.* at 127.

[35] *Id.*

[36] *Id.* at 127–28.

[37] *Schechter Poultry*, 295 U.S. at 528.

[38] Further, the Court held that code provisions relating to hours and wages affected interstate commence only indirectly and thus were not a valid exercise of federal power. *Id.* at 550–51.

[39] *Id.* at 533.

[40] *Id.* at 542.

[41] HAWLEY, *supra* note 16, at 361 n.2.

[42] *Id.* at 362.

[43] *Id.*

[44] *Id.* at 364; *see* Daniel Crane, *The Story of* United States v. Socony-Vacuum*: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES ch.3 (Eleanor M. Fox & Daniel A. Crane, eds. 2007).

[45] Hawley, *supra* note 16, at 373.

[46] *Id.* at 375; United States v. Aluminum Co. of Am., 148 F.2d 416, 421 (2d Cir. 1945). See Spencer W. Waller, *The Story of* Alcoa*: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, *in* ANTITRUST STORIES ch.4 (Eleanor M. Fox & Daniel A. Crane, eds. 2007).

[47] HAWLEY, *supra* note 16, at 374.

[48] *Mamma Spank*, TIME MAGAZINE, Oct. 18, 1937, *available at* http://www.time.com/time/magazine/article/0,9171,758297,00.html.

[49] HAWLEY, *supra* note 16, at 411.

[50] *Id.* at 412.

[51] 308 U.S. 188 (1939).

[52] HAWLEY, *supra* note 16, at 435.

[53] 334 U.S. 131, 156 (1948).

[54] United States v. Am. Med. Ass'n, 28 F. Supp. 752 (D.D.C. 1939), *rev'd*, 110 F.2d 703 (D.C. Cir. 1940); HAWLEY, *supra* note 16, at 436–37.

[55] HAWLEY, *supra* note 16, at 439.

[56] *Id.* at 440.

[57] Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50 J. INDUS. ECON. 1, 8 (2002).

[58] Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis* 10–11 (Fed. Reserve Bank of Minneapolis, Working Paper 597, 2001).

[59] *Id.* at 11.

[60] HAWLEY, *supra* note 16, at 439.

[61] *Id.* at 436.

[62] Christina D. Romer, *Why Did Prices Rise in the 1930s?*, 59 J. ECON. HIST. 167, 197 (1999).

[63] Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equlibrium Analysis*, 112 J. POL. ECON. 779, 808–13 (2004); Meg Sullivan, *FDR's Policies Prolonged Depression by 7 Years, UCLA Economists Conclude*, UCLA NEWSROOM, Mar. 3, 2009, http://newsroom.ucla.edu/portal/ucla/FDR-s-Policies-Prolonged-Depression-5409.aspx.

[64] RICK SZOSTAK, TECHNOLOGICAL INNOVATION AND THE GREAT DEPRESSION 67 (1995).

[65] Andrew Ross Sorkin, *Why Obama May Assent to Deals*, N.Y. TIMES, Nov. 11, 2008, at B1.

[66] The Conscience of a Liberal, http://krugman.blogs.nytimes.com/2008/12/03/even-more-on-nominal-wages/ (Dec. 3, 2008, 11:11 EST).

[67] Adam Cohen, Editorial, *Are Cuts in Hours and Pay an Alternative to Mass Layoffs?*, N.Y. TIMES, Dec. 6, 2008, at A20.

[68] The shareholders of a company are the owners (or principals) and yet the decisions that affect the value of their investment are made by the management and board of directors (or agents). Although the shareholders have the contractual right to control the decisions made by the management, there are a number of issues that make effective control problematic. *See generally* Michael C. Jensen & William H Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). For example, information about the value of a shareholder's investment comes from managers who have an incentive to provide information that overstates the effectiveness of management's performance and therefore overstates the value of the shareholder's investment. 1 Michael C. Jensen, *Agency Costs of Overvalued Equity*, 34 FIN. MGMT. 5 (2005).

[69] For example, Ben Bernanke notes that countries that left the Gold Standard were able to reflate their money supplies and price levels. In contrast, countries remaining on gold were forced into further deflation. For this reason nations that abandoned the Gold Standard recovered from the Depression more quickly than countries that remained on gold. Ben S. Bernanke, *The Macroeconomics of the Great Depression: A Comparative Approach*, 27 J. MONEY, CREDIT & BANKING 1, 4 (1995).

[70] "One thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead." *See, e.g.*, J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Implications of the Financial Meltdown for the FTC 2 (Jan. 29, 2009), *available at* http://www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf.

[71] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

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