

THE TARP BAILOUT OF GM: A LEGAL, HISTORICAL, AND LITERARY CRITIQUE

BRENT J. HORTON*

ABSTRACT	218
INTRODUCTION	218
I. THE NEW DEAL.....	225
A. <i>The Transportation Act of 1920 and Enforcement in the 1930s</i>	225
B. <i>The Motor Carrier Act of 1935</i>	229
C. <i>The National Industrial Recovery Act of 1933</i>	233
D. <i>The New Deal as Failed Economic Policy</i>	237
1. The Cole and Ohanian Study	237
2. Posner’s Critique of New Deal Economic Policies	238
3. FDR Admits that New Deal Economic Policies Failed	240
II. THE TROUBLED ASSET RELIEF PROGRAM.....	241
A. <i>The Bush Bailout</i>	242
B. <i>The Obama Bailout</i>	248
C. <i>GM Returns the Favor</i>	248
1. A Treasury-Appointed Board of Directors	250
2. Contractual Obligations to Produce Environmentally-Friendly Vehicles	251
D. <i>The Propriety of Government Imposed Corporate Social Responsibility</i>	252
E. <i>Other Proffered Justifications for the GM Bailout</i>	257
III. <i>ATLAS SHRUGGED’S CONTRIBUTION TO LEGAL</i>	

* Assistant Professor of Law & Ethics, Fordham University; Corporate LL.M., New York University College of Law; J.D., Syracuse University College of Law. Thanks are in order to my ever-patient fiancée, Kelley. Thank you to Jack Vrablik for research assistance. Thank you to my colleagues Benjamin Cole, Mark Conrad, Kenneth Davis, Kevin Jackson, and Elizabeth Pinho Cosenza for your comments on prior drafts.

No. 2	<i>The TARP Bailout of GM</i>	217
	SCHOLARSHIP	260
	A. <i>Atlas Shrugged 's Critique of Emergency Economic Legislation</i>	260
	B. <i>Satirical Legal Scholarship</i>	268
	CONCLUSION.....	271
	POSTSCRIPT.....	273

ABSTRACT

This Article argues that President Obama's use of TARP to fund a Chapter 11 restructuring of GM is reminiscent of the anticompetitive economic policies favored by Franklin Delano Roosevelt during the New Deal. However, it is largely agreed that FDR's New Deal economic policies prolonged the Great Depression. As such, a question arises: why would President Obama repeat FDR's failed economic policies? This question assumes that President Obama's goal is economic in nature.

This Article argues that President Obama's true goal is not economic, but social—to transform the United States automotive industry into one that produces environmentally-friendly vehicles. If that is the case, that is fine—and perhaps laudable—but I am reminded of Arthur Leff's admonition that when politicians implement policy they “ought to have the political nerve to do so with some understanding (and some disclosure) of what [they] are doing.”¹

Finally, this Article concludes by discussing the fact that over fifty years ago, Ayn Rand described politicians using emergency economic legislation to implement social change. Her novel, *Atlas Shrugged*,² provides a unique prospective on this Article's discussion of both the New Deal and TARP.

INTRODUCTION

In 2008, General Motors Corporation (GM) was facing unsustainable legacy costs and increased competition from Asia and Europe.³ The deepening economic recession in the United

1. See *infra* note 29.

2. AYN RAND, *ATLAS SHRUGGED* (1957).

3. Andrea Billups, *Out of Gas; On Verge of Extinction, American Auto Industry Must Make Big Changes*, WASH. TIMES, Jan. 18, 2009, at M04. One commentator explained:

Population aging is also likely to create huge legacy costs for employers. This is particularly true in the United States, where health and pension benefits are largely provided by the private sector. General Motors (GM) now has 2.5 retirees on its pension rolls for every active worker and an unfunded pension debt of \$19.2 billion. Honoring its legacy costs to retirees now adds \$1,800 to the cost of every vehicle GM makes, according to a 2003 estimate by Morgan Stanley.

Phillip Longman, *The Global Baby Bust*, 83 FOREIGN AFF. May-June 2004, at 64, 73. As to competition from Asia, see Hailu Regassa & Ahmad Ahmadian, *Comparative Study of*

States was threatening to push GM into liquidation.⁴ GM CEO Rick Wagoner testified before Congress that only federal government assistance could save GM.⁵ President Bush, “[a]bandon[ing] free-market principles to save the free-market system,”⁶ directed the Treasury to provide \$14 billion to GM pursuant to the Emergency Economic Stabilization Act of 2008 (EESA)⁷ and the Troubled Asset Relief Program (TARP).⁸ However, following the inauguration of Barack Obama, the TARP bailout of GM expanded exponentially, and by June 3, 2009, GM had received an additional \$36 billion.⁹ But now the cash infusion was contingent upon GM restructuring under Chapter 11 of the Bankruptcy Code.¹⁰ Why did the Obama Administration agree to fund GM’s Chapter 11 restructuring?

The Obama Administration—at least in public—repeated the explanation offered by the Bush Administration, that bailing out GM was necessary to save the economy.¹¹ Consider the following public statement from the President:

[No one doubts] the importance of a viable auto industry to the well-being of families and communities across our industrial Midwest and across the United States. In the midst of a deep recession and financial crisis, the collapse of these companies would have been *devastating* for countless

American and Japanese Auto Industry: General Motors Versus Toyota Motors Corporations, 8 BUS. REV. 1 (2007).

4. Tom Krishner, *GM CEO Says Bankruptcy Would Cause Liquidation*, USA TODAY, Mar. 17, 2009.

5. *Examining the State of the Domestic Automobile Industry, Hearing before the S. Comm. on Banking, Housing, and Urban Aff.*, 110th Cong., 2–4 (2008) (statement of G. Richard Wagoner, Jr., Chairman and Chief Executive Officer of General Motors Corporation).

6. Dana Milbank, *The Confessor in Chief*, WASH. POST, Dec. 19, 2008, at A3.

7. Pub. L. No. 110-343, 122 Stat. 3765 (codified at 12 U.S.C. §§ 5201–61 (2008)).

8. *Id.* at § 101-136 (codified at 12 U.S.C. § 5211–38 (2008)) (creating TARP). As to the automobile industry, the relevant TARP sub-program is the Auto Industry Financing Program (AIFP). ACCOUNTABILITY FOR THE TROUBLED ASSET RELIEF PROGRAM, THE SECOND REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL 7 (Jan. 9, 2009) (discussing AIFP); U.S. TREASURY DEPARTMENT OFFICE OF FINANCIAL STABILITY TROUBLED ASSET RELIEF PROGRAM TRANSACTIONS REPORT 10 (June 19, 2009) [hereinafter TARP TRANSACTION REPORT] (listing AIFP expenditures).

9. TARP TRANSACTION REPORT, *supra* note 8, at 10.

10. See 11 U.S.C. §§ 1101–45; Paul Kane, *Democrats’ Push for Full-Scale Stimulus Stalled Until Jan. 20*, WASH. POST, Nov. 15, 2008, at A01 (describing additional requirements of the expanded bailout).

11. Kate Linebaugh & Sharon Terlep, *The Auto Industry Bailout: GM Dealers Await Word on Deeper Cuts*, WALL ST. J., Apr. 28, 2009, at A8; Sean Higgins, *Automakers Rally on Hopes for Bailout, but White House, GOP Have Concerns*, INV. BUS. DAILY, Dec. 9, 2008, at A01.

Americans, and done *enormous damage to our economy*—beyond the auto industry.¹²

However, this Article argues that despite public statements to the contrary, the Obama Administration's expanded bailout of GM had very little to do with saving the economy. Instead, the Chapter 11 restructuring of GM was a first step in transforming the American automotive industry from one that produces large sports utility vehicles into one that produces environmentally-friendly cars and trucks.

First, this Article will expose the fallacy of the claim that government interference in private industry is necessary to avoid devastation to our economy.¹³ The American people have been here before. Part I of this Article turns to the past, FDR's New Deal. FDR's New Deal was premised on a belief that the Great Depression was caused by the free market; that "cutthroat competition" and "foolish overproduction" drove down prices and rendered existing businesses insolvent.¹⁴ FDR's New Deal

12. President Barack Obama, Remarks by the President on General Motors Restructuring, Grand Foyer, White House (June 1, 2009) (emphasis added). The President's statement echoed prior statements from the House of Representatives. Speaker of the House Nancy Pelosi stated:

In order to prevent the failure of one or more of the major American automobile manufacturers, which would have a *devastating impact on our economy*, particularly on the men and women who work in that industry, Congress and the Bush administration must take immediate action . . . I am confident Congress can consider emergency assistance legislation next week . . .

David M. Herszenhorn & Carl Hulse, *Democrats Seek Emergency Help for Carmakers*, N.Y. TIMES, Nov. 12, 2008, at A1.

13. Obama, *supra* note 12.

14. FDR told the following fable about oversupply driving down prices:

"[A] story that was told to me the other day." The story of what FDR called "a certain little sweater factory in a little town"—"I won't even give you the location of it." . . . The factory, which FDR said was the town's only industry, normally employed about 200 people who "had always been on exceedingly good terms" with the owners. However, "it was difficult to sell enough sweaters to keep them going because there were so many sweater factories" in the nation, all of which had had only about six weeks' worth of work in the past year. The town, FDR said, was "practically starving to death." So the people decided that they all could work if they reduced everyone's wages by 33 percent. That would cut the cost of their sweaters and enable them to undersell competitors. FDR said the factory's sales agent went to New York and "in 24 hours" sold "enough sweaters to keep that factory going for six months, 24 hours a day, three shifts."

George F. Will, *FDR's Sweater Fable*, NEWSWEEK, Mar 9, 2009, at 62. Roosevelt continued the fable by lamenting that the sweater factory likely "put two other sweater factories completely out of business." *Id.* He concluded that the best solution to this problem was less competition. *Id.*

attempted to reduce those competitive pressures on existing businesses—at least in part—with the Motor Carrier Act (MCA)¹⁵ and the National Industrial Recovery Act (NIRA).¹⁶ The MCA and NIRA limited competitive pressures on certain industries like trucking and steel by erecting barriers to entry that helped those industries at the expense of entrepreneurial firms.¹⁷ When one considers the number of entrepreneurial firms stifled by the MCA and the NIRA and the fact that eighty percent of new jobs are created by small firms (defined as 100 or fewer employees),¹⁸ common sense leads to the conclusion that these New Deal programs likely prolonged the Great Depression. As it turns out, both economists¹⁹ and law and economics scholars agree with this common sense conclusion that government interference in business and anticompetitive policy harms, rather than helps, the economy.²⁰

The other side of the New Deal was increasing demand. This portion of the New Deal was based on Keynesian economic theory. According to Keynes, in the event of economic recession, the government must take action to increase demand on goods and services. William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1454 (1986). As such, FDR demanded that cartels increase worker wages to increase demand on goods. Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50 J. INDUS. ECON. 1, 3 n.5 (2002).

15. Motor Carrier Act of 1935, ch. 498, Pub. L. No. 74-225, 49 Stat. 543 (1935) (current version at 49 U.S.C. §§ 10101–02 (2000)); Legislation, *Federal Motor Carrier Act*, 36 COLUM. L. REV. 945, 952 (1936). The Motor Carrier Act was part of the third phase of the New Deal. Herbert E. Dougall, *Third Phase of the New Deal*, BARRONS, Jan. 20, 1936, at 15.

16. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. 703–10), *invalidated by* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); David Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251, 260 (2009) (“[T]he New Deal sought stability by directly curtailing price and cost competition, often by limiting new entrants.”).

17. Kennedy, *supra* note 16, at 260.

18. David L. Birch, *Who Creates Jobs?*, PUB. INT., Fall 1981, at 3; David Neumark, *Do Small Businesses Create More Jobs?: New Evidence for the United States from the National Establishment Time Series* (Nat’l Bureau of Econ. Research, Working Paper No. 13818, 2008) (confirming Birch’s research); *see also* Rafael Efrat, *The Tax Burden and the Propensity of Small Businesses to File for Bankruptcy*, 4 HASTINGS BUS. L.J. 175, 176 (2008) (“Small-business owners in the United States make a significant contribution to the economy. Small-business owners make up 6 percent of the adult population and approximately 11 percent of working Americans.”); Note, Recent Legislation, 110 HARV. L. REV. 553 (1996) (If you define small business as companies with fewer than 500 employees, they “created almost four million net jobs from 1989 to 1993, whereas large businesses lost roughly 3.5 million net jobs during the same period.”).

19. *See* Harold L. Cole & Lee E. Ohanian, *New Deal Policies and The Persistence Of The Great Depression: A General Equilibrium Analysis*, 112 J. POL. ECON. 779 (2004) (discussing economists’ view of New Deal programs).

20. *See, e.g.*, Richard A. Posner, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 553, 563 (1998) [hereinafter Posner, *Social Norms*] (stating that the New Deal was rule by expert); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1572 (1998) [hereinafter Posner, *Rational*

Part II argues that while it is true that FDR's use of economic legislation and President Obama's use of TARP are analogous—both rely on government control and reducing competition—it is a mistake to assume that President Obama's use of TARP is a reincarnation of FDR's New Deal economic policies. That would presume that President Obama refuses to learn from the failure of FDR's economic policies. I refuse to believe that a Harvard-trained lawyer and Visiting Law and Government Fellow at the University of Chicago²¹—an institution known for its law and economics approach to legislation²²—would refuse to learn from history. “Contradictions do not exist. Whenever you think you are facing a contradiction, check your premises. You will find that one of them is wrong.”²³

As such, Part II.B continues with a more plausible explanation for the Obama Administration's use of TARP funds to restructure GM: the Obama Administration is not using TARP to repair the economy, but instead to “transform the economy,”²⁴ or at least the portion that produces automobiles. The Obama Administration does not “want a serious crisis to go to waste,”²⁵ and in President Obama's own words, the 2009 economic crisis provides a “chance to transform our economy . . . [and] put people to work building . . . fuel-efficient cars.”²⁶ The Obama Administration used TARP support to purchase a *quid pro quo* from GM.²⁷ The Obama Administration was able to convince GM to cooperate in the promotion of a broader social interest,

Choice] (same); Richard Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 621 (1969) [hereinafter Posner, *Natural Monopoly*] (discussing New Deal's “exaggerated faith in the independence and expertise of government administrators”). Likewise, there is a plethora of books discussing the topic. See, e.g., BURTON W. FOLSOM JR., *NEW DEAL OR RAW DEAL?: HOW FDR'S ECONOMIC LEGACY HAS DAMAGED AMERICA* (Threshold 2008); JIM POWELL, *FDR'S FOLLY: HOW ROOSEVELT AND HIS NEW DEAL PROLONGED THE GREAT DEPRESSION* (Crown 2003); MICHAEL W. WEINSTEIN, *RECOVERY AND REDISTRIBUTION UNDER THE NIRA* (North-Holland Publishing Company 1980); E.W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (Princeton University Press 1966).

21. See BARACK OBAMA, *DREAMS FROM MY FATHER*, *passim* (1995) (discussing President Obama's legal career).

22. R.H. Coase, *Law and Economics at Chicago*, 36 J. L. & ECON. 239 (1993) (discussing the law and economics movement at the University of Chicago).

23. RAND, *supra* note 2, at 199.

24. President Barack Obama, Speech to the Business Council (Feb. 13, 2009) (emphasis added).

25. Timothy Carney, *Obamanomics: ‘Crisis’ is a Cover For Ruining Your Retirement*, WASH. TIMES, March 16, 2009, at A18 (quoting Rahm Emanuel, White House Chief of Staff).

26. Obama, *supra* note 24.

27. See discussion *infra* Part II.B.

transforming the American automobile industry into one that produces environmentally-friendly cars and trucks, in exchange for a TARP bailout.²⁸ If that is the case, that is fine—and perhaps a laudable goal—but I am reminded of Arthur Leff’s admonition: when politicians implement policy they “ought to have the political nerve to do so with some understanding (*and some disclosure*) of what [they] are doing.”²⁹ The Obama Administration should not try to convince us that TARP’s application to GM is intended to improve the economy, when history shows it will have the opposite effect. The Obama Administration should tell us the truth, that they believe the current economic downturn presents an opportunity to implement broader social policy. They may find that the American people are receptive to the truth, and who knows, maybe even receptive to the policy.

Of course, using emergency economic legislation to force social change is not new. It repeats throughout history and has been the subject of legal scholars and novelists alike. Part III will thus conclude this Article by bringing a diverse perspective to the foregoing analysis of emergency economic legislation and its abuse in *Atlas Shrugged*.³⁰ Ayn Rand’s magnum opus, *Atlas Shrugged*, is often derided by legal academics as a cold, exploitative picture of humanity,³¹ a “utopian fantasy,”³² and a “remarkably silly book.”³³ They “protest[] too much, methinks.”³⁴ *Atlas Shrugged* should be celebrated as bringing a diverse voice to the critique of emergency economic legislation.³⁵ In fact, *Atlas Shrugged*’s arguments are not so different from the more accepted arguments of law and economics scholars³⁶ who argue that the New Deal was a

28. See discussion *infra* Part II.C.

29. Arthur Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 558 (1967) (emphasis added).

30. RAND, *supra* note 2, *passim*.

31. Eleanor Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1720 (1986) (briefly attacking *Atlas Shrugged* in a critique of Chicago’s School of Economics).

32. Linda Hirshman, *The Rape of the Locke: Race, Gender, and the Loss of Liberal Virtue*, 44 STAN. L. REV. 1133, 1152 (1992).

33. Whittaker Chambers, *Big Sister Is Watching You*, 25 NAT’L REV. 594, 594 (1957).

34. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, line 240 (George Baker ed., MacMillan 1913).

35. See discussion *infra* Part III.C.

36. Ayn Rand uses an approach akin to the law and economics balancing approach to attack the New Deal regulatory regime, but, amazingly, she did it two decades before Richard Posner. Let me be clear, I am not saying that Richard Posner was or is

progressive panacea³⁷ of “rule by expert,”³⁸ now discredited.³⁹ Nor is Rand’s argument far removed from the thesis of this Article, that emergency economic legislation is often used by the ruling class to accomplish broader social ends.

While many law review articles explain the legal insight that can be gleaned from works of literature, from *To Kill a Mockingbird*,⁴⁰ to *The Great Gatsby*,⁴¹ to *The Catcher in the Rye*,⁴² there is an amazing lack of legal scholarship discussing *Atlas Shrugged*.⁴³ This failure is unforgivable when one considers that the book heavily influenced scholarship in economics⁴⁴ and

channeling Ayn Rand’s *Atlas Shrugged*, or was or is even influenced by the book or its author; in fact, in a 2009 article he stated that in the 1960s Ayn Rand did not appeal to him. See Posting of Richard Posner to the Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2009/05/is_the_conserva.html (May 10, 2009, 14:32 EST). And in another article he was even less charitable, “I have long thought it troublesome that Alan Greenspan was a follower of Ayn Rand.” Posting of Richard Posner to the Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/04/reregulate_fina.htm (Apr. 28, 2008, 12:35 EST). What I am saying is that Rand and Posner have very similar evaluations of business regulation. Both Rand and Posner point out the high cost of regulation of monopolies and oligopolies—both in terms of higher prices to the consumer and barriers to entry.

37. Posner, *Rational Choice*, *supra* note 20, at 1572

38. Posner, *Social Norms*, *supra* note 20, at 563.

39. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 628 (4th ed. 1992).

40. Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill A Mockingbird*, 117 HARV. L. REV. 1682 (2004); Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intranter in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. 601 (1999).

41. Allen Boyer, *The Great Gatsby, the Black Sox, High Finance, and American Law*, 88 MICH. L. REV. 328 (1989); Brian Fintan Moore, *Assigning Moral Culpability in F. Scott Fitzgerald’s The Great Gatsby*, 50 RUTGERS L. REV. 645 (1998).

42. Stewart G. Pollock, *Lawyers and Judges as Catchers in the Rye*, 34 TULSA L.J. 1 (1998).

43. Some notable exceptions are: Simone A. Rose, *Will Atlas Shrug? Dilution Protection For “Famous” Trademarks: Anti-Competitive “Monopoly” Or Earned “Property” Right?*, 47 FLA. L. REV. 653 (1995) (using *Atlas Shrugged* to discuss monopolization); John Kunich, *Fiddling Around While the Hotspots Burn Out*, 14 GEO. INT’L ENVTL. L. REV. 179 (2001) (applying *Atlas Shrugged* to environmental law); Michael Coblenz, *Not for Entertainment Only: Fair Use and Fiction as Social Commentary*, 16 UCLA ENT. L. REV. 265, 304 (2009). Many of the discussions simply mentioned *Atlas Shrugged* in passing, assuming that the reader would understand the reference due to the book’s popularity. Ian Ayres and Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 281 n.141 (2001). Rand’s prior book, *The Fountainhead*, did receive detailed treatment. Alan D. Hornstein, *Narrative Jurisprudence: The Trials of Howard Roark*, 23 LEGAL STUD. F. 431 (1999).

44. See David Friedman, *Many, Few, One: Social Harmony and the Shrunk Choice Set*, 70 AM. ECON. REV. 225, 226 n.4 (1980) (describing the quintessential capitalist as *Atlas Shrugged*’s Hank Reardon, who built his enterprise from the “sweat of his brow”); Lewis E. Hill & Robert L. Rouse, *The Sociology of Knowledge and the History of Economic Thought*, 36 AM. J. ECON. & SOC. 299, 305 (1977) (calling Ayn Rand’s economic system utopian); Max E. Fletcher, *Harriet Martineux and Ayn Rand: Economics in the Guise of Fiction*, 33 AM. J. ECON. & SOC. 367 (1974); John B. Ridpath and James G. Lennox, *Ayn Rand’s Novels: Art or Tracts? Two Additional Views*, 35 AM. J. ECON. & SOC. 213 (1976).

business ethics,⁴⁵ as well as influenced law students⁴⁶ and everyday Americans—in fact, according to the Library of Congress, *Atlas Shrugged* is second in influence only to the Bible.⁴⁷ As to the last group—the American people—Ayn Rand took on the herculean task of “convert[ing] her readers to the view that . . . a completely unregulated system is to be preferred to a mixture of freedom and regulation that now prevails in economic affairs.”⁴⁸

I. THE NEW DEAL

A. *The Transportation Act of 1920 and Enforcement in the 1930s*

President Theodore Roosevelt’s cartel-busting crusade that dominated the first two decades of the twentieth century⁴⁹ was replaced by government-supported cartels during the presidency of FDR.⁵⁰ To be concise, the battle against cartels was already

45. See Christopher Michaelson, *Dealing with Swindlers and Devils: Literature and Business Ethics*, 58 J. BUS. ETHICS 359 (2005) (suggesting that Ayn Rand’s philosophy encouraged scandals like Enron); Bernard Sarachek, *Images of Corporate Executives in Recent Fiction*, 14 J. BUS. ETHICS 195 (1995) (“For Rand, all forms of collectivism, including the corporation, government and community moral codes constitute barriers raised by mediocre people to inhibit and control the true doers and builders of society.”); P. Eddy Wilson, *The Fiction of Corporate Scapegoating*, 12 J. BUS. ETHICS 779 (1993) (comparing scapegoating characters in *Atlas Shrugged* with actual corporate scapegoating).

46. A 2006 survey of entering law students ranks *Atlas Shrugged* fourth, behind, the *Catcher in the Rye* (3rd), *The DaVinci Code* (2nd) and *To Kill a Mockingbird* (1st). The students were asked for their favorite book. Ian Galacher, “Who Are Those Guys?": *The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 CAL. W. L. REV. 151, app. A (2007).

47. Esther B. Fein, *Book Notes*, N.Y. TIMES, Nov. 20, 1991, at C26. Since it was published in 1957, *Atlas Shrugged* has sold over 6 million copies. Mark Sanford, *Atlas Hugged*, NEWSWEEK, Nov. 2, 2009.

48. Max E. Fletcher, *Harriet Martineux and Ayn Rand: Economics in the Guise of Fiction*, 33 AM. J. ECON. & SOC. 367, 369 (1974) (Ayn Rand “had great success in simplifying the esoteric ideas of [government involvement in] economics and bringing them to the public in the form of fiction”).

49. Michael S. Lewis-Beck, *Maintaining Economic Competition: The Causes and Consequences of Antitrust*, 41 J. POL. 169, 179 (1979). Lewis-Beck argues:

Although Theodore Roosevelt cultivated his reputation as a serious trustbuster, his immediate successors actually started more cases than he did. Democrat Woodrow Wilson, for example, initiated over twice as many suits as TR. In his 1912 campaign against Roosevelt, Wilson spoke out forcefully against politically-connected business combinations: “The masters of the government of the United States are the combined capitalists and manufacturers of the United States. . . . [the laws should] pull apart, and gently, but firmly and persistently dissect.”

50. Relaxation of the antitrust laws corresponded with greater government cooperation with business. See Calvin Woodard, *Reality and Social Reform: The Transition*

coming to an end in the 1920s and early 1930s with legislation intended to promote closer cooperation between government and politically-connected business.⁵¹ The Transportation Act of 1920,⁵² which was the apparent model for Ayn Rand's fictional Anti-Dog-Eat-Dog Rule,⁵³ empowered the Interstate Commerce Commission (ICC) to regulate entry into the railroad industry by granting (or refusing to grant) certificates of public convenience and necessity.⁵⁴ The prospective entrant had to show that "the present or future public convenience and necessity require or will require the construction, or operation . . . of such additional or extended line of railroad."⁵⁵ Of course,

from Laissez-Faire to the Welfare State, 72 YALE L.J. 286, 306, 323 (1962) (discussing the demise of laissez-faire and the rise of the welfare state). It would take the Supreme Court a decade and a half to accept the welfare state, not supporting government intervention in business until 1937. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 206 (1994); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2184 n.145 (Jun. 1999).

51. The Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920), as amended by the Emergency Railroad Transportation Act of 1933, Pub. L. No. 73-68, 48 Stat. 211, 217 (1933):

The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

49 U.S.C. § 5-15 (1934); *Texas v. United States*, 292 U.S. 522 (1934); R. W. Harbeson, *The Emergency Railroad Transportation Act of 1933*, 42 J. POL. ECON. 106, 112 (1934); Edwin C. Goddard, *The Emergency Railroad Transportation Act, 1933*, 31 MICH. L. REV. 1112, 1116 (1933); but see Edward Dumbauld, *Rate Fixing Conspiracies in Regulated Industries*, 95 PENN. L. REV. 643 (1947) (arguing that the railroads were still subject to antitrust laws).

52. Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456 (1920).

53. RAND, *supra* note 2, at 75; see *infra* Part III.A.

54. CHRISTOPHER JAMES CASTANEDA, *REGULATED ENTERPRISE: NATURAL GAS PIPELINES AND MARKETS 1935-1954* 8 (1993).

55. The applicable text of the statute provides:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad,

.....

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the

this is a fact-based question that leaves much room for chicanery on the part of railroad cartels that want to exclude new market entrants. Consider the case of *Piedmont & Northern Railway Co. v. United States*.⁵⁶ In 1925 the Piedmont region of South Carolina was beginning to diversify away from cotton to steel.⁵⁷ The Piedmont & Northern Railway Company (P&N) “realized the possibility of great industrial development” in the region of Piedmont, and sought to accelerate this process by extending its railroad line from Spartanburg, South Carolina to Gastonia, North Carolina,⁵⁸ a \$15,000,000 project (\$184,000,000 today).⁵⁹ The ICC became aware of these plans and intervened, sending a letter dated March 8, 1927, reprimanding P&N for not applying for governmental permission to expand.⁶⁰

P&N responded to the letter from the ICC by begrudgingly filing an application for a certificate of public convenience and necessity, arguing that the ICC lacked jurisdiction over it because P&N was an inter-urban electric railroad, a species of railroad exempt from the Transportation Act.⁶¹ Setting aside the issue of jurisdiction, the ICC turned to whether there was substantial demand for the lines of road proposed by P&N, and whether “service would be improved and the industrial development of the region would be stimulated and enlarged.”⁶² Even if we assume the propriety of the federal government in determining whether a new business is needed, it appeared that P&N had the better argument.⁶³ What P&N was proposing was novel, it would use its high speed electric cars (a new technology

certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby.

41 Stat. 456, 477–78 (1920); see also *Texas v. E. Tex. R.R. Co.*, 258 U.S. 204, 218 n.1 (1922).

56. 30 F.2d 421 (W.D.S.C. 1929), *rev'd*, 280 U.S. 469 (1930).

57. Frank Bohn, *New South Thrives with Industrial Life*, N.Y. TIMES, Oct. 25, 1925, at XX1; David Carleton, *The Piedmont and Waccamaw Regions: An Economic Comparison*, S.C. HIST. MAG., Apr. 1987, at 83.

58. *Piedmont*, 30 F.2d at 423; Note, *Judicial Review of Negative Orders by the Interstate Commerce Commission*, 34 COLUM. L. REV. 908, 914–16 (1934).

59. *P&N Answers I.C.C.*, WALL ST. J., May 5, 1930, at 7.

60. *Piedmont*, 30 F.2d at 422.

61. *Id.* at 423.

62. *Id.*

63. *Id. passim.*

before restricted to within cities)⁶⁴ to transport passengers and goods not only within cities, but between cities as well.⁶⁵ The electric cars could travel on intra-city tracks (via tracks imbedded in the streets) as well as along inter-city tracks previously dominated by steam locomotives.⁶⁶ “The switching service thus made available in the cities [would be] extremely convenient for industries of all sorts, including factories, wholesale houses, and even retail houses.”⁶⁷ The new service would provide “means by which [inner-city] mills and factories could find connections with the steam railroads of the country for the delivery of freight.”⁶⁸ Beyond the growth opportunities for local industry, consider the number of jobs that would have been created by a \$184,000,000 construction project.

However, the existing railroad cartel lead by Southern Railway (“Southern”) intervened in the action and, backed by the power of the ICC, sought to block the entry of P&N into their market, arguing that they alone adequately served the geographic area in question and that they would lose business to Northern.⁶⁹ The ICC denied the certificate to P&N, finding that the proposed line would duplicate service provided by Southern.⁷⁰ The ICC’s decision was upheld by the District Court for the Western District of South Carolina.⁷¹ It was not until three years later when the Supreme Court found that the ICC had overstepped its jurisdiction that P&N was free to expand without governmental interference.⁷² By then, the damage was done. Innovation in the Piedmont region of South Carolina had been

64. Carl W. Condit, *The Pioneer Stage of Railroad Electrification*, 67 *TRANSACT. AM. PHIL. SOC’Y* 1 (1977) (discussing the early years of the electric railroad in 1905 Brooklyn).

65. *Piedmont*, 30 F.2d at 427.

66. *Id.*

67. *Id.*

68. *Id.* at 428.

69. *Id.* at 422–23. Suits by competing railroads seeking to stop new railroads or extensions of existing railroads were common. See *Chicago Junction Case*, 264 U.S. 258 (1924) (“Leave to intervene can be granted only to one entitled under the act to complain to the Commission. The right to complain was broadly bestowed by Congress. From its inception the Commission has construed liberally this right to complain.”) (citations omitted).

70. *Piedmont*, 30 F.2d at 423; see also *Bars P.&N. Road Extension*, *N.Y. TIMES*, Apr. 16, 1928, at 41.

71. *Piedmont*, 30 F.2d at 423.

72. *Piedmont & N. Ry. Co. v. United States*, 280 U.S. 469 (1930); *High Court Gets Rail Cases*, *BARRONS*, Oct. 20, 1930, at 7.

delayed by three years.⁷³ This outcome was representative of problems around the nation.⁷⁴ During the period from 1920 to 1940, while the number of large railroads (defined as greater than 5,000 miles of track) remained constant at approximately fifteen, the number of small railroads (defined as less than 5,000 miles of track) that could challenge the large railroads fell by half, from 1,083 to 559.⁷⁵ Politically-connected business—the railroad cartel—successfully consolidated power by excluding entrepreneurial firms with the help of the federal government.

B. *The Motor Carrier Act of 1935*

During the Great Depression, the true competitive challenge to the railroad cartels came from the infant trucking industry, or motor carriers.⁷⁶ Motor carriers made a phenomenal advance in the years from 1919 to 1935, the years following the First World War.⁷⁷ The number of trucks providing transportation services grew forty-fold, from 85,600 in 1914 to 3,480,939 in 1930.⁷⁸ This growth was largely due to the innovation of small firms that offered improved speed, flexibility of services rendered, and lower fares.⁷⁹ In response to this new competitive threat, the railroad cartels again lobbied the government for more industry-protecting laws and regulations.⁸⁰ The result was the Motor Carrier Act of 1935.⁸¹ The Motor Carrier Act forbade motor carriers from operating without a certificate of public convenience and necessity.⁸² Consider the case of *Maher v. United States*.⁸³ Dan E. Maher (“Maher”) was an existing carrier,

73. See *High Court Gets Rail Cases*, BARRONS, Oct. 20, 1930, at 7 (explaining that as of October of 1930, Piedmont & Northern was still litigating the appeal on remand).

74. W. N. Leonard, *The Decline of Railroad Consolidation*, 9 J. ECON. HIST. 1, 10 (1949).

75. *Id.* at 10 tbl. 1. Amazingly, rather than being upset at the growing lack of competition, commentators of the day complained that the reductions were simply not the right kind—they were the result of abandonment, not consolidation. They argued that the abandonment of these smaller railroads was inevitable and that the Commission should have had more power to force consolidations of the smaller into the large. *Id.*

76. Legislation, *Federal Motor Carrier Act*, *supra* note 15, at 945.

77. *Id.* at 945 n.2.

78. *Id.* at 945.

79. *Id.* at 947.

80. CASTANADA, *supra* note 54, at 8.

81. Motor Carrier Act of 1935, Pub. L. No. 74-225, § 206(a), 49 Stat. 543 (1935) (codified as amended at 49 U.S.C. §§ 502–07, 522, 523, 525, 526, 315, 31502–04 (2008)).

82. Motor Carrier Act § 206; EARL LATHAM, *THE POLITICS OF RAILROAD COORDINATION 1933–1936* 232–33 (1959).

83. *Maher v. United States*, 23 F. Supp. 810, 811 (D. Or. 1938), *rev'd*, 307 U.S. 148 (1938).

who had transferred passengers and freight along Highway 99 on the west coast since 1931.⁸⁴ Despite the fact that Maher's activities predated passage of the Motor Carrier Act, Maher was still required to apply for a certificate of convenience and necessity from the ICC.⁸⁵ Just as they had done in *Piedmont*, railroads that competed with Maher seized the opportunity to try to put Maher out of business and intervened in the action, arguing that Maher's service would duplicate their own.⁸⁶ Like they had done in *Piedmont*, they argued that Maher's service was not needed.

Pursuant to the Motor Carrier Act, the ICC had the power to grant (or withhold) permission to motor carriers to operate based on whether the ICC deemed the service to be demanded by public convenience and necessity.⁸⁷ Alternatively, a motor carrier could be grandfathered pursuant to Section 206 of the Act.⁸⁸ Under the latter option the ICC would grant a certificate

84. *Id.* at 812.

85. *Id.*

86. *Id.*

87. The Motor Carrier Act Section 207 states:

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Motor Carrier Act of 1935, Pub. L. No. 74-225, § 206(a), 49 Stat. 543 (1935) (codified as amended at 49 U.S.C. §§ 502-07, 522, 523, 525, 526, 315, 31502-04 (2008)).

88. Motor Carrier Act Section 206 states:

(a) No common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public

reasoning that the operation from some past time is conclusive evidence that “public convenience and necessity will be served by continued operation.”⁸⁹ Because Maher’s business predated passage of the Motor Carrier Act in 1935, he filed with the ICC an application based on Section 206, “to operate as a common carrier by motor vehicle of passengers and their baggage over U.S. Highway No. 99, between Portland, Oregon and Seattle, Washington, and intermediate points thereof.”⁹⁰ Those opposing Maher, including the railroads, argued that Maher shifted from an irregular schedule to a regular schedule after the passage of the Motor Carrier Act in 1935, and as such could not be granted permission to operate pursuant to Section 206.⁹¹ The ICC agreed that the scope of the grandfather clause was limited to extent of prior operations,⁹² denied the application and ordered that Maher cease and desist his operations.⁹³

Maher appealed, but the Supreme Court upheld the ICC’s determination, prohibiting Maher from further operation, stating:

Invoking the “grandfather clause,” the appellee sought from the Commission a certificate authorizing continuance of his regular service between the fixed termini of Portland and Seattle on U.S. Highway 99. But the Commission found that the regular operation over this route had only been instituted on May 29, 1936. Theretofore, and including the crucial period prior to June 1, 1935, the appellee had been engaged in quite different services from those for which it asked a certificate—namely, “an irregular, so-called ‘anywhere-for-hire’

convenience and necessity will be served by such operation, and without further proceedings if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this chapter, and such certificate shall be issued or denied accordingly.

Motor Carrier Act § 206.

89. Note, *The “Grandfather” Clause in Federal Motor Carrier Regulation*, 43 COLUM. L. REV. 207, 208 (1943).

90. *Maher*, 23 F. Supp. at 812.

91. *Id.* at 812–13.

92. Note, *Public Utilities: Are the Rights under Grandfather Clause Limited to the Extent of Prior Operations*, 30 CAL. L. REV. 101, 102 n.4 (1941–1942).

93. *Maher*, 23 F. Supp. at 812–13.

operation in Oregon with occasional trips to points in Washington” over any route adapted to a particular trip, but using at least for part of the distance U.S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee’s regular route was established. Applying these findings, which are binding here, the Commission ruled that the appellee did not bring himself within the privilege of the “grandfather clause.” In making this application of the statute, the Commission properly construed it.⁹⁴

Maher was enjoined from further operations.⁹⁵ This was a win for the railroads. They now had one less business to compete against. It is also just one of many instances of the ICC stifling the infant trucking industry in favor of the railroads by “narrowly interpret[ing] the ‘grandfather clause’ . . . so as to deny certificates and permits to operating truck lines.”⁹⁶ Again, politically-connected business—the railroad cartel—successfully consolidated power by excluding entrepreneurial trucking firms with the help of the federal government.⁹⁷

94. *Maher v. United States*, 307 U.S. 148, 154–55 (1939). *Maher* was in accord with the decisions of other courts that limited the grandfather clause to the scope of the prior operation:

In *Motor Transit Co. v. Railroad Commission*, the carrier attacked an order of the Railroad Commission limiting its operation to the through routes used during the grandfather period and refusing to allow local service between intermediate points. It contended that operation prior to the grandfather date gave it unlimited rights, vested by the legislature and completely beyond the power of the Commission to touch. The court rejected this argument, saying, “To hold that by the operation of a through line on that date petitioners were given a franchise to operate to any extent that they, in their judgment, might see fit, limited solely by the restriction that operations must be between the same termini and over the same route, would be to materially decrease the power of the commission over these lines and thus overlook the primary purpose of the enactment which was to give to the commission, in the interest of the public, the fullest power possible to regulate the operation of auto stage companies.”

Public Utilities, *supra* note 92, at 103–04 (1941) (discussing *Motor Transit Co. v. R.R. Comm’n*, 189 Cal. 573 (1922)).

95. *Maher*, 307 U.S. at 154–55.

96. Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L. J.* 467, 498 (1952) (citing *Vedder Oil Contract Car. App.*, 1 *M.C.C.* 758 (1936); *McDonald v. Thompson*, 305 U.S. 263 (1938); and *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74 (1942)).

97. It is also true of the time, that even where certain motor carriers were approved, their operations were restricted in terms of geography or commodity so as to protect markets dominated by the railroad cartels. See Huntington, *supra* note 96, at 498.

C. *The National Industrial Recovery Act of 1933*

New Deal cooperation between the federal government and politically-connected business was not limited to propping up the railroad cartels. The National Industrial Recovery Act of 1933 (NIRA)⁹⁸ extended protections to over 500 industry-centered cartels under the guise of “bring[ing] ‘order’ to the existing ‘chaotic and overly competitive’ United States economy.”⁹⁹ The NIRA delegated to the various cartels (usually organized as industry trade associations) the power to write codes of fair competition.¹⁰⁰ The “Code of Fair Competition for

98. NIRA Section 1 provides:

A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to *eliminate unfair competitive practices*, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

National Industrial Recovery Act, Pub. L. No. 73-67 § 1, 48 Stat. 195 (1933), Title I *invalidated* by *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Title II expired in June, 1935).

99. William L. Anderson, *Risk and the National Industrial Recovery Act: An Empirical Evaluation*, 103 PUB. CHOICE 139, 141 (2000); Cole & Ohanian, *supra* note 19, at 784 (“By 1934, NRA codes covered over 500 industries, which accounted for nearly 80 percent of private, nonagricultural employment.”).

100. Note, *Some Legal Aspects of the National Industrial Recovery Act*, 47 HARV. L. REV. 85, 85 n.2 (1933). The NIRA stated in relevant part:

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a *code or codes of fair competition* for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade

the Iron and Steel Industry”¹⁰¹ (Steel Code) is representative of the other codes. The Steel Code was approved by FDR on August 19, 1933.¹⁰² Written by the American Iron and Steel Institute, the Steel Code guaranteed the dominance of the historical steel manufacturers and its members—the steel cartel.¹⁰³ Prominent in the Steel Code was price fixing.¹⁰⁴ The Steel Code provided that each steel manufacturer must file a base price with the Institute.¹⁰⁵ The lowest filed price was the price for the entire industry.¹⁰⁶ If a small enterprise wanted to

Commission Act, as amended [chapter 2 of this title]; but nothing in this title [chapter] shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended [chapter 2].

National Industrial Recovery Act § 3 (emphasis added).

101. Exec. Order No. 6254 (Aug. 19, 1933), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=14506>.

102. *Id.* It reads as follows:

An Application having been duly made, pursuant to and in full compliance with the provisions of Title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a Code of Fair Competition for the Iron and Steel Industry, and hearings having been held thereon and the Administrator having rendered his report together with his recommendations and findings with respect thereto, and the Administrator having found that the said Code of Fair Competition complies in all respects with the pertinent provisions of Title I of said Act and that the requirements of clauses (1) and (2) of subsection (a) of Section 3 of the said Act have been met:

Now, THEREFORE, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by Title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do adopt and approve the report, recommendations and findings of the Administrator and do order that the said Code of Fair Competition be and it is hereby approved.

FRANKLIN D. ROOSEVELT.

Id.

103. *See, e.g.*, Jonathan B. Baker, *Identifying Cartel Policing Under Uncertainty: The U.S. Steel Industry, 1933–1939*, 32 J.L. & ECON., Oct. 1989, S47, at S71 (“[T]he steel code successfully facilitated collusion by ensuring that cooperation was a dominant strategy for all producers.”). *See generally* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 664–67 (2004) (discussing the ways cartels used the Steel Code, and the National Recovery Act generally, to effect price-fixing and collusion).

104. *Some Legal Aspects*, *supra* note 100, at 102 n.121 (citing Code for the Iron and Steel Industry, art. VII, schedule E (price fixing provision)).

105. *Some Legal Aspects*, *supra* note 100, at 97 n.80 (citing Code for the Iron and Steel Industry, art. IX (requiring that prices be reported to the Institute)); John Knight Holbrook, Jr., *Price Reporting as a Trade Association Activity, 1925 to 1935*, 35 COLUM. L. REV. 1053, 1061 (1935); Malcolm P. Sharp, *Title I of the National Recovery Act*, 1 U. CHI. L. REV. 320 (1933); *Two Price Rises in Steel Weighty*, N.Y. TIMES, Sept. 4, 1933, p. 17; *Text of Eastman Letter on Rail Price Costs and Rates*, WALL ST. J., Oct. 30, 1933, at 8 (arguing that the NIRA was nothing more than government sanctioned price fixing); *Rail Bid Collusion Laid by Eastman to Four Concerns*, N.Y. TIMES, Oct. 29, 1933, at 1; *Letters Alluded to by Eastman*, WALL ST. J., Oct. 30, 1933, at 10.

106. Holbrook, *supra* note 105, at 1061 n.40; Sharp, *supra* note 105, at 325. The steel industry was not alone in such price fixing:

sell steel for less to capture market share (perhaps because it found a way to be more innovative and efficient), it would have to file a lower price with the Institute ten days in advance, giving the large businesses plenty of time to match the lower price.¹⁰⁷ “The gain from a price cut—attracting additional customers—thus could be offset immediately by other cartel members, diminishing the incentive for the cut in the first place.”¹⁰⁸ The result was less price-cutting, and, it follows, higher prices for the consumer.¹⁰⁹

While the National Industrial Recovery Act, 48 Stat. 195, was in effect, a Code of Fair Competition for the Tag Industry was promulgated February 1, 1934. The Code Authority consisted of the Executive Committee of the Institute and such other persons as the Administrator for Industrial Recovery designated. Under the Code, a so-called ‘open-price plan of selling’ was prescribed, under which each member of the industry was required to file a schedule of his prices and terms of sale; manufacturers who did not file such a schedule were ‘deemed to have filed a schedule conforming * * * with the schedule * * * on file which states the lowest price and the most favorable terms.’ It was provided that no filed schedule ‘shall be such as to permit the sale of any product at less than the cost thereof’ to the filing member, determined in a manner thereafter prescribed. Further, it was provided that no member of the industry ‘shall sell such product for less than such price or upon terms or conditions more favorable’ than stated in his filed price schedule. A revised schedule might be filed at any time, but such revision was not to become effective until seven days after the date of filing, ‘provided, however, that an increased price may become effective at such earlier date as the member filing the same shall fix.’ Petitioners concede that these price-fixing provisions of the Code would have been illegal except for the exemption from the anti-trust laws contained in the National Industrial Recovery Act.

Trade Mfr.’s Inst. v. FTC, 174 F.2d 452, 454 (1st Cir. 1949).

107. Holbrook, *supra* note 105, at 1065 n.58.

108. Jason E. Taylor, *Cartel Code Attributes and Cartel Performance: An Industry-Level Analysis of the National Industrial Recovery Act*, 50 J. LAW & ECON. 597, 603 (2007).

109. This sort of “open price filing discourages competition by revealing firms’ pricing policies to rivals, allowing them to match the price or otherwise ‘retaliate’ against a price-cutting firm.” Jason E. Taylor & Peter G. Klein, *An Anatomy of a Cartel: The National Industrial Recovery Act of 1933 and Compliance Crisis of 1934*, 26 RES. ECON. HIST. 235, 238 (2008). Consider:

In a market where sellers are few, a price reduction that produces a substantial expansion in the output of one will result in so substantial a contraction in the output of the others that they will quickly respond to the reduction. If, for example, there are three sellers of equal size in a market, a 20 percent expansion in the output of one will cause the output of each of the others to fall not by 0.2 percent but by 10 per-cent, a contraction the victims can hardly overlook. Anticipating a prompt reaction by his rivals that will quickly nullify his gains, the seller in a concentrated market will be less likely to initiate a price reduction than his counterpart in the atomized market. Oligopolists are thus “interdependent” in their pricing. They base their pricing decisions in part on anticipated reactions to them. The result is a tendency to avoid vigorous price competition.

Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) (summarizing the argument of Prof. Donald Turner).

Neither was price fixing the only pro-cartel provision in the Steel Code. It also provided “none of the members of this code shall initiate the construction of any new blast furnace or open hearth or Bessemer steel capacity,”¹¹⁰ and prohibited each member of the cartel from selling superior steel from that of its larger competitors.¹¹¹ These provisions ensure that each steel company maintains its current market share by prohibiting increases in production.¹¹² Seventy-five years later, with the benefit of hindsight, it is clear that these laws promote stagnation and stifle entrepreneurs, as Burton W. Folsom, Jr., points out:

The whole NRA, by carving up markets among existing producers and by fixing prices and wages, assumed all industry was stagnant and unchanging. In fact, almost no industry fit that model. In steel, for example, when Andrew Carnegie founded what became Carnegie Steel, in 1872, he was the smallest producer in America—and England far outsold the United States in the World Steel Market. Rails were the main steel product, and the price of rails was about \$56 a ton. In 1872, however, unlike in 1933, markets, prices, and wages were not fixed; they were fluid and the American customer was the winner. Carnegie, for example, cut costs by using the Bessemer process and open-hearth method of making steel; he innovated in accounting with double-entry book-keeping; he was daring in sales by bidding for contracts and assuming that economies of large scale could help him fulfill contracts profitably. Unlike his competitors, if Carnegie found a cheaper way to make rails, he would rip out a factory and rebuild the improved version immediately. As a result, in 1900 Carnegie was the largest steel producer in the United States and larger than all the major steel producers in England put together. He could make steel rails at \$11.50 per ton. Competition in price and product helped Carnegie and all consumers of steel.¹¹³

110. Taylor, *supra* note 108, at 609 (quoting The Iron and Steel Code, article V, sec 2).

111. *Some Legal Aspects*, *supra* note 100, at 110 n.180 (citing Code for the Iron and Steel Industry, Schedule H (D and L)).

112. *Some Legal Aspects*, *supra* note 100, at 110 n.180 (citing Code for the Iron and Steel Industry, Schedule H (D and L)).

113. FOLSOM, *supra* note 20, at 46 (citing HAROLD LIVESAY, ANDREW CARNEGIE AND THE RISE OF BIG BUSINESS 150, 165–66 (1975)).

D. *The New Deal as Failed Economic Policy*

1. The Cole and Ohanian Study

FDR claimed that New Deal economic programs like the MCA and NIRA would lift America out of depression. However, as demonstrated by the cases of *Piedmont* and *Maher* above, New Deal economic policies were ill-suited to spur economic growth.¹¹⁴ This anecdotal evidence is supported by a groundbreaking study by economists Harold L. Cole and Lee E. Ohanian at UCLA.¹¹⁵ Cole and Ohanian start by pointing out that the recovery from the Great Depression was long and weak.¹¹⁶ GDP, “which was 39 percent below trend at the trough of the Depression in 1933, remained 27 percent below trend in 1939.”¹¹⁷ They argue that this weak recovery is odd given the doubling of the monetary base (printing money), increased productivity, and increased banking output after 1933.¹¹⁸ The economy should have recovered rapidly.¹¹⁹ Even prior to the Cole and Ohanian study many suspected that the New Deal’s support for politically-connected business—by permitting collusion and suspending antitrust laws—was the culprit for the length and depth of the Great Depression.¹²⁰ But Cole and Ohanian set out to prove this theory through quantitative evaluation.¹²¹ By comparing a competitive model (i.e., free market capitalism) and a cartelization model (i.e., government supported collusion) to actual data from the New Deal period, they conclude that FDR’s New Deal prolonged the depression by three years, that is to say, if the government did nothing the Great Depression would have ended in 1936 rather than 1939.¹²² The study concludes, “Not only did the adoption of [the NIRA] coincide with the persistence of depression through the late

114. *See supra* Part I.A.

115. Cole & Ohanian, *supra* note 19, at 814.

116. *Id.* at 781.

117. *Id.*

118. *Id.*

119. *Id.*; *see also* Harold Cole & Lee Ohanian, *The Great Depression in the United States from a Neoclassical Perspective*, FED. RES. BANK OF MINNEAPOLIS Q. REV., Winter 1999, at 2.

120. Cole & Ohanian, *supra* note 19, at 781.

121. *Id.*

122. *Id.* at 781 n.1, 808, 810.

1930s, but the subsequent abandonment of these policies coincided with the strong economic recovery of the 1940s.”¹²³

2. Posner’s Critique of New Deal Economic Policies

Likewise, law and economics scholarship supports the above indictment of the New Deal. Richard Posner argued that FDR’s New Deal economic policies resulted from a fundamental misunderstanding of the role of competition and an overreliance on the expertise of government bureaucrats.¹²⁴

Posner states:

The view of the great depression as rooted in the excesses of competition and curable by reducing competition is discredited. Of course, when demand declined during the depression much of the existing industrial capacity, geared as it was to supplying a larger demand, became temporarily excess. But limiting competition would not have increased purchasing power and therefore demand; it would just have impaired the efficiency of economic activity at its reduced level. Nonetheless, the cartel remedy for depressions was tried in the early New Deal statutes, such as the National Industrial Recovery Act, which authorized industries to fix minimum prices.¹²⁵

Posner uses the railroads to illustrate his case.¹²⁶ He points out that in the case of railroads, government approves the major players in certain monopolies (or more precisely, oligopolies) in return for internal subsidies.¹²⁷ That is to say, the government protects the railroad’s monopoly, and in return the railroad agrees to provide service to rural communities at a loss funded by monopoly profits.¹²⁸ Once the railroad is serving rural communities—communities that it would not be profitable to serve under free competition—a symbiotic relationship is created between railroad and the government.¹²⁹ The railroad now has a strong argument that the regulators “should use their

123. *Id.* at 813.

124. Posner, *Natural Monopoly*, *supra* note 20, at 621 & n.156; *see also* Posner, *Social Norms*, *supra* note 20, at 563 (stating that the New Deal was rule by expert); Richard A. Posner, *Rational Choice*, *supra* note 20, at 1572.

125. POSNER, *supra* note 39, at 628.

126. Posner, *Natural Monopoly*, *supra* note 20, at 609.

127. *Id.* at 608.

128. *Id.*

129. *Id.* at 607–08.

control over new entry to preserve its monopoly despite changed conditions of cost and demand.”¹³⁰ The railroad can “denounce prospective entrants into its monopoly markets as ‘cream skimmers’ who, by competing away the firm’s monopoly profits, would cut the ground out from under its subsidized customers in other markets.”¹³¹

Posner also turns his sights on FDR’s argument that barriers to entry are necessary to prevent “cutthroat competition” and “foolish overproduction” that lead to excess supply and losses.¹³² Such barriers are redundant, as entrepreneurs will not enter a saturated market:

If a prospective entrant realizes there is room for only one firm in the market, it will not enter unless confident of being able to supplant the existing monopolist. If it enters in the mistaken belief that the market will support more than one seller or that it is more efficient than the incumbent, it will soon be eliminated either by bankruptcy or by being acquired (presumably at a low price, reflecting its poor prospects) by the incumbent. So long as a single firm can meet the market’s entire demand most efficiently, one can be reasonably confident that the market will shake down to a single firm, at least if there are no undue inhibitions on price competition or merger.”¹³³

On the other hand, barriers to entry tend to prolong monopoly long after the rational factors that have led to it have receded, by protecting the monopolist.¹³⁴ As such, Posner points out that government imposed barriers to entry are detrimental; like Cole and Ohanian above, he argues that allowing the free market to function without government control will lead to a better result.¹³⁵ On the other hand, regulatory restrictions on entry exacerbate the problem of monopoly by “[raising] the price that a rational monopolist can fix without encouraging entry.”¹³⁶ If a

130. *Id.* at 608.

131. *Id.* Posner posits as an example “a great many business enterprises had been attracted to the West in reliance on the low rates [offered by the railroad], and they had sufficient influence with Congress and the Interstate Commerce Commission not only to prevent the needed revision in rail rates but also to bring trucking under regulation, lest truck competition completely erode the railroads’ pattern of preferential rates.” *Id.*

132. Posner, *Natural Monopoly*, *supra* note 20, at 612–13.

133. *Id.*

134. POSNER, *supra* note 39, at 628.

135. Posner, *Natural Monopoly*, *supra* note 20, at 612–13.

136. *Id.* at 615.

railroad knows that no entrant can challenge it if it raises prices, it will do so.¹³⁷ Posner's argument is elegant in its simplicity: the costs of attempting to regulate competition—in this case by restricting entry—are greater than the benefits.¹³⁸ He concludes that while it offends “that monopolies based on public franchise should be free to charge whatever the market will bear, it follows not that monopolies should be regulated.”¹³⁹ And “[i]t is precisely regulation that, by limiting entry into the markets of monopolists,” makes the matter worse.¹⁴⁰

3. FDR Admits that New Deal Economic Policies Failed

Let me be clear, I am not arguing that FDR *intended* to prolong the Great Depression by limiting competition. I think he actually believed that the free market and cutthroat competition were to blame for the country's economic troubles. However, it is evident that whatever his intent, New Deal economic policies did little to end—and likely made worse—the economic downturn that dominated the 1930s. In fact, in a stunning admission largely ignored by historians and

137. *Id.* at 612–13.

138. Legislation should not be passed where it will make an inefficient situation less efficient. See POSNER, *supra* note 39, at 628; Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 YALE L.J. 903 (2003). What is efficiency? Possible answers include: “efficient production, efficient exchange, Pareto efficiency, national income maximization, wealth maximization, [or] utility maximization.” NICHOLAS MERCURO AND STEVEN G. MEDEMA, *ECONOMICS AND THE LAW* 68 (2d ed. 2006) (quoting ROBERT COOTER, *LAW AND ECONOMICS* 1283 (1988)). Alternatively, there is Pareto Efficiency, through which at least one person can be made better off without making anyone else worse off. Consider:

In a voluntary trade, both parties are better off than before the trade—“value” is increased. In monetary transactions, as long as a buyer is willing and able to pay an amount which a seller is willing to accept, value could be increased by the trade—that is, by his behavior each party indicates that he thinks his situation has improved. When no more such trades can be made, the situation is “efficient.”

C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 4–5 (1975) (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 628 (Boston 1972)); see also Herbert Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993, 994 (1990). This is dependent upon principles of neoclassical economics' assumption that all actors act rationally (having full information) to maximize efficiency. James R. Hackney, Jr, *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law*, 15 LAW & HIST. REV. 275, 318 (1997).

139. Posner, *Natural Monopoly*, *supra* note 20, at 541 (1970) (responding to Swindler, *Comments on the Case for Deregulation*, 22 STAN. L. REV. 519, 521 (1970)).

140. *Id.*

economists,¹⁴¹ in 1938, FDR spoke against the collectivist premise underlying his very own New Deal and admitted that the NIRA's support of cartels increased economic stagnation and unemployment.¹⁴² Speaking to the issues of cartel, FDR stated, "the American economy has become a concealed cartel system The disappearance of price competition is one of the primary causes of present difficulties."¹⁴³ Speaking to the impact of cartelization and price fixing on unemployment, FDR admitted, "it is no accident that in industries, like cement and steel, where prices [were fixed], payrolls have shrunk as much as 40 and 50 per cent in recent months."¹⁴⁴ FDR continued, "Nor is it mere chance that in most competitive industries where prices adjust themselves quickly to falling demand, payrolls and employment have been far better maintained."¹⁴⁵ In fact, unemployment at the time that FDR was speaking was 19.1 percent, worse than the 14.3 percent figure of the year before.¹⁴⁶ *Mea culpa.*

II. THE TROUBLED ASSET RELIEF PROGRAM

Part II compares FDR's New Deal to TARP. Part II.A argues that the use of TARP to support GM repeats a fundamental mistake of FDR's New Deal—supporting politically-connected businesses and stifling competition. Part II.B will argue that despite the foregone conclusion, President Obama was willing to exponentially expand President Bush's TARP support of GM in return for a *quid pro quo*. The Obama Administration pressured the Treasury to expand its investment in GM, and then leveraged the Treasury's 60.8 percent ownership stake into an agreement on the part of GM to implement a business plan in line with a broader social policy—transforming the American automobile industry into one that produces environmentally-

141. *But see* Cole & Ohanian, *supra* note 19, at 793 (pointing out FDR's admission that New Deal economic policies failed); Randall Morck & Bernard Yeung, *Dividend Taxation and Corporate Governance*, 19 J. ECON. PERSP. 163, 175–76 (2005) (same).

142. Franklin D. Roosevelt, Message to Congress on Curbing Monopolies (Apr. 29, 1938), *reprinted at* 32 AM. ECON. REV. 119, Appendix A.

143. Cole & Ohanian, *supra* note 19, at 793.

144. Roosevelt, *supra* note 142.

145. Roosevelt, *supra* note 142.

146. Richard J. Jensen, *The Causes and Cures of Unemployment in the Great Depression*, 19 J. INTERDISC. HIST. 553, 557, table 1 (1989).

friendly cars and trucks.¹⁴⁷ This is a transformation that continues to this day.

A. *The Bush Bailout*

The GM bailout began, not with the Obama Administration, but with the lame-duck presidency of George W. Bush. In the fall of 2008, GM sought financial assistance from the federal government.¹⁴⁸ GM CEO Rick Wagoner testified before Congress “that without federal assistance, [GM would] not have the cash necessary to continue operations.”¹⁴⁹ The House of Representatives was open to the request, concluding that “action in the form of financial aid to the domestic automobile industry is necessary to stabilize the economy.”¹⁵⁰ The resulting legislation, the Auto Industry Financing and Restructuring Act, passed the House of Representatives on December 10, 2008.¹⁵¹ However, the bill failed to muster support in the Senate amidst a more sober belief that in a free market, firms with poor business plans should be allowed to fail; as Senator McConnell stated in opposition “[n]one of us want to see (American automakers) go down, but very few of us had anything to do with the dilemma that they've created for themselves.”¹⁵² H.R. 7321 never became law.¹⁵³

Upon defeat of H.R. 7321, President Bush—keeping the Oval Office warm until President-elect Obama could move in—used the already established TARP program to prevent what he feared would be the collapse of GM.¹⁵⁴ The use of TARP was

147. See discussion *infra* Part II.C.

148. Bill Vlasic & David Herzenhorn, *Detroit Chiefs Plead for Aid, to Little Avail*, N.Y. TIMES, Nov. 19, 2008, at A1.

149. U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), GAO-10-151 TROUBLED ASSET RELIEF PROGRAM: CONTINUED STEWARDSHIP NEEDED AS TREASURY DEVELOPS STRATEGIES FOR MONITORING AND DIVESTING FINANCIAL INTEREST IN CHRYSLER AND GM 9, fig. 1 (Nov. 2009), available at <http://www.gao.gov/new.items/d10151.pdf>. GM was not alone. Chrysler CEO Bob Nardelli testified that “without immediate bridge financing support, Chrysler’s liquidity could fall below the level necessary to sustain operations.” Vlasic & Herzenhorn, *supra* note 148, at A1.

150. H.R. 7321, 110th Congress (2008).

151. *Id.*

152. Halimah Abdullah, *Auto Bailout’s Defeat Shows Senate Minority Leader McConnell Still Has Leverage*, MCCLATCHY-TRIB. NEWS SERV., Dec. 13, 2008.

153. Nicholas Johnston & John Hughes, *Senate Rejects Auto Industry Bailout*, BLOOMBERG, Dec. 11, 2008.

154. David Shepardson, *Bush, Treasury Want to Prevent Auto-Collapse*, DETROIT NEWS, Dec. 13, 2008 (“Given the current weakened state of the U.S. economy, we will consider other options if necessary—including use of the TARP program—to prevent a collapse

against the advice of President Bush's own Secretary of the Treasury, Hank Paulson, who was "opposed to using funds from TARP because he has said the \$700 billion are designed to bolster the financial sector."¹⁵⁵ The Senators who had just finished defeating H.R. 7321 were even more incensed, in an open letter they rebuffed the President, "Congress never voted for a federal bailout of the automobile industry, and the only way for [TARP] funds to be diverted to domestic automakers is with explicit congressional approval."¹⁵⁶ The letter concluded, "tempting as it is to step in with a federal bailout, American taxpayers cannot afford to save every company facing financial peril."¹⁵⁷

Hank Paulson was correct to oppose the expanded use of TARP by President Bush; using TARP funds to support GM finds no basis in law.¹⁵⁸ The original legislative intent of TARP was for the Treasury to purchase toxic assets such as mortgage backed securities from banks.¹⁵⁹ It nowhere mentions the automotive industry. The portion of the EESA establishing TARP reads:

The Secretary is authorized to establish the Troubled Asset Relief Program (or "TARP") to purchase, and to make and fund commitments to purchase, *troubled assets* from any *financial institution*, on such terms and conditions as are

of troubled automakers,' White House spokeswoman Dana Perino said in a written statement, referring to the Troubled Assets Relief Program, which has sent billions of dollars to troubled financial firms.").

155. Vicki Needham, *White House Not Yet Ready to Back Auto Aid*, ROLL CALL, Dec. 16, 2008.

156. *Id.*

157. *Id.*

158. Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569, 583 (2009).

159. Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 FLA. L. REV. 827, 873 (2009) (discussing use of TARP funds to purchase private-label MBS from GMAC); see also William F. Stutts & Wesley C. Watts, *Of Herring and Sausage: Nordic Responses to Banking Crises as Examples for the United States*, 44 TEX. INT'L L.J. 577, 614 n.221 (2009) ("TARP's scope, in an atmosphere of significant political turmoil, was later expanded further beyond the apparent original intent of purchasing mortgage related assets, to provide a method of funding for U.S. car manufacturers."); David Schudde, *Responding to the Subprime Mess: The New Regulatory Landscape*, 14 FORDHAM J. CORP. & FIN. L. 709, 759 n.202 (2009). The first program established pursuant to TARP was the Capital Purchase Program, established October 14, 2008. Press Release HP-1207, U.S. Dept't of the Treasury, Treasury Announces TARP Capital Purchase Program Description (Oct. 14, 2008). In January 2009, Secretary of the Treasury Henry Paulson implemented the Targeted Investment Program (TIP). See Press Release HP-1338, U.S. Dept't of the Treasury, Treasury Releases Guidelines for Targeted Investment Program (Jan. 2, 2009). TIP carried forth the original intent of TARP by allowing the Treasury to purchase troubled assets. See *id.*

determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary.¹⁶⁰

In addition:

The term “troubled assets” means—

(A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and
(B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.¹⁶¹

And finally:

The term “financial institution” means any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession . . . , and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.¹⁶²

A plain reading of the foregoing legislative language makes clear that TARP funds were intended to be applied only to purchase “troubled assets” (mortgages and mortgage-backed securities) from “financial institutions” (banks), not to bail out the automotive industry.¹⁶³ Gary Lawson of Boston University explains that the contrary argument is bizarre, requiring the reader to “stop at the words ‘any institution’ in the definition of

160. Emergency Economic Stabilization Troubled Asset Relief Program, 12 U.S.C. § 5211(a)(1) (2008) (emphases added).

161. *Id.* § 5202(9).

162. *Id.* § 5202(5).

163. Shah, *supra* note 158, at 583. Thus, under TARP we saw the creation of the Capital Purchase Program (CPP) to bolster the balance sheets of, among others, Bank of America, Bank of New York Mellon, CitiGroup, Stanley, State Street, and Wells Fargo. Ahn P. Nguyen & Carl E. Enomoto, *The Troubled Asset Relief Program (TARP) and the Financial Crisis of 2007–2008*, 7 J. BUS. & ECON. RESEARCH 93 (2009). And the Systemically Significant Financial Institution Program (SSFI) to assist insurer AIG. William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, *passim* (2009).

‘financial institution’ and say that automakers are institutions, so end of story.”¹⁶⁴ But such an interpretation ignores the fact that

“institution” appear[s] in a definition of “financial institution,” [and that all of] the (non-exhaustive) examples given in the statute all have something to [do] with finance, the two hundred pages of statute surrounding this definition deal with financial matters, and the context in which the statute was enacted fairly screams that “financial institution” means institutions that are in some important sense financial.¹⁶⁵

Lawson concludes that “the financing arms of the automakers—which have obtained loans of their own apart from the initial \$17.4 billion—would qualify as financial institutions. Pawn shops might [even] make it in. But automakers are no more ‘financial institution[s]’ under this statute than I am.”¹⁶⁶ Despite the foregoing, President Bush unwisely directed that the Treasury make loans to GM under the auspices of TARP in the amounts of \$13 billion.¹⁶⁷ A move that President Bush now admits was a mistake.¹⁶⁸

Setting aside the legality (or propriety) of using TARP funds to support GM, the next logical question is: did the federal action create a barrier to entry, strengthening politically-connected business in a manner reminiscent of the New Deal? The short answer is, “yes.” The use of taxpayer funds to purchase a 60.8 percent interest in GM is a subsidy.¹⁶⁹ While not as obvious a barrier to entry as the New Deal’s licensing requirement for new firms, “[a subsidy] is a capital investment that the competitive market does not support [It creates] a barrier to entry by non-subsidized competitors . . . by infusing [the existing business] with cash untethered to performance.”¹⁷⁰

164. Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL’Y 55, 70 (2010).

165. *Id.* at 71.

166. *Id.*

167. CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: THE USE OF TARP FUNDS IN THE SUPPORT AND REORGANIZATION OF THE DOMESTIC AUTO. INDUS. 3 (Sept. 9, 2009) [hereinafter SEPTEMBER OVERSIGHT REPORT].

168. Joseph Curl, *Bush Warns of the Dangers of Too Much Government*, WASH. TIMES, Nov. 13, 2009, at A1.

169. A “subsidy” is “a grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate.” BLACK’S LAW DICTIONARY (8th ed., 2004); see Paul Ingrassia, *The Sinking Saab*, WALL ST. J., Nov. 27, 2009 (describing GM’s “taxpayer-subsidized bankruptcy”).

170. *Reilly v. Hearst Corp.*, 107 F. Supp. 2d 1192, 1209 (N.D. CA. 2000); see also *New York State Dairy Foods, Inc. v. Ne. Dairy Compact Commission*, 198 F.3d. 1, 24 (1st Cir.

The question largely depends on what the subsidized firm does with the cash infusion. Consider *Safir v. United States*.¹⁷¹ Mr. Safir was president of the Atlas Moving and Storage Company from 1939 to 1968 and “from 1955 to 1968, he was president of the Weissberger Moving and Storage Company, which was one of the largest moving companies in New York.”¹⁷² Safir formed Sapphire Steamship Lines, Inc. (Sapphire Lines) in 1965 in an attempt to break into the market for carrying household goods for military families, both domestically and across the North Atlantic.¹⁷³ Safir was trying to break into a very exclusive club, dominated by a group of six shipping firms comprising the Gulf American Flag Berth Operators (the Shipping Cartel).¹⁷⁴ The Shipping Cartel benefited from a generous federal subsidy, and upon Sapphire Lines entering the market collectively reduced its rates to below what the market would bear for eleven months, compensating for the loss with the federal cash infusion.¹⁷⁵ After Sapphire Lines was forced into bankruptcy, the Shipping Cartel raised their rates again.¹⁷⁶

The logical end of the government erecting a protective barrier to entry around GM is that other firms will be squeezed out, because they simply cannot compete with a government-backed GM.¹⁷⁷ GM has access to taxpayer funded loans that

1999) (“The pooling mechanism is in effect a subsidy and compensatory payment which is a barrier to the entry of milk into the Compact region.”); Ejan Mackaay, Comment, *Legal Hybrids: Beyond Property And Monopoly?* 94 COLUM. L. REV. 2630, 2634 n.6 (1994).

171. 616 F. Supp. 613 (E.D.N.Y. 1985).

172. *Obituary, Marshall P. Safir, 75, Shipping Executive*, N.Y. TIMES, Mar. 30, 1995 available at <http://www.nytimes.com/1995/03/30/obituaries/marshall-safir-75-shipping-executive.html>.

173. *Sapphire Steamship Sues to Halt Subsidy of Ship Operators*, WALL ST. J., June 25, 1968, at 23.

174. *Sapphire Steamship Was Conspiracy Target, Federal Agency Rules*, WALL ST. J., Dec. 13, 1967, at 13.

175. *Court Review Ordered of Subsidy Payments to Shipping Consortium*, WALL ST. J., Oct. 1, 1969, at 12.

176. *Id.*

177. While this Article concentrates on prospective entrepreneurial firms, it is likewise important to consider that in addition to preventing prospective firms from competing, a barrier to entry may also remove existing firms from the marketplace as well. Thus, at least one notable economist argues:

Auto producers whose products American consumers find most appealing have been notably missing from the roster of bailout recipients. Our subsidies instead have gone to the poor performers, firms whose past management decisions proved faulty. As a result the bailout has created moral hazard problems, inadvertently handicapping the progress of stronger, non-subsidized producers.

accrue interest at a mere five percent per year.¹⁷⁸ This is during the same summer that other bridge loans for businesses going through reorganizations ranged around ten percent, if they could be obtained at all.¹⁷⁹ The billions of dollars saved on interest alone are a competitive advantage that can be used for additional research, marketing, or even to lower product prices below that of GM's competitors. This can mean the difference between being a winner and loser in a competitive market.¹⁸⁰ Already, GM is using the Treasury supplied taxpayer dollars to compete against other auto makers. GM "announced that . . . it

THOMAS D. HOPKINS, NAT'L TAXPAYERS' UNION, *THE AUTO BAILOUT—A TAXPAYER QUAGMIRE—ISSUE BRIEF 175* (2009). As such, we must ask what effect the federal cash infusion into GM will have on those competitors, such as Ford Motor Corporation, that did not take a cash infusion? Ford has shown great resilience in the face of anticompetitive behavior (see the discussion of the *Selden* lawsuit above), but whether it can compete in the face of a government subsidized GM and Chrysler remains to be seen.

178. LIBOR plus 300 basis points, with a LIBOR floor set at 2%. The Term Sheet for the GM loan provides:

Each Advance shall accrue interest at a rate per annum equal to (i) the sum of (x) the greater of (A) three-month LIBOR and (B) the LIBOR Floor, plus (y) the Spread Amount, multiplied by (ii) the outstanding principal balance of such Advance. The Interest Rate shall be determined on the Closing Date and reset on each Interest Payment Date

Press Release, U.S. Dep't of Treasury, *Indicative Summary of Terms for Secured Term Loan Facility* (Dec. 19, 2008), *available at*

<http://www.treas.gov/press/releases/reports/gm%20final%20term%20%20appendix.pdf>. The LIBOR floor of 2% was implicated because the three-month LIBOR as of Dec. 2008 was 1.08% and has since fallen to .23%.

179. Kevin Fung, *Masonite Plan Gets Confirmed*, DAILY DEAL, June 1, 2009 ("The loan will be secured by first-priority liens on all the assets of a reorganized Masonite and mature in December 2013. The interest rate is set at LIBOR plus 700 basis points, with a LIBOR floor of 3%, or prime plus 600 basis points, with a prime floor of 5%."); Richard Kellerhals, *Credit Suisse, GE Ready Quebecor Exit Facility*, BANK LOAN REP., Pg. 1 Vol. 24 No. 22, June 1, 2009 (LIBOR plus 600 bps with a floor of 3%); Kevin Fung, *Stock Building Supply Wins DIP Approval*, DAILY DEAL, May 28, 2009 (LIBOR plus 700 bps with a LIBOR floor of 3%); John Blakely, *ION Media Wins DIP Approval*, DAILY DEAL, May 22, 2009 (LIBOR plus 1200 bps with a LIBOR floor of 3.5%); John Blakely, *Successful Shopping*, DAILY DEAL, May 21, 2009 (LIBOR plus 1200 bps with a LIBOR floor of 1.5%).

180. Stephen Moore & Dean Stansel, *Ending Corporate Welfare as We Know It*, CATO Policy Analysis No. 225, May 12, 1995. The CATO Institute pointed out:

Corporate welfare creates an uneven playing field. Business subsidies, which are often said to be justified because they correct distortions in the marketplace, create huge market distortions of their own. The major effect of corporate subsidies is to divert credit and capital to politically well-connected firms at the expense of their politically less influential competitors. Those subsidies are thus inherently unfair. Sematech, for example, was reportedly launched to promote the U.S. microchip industry over rivals in Japan and Germany. In practice, Sematech has become a cartel of the large U.S. chip producers—such as Intel—that unfairly handicaps the hundreds of smaller U.S. producers.

Id.

will offer \$1,000 to Toyota owners toward a down payment on a GM vehicle and up to \$1,000 to help to pay off current leases early.”¹⁸¹ One Toyota dealer was shocked that the U.S. government would throw its weight behind a competitor, “[o]ne day, U.S. Toyota dealers woke up to find that their government owned their competitor, . . . [n]ow, our tax dollars are being used against us. Our government has a major conflict of interest.”¹⁸²

B. *The Obama Bailout*

The Obama Administration compounded the Bush Administration’s mistake by expanding the use of TARP funds to fundamentally restructure GM.¹⁸³ President Obama doubled the amount of cash available to GM and directed the Treasury to provide “\$30.1 billion under a debtor-in-possession financing agreement to assist GM through [a] restructuring period.”¹⁸⁴ The purpose of the bridge loan was to allow GM to fund day-to-day operations during the reorganization period.¹⁸⁵ With the commitment for a \$30.1 billion bridge loan in place, at the direction of the Obama Administration GM drafted a Chapter 11 plan of reorganization and filed for bankruptcy on June 1, 2009. On July 10, 2009, New GM acquired substantially all of Old GM’s assets.¹⁸⁶ Old GM retained those assets that were a liability.¹⁸⁷ At that time, the “Treasury converted most of its loans . . . to 60.8% of the common equity in New GM and \$2.1 billion in preferred stock.”¹⁸⁸ As of the date of this Article, the Treasury now owns 60.8 percent of New GM.

C. *GM Returns the Favor*

What did the Obama Administration receive as a *quid pro quo* for financing GM’s Chapter 11 restructuring? A clue to the

181. Peter Whoriski, *Toyota Faced Pressure from U.S. Officials before Announcing Recall*, WASH. POST, Jan. 28, 2010, at A19.

182. David Falchek, *Scranton Toyota Dealer Blames Politics*, TRIB. BUS. NEWS, Mar. 5, 2010 (quoting Greg Gagorik).

183. CONGRESSIONAL OVERSIGHT PANEL, *supra* note 167, at 3.

184. U.S. DEP’T OF THE TREASURY, TROUBLED ASSETS RELIEF PROGRAM EIGHTH TRANCHE REPORT TO CONGRESS 4 (Oct. 7, 2009).

185. Kane, *supra* note 10, at A01.

186. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 149, at 7, 9 & fig. 1.

187. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 149, at 7, 9 & fig. 1.

188. U.S. DEP’T. OF THE TREASURY, *supra* note 184, at 4.

answer lies in a statement made by Rahm Emanuel, President Obama's Chief of Staff: "[Y]ou never want a serious crisis to go to waste. . . . [An economic crisis is] an opportunity to do things that you think you could not do before."¹⁸⁹ Indeed, President Obama himself stated in a speech to the Business Council that he wanted to "use this crisis as a chance to transform our economy . . . [and] put people to work building wind turbines and solar panels and fuel-efficient cars."¹⁹⁰ And so it follows, in return for financial support from the Treasury, GM became receptive to cooperation in the implementation of a broader social goal theretofore unobtainable, creating an American auto industry purposed to be environmentally friendly. Historically, Washington loses when it tries to "green" the automobile industry.¹⁹¹ Consider the cap-and-trade legislation that recently floundered in the senate.¹⁹² It joins a long list of recent failures to pass environmental legislation: the America's Climate Security Act,¹⁹³ Climate Stewardship and Innovation Act,¹⁹⁴ Low Carbon Economy Act,¹⁹⁵ Electric Utility Cap and Trade Act,¹⁹⁶ and the Improved Passenger Automobile Fuel Economy Act.¹⁹⁷ As such, under the cover of economic emergency, the Obama Administration seized the opportunity to stretch the legal limits of TARP, implementing the first step in a broader social goal of an environmentally-friendly manufacturing base, molding GM into "a 21st century auto [maker] . . . manufacturing . . . fuel-efficient cars and trucks."¹⁹⁸

189. Carney, *supra* note 25, at A18 (quoting Rahm Emanuel, White House Chief of Staff).

190. Obama, *supra* note 24.

191. See generally Ian Talley, *Senate to Put Off Climate Bill Until Spring*, WALL ST. J., Nov 18, 2009, at A.4; Jennifer A. Dlouhy, *Global Warming Battle Heats Up Cap-And-Trade Plan May Be In For A Hard Time In Senate Hearings*, HOUSTON CHRONICLE, Dec. 3, 2009, at 1.

192. Talley, *supra* note 191, at A.4; Dlouhy, *supra* note 191, at 1.

193. S.2191, 110th Cong. (2007) (Reduces greenhouse-gas emissions by 63%). It was referred to the Committee on Environment and Public Works, where it died.

194. S.280, 110th Cong. (2007) (allowing for carbon trading). It was referred to the Committee on Environment and Public Works Subcommittee on Private Sector and Consumer Solutions to Global Warming and Wildlife Protection, where it died.

195. S.1766, 110th Cong. (2007) (reducing carbon emissions). Introduced in Senate. This bill never even made it to committee.

196. S.317, 110th Cong. (2007) (cap and trade). Introduced in Senate. This bill never even made it to committee.

197. S.183, 110th Cong. (2007) (setting Café standard of 40 mpg). This bill was referred to the Committee on Commerce, Science, and Transportation, where it died.

198. President Barack Obama, Remarks by the President on the American Automotive Industry, Grand Foyer, White House (Mar. 30, 2009).

1. A Treasury-Appointed Board of Directors

A receptive board of directors is integral to implementing a government-approved business plan, one that requires the production of environmentally-friendly vehicles. With a 60.8 percent equity interest, the Treasury was in a position to reconstitute GM's board of directors.¹⁹⁹ First, GM CEO Rick Wagner stepped down after an Oval Office meeting with President Obama and was replaced by CEO Fritz Henderson.²⁰⁰ Wagner was not alone, as Treasury moved to replace a large portion of the GM board of directors.²⁰¹ Treasury named Edward Whitacre chairman of the board on June 9, 2009.²⁰² On July 20, 2009, Treasury named Daniel F. Akerson, David Bonderman, Robert D. Krebs, and Patricia F. Russo to the board.²⁰³ Amazingly, none of the Treasury-named directors have

199. Nick Bunkley, *G.M. Adds 5 Directors and Announces Several Top Level Retirements*, N.Y. TIMES, July 24, 2009, at 34.

200. John Stoll & Greg Hitt, *U.S. Moving to Overhaul Ailing Auto Industry*, WALL ST. J., Dec. 8, 2008, at A1 (President Obama made clear that any restructuring must make the industry more "environmentally friendly"); Sheryl Gay Stolberg & Bill Vlasic, *U.S. Lays Down Terms for Auto Bailout*, N.Y. TIMES, Mar. 30, 2009, at A1 ("The decision to ask G.M.'s chairman and chief executive, Rick Wagoner, to resign caught Detroit and Washington by surprise, and it underscored the Obama administration's determination to keep a tight rein on the companies it is bailing out—a level of government involvement in business perhaps not seen since the Great Depression."). When asked whether GM's move toward manufacturing environmentally-friendly automobiles was directly attributable to pressure from the Obama Administration, Treasury-appointed CEO Fritz Henderson was diplomatic:

CAROLINE HEPKER, MEDIA, BBC: You talked a lot about green products and trying to move forward in terms of embracing more fuel efficient cars. You've also talked about the government staying out of GM's business, but President Obama has been very firm really about talking about more fuel efficient vehicles. Will there be pressure on you to come out with a new greener vehicle for the United States sooner?

FRITZ HENDERSON: Well . . . I think the technologies that we're investing in, whether it's the Volt, whether it's hybrid technology, whether it's basic research, is all important for us to get that accomplished. So I think our objectives both as a firm as well as to the market are in alignment with what not only President Obama, but I think most governments around the world would view the importance of having more fuel efficient vehicles. I don't think it's unique simply to the United States.

Press Conference, General Motors (June 1, 2009), *available at* [http://www.gm.com/restructuring/docs/GM-Transcript-2009-06-01T16-15\[1\].pdf](http://www.gm.com/restructuring/docs/GM-Transcript-2009-06-01T16-15[1].pdf).

201. Bunkley, *supra* note 199.

202. Katie Merx & Mike Ramsey, *Opel Tops GM's Agenda As Whitacre Leads First Meeting*, FIN. POST, Aug. 3, 2009, *available at* <http://www.financialpost.com/m/story.html?id=1855803>.

203. Bunkley, *supra* note 199.

experience in the automotive industry.²⁰⁴ On the other hand, what many of these directors have in common is openness to transforming GM into a firm that produces cars and trucks that are more environmentally-friendly. Consider that Fritz Henderson stated following his appointment, “[t]oday marks the beginning of what will be a new company, a New GM, dedicated to building the very best cars and trucks, highly fuel-efficient, world-class quality, green technology development, and with truly outstanding design”;²⁰⁵ and following his appointment, Edward Whitacre trumpeted GM’s new “commitment to green technology . . . [f]rom vehicles that are gas-friendly to those that are gas-free.”²⁰⁶

2. Contractual Obligations to Produce Environmentally-Friendly Vehicles

Of course, a receptive board of directors alone does not get the Obama Administration to its goal. When GM presented its Chapter 11 Restructuring Plan, it solidified its commitment to produce advanced technology vehicles.²⁰⁷ In the Restructuring Plan, under the heading Federal Requirements, Domestic Manufacture of Advanced Technology Vehicles, GM agrees to the following:

General Motors fully understands and appreciates the challenges to energy security and the climate from increased global consumption of petroleum. . . . [It will] invest heavily in alternative fuel and advanced propulsion technologies during the 2009-2012 timeframe. This investment is substantially to support the expansion in hybrid offerings, and

204. Martin Zimmerman, *GM Picks Ex-Chief of AT&T as Chairman*, LOS ANGELES TIMES, June 10, 2009, at B1 (discussing Whitacre’s lack of auto-industry experience); David Shepardson, *GM’s Latest Shakeup*, DETROIT NEWS, July 24, 2009, at B9 (“none has experience in the auto industry”).

205. Sharon Silke Carty, *The Pieces Come Together Today For A Smaller, Leaner GM*, USA TODAY, July 10, 2009, at 1B.

206. Katie Collins, *GM Chairman Rolls Into Seguin*, GAZETTE-ENTERPRISE, Nov. 11, 2009. Appointee Patricia F. Russo advocates “developing energy-efficient products and managing in the most environmentally sound way.” Patricia Russo, *Success Requires Imagination, the Right Business Plan, and the Right Environment*, 73 VITAL SPEECHES OF THE DAY 223 (2007). In her role as Alcatel–Lucent’s CEO, Russo approved of her corporations’s “dedicat[ion] to ecosustainability” and “corporate social responsibility.” ALCATEL–LUCENT, CORP. SOC. RESPONSIBILITY REPORT 2007, available at http://www.alcatel-lucent.com/wps/DocumentStreamerServlet?LMSG_CABINET=Docs_and_Resource_Ctr&LMSG_CONTENT_FILE=Corp_Governance_Docs/RA_DD_GB_WEB.pdf.

207. GENERAL MOTORS CORP., 2009–2014 RESTRUCTURING PLAN 21 (2009).

for the Volt's EREV technology. The Company is developing these and other technologies, . . . consistent with its objective of being the recognized industry leader in fuel efficiency.²⁰⁸

The Plan continues by highlighting actions already taken in response to the loan agreement:

[GM agreed] to construct a new manufacturing facility in the United States to build Lithium-Ion battery packs for the Chevrolet Volt. Lithium Ion batteries are an essential technology for electric vehicles to be viable and, more generally, an important energy storage capability for this country in the long run.²⁰⁹

And in accord with its obligations:

The Company has already submitted two Section 136 applications to the Department of Energy in support of various 'advanced technology' vehicle programs contained in General Motors product portfolio, which include some of the alternative fuel and advanced propulsion investment described above. These two requests combined total \$8.4 billion, and a third application is planned for submission by March 31, 2009.²¹⁰

D. *The Propriety of Government Imposed Corporate Social Responsibility*

Is it proper for GM's new board of directors to implement broader social policy at the insistence of the Obama Administration? Concerned by what they view as a political usurpation of GM to achieve a social end,²¹¹ some politicians

208. *Id.* at 21–22.

209. *Id.* at 22.

210. *Id.*

211. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 149, at 24–25 (discussing concern over “external pressures [from politicians] to focus on public policy goals over focusing on its role as a commercial investor”). The independent GAO has warned against such interference:

Experts emphasized the importance of Treasury resisting external pressures to focus on public policy goals over focusing on its role as a commercial investor. For example, some experts said that Treasury should not let public policy goals such as job retention interfere with its goals of maximizing its return on investment and making Chrysler and GM strong and viable companies. They said that this is especially important because making the companies financially strong and competitive may require reducing the number of employees. Nevertheless, one expert suggested that Treasury should consider public policy goals and include the value of jobs saved and other economic benefits from its investment when calculating its return, since these goals, though not important to a private investor, are critical to the economy.

attempted to settle the debate legislatively; one proposed bill would “guarantee that the companies are run not as political pawns but as profit-making entities seeking to maximize shareholder value.”²¹² The relevant portion of the TARP Recipient Ownership Trust Act of 2009 provides that any ownership interest acquired by Treasury shall be transferred to a limited liability company, which shall hold such ownership interest in trust for the benefit of the American tax payer.²¹³ The managers of the LLC must be independent of the United States government and shall “have a fiduciary duty to the American taxpayer for the maximization of the return on the investment of the taxpayer made under the Emergency Economic Stabilization Act of 2008, in the same manner and to the same extent that any director of an issuer of securities has with respect to its shareholders under the securities laws and all applications of State law.”²¹⁴ The law did not pass and never became part of TARP.²¹⁵

As long as Treasury maintains ownership interests in Chrysler and GM, it will likely be pressured to influence the companies’ business decisions. Treasury has said that it plans to manage its investment in Chrysler and GM in a commercial way. Yet Treasury faces external pressures, such as to prioritize jobs over maximizing its return. For example, Congress is currently considering a number of bills to restore automotive dealers’ contracts terminated in restructuring, and Treasury officials noted that they receive frequent calls from Members of Congress expressing concern about dealership closings.

Id.

212. George Will, *Obama’s State Capitalism*, WASH. POST, Aug. 23, 2009, at A21 (discussing the TARP Recipient Ownership Trust Act of 2009, S. 1280, 111th Cong. (2009)).

213. TARP Recipient Ownership Trust Act of 2009, S. 1280, 111th Cong. § 3(a) (2009).

214. *Id.* at § 3(c)(3). *But see* Auto Industry Financing and Restructuring Act, H.R. 7321, 110th Cong. § 2 (2008). It took the exact opposite approach. It had more to do with promoting a broader social interest—environmentally friendly industry—for GM. The first stated purpose of H.R. 7321 was “to ensure that such authority and such facilities are used in a manner that . . . results in a viable and competitive domestic automobile industry that minimizes adverse effects on the environment.” The second purpose is to “enhance[] the ability and the capacity of the domestic automobile industry to pursue the timely and aggressive production of energy-efficient advanced technology vehicles.” Those purposes are placed before preserving and promoting the jobs of American workers.

215. The Committee on Banking, Housing, and Urban Affairs has yet to act on the bill. They are wielding their “blocking power”—“if committee members disfavor the bill for any reason, they can do nothing and allow the bill to languish in committee.” Brent J. Horton, *How Corporate Lawyers Escaped Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 S.C.L. REV. 149, 171 (citing Roberta Ramoner, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance* 196 (YALE UNIV. INT’L CNTR FOR FIN., Working Paper No. 04-37, 2004)).

The above political conflict mirrors the academic conflict as to whether wealth maximization should be trumped by social responsibility. One of the best debates on the issue is between Professor Lynn Stout of UCLA and Jonathan Macey of Yale.²¹⁶ On the side of social responsibility, Professor Lynn Stout of UCLA argues in *Why We Should Stop Teaching Dodge v. Ford*, that a corporate board of directors should promote a broader social purpose, not just maximize shareholder wealth.²¹⁷ Specifically, she is against the recurring appearance of *Dodge v. Ford* in the classroom and before the bench and bar.²¹⁸ In *Dodge v. Ford*, a shareholder, John Dodge, brought an action to compel Ford Motor Company to declare a dividend in 1916.²¹⁹ Since Ford's formation in 1903, "[t]he cars it manufactured met a public demand, and were profitably marketed."²²⁰ The company was so successful that it paid special dividends to its shareholders as follows: "December 13, 1911, \$1,000,000; May 15, 1912, \$2,000,000; July 11, 1912, \$2,000,000; June 16, 1913, \$10,000,000; May 14, 1914, \$2,000,000; June 12, 1914, \$2,000,000; July 6, 1914, \$2,000,000; July 23, 1914, \$2,000,000; August 23, 1914, \$3,000,000; May 28, 1915, \$10,000,000; and October 13, 1915, \$5,000,000."²²¹ Even with the foregoing special dividends, Ford had cash on hand on July 31, 1916, of \$52,550,771.92.²²² Thereafter, declared Henry Ford, there would be no further special dividends.²²³ Ford's reasoning was blunt. He rejected any fiduciary obligation to maximize shareholder wealth, arguing that as "the stockholders had received back in dividends more than they had invested they were not entitled to receive anything additional."²²⁴ Ford wanted to use the cash to further social ends, employing more employees, paying his employees more, and subsidizing the price of his Model-T so that more Americans could put one in

216. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177 (2008).

217. Stout, *supra* note 216, at 166.

218. *Id.* (discussing *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919)).

219. *Dodge*, 170 N.W. at 683.

220. *Id.* at 670.

221. *Id.*

222. *Id.*

223. *Id.* at 671.

224. *Id.*

their driveway.²²⁵ Altruistic as Ford's purpose was, the court could not escape the underlying reality that Ford's first duty was to Ford's shareholders.²²⁶ The court stated:

There should be no confusion. . . . [a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of [the] directors is to be exercised in the choice of means to attain that end, and does not extend to . . . other purposes.²²⁷

It is the above positive statement of law that Professor Stout finds objectionable. Professor Stout begins her critique of *Dodge v. Ford* by declaring that it is bad law, that it was a "mistake," a "doctrinal oddity."²²⁸ But as Professor Macey points out:

The case is not a doctrinal oddity. *Dodge v. Ford* still has legal effect, and is an accurate statement of the form, if not the substance, of the current law that describes the fundamental purpose of the corporation. By way of illustration, the American Law Institute's ("ALI") *Principles of Corporate Governance* ("Principles"), considered a significant, if not controlling, source of doctrinal authority, are consistent with *Dodge v. Ford*'s core lesson that corporate officers and directors have a duty to manage the corporation for the purpose of maximizing profits for the benefit of shareholders. Specifically, section 2.01 of the *Principles* makes clear that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."²²⁹

This longstanding statement of shareholder primacy as positive law is reflected in most state corporate codes, that provide that a "'Corporation' . . . means a corporation for *profit*."²³⁰ In fact, many states provide that a board of directors can only consider social responsibility "when doing so does not harm shareholder[] [wealth] in any demonstrable way."²³¹

225. *Id.*

226. *Id.* at 684.

227. *Id.*

228. Stout, *supra* note 216, at 166.

229. Macey, *supra* note 216, at 178.

230. N.Y. BUS. CORP. LAW § 102 (McKinney 2008) (emphasis added); *see also* MODEL BUS. CORP. ACT § 1.40(4) (1979).

231. Macey, *supra* note 216, at 179. These corporate constituency statutes "only serve[] to underscore the primacy of the obligation to direct efforts at enhancing economic value of firm because they would be superfluous if it was already well-

However, Professor Stout is undeterred, and argues that if a corporation wants to make a profit, it should state so in its articles of incorporation:

[T]hey can easily include in the corporate charter a recitation of the *Dodge v. Ford* view that the corporation in question “is organized and carried on primarily for the profit of the stockholders.” In reality, corporate charters virtually never contain this sort of language. Instead, the typical corporate charter defines the corporate purpose as anything “lawful.”²³²

I will simply counter that the reason corporate charters state that the entity is organized for “any lawful purpose,” rather than “for the profit of the shareholders,” is that the latter statement is made clear by 400 years of European (and later American) business and legal tradition.²³³ Further, Professor Stout’s argument turns the default rule of *Enea v. Superior Court*²³⁴ on its head, and ignores the fact that fiduciary duties—including the duty to maximize shareholder value—exist whether or not the parties involved contract for them. In *Enea*, the defendant argued that he did not have a fiduciary duty to maximize the financial return of a partner absent an agreement establishing such a duty.²³⁵ The court easily rejected that argument, stating:

Defendants also persuaded the trial court that they had no duty to collect market rents in the absence of a contract expressly requiring them to do so. This argument turns partnership law on its head. Nowhere does the law declare that partners owe each other only those duties they explicitly assume by contract. On the contrary, the fiduciary duties at issue here are *imposed by law*, and their breach sounds in tort. We have no occasion here to consider the extent to which partners might effectively limit or modify those delictual duties by an explicit agreement or whether the partnership agreement in fact required market rents by its terms. There is no suggestion that it purported to affirmatively *excuse*

understood that directors did not violate their responsibilities to shareholders when considering the needs of other constituencies.” Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2623–24 n.184 (May 2008). Nor do these statutes “permit managers to benefit non-shareholder constituencies at the expense of shareholders.” Macey, *supra* note 216, at 179.

232. Stout, *supra* note 216, at 169.

233. The Dutch East India Company, for example, was founded in 1602 to make a profit. See Christine Lucassen, *Amsterdam Bourse Gets Renewed Lease of Life*, HET FINANCIEELE DAGBLAD (English Edition), Oct. 31, 2001.

234. 34 Cal. Rptr. 3d 513 (Cal. Ct. App. 2005).

235. *Id.* at 516.

defendants from the delictual duty not to engage in self-dealing. Instead, their argument is predicated on the wholly untenable notion that they were entitled to do so unless the agreement explicitly declared otherwise.²³⁶

In short, Professor Stout's article is best read as arguing for a normative position, what the law should be, not what the law is. However, in my opinion, it is unwise to impose social responsibility on existing corporations, because social responsibility is an amorphous concept that can be shaped to fit any political agenda. On the other hand, most corporations have done just fine for their millions of shareholders (and by implication, the nation) by following the shareholder wealth model to which Professor Stout objects. Despite the forgoing arguments against forcing social responsibility upon corporations, it appears that the Obama Administration is usurping GM's board of directors to implement a political agenda. Let me be clear, while I am not opposed to GM *choosing* to shift to a more environmentally-friendly business plan, I do question the propriety of the federal government *forcing* that decision.²³⁷

E. Other Proffered Justifications for the GM Bailout

The Obama Administration argues that a federal bailout will make GM more competitive.²³⁸ However, the foregoing assertion corrupts the very essence of competition, twisting it beyond any form recognizable to Adam Smith or Milton Friedman. Competition requires that some businesses fail. "The failure of some participants sweeps away the least innovative and/or poorly managed companies."²³⁹ Yet failure is impossible where a company is propped up by a never ending supply of taxpayer dollars.

Perhaps the Obama Administration uses the term "more competitive" to indicate that top-down bureaucratic control will result in a better business plan for GM. That would be in accord with the House of Representative's belief that it can write a

236. *Id.* at 518–19 (citations omitted).

237. See George F. Will, *The Obama Doctrine*, THE OREGONIAN, Aug. 24, 2009.

238. Obama, *supra* note 198.

239. Richard W. Rahn, *The Necessity of Failure*, WASH. TIMES, Mar. 24, 2010, at B04.

better business plan than GM's prior board of directors.²⁴⁰ H.R. 7321 stated that "errors in the business model of domestic automobile manufacturers, and emergency economic circumstances, . . . has led to the possibility of the failure of the domestic automobile industry, which failure would have a systemic adverse effect on the economy."²⁴¹

However, several factors inevitably make top-down bureaucratic control of business inefficient.²⁴² The most prominent problem is "political" management.²⁴³ As one commentator stated:

Since control of the organization, the functions, and, most important, the funds of the department is [sic] tightly held by the legislature, influential members of that body necessarily speak with great impressiveness to the administrators proper. Administrative measures designed to create goodwill or secure votes for a Senator in South Carolina unfortunately seldom coincide with sound business practices. Multiply one Senator by a dozen, throw in several score of Representatives, or perhaps substitute state legislators, and then evaluate efficiency! And it is not necessary to impute such selfish and personal motives to get comparable results. Imagine several hundred Congressmen interfering with the management details of an enterprise even with the worthiest of intentions!²⁴⁴

We already see the foregoing happening with the application of TARP funds to GM. While the Obama Administration promised that it would not interfere with the day-to-day operations of GM, it has proved unable to control its allies in Congress.²⁴⁵ "Treasury officials noted that they receive frequent calls from Members of Congress expressing concern about dealership closings."²⁴⁶ Barney Frank—who coincidentally oversees TARP—reversed a prior GM decision to close a plant in Frank's congressional district by directly calling GM's CEO, Fritz

240. H.R. 7321, 110th Cong. (2008). President Obama asked his auto task force to "work closely with GM to produce a better business plan," that relies on "manufacturing the fuel-efficient cars and trucks that will carry us towards an energy-independent future." Obama, *supra* note 198.

241. H.R. 7321, 110th Congress (2008).

242. John McDiarmid, *Can Government Be Efficient in Business?* 206 ANNALS AM. ACAD. POL. & SOC. SCI. 155 (1939).

243. McDiarmid, *supra* note 242, at 156.

244. *Id.*

245. See, e.g., Jared Allen, *Auto Plan Hits Potholes*, THE HILL, June 8, 2009, at 1 (discussing congressional meddling in GM's restructuring plan).

246. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 149, at 25.

Henderson.²⁴⁷ The Norton, Massachusetts plant remains open.²⁴⁸

Another problem with government control of business is top-down rule by expert. Rule by expert inevitably leads to absurd results. In 1935, the NIRA²⁴⁹—the quintessential example of rule by expert—was found unconstitutional in *Schechter Poultry Corp. v. United States*.²⁵⁰ At issue was one of the NIRA imposed codes that regulated matters as local as what chicken a customer could choose when going to a poultry market.²⁵¹ Schecter was convicted of “permitting customers to make selections of individual chickens taken from particular coops and half coops.”²⁵² The give-and-take during Supreme Court oral argument tells us all we need to know about why New Deal rule-by-expert failed:

MR. JUSTICE MCREYNOLDS: I want to see whether I understand [the arrangement] correctly. . . . These chickens are brought into New York by the carload, and they are taken out and put in coops? [Mr. Heller, arguing for Schecter company, says yes, and he further informs the Justice that there are thirty to forty chickens in a coop.] And if he undertakes to sell them [from the coop] he must have a straight-killing?

MR. HELLER: He must have a straight-killing. In other words, the customer is not permitted to select the ones he wants. He must put his hand in the coop when he buys from the slaughterhouse and then take the first chicken that comes to hand. He has to take that.

[Laughter—recorded in the chamber]

MR. JUSTICE MCREYNOLDS: Irrespective of the quality of the chicken?

[More laughter in the courtroom]

247. Allen, *supra* note 245 (“Frank’s staff said the lawmaker spoke with GM CEO Fritz Henderson and convinced him to keep the Norton, Mass., plant open for at least 14 months.”).

248. *Id.* Likewise, interference can come from the executive branch. McDiarmid, *supra* note 242, at 156. Fisker, a maker of plug-in hybrids, received capital from the federal government. *See* Press Release, U.S. Department of Energy, US Energy Secretary Chu Announces \$528 Million Loan for Advanced Vehicle Technology for Fisker Automotive (Sept. 22, 2009), *available at* <http://www.atvmlan.energy.gov/public/fisker.pdf>. Vice President Joe Biden made sure that in return for the capital, Fisker agreed to use a plant located just 4 miles from his house. *See* Neil King, Jr., *Venture Capital: New VC Force*, WALL ST. J., Dec. 14, 2009, at A1.

249. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. § 703–710).

250. 295 U.S. 495 (1935).

251. *Id.* at 550.

252. *Id.* (quotations omitted).

. . . Suppose it is a sick chicken? [He is told that a buyer *was* free to reject a sick chicken.] Now can he break up those coops and sell them, half a dozen chickens to one man, and half a dozen to another man?

MR. HELLER: He cannot. He can sell a whole coop, or one-half of a coop That is all. And when he sells five, or six, or two, or three, he cannot permit the purchaser any selection of the chickens in the coop.

MR. JUSTICE STONE [intervenes to ask]: Do you mean that there can be a selection if he buys one-half the coop?

MR. HELLER: No. You just break the box into two halves.

[Laughter in the Courtroom]

[Then,] MR. JUSTICE SUTHERLAND [asks]: Well, suppose, however, that all the chickens have gone over to one end of the coop?

[More laughter in the courtroom]²⁵³

I am sure that whoever came up with the Poultry Code's rule for "straight killing" was an expert, and had the best of intentions, but the result was nevertheless silly. Let's face it, the thought of an expert divining the future of the automobile industry is likewise silly. In 1910, Thomas Edison, who all agree is an expert, proclaimed, "in 15 years, more electricity will be sold for electric vehicles than for light."²⁵⁴ I am glad Mr. Edison—genius that he was—was not in charge of planning the American economy. All kidding aside, like the NIRA and the Poultry Code, federal government influence over GM is likely to lead to absurd results. Economic prosperity, when it returns, will be despite such expert government intervention, not because of it.

III. *ATLAS SHRUGGED'S* CONTRIBUTION TO LEGAL SCHOLARSHIP

A. *Atlas Shrugged's Critique of Emergency Economic Legislation*

No critique of emergency economic legislation is complete without recognition of Ayn Rand's literary magnum opus, *Atlas*

253. HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 85 (2nd prtg. 1997) (alterations in original).

254. CHRISTOPHER CERF & VICTOR NAVASKY, *THE EXPERTS SPEAK: THE DEFINITIVE COMPENDIUM OF AUTHORITATIVE MISINFORMATION* 249 (PANTHEON BOOKS 1998). My favorite definition of an "expert" is as follows: "'X' as you know stands for unknown. 'Spurt' can be defined as a drip under pressure. So an expert is an anonymous drip under pressure." Mark Draper, *Shall the Family Endure? A Question of Love*, in 61 *Vital Speeches of the Day* 1 (Dec. 15, 1994).

Shrugged, a thinly veiled attack on FDR's New Deal.²⁵⁵ Ayn Rand stated as to her writings, "[w]hen you read [them], you'll see what an indictment of the New Deal [they are], . . . although I never mentioned the New Deal by name."²⁵⁶ *Atlas Shrugged* can be considered literary support for the assertions contained above. Authors of legal or political fiction need to have a strong grasp of political reality in order to make their work believable. If the work is not believable it will not sell. Ayn Rand's *Atlas Shrugged* sold well.

Author Ayn Rand satirizes FDR's use of the New Deal to support politically-connected business at the expense of entrepreneurial firms.²⁵⁷ Entrepreneurial firms are the life-blood of the American economy,²⁵⁸ but as Ayn Rand points out, they are driven out of business by New Deal imposed regulations that bar them from competing in industries dominated by politically-connected business.²⁵⁹ Thus, in *Atlas Shrugged*, as the National Legislature spawned more laws to protect politically-connected business, "these in turn, generate[d] more havoc and poverty, which inspire[d] the politicians to create more . . . and the downward spiral repeat[ed] itself until the productive sectors of the economy collapse[d] under the collective weight of taxes and [regulation]."²⁶⁰ In *Atlas Shrugged*, the entrepreneurial firms that survived until the total collapse of the American economy retreated to a hidden Colorado valley, a kind of capitalist Shangri-La where they could reap the rewards of their labor, without the stifling weight of government regulation.²⁶¹ For those that remained behind the result was a chaotic dark age (literally):

255. RAND, *supra* note 2, *passim*.

256. Jennifer Burns, *Godless Capitalism: Ayn Rand and the Conservative Movement*, 1 MOD. INTELL. HIST. 359, 367 (2004) (quoting Letter from Rand to Dewitt Emory, May 17, 1943) (quotations omitted).

257. RAND, *supra* note 2, *passim*.

258. Birch, *supra* note 18, at 65; Efrat, *supra* note 18, at 176 (discussing the importance of small businesses to job creation).

259. RAND, *supra* note 2, *passim*.

260. Stephen Moore, 'Atlas Shrugged': *From Fiction to Fact in 52 Years*, WALL ST. J., Jan. 9, 2009, at A16.

261. RAND, *supra* note 2, at 1158. Rand's theory of the entrepreneurial firm being crowded out by the government-supported cartel is mirrored by "'cartel theory,' . . . [a] barriers-to-entry account [that] effectively splits industry into two groups, existing firms and prospective firms, and posits that existing firms will work to secure regulations that will allow them to 'become federal protectorates, living in the cozy world of cost-plus, safely protected from the ugly specters of competition, efficiency and innovation.'"

Looking down [from the airplane] they could see the last convulsions [of New York City]: the lights of the cars were darting through the streets, like animals trapped in a maze, frantically seeking an exit, the bridges were jammed with cars, the approaches to the bridges were veins of massed headlights, glittering bottlenecks stopping all motion, and the desperate screaming of sirens reached faintly to the height of the plane . . . The plane was above the peaks of the skyscrapers when suddenly, with the abruptness of a shudder, as if the ground had parted to engulf it, the city disappeared from the face of the earth. It took them a moment to realize that the panic had reached the power stations—and that the lights of New York had gone out.²⁶²

Rand described the world that followed as consisting of “closed factories and ruins, . . . spiritual emptiness, hopelessness, confusion, dullness, grayness, fear.”²⁶³

Any attempt to summarize a work as intricate as *Atlas Shrugged* is bound to leave more questions than answers.²⁶⁴ I hope to simplify the matter somewhat by limiting my comments to those portions that lionize the entrepreneurial firm (new firms that create a new product or process),²⁶⁵ and, more particularly, those portions that describe the entrepreneurial firm’s struggle against emergency economic legislation that assists politically-connected business.²⁶⁶ It is this last topic that I find most interesting—the struggle of the entrepreneurial firm against politically-connected business.

Much of *Atlas Shrugged* is limited to a critique (or satire) of politically-connected business.²⁶⁷ This critique often looks at the adverse effect on entrepreneurial firms.²⁶⁸ Consider one of the lesser protagonists in *Atlas Shrugged*, Dan Conway. He is the

Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1291 (2006).

262. RAND, *supra* note 2, at 1158.

263. JOURNALS OF AYN RAND 392 (David Harriman, ed., 1997).

264. CHRIS MATTHEW SCIABARRA, AYN RAND: THE RUSSIAN RADICAL 114 (6th prtg. 1999) (likewise noting the inherent difficulty in summarizing a book as long as *Atlas Shrugged*).

265. D. Gordon Smith & Masako Ueda, *Law & Entrepreneurship: Do Courts Matter?*, 1 ENTREPREN. BUS. L.J. 353, 355–57 (2006) (defining entrepreneur).

266. DONNA GREINER AND THEODORE B. KINNI, AYN RAND AND BUSINESS, i (2001); AYN RAND & ROBERT MAYHEW, AYN RAND ANSWERS THE BEST OF HER Q & A 41 (2005) (speaking out against businesses that use antitrust legislation to gain an unfair advantage over competitors).

267. RAND, *supra* note 2, *passim*.

268. *Id.* *passim*.

literary embodiment of *Piedmont, Maher, and Safir*. He is an entrepreneurial hero who builds the Phoenix-Durango Railroad from running a local milk line to transporting car after car of shale oil from the Wyatt Oil Fields.²⁶⁹ He upgrades to faster locomotives, better tracks, more lines, always improving.²⁷⁰ By constant innovation and hard work, the Phoenix-Durango grows into a strong competitor in the southwestern United States.²⁷¹ Opposing Dan Conway are Ayn Rand's antagonist cartels, a small group of private firms that seek to maintain their market share in a given industry by using Washington connections to construct regulatory barriers to entry.²⁷² These cartels resent arm's length competition from the Phoenix-Durango.²⁷³ Consider the angry grumbings of James Taggart, CEO of Taggart Transcontinental Railroad ("TTRR").²⁷⁴ James complains that the Phoenix-Durango is operating where TTRR has historical priority and as such, is "robbing" TTRR of its market share.²⁷⁵ According to James, the Phoenix-Durango's actions amount to "destructive competition."²⁷⁶ Of course, that raises a fundamental question: destructive to whom? James clearly means destructive to the historical dominance of TTRR.²⁷⁷ Certainly not destructive to all the new employees hired by the Phoenix-Durango, or the businesses that receive efficient service from the Phoenix-Durango.

James seeks to prevent the Phoenix-Durango from competing with his railroad in the southwest.²⁷⁸ James turns to "his man" in Washington, named Wesley Mouch, to lobby for a series of laws preventing entrepreneurial firms from entering or competing in

269. Wyatt is another of Ayn Rand's protagonists. *Id.* at 292.

270. *Id.* at 9 ("Imagine a thing called the Phoenix-Durango competing with Taggart Transcontinental! It was nothing but a local milk line 10 years ago.").

271. *Id.* at 10, 21.

272. See THOMAS SOWELL, BASIC ECONOMICS 102 (2004) (discussing characteristics of cartel).

273. RAND, *supra* note 2, at 10, 21.

274. *Id.*

275. *Id.* at 21.

276. *Id.* at 10. Historically, "destructive competition" is defined as ruinous price cutting, or "price wars" between competitors. Note, *Fixation of Minimum Utility Rates to Prevent Destructive Competition*, 43 YALE L.J. 114 (1933).

277. RAND, *supra* note 2, at 10.

278. It is important to note that Ayn Rand is not against cartels *per se*, but only those that, as in *Atlas Shrugged*, maintain their dominance through legislative action. Rand states, "there isn't a single profession or service of a productive nature that should be a monopoly, enforced by law." AYN RAND ANSWERS 25 (Robert Mayhew, ed., 2005).

markets controlled by railroads with historical priority.²⁷⁹ In a smoke-filled bar, sipping whiskey from a leaded glass with two perfectly square ice cubes, James begins to make his argument in hushed tones:

Speaking of progressive policies . . . you might ask yourself whether at a time of transportation shortages, when so many railroads are going bankrupt and large areas are left without rail service, whether it is in the public interest to tolerate wasteful duplication of services and the destructive, dog-eat-dog competition of newcomers in territories where established companies have historical priority.²⁸⁰

The National Legislature in *Atlas Shrugged* is more than happy to oblige in return for a *quid pro quo*; they pass a law delegating to the National Alliance of Railroads the power to promulgate binding rules governing all railroad service providers.²⁸¹ In turn, the National Alliance of Railroads promulgates the Anti-Dog-Eat-Dog Rule, “the better to enforce the laws . . . passed by the country’s legislature.”²⁸² It reads as follows:

[railroads] are forbidden to engage in practices defined as “destructive competition”; that in regions declared to be restricted, no more than one railroad [will] be permitted to operate; that in such regions, seniority belonged to the oldest railroad now operating there, and that the newcomers, who had encroached unfairly upon its territory, [will] suspend operations within nine months after being so ordered; that the

279. RAND, *supra* note 2, at 47. The “National Legislature” is Ayn Rand’s representation of Congress.

280. *Id.* at 47.

281. *Id.* at 75.

282. *Id.* Rand possibly borrowed the phrase “dog-eat-dog competition” from a 1929 speech by President Hoover:

The very fact that you gentlemen come together for these broad purposes represents an advance in the whole conception of the relationship of business to public welfare. You represent the business of the United States, undertaking through your own voluntary action to contribute something very definite to the advancement of stability and progress in our economic life. This is a far cry from the arbitrary and *dog-eat-dog* attitude of the business world of some 30 or 40 years ago. And this is not dictation or interference by the Government with business. It is a request from the Government that you cooperate in prudent measures to solve a national problem. A great responsibility and a great opportunity rest upon the business and economic organization of the country. The task is one fitted to its fine initiative and courage.

President Herbert Hoover, Remarks to a Chamber of Commerce Conference on the Mobilization of Business and Industry for Economic Stabilization (Dec. 5, 1929) (emphasis added).

Executive Board of the National Alliance of Railroads [is] empowered to decide, at its sole discretion, which regions are to be restricted.²⁸³

The law created a barrier to entry, pushing Dan Conway's Phoenix-Durango out of Colorado and returning to Taggart Transcontinental the market that it argued it was historically entitled to.²⁸⁴ Conway could have fought the laws; he could have brought suit claiming it was expropriation.²⁸⁵ If a court upheld the Railroad Association's actions based upon misplaced conceptions of "public welfare," he could appeal, and appeal again; he could keep the Phoenix-Durango alive for years to come.²⁸⁶ But he refuses to fight back.²⁸⁷ He dejectedly states—tacitly sanctioning the acts of the Railroad Association's actions—"I'm not sure I would win, but I could try and I could hang onto the railroad for a few years longer, but No, it's not the legal points that I'm thinking about, one way or the other, it's not that. . . . I don't want to fight it" ²⁸⁸ In the end, he agrees to his own destruction, to be sacrificed to the collective, stating hopelessly:

283. RAND, *supra* note 2, at 75.

284. *Id.*

285. *Id.* at 77.

286. *Id.*

287. *Id.*

288. *Id.* "Sanction of the victim" is a common theme in Rand's novels. One of Rand's primary protagonists, John Galt, explains in detail:

Then I saw what was wrong with the world, I saw what destroyed men and nations, and where the battle for life had to be fought. I saw that the enemy was an inverted morality—and that my sanction was its only power. I saw that evil was impotent—that evil was the irrational, the blind, the anti-real—and that the only weapon of its triumph was the willingness of the good to serve it. Just as the parasites around me were proclaiming their helpless dependence on my mind and were expecting me voluntarily to accept a slavery they had no power to enforce, just as they were counting on my self-immolation to provide them with the means of their plan—so throughout the world and throughout men's history, in every version and form, from the extortions of loafing relatives to the atrocities of collectivized countries, it is the good, the able, the men of reason, who act as their own destroyers, who transfuse to evil the blood of their virtue and let evil transmit to them the poison of destruction, thus gaining for evil the power of survival, and for their own values—the impotence of death. I saw that there comes a point, in the defeat of any man of virtue, when his own consent is needed for evil to win—and that no manner of injury done to him by others can succeed if he chooses to withhold his consent. I saw that I could put an end to your outrages by pronouncing a single word in my mind. I pronounced it. The word was "No."

AYN RAND, FOR THE NEW INTELLECTUAL: THE PHILOSOPHY OF AYN RAND 165 (1961) (reproducing John Galt's speech).

[T]he whole world's in a terrible state right now. I don't know what's wrong with it, but something's very wrong. Men have to get together and find a way out. But who's to decide which way to take, unless it's the majority? I guess that's the only fair method of deciding, I don't see any other. I suppose somebody's got to be sacrificed. If it turned out to be me, I have no right to complain.²⁸⁹

And thus this once exceptional individual, this once extraordinary entrepreneur, sanctions his own destruction to assist the National Legislature and politically-connected business in their misguided crusade to save the collective.²⁹⁰

In *Atlas Shrugged*, the worsening economy is simply a cover for the implementation of legislation intended to foster a broader social interest.²⁹¹ Once politicians prop up and protect TTRR, they expect it to take a more socially responsible approach.²⁹² In *Atlas Shrugged*, the preferred social policy was an egalitarian transfer of wealth.²⁹³ At a meeting of the board following the passage of the Anti-Dog-Eat-Dog Rule discussed above:

A man from Washington sat at the table among them. Nobody knew his exact job or title, but it was not necessary: they knew that he was the man from Washington. . . . The Directors did

289. RAND, *supra* note 2, at 78.

290. *Id.* at 77–78.

291. *See, e.g.*, RAND, *supra* note 2, at 130, 299, 333, 538, 539 (discussing Equalization of Opportunity Act, and Preservation of Livelihood Law).

292. RAND, *supra* note 2, *passim*.

293. *Id.* at 503. This too appears to be a thinly veiled attack on FDR. In 1936 FDR declared that he viewed the world in terms of the “economic royalist” against the worker, and praised a government where it acts as the “embodiment of charity,” forcing business to “share the wealth” with the worker. President Franklin D. Roosevelt, Speech before the 1936 Democratic National Convention (June 27, 1936). Indeed, FDR made no secret of his view of businesses as corrupt “money changers.” Steven G. Calabresi, “*A Shining City On A Hill: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*,” 86 B.U. L. REV. 1335, 1368 (2006). It was in 1941 that Roosevelt proposed expansion of the freedoms set forth in the Bill of Rights, and declared that all Americans are entitled to “freedom from want.” President Franklin Roosevelt, Speech, The Four Freedoms (Jan. 6, 1941). From these statements, and his actions, we can conclude that FDR used the New Deal to implement a more equitable distribution of the nation’s wealth. For example, in return for government protections, the railroad cartel agreed to provide service to rural communities at a loss. Posner, *Natural Monopoly*, *supra* note 20, at 608. While the Steel Code did much to solidify the authority of the steel cartel, it also contractually bound the cartel to certain maximum hours for workers. *See Some Legal Aspects*, *supra* note 100, at 86 n.6 (citing Code for the Iron and Steel Industry, Art. IV, § 2 (40 hour average, 48 hour maximum)), and a minimum wage. *See id.* (citing Code for the Iron and Steel Industry, Art. IV, §§ 4, 5, and Schedules C, D (25 to 40 cents per hour)). This was accomplished five years before such obligations would be statutorily imposed pursuant to the Fair Labor Standards Act. 29 U.S.C. ch 8.

not know whether he was present as the guest, the advisor or the ruler of the Board; they preferred not to find out.²⁹⁴

The man from Washington was Mr. Weatherby.²⁹⁵ The irony was thick when Mr. Weatherby told James he would have to raise the wages of employees:

JAMES: “But, good God, Clem!—I’d be open to court action for it”

MR. WEATHERBY [smiling]: “What court? Let [us] take care of that.”

JAMES: “But listen, Clem, you know—you know just as well as I do—that we can’t afford it!”

MR. WEATHERBY [shrugging]: “That’s a problem for you to work out.”

JAMES: “How, for Christ’s sake?”

MR. WEATHERBY: “I don’t know. That’s your job, not ours. You wouldn’t want the government to start telling you how to run your railroad, would you?”²⁹⁶

That edict was followed by still more edicts that limited how productive the employees could be (no more than the other carriers),²⁹⁷ edicts that prohibited firing employees, and eventually, edicts that prevented employees from quitting.²⁹⁸ TTRR had made the proverbial “deal with the devil”: it would continue operations, but as a stagnant entity void of free will.²⁹⁹ The employees became little more than indentured servants, but at least equal ones; after all, is it not best that we take “from each according to his ability,” and give “to each according to his needs”?³⁰⁰ That way, no one goes without.

294. RAND, *supra* note 2, at 502.

295. *Id.*

296. *Id.* (dialogue structure added). When James states that he could be “open to court action,” Rand is likely speaking of a shareholder derivative suit. See, e.g., *Mlinarcik v. E.E. Wehrung Parking, Inc.*, 86 Ohio App. 3d 134 (Ohio Ct. App. 1993) (shareholder derivative suit alleging that certain employees received excessive compensation); *Int’l Ins. Co. v. Johns*, 874 F.2d 1447 (11th Cir. 1989) (describing how shareholders contended that bonuses and consulting agreements provided to certain employees were excessive and constituted corporate waste).

297. *Id.* at 539.

298. *Id.* at 538.

299. *Id.*

300. KARL MARX, *CRITIQUE OF THE GOTHA PROGRAM* 27 (Wildside Press 2008).

B. *Satirical Legal Scholarship*

It is important to dispense with the argument that *Atlas Shrugged* adds nothing to our understanding of President Obama's usurpation of emergency economic legislation, or as Whittaker Chambers, writing for the conservative National Review said of *Atlas Shrugged*, "it [is] a remarkably silly book."³⁰¹ Dismissing *Atlas Shrugged* as "mere literature" not worthy of consideration ignores its place as satirical legal scholarship that can bring fresh perspective to the ivory tower. I suggest that *Atlas Shrugged* fits within even the most restrictive definitions of both positive and normative legal scholarship—it is positive legal scholarship, observing what the law is, showing the inefficiency of government constructed barriers to entry, and in the end, normative legal scholarship, making prescriptions about what the law should be.

Fiction, specifically satirical attacks on legislation, has a long history in legal scholarship.³⁰² Satirical legal scholarship takes what can be an abstraction—the law—and places a sometimes ugly face on it,³⁰³ and, in so doing, convinces the reader that the law must change.³⁰⁴ There are satirical attacks on laws that

301. Chambers, *supra* note 33.

302. "In the last century, satire played a varying yet visible role in scholarly movements critical of law ranging from legal realism to law and economics, from legal anthropology to critical legal studies . . . transcend[ing] the established political and doctrinal boundaries that defined legal studies." Peter Goodrich, *Satirical Legal Studies: From the Legists to the Lizard*, 103 MICH. L. REV. 397, 399–400 (2004).

303. Peter Goodrich, *The Importance of Being Earnest: Satire and the Criticism of Law*, 15 SOC. SEMIOTICS 48, 48 (2005); see also M. H. ABRAMS, A GLOSSARY OF LITERARY TERMS 320 (9th ed., 2009) (defining satire as "the literary art of diminishing or derogating a subject by making it ridiculous and evoking toward it attitudes of amusement, contempt, indignation, or scorn").

304. Goodrich, *Satirical Legal Studies*, *supra* note 303, at 441. Goodrich states:

[the inversive branch of satirical legal scholarship], is propelled by the desire for change, and the will to overturn the order of things. The . . . primary objective is not directly abasement or aggrandizement but rather an overturning of the extant power and a reversal of positions in the hierarchy. . .

.

....

To get a little philosophical, the genre of overturning involves what Alain Badiou terms a "logical revolt," meaning that it expresses insubordination, a decline in reverence, a certain disrespect for the order and sanctity of law.

Id. Satire—when well done—leads to reformation, "and in this sense it has always been an important component in movements for abolition or change . . . of law." *Id.* (quoting DANIEL DEFOE, A TRUE COLLECTION OF THE WRITINGS OF THE AUTHOR OF THE TRUE BORN ENGLISHMAN, at fol. A5 (London, Croft 1703)).

would curtail free speech,³⁰⁵ and on sumptuary legislation (legislation that forbade inordinate expenditures on apparel, food, or furniture).³⁰⁶

In *Atlas Shrugged*, James Taggart espouses legal policy, preventing “destructive” competition, but in a way that makes himself, and thus the legal policy, appear at best ignorant and at worst, malevolent. Is this a form of ad hominem argument? Yes, it does attack the messenger rather than the message, but let’s face reality, “it is sometimes more effective to sneer, hoot and ridicule one’s opponents than to engage them in reasoned legal debate.”³⁰⁷ And as such, in many ways, satire is sometimes more effective than the reasoned balancing of competing policy for purposes of condemning the existing law and causing legal change.³⁰⁸ Some might counter that Ayn Rand is not funny. This is true. But satire need not be funny. Ayn Rand is more in the Roman tradition of satire. “Its brand of entertainment depends rather on wit. It elicits less a laugh than a smile, and it

305. Rodney A. Smolla, *Report on the Coalition for a New America: Platform Section on Communications Policy*, 1993 U. CHI. LEG. FORUM 149 (1993) (presenting fictional and satirical proposal for “progressive” new legislation designed to legally enforce higher ethical behavior by journalists).

306. Michele Lowrie, *Slander and Horse Law in Horace*, 17 *STUD. L. & LIT.* 405, 405 (2005); see Andrew Petkofsky, *The Canadians Are Coming: For Williamsburg*, *RICHMOND TIMES*, Oct. 27, 1996, at C-1 (“Recently proposed satirical Canadian legislation seeking compensation to Canadian descendants of Tory loyalists whose property was confiscated after the American Revolution.”). There are even satirical attacks on competing forms of legal scholarship. Indeed, satire has a long and distinguished history in the battles fought between legal scholars. See Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384, 393 (1985) (attack on the law and economics theory of Richard Posner); Arthur Austin, *The Top 10 Politically Correct Law Review Articles*, 27 *FLA. ST. U. L. REV.* 233, 261–63 (1999); Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 *MICH. L. REV.* 461, 669 (1997) (attack on postmodern legal scholarship); Dennis W. Arrow, “Rich,” “Textured,” and “Nuanced”: *Constitutional “Scholarship” and Constitutional Messianism at the Millennium*, 78 *TEX. L. REV.* 149, 150 (1999) (same). As early as 1938, Karl Lewellyn, Professor at the University of Chicago and drafter of the UCC, under the pseudonym D.J. Swift Teufelsdröckh, wrote *Jurisprudence: The Crown of Civilization: Being Also the Principles of Writing Jurisprudence Made Clear to Neophytes*, 5 *U. CHI. L. REV.* 171 (1938).

307. Charles Yablon, *Failed Lawyers and the Sources of Satire*, 15 *GEO. MASON L. REV.* 775, 776 (2008).

308. *Id.* (“Lawyers and satirists are basically in the same business; satire, like law, is essentially a juridical enterprise. Both constitute methods of social control. Both impose judgments and condemnations on their subjects, and in doing so, confront vexing questions of fairness and justice. Both utilize sophisticated rhetorical techniques to accomplish their objectives. Indeed, one of the recurring questions posed by theorists of satire is whether satire is better thought of as a supplement to existing legal institutions or as a rival to them.”).

makes you think.”³⁰⁹ Both New Deal economic legislation and the laws of *Atlas Shrugged* support cartel behavior by establishing barriers to entry. Ridicule in the latter causes us to view the former in a less-than-positive light.

Further, fiction is more likely to be accepted as legal scholarship where the author is “able to tell stories different from the ones legal scholars usually hear . . . reveal[ing] things about the [legal] world that we [lawyers] ought to know.”³¹⁰ Certainly Ayn Rand brings an experience that very few legal scholars share: her father’s Petrograd pharmacy was nationalized by the Bolsheviks in 1917 (during the October Revolution).³¹¹ Ayn Rand’s family fled to the Crimea to escape the Bolsheviks and almost starved (her parents later died in the siege of Stalingrad in 1942-43).³¹² She developed a deep disdain for collective rights; in her own words, a collectivist society “demands spiritual subordination to the mass in every way conceivable—economic, intellectual, artistic; it allows individuals to rise only as servants to the masses.”³¹³ Following graduation from the University of Leningrad with a degree from the department of social pedagogy in 1924, Rand came to the United States with hope for a new life where she could express her individuality.³¹⁴

Upon her arrival in the United States Rand became appalled by what she saw as the collectivism inherent in Roosevelt’s New

309. Lowrie, *supra* note 306, at 406; see Michael Coblenz, *Not for Entertainment Only: Fair Use and Fiction as Social Commentary*, 16 UCLA ENT. L. REV. 265, 278 (2009) (“Many satires are not funny, but the public seems to associate satire with ridicule or an amusing attack on certain aspects of society.”).

310. Nancy Cook, *Outside The Tradition: Literature As Legal Scholarship: The Call To Stories*, 63 U. CIN. L. REV. 95, 102 (1994). Richard Posner argued that literary fiction had very little to add to our interpretation of statutes, stating “I conclude that the functions of literature and legislation are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed for the one have no useful application to the other.” He continued, “[t]he type of intentionalism that seems, to me at least, the natural and sensible approach to take in reading statutes seems to be a bad way to read literature, and the New Critical approach to literature that I find congenial would be a bad way to read statutes.” Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1374 (1986); see also William H. Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391, 392–93, 400–07 (1986).

311. SCIABARRA, *supra* note 264, at 71.

312. *Id.* at 92.

313. JOURNALS OF AYN RAND, *supra* note 263, at 106.

314. SCIABARRA, *supra* note 264, at 92.

Deal.³¹⁵ Ayn Rand was so opposed to the New Deal that she worked on the 1940 presidential campaign of Wendell Willkie,³¹⁶ who decried that “the American people have accepted centralization of government, regimentation of activities and restriction of liberty to a greater extent than ever before in their history . . . the freedoms we have lost must be rewon and restored, not part, but all of them; not sooner or later, but sooner.”³¹⁷ Rand viewed Willkie as “an outspoken and courageous defender of free enterprise.”³¹⁸ When Roosevelt won in 1940, Rand was dejected. Unable to change the law through politics she turned to changing the law through literary fiction; beginning with the *Fountainhead*³¹⁹ and later *Atlas Shrugged*.³²⁰ Today we have *Atlas Shrugged* as a satire of the New Deal, but more importantly, as a perspective on more recent emergency legislation.

CONCLUSION

Arthur Leff stated forty years ago: politicians “ought to have the political nerve to [act] with some understanding (*and some disclosure*) of what [they] are doing.”³²¹ Today, I echo this call. The Obama Administration is telling the American people that absent government intervention the automotive industry will fail. However, government intervention in industry has been shown time and again to harm the economy by supporting government favored business at the expense of entrepreneurial

315. MIMI REISEL GLADSTEIN, ED., *THE NEW AYN RAND COMPANION* 11–12. “She grew up in Russia . . . then in America, she was astonished to discover that the same anti-life ideas that had destroyed Russia were on the rise here. The result seemed to be periods of profound indignation, when she felt that the whole world was dominated by evil and that she was a metaphysical outcast.” *JOURNALS OF AYN RAND*, *supra* note 263, at 20.

316. See MIMI REISEL GLADSTEIN, ED., *THE NEW AYN RAND COMPANION* 11. Willkie’s private utility had been put out of business by competition from the Tennessee Valley Authority—A New Deal Project. Rand’s affinity for Willkie likely grew out of the fact that while Willkie lost his business in competition with the United States Government, Rand’s family lost its business to the Bolsheviks.

317. Ayn Rand, *The Only Path to Tomorrow*, *READERS DIGEST*, Jan. 1944, at 89.

318. Bill Kaufman, *The Last American Darkhorse*, *AMERICAN ENTERPRISE*, Jan. 1996, at 73.

319. Jennifer Burns, *Godless Capitalism: Ayn Rand and the Conservative Movement*, 1 *MOD. INTELL. HIST.* 359, 367 (2004) (quoting Letter from Rand to Dewitt Emory (May 17, 1943)).

320. SCIABARRA, *supra* note 264, at 113. Her actual notes begin with the date January 1, 1945. See *JOURNALS OF AYN RAND*, *supra* note 263, at 390.

321. Leff, *supra* note 29, at 558 (emphasis added).

firms.³²² Barriers to entry in the form of certificates of public need crushed competition in *Piedmont & Northern Railway Co. v. United States*,³²³ and *Maher v. United States*.³²⁴ Barriers to entry in the form of subsidies crushed competition in *Safir v. United States*.³²⁵ These anecdotes of government interference resulting in economic harm are confirmed by Professors Cole and Ohanian at University of California, Los Angeles, who concluded that New Deal programs like the NIRA allowed politically-connected business to collude and restrict competition, prolonging the Depression by three years.³²⁶

President Obama's legal training at Harvard coupled with his tenure at the University of Chicago—famous for its law and economics approach to legislation—guarantees that he is at least aware of the arguments summarized in the preceding paragraph. As such, there must be a non-economic explanation for the Obama Administration subsidizing GM. Circumstances show that in return for financial support, GM agreed to produce more environmentally-friendly cars and trucks. In so doing, GM empowered President Obama to accomplish one of his favored policy initiatives, “put[ing] people to work building . . . fuel-efficient cars.”³²⁷

The *quid pro quo* for financial support became clear almost immediately; soon after receiving a cash infusion from the Treasury, GM acknowledged that it “fully underst[ood] and appreciate[d] the challenges to . . . the climate from increased global consumption of petroleum[,]” and pledged to “construct a new manufacturing facility in the United States to build Lithium-Ion battery packs” and work with the United States Department of Energy to produce “alternative fuel and advanced propulsion” vehicles.³²⁸

322. See discussion *supra* Part I.

323. 30 F.2d 421 (W.D. S.C. 1929).

324. 23 F. Supp. 810 (D. Or. 1938).

325. 616 F. Supp. 613 (E.D.N.Y. 1985).

326. Cole & Ohanian, *supra* note 19, at 813.

327. Obama, *supra* note 24.

328. GENERAL MOTORS CORP., *supra* note 207, at 21–22. Today, GM is building that \$43 million lithium-ion battery plant in Detroit, Michigan, and has accelerated production of the Chevy Volt. Alisa Priddle, *Battery Pack Production to Revive Plant*, DETROIT NEWS, Aug. 14, 2009, at 7B (“The \$43 million plant . . . will package battery cells for the Chevrolet Volt and other electric vehicles that showcase GM’s new direction. ‘This facility represents the reality that we will reinvent the automobile.’”); *GM Building Battery Plant to Supply Chevy Volt*, CHEMWEER’S BUS. DAILY, Aug. 14, 2009 (“General Motors (GM) says it will invest \$43 million to build a lithium-ion battery manufacturing

It is clear that the Obama Administration believes that individual shareholder wealth should take a back seat to the common good, emulating the politicians in *Atlas Shrugged* who reasoned that “the only justification of private property . . . is public service.”³²⁹ If that is the case, that is fine—and some may find it laudable—but the Obama Administration should tell us the truth, that they believe the current economic downturn presents an opportunity to implement broader social policy. They may find that the American people are receptive to the truth, and maybe even receptive to the policy.

POSTSCRIPT

Just prior to the publication of this Article, GM released a television commercial claiming that it had paid back the federal government “in full.” In the commercial, Ed Whitacre strolls through a busy GM factory and pronounces:

I’m Ed Whitacre from General Motors. A lot of Americans didn’t agree with giving GM a second chance. Quite frankly, I can respect that. We want to make this a company that all Americans can be proud of again. That’s why I am here to announce we have repaid our government loan, in full, with interest, five years ahead of the original schedule.³³⁰

Whitacre concludes as pictures of environmentally-friendly plug-in cars flash across the screen: “[f]rom new energy solutions, to the designs of tomorrow, we invite you to take a look at the new GM.”³³¹ The commercial was apparently made to neutralize the stigma that accompanied the federal bailout of GM. The Obama Administration immediately issued a coordinated statement taking credit for the improvement: “[t]his turnaround wasn't an accident of history. It was the result

plant [near Detroit], MI. The site, which will produce batteries for use in GM’s Chevy Volt electric vehicle, is expected to begin production in late 2010.”).

329. Rand, *supra* note 2, at 45.

330. *General Motors Television Advertisement, GM Repaid Government Loan Ahead of Schedule* (broadcast on various television stations beginning April 21, 2010), available at, http://media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/us/en/2010/Apr/0421_fairfax; see also, Ed Whitacre, *The GM Bailout, Paid Back in Full*, WALL ST. J., April 21, 2010, at A19.

331. Whitacre, *supra* note 330.

of . . . decisions made by President Obama to provide GM . . . a lifeline.”³³²

However, the foregoing is nothing but an “elaborate TARP money shuffle.”³³³ First, the source of the payment that allows GM to claim that the Treasury had been paid back “in full” was other “TARP funds currently held in an escrow account.”³³⁴ This is because when TARP funds were given to GM “it basically wasn't all given as a lump sum check . . . [s]ome of it was put in what's called an equity capital facility, which they can draw down.”³³⁵ GM drew from one source of TARP funds to pay back another—the payment did not come from GM profits as implied.

Second, the claim that GM repaid its government loan “in full” is extremely misleading. It may be true that the Treasury no longer has a debt investment in GM. However, the Treasury’s equity investment (in the form of both preferred and common shares) remains unchanged; to be clear, GM paid back only that portion of Treasury loans that were not converted into preferred and common stock as part of GM’s Chapter 11 bankruptcy—only \$7 billion of the total \$50 billion made available to GM.³³⁶ The Treasury still owns 60.8 percent of GM, an equity investment with a face value of \$41.5 billion.³³⁷ GM’s ability to pay back the Treasury’s equity investment depends entirely on its ability to make a public offering or IPO to raise funds. However, it is unlikely that an IPO would raise enough funds to purchase back the Treasury investment.³³⁸ For the

332. Nick Bunkley, *G.M. Repays U.S. Loan, While Chrysler Posts Improved Quarterly Results*, N.Y. TIMES, Apr. 22, 2010, at B3.

333. Letter from Charles E. Grassley, U.S. Senator, to Timothy F. Geithner, U.S. Treasury Secretary (April 22, 2010) (quoting Office of the Special Inspector General for TARP, Quarterly Report to Congress dated April 20, 2010, page 115), available at <http://grassley.senate.gov/about/upload/2010-04-22-Letter-to-Treasury-Department.pdf>.

334. *Id.*

335. *On the Financial Institution Tarp Fee: Hearing Before the S. Comm. on Finance 111th Cong.* (April 20, 2010) (testimony of Neil Barofsky, Special Inspector General for the Troubled Asset Relief Program).

336. OFFICE OF FINANCIAL STABILITY, U.S. DEP’T OF TREASURY, TROUBLED ASSET RELIEF PROGRAM TRANSACTIONS REPORT 15 (2010), available at <http://www.financialstability.gov/docs/transaction-reports/4-26-10%20Transactions%20Report%20as%20of%204-26-10.pdf>.

337. *Id.*

338. David Nicklaus, *GM's 'Paid In Full' Is Short By \$53 Billion Automaker Is Still Deep In Debt—To The Taxpayers*, ST. LOUIS POST-DISPATCH, April 25, 2010, at E1.

foreseeable future, the federal government will own—and implement environmental policy through—GM.