

REIMAGINING THE WTO: APPLICATIONS OF THE NEW DEAL AS A MEANS OF REMEDYING EMERGING GLOBAL ISSUES

INTRODUCTION

With the onset of the era of globalization, the World Trade Organization (WTO) is prominent and influential due to its unique global position. The WTO is a world trade facilitator—a body dedicated to the elimination of trade barriers between member states—not a world government.¹ In light of recent events, such as the lack of effective consensus at the United Nations over how to deal with Iraq, the WTO may be the one international body with the ability to tackle worldwide issues, and in fact, it already does deal with global issues such as the AIDS crisis in Africa.²

Some scholars have criticized the WTO for its rigid adherence to free trade principles. One such critic is sociologist Charles Derber. His vision of the WTO contemplates its acting as a world government, not a trade body.³ He criticizes the WTO for effectively deregulating member nations'

1. One need only look to the WTO's own Web site to see how it views its mission. The WTO states that it "is the only international organization dealing with the global rules of trade between nations," and it further states that "[i]ts main function is to ensure that trade flows as smoothly, predictably and freely as possible." WTO, *The WTO in Brief*, available at http://www.wto.org/english/whatis_e/whatis_e/inbrief_e/inbr00_e.htm (last visited May 10, 2005); see also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994); Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) (establishing the WTO as well as its instruments and side agreements); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125, 1154 (1994) [hereinafter GATT] (incorporating the previous world trade agreement, General Agreement on Tariffs and Trade (GATT), into the new WTO structure, and stating the free trade principles that form the bedrock of the WTO); General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, Dec. 15, 1993, 33 I.L.M. 13 (1994) (replacing the prior-term Multilateral Trade Organization with World Trade Organization).

2. See, e.g., Henry Chu, *U.N. Has a Part in Rebuilding Iraq, Powell Says*, L.A. TIMES, Apr. 4, 2003, at A16 (noting the discord created among the allies of NATO over the war in Iraq and that the coalition would have supremacy over the rebuilding effort, not the United Nations); John Fraser, *WTO Deal Allows SA to Export Cheap Drugs*, BUS. DAY (South Africa), Sept. 1, 2003, at 1 (reporting on the historic WTO deal allowing for importation of generic drugs by African countries facing health crises); Guy De Jonquieres, *WTO Near Accord on Medicines*, FIN. TIMES, Aug. 23, 2003, at 1 (outlining the issues the WTO dealt with regarding the need to overcome patent protection rules to allow for poor countries dealing with the AIDS epidemic to import generic drugs that are less expensive).

3. CHARLES DERBER, *PEOPLE BEFORE PROFIT* 145 (2002). Derber does agree that "[t]he WTO is not a formal world government," but he also states that the WTO "is the only global governance

labor and environmental protections in the name of free trade.⁴ Derber's book describes this situation with the WTO as part of a "global Constitutional Moment" which in his estimation reached a second stage in 1995.⁵ He believes the WTO and other major global financial institutions represent one strain of the U.S. Constitution—the strain dedicated to protecting property rights.⁶ Derber sees the United Nations as representing a competing strain of the U.S. Constitution—the strain dedicated to protecting and expanding individual rights embodied by the Bill of Rights.⁷ Derber advocates for a global New Deal to reverse the international shift toward the principles of the U.S. Constitution favoring protection of property over rights of people.⁸ He advocates for four policy agendas to achieve this New Deal: global regulation; redistribution; decommodification; and participation.⁹ This Note mainly addresses the first of his agendas, global regulation, but critiques aspects of his other proposals, as well.

Derber's global New Deal is premised on his comparison of the current global period with the Gilded Age, a period when corporate robber barons led the United States into a type of uncivilized and uncontrolled capitalism.¹⁰ During the New Deal era, Derber states that the United States recognized that massive government intervention was required to rein in the exploitation of the Gilded Age and to create a new capitalism which was "respectful of workers and communities."¹¹ Derber then finds that in today's world of globalization, there exists an uncivilized and unregulated capitalism similar to that of the Gilded Age.¹² Thus, the world presently faces a situation similar to the one faced by the United States prior to the New Deal.¹³

system with real economic enforcement powers." *Id.* at 119–20.

4. *Id.* at 149.

5. *Id.* at 119. Derber further notes that the first major "Constitutional Moment" in the new globalization was the founding of the International Monetary Fund and the World Bank, known collectively as the Bretton Woods institutions because they were founded at a U.N. conference in Bretton Woods, New Hampshire.

6. *See id.* at 107 (comparing the U.N. Charter with the Bretton Woods institutions).

7. *Id.*

8. *See id.* at 148–51 (laying out Derber's vision of a global New Deal).

9. *See id.* at 148–66 (advocating for regulation of the world monetary policy and corporations, redistribution of wealth and income, decommodification to reverse the trend toward privatization and to make natural resources a public commodity or "global commons" as Derber terms it, as well as participation, which means a more democratic global process).

10. *Id.* at 148.

11. *Id.*

12. *Id.*

13. *Id.*

Derber's solution is to advocate for a global New Deal.¹⁴ While some of his policy suggestions focus on other international institutions, this Note concentrates on the policies aimed at the WTO. He in fact calls for the complete abolition of the WTO, insisting that the United Nations and other more progressive institutions replace it.¹⁵ He considers the WTO and its brethren—international financial institutions such as the International Monetary Fund and World Bank—“centralized ‘world governments.’”¹⁶ Derber does not suggest ending globalization, but rather harnessing globalization to create a more democratic world system that will attack poverty instead of allowing a “feeding frenzy for the rich.”¹⁷ He contends that “deregulation of financial markets . . . is a dagger aimed at the heart of democratic self-rule” forcing weaker nations to “open themselves indiscriminately to foreign ownership, and transform themselves into agro-export economies while their people lack food.”¹⁸ To combat this problem, Derber does not propose “global protectionism” but instead sees his vision as being in kindred spirit with the Keynesian vision of the original Bretton Woods ideas, such as “the need for a regulated financial order” where trade agreements are “subordinated . . . to democratic regulation.”¹⁹ Although Derber's global New Deal proposal advocates WTO abolition, the WTO is not likely to be abolished, and accordingly, this Note examines the global New Deal proposal in the context of reform within the current WTO system.²⁰

Seeking inspiration from the past to deal with complex new global issues, the concept of a New Deal for the WTO is born.²¹ Derber's New

14. *Id.*

15. *See id.* at 147–48 (calling for WTO abolition and the creation of a more democratic global government by building on United Nations agencies, as well as new agencies and bodies).

16. *Id.* at 145.

17. *Id.* at 148.

18. *Id.* at 151. Derber is not the first to see unregulated international markets as a boon for wealthy nations at the expense of underdeveloped nations. For a similar view from Swedish scholar Dr. Gunnar Myrdal, see GUNNAR MYRDAL, *THE CHALLENGE OF WORLD POVERTY* 279 (1970), where he outlined a similar finding, noting that unregulated market forces in “*international trade . . . will generally tend to breed inequality, and will do so the more strongly when substantial inequalities are already established.*”

19. DERBER, *supra* note 3, at 151.

20. *See id.* at 149 (discussing a proposal to regulate, within the context of current WTO trade laws, albeit in the context of subordinating them to a new system).

21. *Cf.* Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 *FORDHAM INT'L L.J.* 481, 485 (2000) (offering the Progressive movement of the early twentieth century led by Theodore Roosevelt as an alternative historical analogue for the WTO to follow). Posner and Reif do briefly discuss the New Deal Supreme Court jurisprudence, and they focus on how to make the WTO achieve better balance between free trade and promotion of positive social policy. *Id.* at 498–500, 503–13.

Deal policy of regulation, the main policy that this Note examines, aims to regulate global corporations and money. His goal is to eradicate the race to the bottom, with the result being improved protection of the labor market and the environment.²² Specifically, Derber wants to “subordinate all the current WTO and GATT trade laws” to a new system “based on human rights and sustainable development.”²³ He wants the new system to enforce global labor and environmental standards “shredded by the current system.”²⁴ The goal is to level the playing field between developed and developing nations. This leveling would be accomplished by preventing “predatory” practices by multinational corporations through the enforcement of globally uniform standards, thus ending the race to the bottom.²⁵ Derber’s vision of a more level playing field between developing and developed nations, anchored by new globally uniform labor and environmental standards, is certainly laudable. Yet one must question the historical accuracy of the moniker New Deal when discussing Derber’s plan.²⁶

Often, scholars focus on how the WTO adjudicative system compares to the U.S. Supreme Court jurisprudence—attempting to determine whether the WTO trade regime jurisprudence is or is not analogous to the U.S. dormant commerce clause jurisprudence.²⁷ However, an interesting and relatively unexamined question deals with the accuracy of comparing the current global situation and WTO reform with the Great Depression era and the New Deal. While many proponents of WTO reform use analogues to

22. DERBER, *supra* note 3, at 149. There is discussion of the race to the bottom in Part II of this Note.

23. *Id.*

24. *Id.* at 151–52.

25. *See id.* at 152–53 (detailing the policy by which proposed new institutions to replace the WTO and current institutions would implement global labor, social, and environmental standards to set a global uniform floor and offering incentives to raise these standards beyond the minimum level).

26. *See id.* at 154, 159 (detailing other portions of Derber’s policy agenda that are not discussed in detail in this Note). These proposals deal mainly with redistributing wealth to the poor in the global economy and decommodification, whereby Derber would reverse the privatization trend and claim various resources as public. The historical accuracy of labeling these policies as New Deal policies is debatable, which is demonstrated in Parts I and III of this Note. These Parts discuss the historical New Deal and its focus on the private sector. For purposes of this Note, Derber’s goal of regulation is the focal issue.

27. *See, e.g.,* Posner & Reif, *supra* note 21, at 500–01 (discussing dormant commerce clause development in U.S. jurisprudence and raising questions of its relevance to today’s global trade system); Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT’L ECON. L. 1, 40 (2003) (comparing the WTO with the Supreme Court’s “process based” approach to dormant commerce clause cases); David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L L. 279, 360–63 (2001) (comparing U.S. dormant commerce clause jurisprudence to the WTO within the context of searching for a comprehensive definition of free trade).

periods in U.S. history to make their point more salient to U.S. citizens, one must examine whether these analogues are properly drawn for them to have any true relevance to today's political debates. To analyze the comparison between the historic New Deal and Derber's proposed global New Deal, one must examine what types of remedying legislation President Franklin Roosevelt and the New Deal-era legislators sought to enact in relation to the trying circumstances of the time. How does the historic New Deal compare with the types of protections advocated by WTO critics to meet the trying circumstances of the twenty-first century?

Within this issue are multiple sub-issues. One is whether the circumstances surrounding the enactment of the New Deal are similar to the circumstances of today. Another is how environmental, labor, and other social protections advocated for the WTO compare with protections that were put in place during the New Deal. Finally, assuming that such protections are needed for the WTO, how would they best be implemented? While each of these sub-issues could easily comprise a separate Note, this Note addresses the main issue: whether the New Deal is a proper analogue for the WTO to emulate. Importantly, this Note focuses on the enacted New Deal legislation and the way this legislation remedied effects of the Great Depression. It will not focus on the dramatic Supreme Court rulings that found much of the early New Deal legislation unconstitutional.

Part I of this Note discusses the circumstances surrounding the enactment of the New Deal, and the types of legislation President Roosevelt and Congress enacted during that era. Part II analyzes the WTO, its formation and functions, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as an example of a substantive, positive side agreement to the WTO. Part III compares the economic and political situation of today to that preceding the New Deal. Part III also examines whether a robust program for the WTO, as Professor Derber advocates, would be an appropriate response to today's economic and political challenges internationally, and how such a program would compare with the protections implemented during the New Deal. Finally, Part III shows how the protections Professor Derber advocates could potentially be implemented within the framework of the WTO.

I. THE ORIGINAL NEW DEAL

A. *The Impetus for the New Deal: The Great Depression*

While Professor Derber discusses the Great Depression, which provided the impetus for the original New Deal, one must consider whether

his contention that the current world situation is similar or worse than the situation during the Great Depression is accurate, or merely a convenient comparison for his broader purposes.²⁸ Derber argues that the recent recession, terrorist attacks, and decline of high-tech markets provides “fertile” ground for a New Deal.²⁹ Derber offers anecdotal evidence to support his findings that the world is ready for a shift towards a global New Deal.³⁰

A discussion of the Great Depression is imperative to provide background information for this Note. Such information establishes a basis not only for comparing remedies such as the New Deal and proposed WTO changes for social protection, but also the political and economic climates which would allow for such changes. A recent article by Professor Steven Ramirez reviewing the New Deal noted that the Great Depression was a “cataclysmic event [that] forever changed the federal government’s role in the economy.”³¹ The circumstances of the times were desperate, and it may be impossible to exaggerate the hopelessness of the period.

1. Living in the Great Depression

Based on economic data, Professor Ramirez found that the Great Depression lasted from 1929 until at least 1939, if not longer.³² He notes that unemployment rose 22% from 1929 to 1933, reaching a level slightly above 25% in 1933 and not receding below 10% until 1941.³³ Additional indicators of the extremity of the Great Depression included one thousand home foreclosures per day in 1933; a decline in gross domestic investment by 80% from 1929 to 1933; labor unrest, which included violence and deaths; and a decline in Real Gross National Product from over seven hundred billion dollars in 1929 to under five hundred billion dollars in 1933.³⁴ The New York Stock Exchange lost over 40% of its value, a staggering twenty-six billion dollars, in a matter of weeks following the

28. DERBER, *supra* note 3, at 156. There is more on this comparison in Part III of this Note.

29. *Id.* at 157.

30. *Id.* Among Derber’s anecdotal evidence of the coming of a global New Deal is the situation in Argentina, where he notes that the President of Argentina has criticized the international economic model and promised to spend money on social programs instead of repaying debt. *Id.* Derber argues that this paralleled the shift in thinking from the laissez-faire Hoover administration to the more activist and socially conscious Roosevelt administration. *Id.*

31. Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 517 (2003).

32. *Id.* at 524.

33. *Id.*

34. *Id.* at 524–26.

crash of October 1929.³⁵ At least four million Americans were unemployed by the spring of 1930, and breadlines were appearing in larger cities.³⁶

These breadlines were full of “embarrassed men, shuffling patiently forward for a chance at a piece of bread and a cup of coffee.”³⁷ The situation was desperate; in New York City, “the number of families on relief . . . increased 200 per cent since the crash . . . [and] municipal lodging houses were now crowded,” many with individuals who were there for the first time.³⁸ Homeless men slept on a municipal barge tied to a dock at night in New York, while in Detroit, thousands of unemployed men sat in parks “muttering to themselves” all day long.³⁹ Conditions only deteriorated, and in “the second winter of the depression . . . unemployment began to settle into a way of life.”⁴⁰ Many people dug through refuse to find food.⁴¹ By the spring of 1931, unemployment doubled to eight million people; some areas were extremely hard hit, such as Pennsylvania with almost one quarter of the workforce out of work.⁴²

The Great Depression caused a situation in the United States where many were concerned about revolution as a response to the lack of effective government action to stop the rapid decline of the economy. The American Federation of Labor voiced this opinion when it spoke of impending violence and revolution if the unrest caused by the economy was not remedied.⁴³ Wealthier Americans feared a siege by revolutionaries, and the leader of the National Farmers Union predicted doom for capitalism.⁴⁴ Government seemed helpless to counteract the problems posed by the Great Depression.⁴⁵

35. ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919–1933*, at 159 (1957).

36. *Id.* at 167.

37. *Id.*

38. *Id.*

39. *Id.* (quoting Bruce Bliven, *On the Bowery*, *NEW REPUBLIC*, Mar. 19, 1930).

40. *Id.* at 171. This way of life included living “in unheated tenements, in the flophouses smelling of sweat and Lysol, in the parks, in empty freight cars, along the windy waterfronts” and in shacks built wherever there was land that was not occupied. *Id.* Schlesinger describes the shanties and tarpaper towns that sprung up, some of which were “squalid beyond belief, with the smell of decay and surrender.” *Id.* These new communities were called Hoovervilles after President Herbert Hoover, a symbol for many of the inability or unwillingness of the government to respond to the crisis. *Id.* Only “the fortunate” found their way to Hoovervilles, while others crowded “in doorways, in empty packing cases, [or] in boxcars” at night. *Id.*

41. *Id.* Schlesinger quotes one observer who asked, “Have you seen the uncontrollable trembling of parents who have gone half starved for weeks so that the children may have food?” *Id.*

42. *Id.*

43. ROBERT S. MCELVAINE, *THE GREAT DEPRESSION: AMERICA 1929–1941*, at 90–91 (1993).

44. *Id.* at 90–92.

45. See SCHLESINGER, *supra* note 35, at 172 (discussing the lack of fiscal sources and credit for localities, as well as the decline in state tax revenue and the overall declining standard of relief care by

In 1932, there was reason for concern. Unemployment had reached a new total of approximately thirteen million people, and “[m]any lived in the primitive conditions of a preindustrial society stricken by famine.”⁴⁶ Millions roamed “the country in a fruitless quest for work,” and the desperation extended to all ends of the country, from Tennessee to New Jersey, from Pennsylvania to Illinois, from California to New York.⁴⁷ One writer said of the tough winter of 1932 that “we could smell the depression in the air.”⁴⁸ A Communist-inspired march on the Ford factory in Dearborn, Michigan ended in a bloody clash with police leaving four protestors dead.⁴⁹ That same year, a group of twenty thousand World War I veterans in need of money gathered in Washington, D.C. to ask for early payment of a bonus that the government promised to give them in 1945. This protest also ended in bloodshed when President Herbert Hoover set the U.S. Army upon the group of veterans.⁵⁰ Even the normally conservative farmer was driven to radicalism by the depths of the Great Depression.⁵¹ At the end of Hoover’s time in office, “more than fifteen million workers had lost their jobs,” and national income had been cut in half.⁵²

the government). The need for federal aid was pronounced in the South, where states like Florida, South Carolina, Georgia, and Alabama had weak decentralized executive branches that were ill-equipped to deal with crisis situations. DAVID R. COLBURN & LANCE DEHAVEN-SMITH, *GOVERNMENT IN THE SUNSHINE STATE* 7 (1999). These states were heavily reliant on the New Deal to stay afloat. For more on the Southern states’ executive-branch structures and Florida’s experience during the Great Depression, see *id.* at 7, 28–36, 88, 147.

46. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940*, at 1 (1965).

47. *Id.* at 2–3.

48. *Id.* at 18 (quoting Harold Clurman). The Great Depression was palpable to one correspondent, who said that “I see on streets filthy, ragged, desperate-looking men, such as I have never seen before.” *Id.* at 19 (quoting Henry Morrow Hyde).

49. MCELVAINE, *supra* note 43, at 92–93.

50. Ramirez, *supra* note 31, at 525; see also MCELVAINE, *supra* note 43, at 92–94 (noting that General Douglas MacArthur actually acted on his own accord and disobeyed orders from Hoover in evicting the veterans, although Hoover was blamed for this action).

51. See SCHLESINGER, *supra* note 35, at 176 (quoting the president of the Wisconsin Farmers’ Union testifying to the Senate Agriculture Committee in 1932 as saying, “I am as conservative as any man could be, but any economic system that has it in its power to set me and my wife in the streets, at my age—what else could I see but red” in referring to the inclination of farmers to become communist due to the extreme financial disaster they faced); see also LEUCHTENBURG, *supra* note 46, at 138–39 (discussing the desperation of the “Arkies” and “Okies,” farmers from Arkansas and Oklahoma whose farms literally were blown away in dust storms and who headed west with their families to seek work, only “to be drowned in a sea of cheap labor” and exploited). As Leuchtenburg points out, the symbolization of the farm families’ odyssey from Oklahoma to California is chronicled in JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

52. LEUCHTENBURG, *supra* note 46, at 18–19. Beyond the mere fact of unemployment was the hopelessness of those who wanted to work and could not find a job. One worker said that “the anniversary of your layoff . . . makes you feel more hopeless,” and Leuchtenburg observed that confidence had given way to a feeling of impotence among the unemployed, even leading some to

2. The Causes of the Great Depression

At the outset, it is important to remember that the Great Depression was both an American experience and an international one—although U.S. economic failures may have been the spark which ignited the worldwide Depression.⁵³ That being said, the Great Depression must be evaluated within the confines of the U.S. experience, as New Dealers tailored the relevant New Deal protections to benefit the United States. The causes of the Great Depression were apparently many, and there is no grand consensus among scholars, although there are many plausible theories. Some scholars theorize that the main cause was poor income distribution through the capitalist system, effectively causing a collision between production and consumption limits.⁵⁴ Not wholly inconsistent with that approach, Professor Ramirez notes that “the Depression had its roots in the speculative stock market boom of the 1920s.”⁵⁵

One persuasive theory is simply that consumer demand fell in sharp bursts.⁵⁶ Christina Romer posits that a multitude of factors caused monetary problems, including the adherence to the gold standard; the raising of interest rates by the Federal Reserve at an inopportune time in an attempt to stem the stock market speculation prior to the Great Depression; a decline in consumption that caused decline in the stock market; and a series of banking crises which perpetuated the Great Depression by causing pessimism amongst consumers and businesspersons.⁵⁷

Perhaps most relevant is the conclusion by Professor Ramirez regarding the causes of the Great Depression. He notes that there exists some consensus by economists that “the central failure was the volume of investment—and it is clear that there were few tools available to policymakers to counter this essential fact.”⁵⁸ Thus, it becomes clear that

withdraw from society in the equivalent of social excommunication. *Id.* at 118–19.

53. See MCELVAINE, *supra* note 43, at 49 (finding that American collapses set off the worldwide Depression because the United States shunned its responsibilities as a leader of the world economy).

54. *Id.*

55. Ramirez, *supra* note 31, at 526.

56. Christina D. Romer, *The Nation in Depression*, 7 J. ECON. PERSP. 19, 25 (1993).

57. *Id.* at 25–32.

58. See Ramirez, *supra* note 31, at 527 (finding that central to the cause of the Great Depression were failures by the Federal Reserve at key junctures in the crisis, because their motivation may have been more politically oriented, rather than based on sound economics). Ramirez goes on to note the reasons why there were few options for politicians of the day to respond. Discussing “[t]he dogma of the day,” he notes that it required markets to be left alone; for wages to fall to create economic equilibrium; that budgets be balanced which “stripped the government of fiscal policy”; that the gold standard be adhered to “which stripped the government of monetary policy”; and found that President Herbert Hoover was not so much a rigid adherent to the conservative philosophy as much as a President

although the causes contributing to the Great Depression were many, the tools which U.S. politicians had to combat it were few.⁵⁹ Here, the impetus for the New Deal becomes clear, as it was a response to a nation in need of new leadership to quell unrest and in need of a broader ideology capable of innovation in government to combat economic catastrophe. The Great Depression represented, in essence, a unique opportunity to save both democracy and capitalism—but also to enact far-reaching social reforms.

B. *The New Deal Protections*

Into this seemingly intractable situation came President Franklin D. Roosevelt. His election over incumbent President Herbert Hoover in 1932 signaled the victory of “FDR’s vision of an active government, responsible for managing and regulating the economy.”⁶⁰ While various radical forces waited in the wings to push their respective ideology on a fearful nation, Roosevelt set out clearly to preserve capitalism and democracy by working with Congress to enact social and economic reforms.⁶¹ Roosevelt was critical of supposedly free markets, and his skepticism centered on the concern of “whether free markets alone could assure adequate macroeconomic performance.”⁶²

According to historians, there are at least two, and arguably three, separate New Deal periods within the Roosevelt administration beginning in 1933 and ending in 1945.⁶³ Each New Deal had its own distinctive

unwilling to experiment and deviate from the laissez-faire economic doctrines prevailing at the time. *Id.* at 528–30.

59. See generally MCELVAINE, *supra* note 43, at 73–94 (noting how the Great Depression ran its course, and the actions and inactions by President Hoover—who although faulted by many historians for his failure to react adequately to the Depression, due in part to his supposed adherence to the concept of natural market corrections, may deserve less of the blame for the Depression, despite his decision-making being anything but fortuitous).

60. Ramirez, *supra* note 31, at 530; see also RICHARD POLENBERG, *THE ERA OF FRANKLIN D. ROOSEVELT, 1933–1945: A BRIEF HISTORY WITH DOCUMENTS* 8 (2000) (noting that Roosevelt’s victory over Hoover was by approximately seven million votes and included Democratic gains in the House and Senate, which, combined with the crisis atmosphere, gave Roosevelt a degree of cooperation that he otherwise might not have had).

61. Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 INT’L ORG. 41, 42 (1984).

62. Ramirez, *supra* note 31, at 532.

63. See generally Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 WM. & MARY BILL RTS. J. 403, 426–27 (noting that the First New Deal commenced in 1933 and the Second New Deal commenced in 1935); John W. Jeffries, *The “New” New Deal: FDR and American Liberalism, 1937–1945*, 105 POL. SCI. Q. 397, 397 (1990) (discussing that a “Third New Deal” existed during the years of 1937–1945, albeit somewhat under the radar due to the crisis of World War II).

programs. These programs were designed to combat the Great Depression and extend social protections.

1. The First New Deal

The First New Deal period, beginning in 1933 after Roosevelt's election, included the National Industrial Recovery Act (NIRA), which created the National Recovery Administration (NRA).⁶⁴ This major piece of legislation faltered. The NIRA's goal was to assist businesses in keeping wages and prices high—but it was written in such a way that business interests had control over drafting codes regulating the market prices—and it failed because businesses chose to keep production low and prices high.⁶⁵ In addition, the legislation failed to create a genuinely enforceable right to organize for laborers.⁶⁶

Professor Ramirez notes that in contrast to the NIRA, “[t]he real legacy of the New Deal’s regulatory initiatives lies in innovations designed not to quell but to facilitate market action.”⁶⁷ With this in mind, the first New Deal featured much legislation that did bear on the legacy of the New Deal as a whole. For example, the Agricultural Adjustment Act (AAA)⁶⁸ served as the New Deal’s farm policy and attempted, according to Roosevelt, “to balance agricultural production and consumption so as to avoid surpluses and ensure that farmers got a fair price.”⁶⁹ Despite some drawbacks, the gross farm income was up 50% by 1936, and farm debt dropped by one billion dollars.⁷⁰ It is important to note that the AAA was voluntary, not coercive.⁷¹

64. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (repealed 1935); POLENBERG, *supra* note 60, at 9.

65. POLENBERG, *supra* note 60, at 9–10; *see also* MCELVAINE, *supra* note 43, at 161–62 (terming the NRA “a colossal failure” prior to the NIRA being struck down by the Supreme Court as an “unconstitutional delegation of legislative power” (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935))).

66. POLENBERG, *supra* note 60, at 10; *see also* Ramirez, *supra* note 31, at 535 (noting that despite its grand notions of regulating free markets for production and pricing, this legislation was not part of the New Deal’s legacy).

67. Ramirez, *supra* note 31, at 535.

68. Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933) (codified as amended at 7 U.S.C. § 601 (2000)).

69. POLENBERG, *supra* note 60, at 11; *see also* MCELVAINE, *supra* note 43, at 148 (discussing the Emergency Farm Mortgage Act tied to the AAA, which provided farmers with lower mortgage rates).

70. POLENBERG, *supra* note 60, at 12. One of these drawbacks was the reduced need for farm labor due to less workable acreage because of federal payments to farmers in exchange for limitations on production to avoid surpluses that devalued crops. *Id.*

71. MCELVAINE, *supra* note 43, at 149. The AAA was declared unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936). *Id.* at 150–51.

The First New Deal also dealt with home ownership in the Home Owners' Loan Act of 1933⁷² and the National Housing Act.⁷³ The National Housing Act created the Federal Housing Administration, which, along with the Home Owners' Loan Act, helped increase home ownership through insurance of home loans and lower interest rates to home purchasers.⁷⁴

Other early New Deal actions included the creation of the Federal Emergency Relief Administration, which made grants to the states for relief, and the Public Works Administration, which was intended to expand public works and provide employment; both programs were enacted with the goal of getting the economy moving.⁷⁵ Another creation, the Civil Works Administration (CWA) provided quick employment relief despite criticism by conservatives for being wasteful.⁷⁶ The CWA became a victim of its own success, and due to concern that people were beginning to rely too much on the government and regarded the temporary program as their entitlement, the program ceased over a period of time.⁷⁷ Yet another creation was the Works Progress Administration, which conducted construction and improvement of public facilities as a means of providing employment; this helped limit the number of people who were "on the dole" of federal welfare relief.⁷⁸ Professor Ramirez notes that the legacy of the New Deal with respect to public works was "a mixed bag" and found that while many of these works proved useful, they did not create the type of major stimulation to the economy that might have been expected.⁷⁹

Quite interesting for purposes of this Note is the conservationist aspect of the New Deal. Although the environmental movement had not started in earnest, Roosevelt considered himself a conservationist and thus pushed for some measures that mixed environmental conservation with economic initiative and social protection.⁸⁰ The New Deal featured two major efforts that had environmental aspects: the Tennessee Valley Authority (TVA) and

72. Home Owners' Loan Act of 1933, Pub. L. No. 73-43, 48 Stat. 128 (codified as amended at 12 U.S.C. § 1461 (2000)).

73. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified as amended at 12 U.S.C. § 1701 (2000)).

74. Ramirez, *supra* note 31, at 560–61.

75. MCELVAINE, *supra* note 43, at 151–52.

76. *See id.* at 153–54 (noting that the CWA was denounced "for being rife with 'petty graft' and 'politics'").

77. *Id.* at 154.

78. *Id.* at 265.

79. Ramirez, *supra* note 31, at 554–55.

80. *See* POLENBERG, *supra* note 60, at 13 (describing the cause of conservation as being close to Roosevelt's heart); LEUCHTENBURG, *supra* note 46, at 173 (touting the New Deal's focus on soil conservation, meant to combat the effects of dust storms and preserve land for future generations).

the Civilian Conservation Corps (CCC). The TVA focused on a forty thousand square mile region, and “provided cheap electric power” and simultaneously worked to “prevent soil erosion and control floods.”⁸¹ The TVA dealt with the poverty stricken area of the South and provided for people who had no electricity, running water, and whose land was increasingly untenable.⁸² The TVA worked to reforest, develop marginal lands, and improve the Tennessee River for navigation and the economic well-being of the people in the area.⁸³ The CCC “combined the functions of relief and forestry.”⁸⁴ CCC “volunteers fought forest fires and reseeded grazing lands; they constructed roads, bridges, water-storage basins, and camping facilities; they built wildlife refuges, fish-rearing ponds, and animal shelters.”⁸⁵

The financial side of the First New Deal featured the Banking Act of 1933,⁸⁶ the Securities Exchange Act of 1934 creating the Securities Exchange Commission (SEC),⁸⁷ and the Securities Act of 1933.⁸⁸ The Banking Act was notable for its creation of the Federal Deposit Insurance Corporation (FDIC), which made “bank deposits as safe as government bonds in order to stem bank runs and protect communities from the economic shock of bank failures.”⁸⁹ The Banking Act was intended to relieve banks from needing to maintain reserves in anticipation of bank runs, freeing banks to fund economic growth.⁹⁰ The Banking Act also consolidated control of monetary policy in the Federal Reserve Board and insulated the Federal Reserve from political pressures, partly by giving long terms to its members.⁹¹ The Securities Act of 1933 and Securities Exchange Act of 1934 can be characterized, according to Professor Ramirez, as being about “disclosure” by corporations, and their goal was to

81. POLENBERG, *supra* note 60, at 13.

82. Ramirez, *supra* note 31, at 552.

83. *Id.*

84. POLENBERG, *supra* note 60, at 13.

85. *Id.*

86. Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

87. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a (2000)). *See generally* MCELVAINE, *supra* note 43, at 165 (explaining that business complaints led to the weakening of the Securities Exchange Act, which resulted in an increase in decision-making power of the SEC).

88. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a (2000)); *see also* Ramirez, *supra* note 31, at 535–40 (outlining the three key New Deal financial regulatory acts).

89. Ramirez, *supra* note 31, at 543.

90. *Id.* at 544.

91. *See id.* at 540 (finding that the overwhelming independence of the Federal Reserve Board created by the New Deal was a major success of the period).

revive investor confidence in the newly transparent market.⁹² Roosevelt further sought to reach out to business interests by appointing Joseph Kennedy as chairman of the new SEC, someone who they could trust as one of their own.⁹³

2. The Second New Deal

The Second New Deal period featured dramatic legislation on finance and labor-related issues. In 1935, Roosevelt signed the Social Security Act⁹⁴ and the National Labor Relations Act (NLRA) (also known as the Wagner Act).⁹⁵ The Social Security Act “provided unemployment insurance, pensions for retired workers, aid to dependent children, and other social insurance programs.”⁹⁶ Indeed, this legislation signaled a new governmental social responsibility for the “care of the aged, unemployed, handicapped, and impoverished.”⁹⁷ The Act had the effect of socializing “the costs of unemployment and old age and removed those burdens from the shoulders of business.”⁹⁸ This shows that under the historic New Deal, the private sector was not forced to relieve the public’s burden through regulation—here it was just the opposite, the public was relieving the private sector’s burden.

The NLRA was a landmark law. It provided a legally enforceable right for workers to form unions by majority vote; protected the right to strike; outlawed company-run unions; “set up the National Labor Relations Board (NLRB) to manage representation elections”; and outlawed certain “methods by which employers might interfere with workers’ rights to organize.”⁹⁹ The goals of the legislation were to diffuse labor unrest and to stimulate the economy by creating a consumer base.¹⁰⁰ It succeeded in remedying the problems inherent in the NIRA labor provisions, namely by

92. *Id.* at 535.

93. See MCELVAINE, *supra* note 43, at 165 (noting that Roosevelt thought Kennedy would be acceptable to business because he was a businessperson with ties to the business community).

94. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

95. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 141 (2000)).

96. Ramirez, *supra* note 31, at 547.

97. MCELVAINE, *supra* note 43, at 257.

98. Ramirez, *supra* note 31, at 548.

99. Theda Skocpol et al., *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1297 (1990).

100. See Ramirez, *supra* note 31, at 549–51 (citing legislation sponsor Robert Wagner who explained, according to Ramirez, “that the NLRA was designed to create a vibrant middle class, with higher wages, as a means of stimulating economic growth”).

outlawing company-formed unions. The NLRA was a success in quelling unrest and in raising worker wages.¹⁰¹ Although social protection of workers was a consideration, the interest promoted was also the interest of creating a consumer class to stimulate the economy.

3. A Third New Deal?

In addition to all of this activity, the Third New Deal, lasting from 1937 until 1945, added new economic initiatives and set forth a vision of economic and social protections for the future. Mainly, however, this period was “to improve those programs already in place, not to devise new ones,” and it is obvious that the onset of World War II sapped much of the administration’s attention to domestic issues.¹⁰² Still, this period provided many interesting New Deal proposals.

One major initiative achieved during the Third New Deal period was the passage of the Fair Labor Standards Act (FLSA) of 1938.¹⁰³ The Act established a nationwide minimum wage rate as well as a maximum standard for hours worked.¹⁰⁴ It also prohibited the employment of children younger than sixteen years of age.¹⁰⁵ The FLSA enactment came with the expectation that it would provide for increased unionization by reducing businesses’ incentive to move across state lines in search of more lax labor standards.¹⁰⁶

Other aspects of the Third New Deal involved visions and theories more so than the actual passage of laws. Roosevelt’s vision in 1944 of future reforms included a second bill of rights dealing with economic and social issues such as health, security, housing, clothing, shelter, opportunity to advance, education, and a right to work.¹⁰⁷ The Third New Deal did not come to pass because, aside from Roosevelt’s death in 1945, the economy had recovered during the war, and political interests were no longer inclined toward further reform. The Third New Deal, like its predecessors, featured prominent plans to stimulate the economy through the private sector and free enterprise.¹⁰⁸ The Third New Deal also featured plans to encourage

101. *Id.* at 551.

102. See MCELVAINE, *supra* note 43, at 307–08 (explaining how President Roosevelt was grappling with “military preparedness” in 1939 and 1940).

103. See LANDON R.Y. STORRS, CIVILIZING CAPITALISM 177 (2000) (detailing the history of the drive to pass the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (2000)).

104. STORRS, *supra* note 103, at 177.

105. *Id.*

106. *Id.* at 178.

107. Jeffries, *supra* note 63, at 398.

108. *Id.* at 412–14, 416–18.

private spending through continuous “pump priming,” which was government spending intended to prime the private sector to spend in response.¹⁰⁹ The overriding goal was to achieve private sector growth to alleviate the pains of the Great Depression.

4. The New Deal Actually Promoted the Principles of Free Trade

After this thorough—but by no means exhaustive—review of New Deal-era protections and ideas, it becomes clear that while the New Deal expanded social protections, it did so with a consistent eye toward encouraging the private sector to function on its own. The NLRA was intended to create a consumer class.¹¹⁰ The Social Security Act intended to relieve businesses of the burden of providing care for aging employees and others in need.¹¹¹ The various public works agencies attempted to encourage employment and expenditure in order to stimulate the economy.¹¹² The AAA was an attempt to eliminate surpluses so farmers would earn better returns.¹¹³ The various financial and housing-related acts were intended to provide for stimulation of investment by individuals.¹¹⁴ It appears that the New Deal not only recognized the defects of the free market, as contended by Professor Derber, but also recognized the primacy of the private sector and the markets as necessary for the recovery from the Great Depression. It follows that, in fact, the New Deal promoted free trade principles.¹¹⁵

II. THE WTO AND THE CIRCUMSTANCES OF TODAY

A. *The Current Political, Economic, and Social Climate*

Examining how the current international climate is similar to, or different from, the situation during the Great Depression is central to determining whether the lessons of the New Deal have any relevance for the WTO. To begin, there is a massive amount of criticism and concern over

109. *Id.* at 401–02.

110. *See* Ramirez, *supra* note 31, at 549 (citing sponsor Robert Wagner’s explanation of the bill).

111. *Id.* at 548.

112. *Id.* at 554–55.

113. POLENBERG, *supra* note 60, at 11.

114. Ramirez, *supra* note 31, at 560–61.

115. *See* Ferguson, *supra* note 61, at 43–45 (citing the New Deal’s attempts to break up public utilities and enact treaties to reduce tariffs).

how free trade worsens the environment worldwide and the WTO's failure to address this in its free-trade-oriented system.¹¹⁶ The criticism does not end with the environment, as labor issues constitute another major gap perceived by critics in the WTO structure.¹¹⁷ A fair question is whether the issues facing the international community in matters of labor and the environment are truly at crisis levels. The answer, at least in some minds, is yes.¹¹⁸

Perhaps the biggest issue with respect to environmental and labor issues in the international context is the so-called race to the bottom problem. This occurs when there is unregulated trade, and corporations have the incentive to exploit developing countries that have more relaxed environmental laws and substandard labor regulations in order to make a larger profit. This causes other countries to entice business investment from multinational corporations through a lax regulatory environment—thus creating a race to see which countries can get to the bottom, figuratively speaking, of the regulatory pile by having the weakest standards.¹¹⁹ The race to the bottom is harmful for developed countries because they lose jobs to developing nations where more lax labor standards attract business.¹²⁰ Yet it is a problem for developing nations as

116. See, e.g., Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 1 (2001) (noting criticism of the WTO on environmental issues and the protests of the WTO by mainstream environmental groups).

117. See generally Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 885 (2003) (discussing the lack of any working group within the WTO to address labor issues and noting that the WTO maintains that the International Labor Organization (ILO) is the proper body to address these issues).

118. See, e.g., AL GORE, *EARTH IN THE BALANCE* 295 (1992) (arguing that the global environmental crisis is so great that it requires a global plan similar to the Marshall Plan, which saved Europe after World War II); Jeff Zeleny, *Rivals Joust for Union Seal of Approval to Battle Bush*, CHI. TRIB., Aug. 6, 2003, at C1 (featuring the argument of Senator John Kerry, the 2004 Democratic Presidential nominee, that environmental and labor provisions must be included in trade agreements to prevent exploitation and save jobs in the United States); see also *infra* note 192 and accompanying text (discussing some of the extremely high unemployment rates in various developing nations and regions).

119. See Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 107 nn.61–62 (2003) (discussing the race to the bottom within the context of offering principles and proposals that would reverse the race to the bottom and create a race to the top). Bill Burton, spokesman for the 2004 Democratic Presidential nominee John Kerry, sums up the argument of many American fair trade advocates by stating that “[i]f you raise environmental and labor standards for everyone across the world so we are on a level playing field, then it helps all industries, particularly agriculture.” Scott Gold, *Louisiana's Deep-Rooted Trade Clash*, L.A. TIMES, Apr. 12, 2004, at A12. According to Burton, “When we are on a level playing field, nobody can compete with the American worker.” *Id.* Burton was speaking about the Central American Free Trade Agreement (CAFTA), which Kerry opposed as it stood, and which President Bush supported. *Id.*

120. See George F. Will, Editorial, *The Economics of Progress*, WASH. POST, Feb. 20, 2004, at

well, where labor forces work at substandard pay rates compared to the rates paid for those same jobs lost in the developed nations.¹²¹ The race to the bottom encourages multinational corporations to exploit the environment and worldwide natural resources by moving their operations to developing nations with weaker environmental regulations—this ensures that developed nations either have to weaken their environmental standards to remain competitive for business or risk halting economic growth.¹²²

A25 (defending N. Gregory Mankiw, President Bush's chairman of the Council of Economic Advisors, who commented that the loss of American jobs due to outsourcing by American firms is actually beneficial to the economy). The loss of jobs in the United States as a result of globalization and trade agreements was a political issue in the recent presidential election, won by President Bush. Many of the Democrats who ran for President were vocal in their criticism of corporations moving jobs to foreign countries as a result of cheaper available labor. Mankiw's comments only added fuel to the political fire. While he may be guilty only of adhering to the principles of comparative advantage advanced by David Ricardo (Ricardo's theory of comparative advantage is discussed in subpart B of this Part), he was roundly panned for his expression of belief in unregulated free trade principles. Criticism came strongly from both political parties. Dr. Gunnar Myrdal saw at the beginning of the 1970s that developing nations would be able to compete with developed nations in low-wage industries and eventually developed nations would either lose some of those industries or protect them with tariffs. MYRDAL, *supra* note 18, at 299. His analysis seemed prophetic in 2004, as this became a hotly debated political issue in developed nations such as the United States. Most free trade advocates, such as Mankiw, welcome the shifting of low-wage industries to developing nations as necessary adherence to the Ricardo theory. However, Myrdal understood that for developed nations to avoid this issue, and avoid protectionism of their low-wage industries, they would have to redirect their planning and resources toward higher-grade goods. *Id.* This would require periods of adjustment and retraining for the work force, a concept getting some play politically today, but one that has not been fully implemented. For more on Myrdal's analysis of this issue, see MYRDAL *supra* note 18, at 293–301. For more on the current political issue and a discussion of President Bush's plan to federally fund some community-college job-retraining programs for workers dislocated in certain industries hit hard by globalization, see Leigh Strobe, *Jobless Rate Holds at 5.6%; Fewer New Jobs Than Expected in June, But Payrolls Still Rise*, CHARLOTTE OBSERVER, July 3, 2004, at 1D. For coverage of the political forces that led to President Bush's reelection, see Wayne Slater, *Religious Conservatives Expect Bush to Deliver: Ohio's 'Values Voters' Want Gay Marriage, Abortion Issues up Front*, DALLAS MORNING NEWS, Jan. 29, 2005, at 1A.

121. See, e.g., Aravind Adiga & Jyoti Thottam, *The New Idea Labs as More Firms Send Research to India and China, Could the U.S. Fall Behind?*, TIME, Jan. 31, 2005, at A6 (discussing the outsourcing of research and development to India and China, possibly marking a new phase in outsourcing where higher-end industry, heretofore thought out of reach of developing nations, is being outsourced to save development costs); Michael Elliott, *The Davos Man*, TIME, Jan. 31, 2005, at A10 (finding that the old argument against globalization—that it only benefited richer nations—is perhaps being replaced by a new argument that richer nations are losing out to poorer nations in globalization due to outsourcing); Jyoti Thottam, *Where the Good Jobs Are Going*, TIME, Aug. 4, 2003, at 36, 36 (noting how U.S. firms are taking advantage of lower labor costs in India to move jobs overseas, causing loss of jobs in the United States, and the payment of much lower wages for those same jobs to Indian laborers).

122. See Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 791 (1998) (describing the race to the bottom concept in relation to the environment); see also John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 558–59 (2000) (making the argument for expansion of the WTO and arguing the race to the bottom is not an issue for the WTO to

It is important to emphasize that Professor Derber does not see the lack of labor and environmental standards in the WTO as the only issue creating rifts between developed and developing nations. He sees “deteriorating global economic conditions and mass antiglobalization protests” as resulting from the global policies that have locked “the poor into chronic emergencies” concerning health and poverty.¹²³ Derber sees the lack of democracy and human rights standards in the WTO and other Bretton Woods institutions as fundamental issues in need of reform.¹²⁴

Further arousing the international situation today is the war and its aftermath in Iraq, which has split the United Nations.¹²⁵ Financial markets have been unsteadied not only by war-related issues, but also by corporate governance scandals.¹²⁶ With the aforementioned circumstances shaping the global economic, political, and social climate, advocates of reform seek to apply New Deal principles to the WTO to remedy some of these ills.¹²⁷ One might wonder whether the current global climate is in any way akin to the circumstances in the United States during the Great Depression. One might ponder the relevance of the New Deal principles when applied to the WTO. Before examining whether a New Deal for the WTO is a properly drawn historical analogue, it is necessary to review what the WTO is and how it functions.

regulate).

123. DERBER, *supra* note 3, at 156. Former President Clinton has written that while free trade worked well in countries that were “well-governed,” he is dissatisfied that many in poor countries were left out. BILL CLINTON, *MY LIFE* 893 (2004). He notes that late in his presidency, half the world lived on under two dollars per day, that a billion people survived on less than a dollar a day, and that over one billion people were hungry every night. *Id.* In addition, he cites the dismal situation in developing countries where one quarter of the people had no clean water, over one hundred million children did not go to school, and ten million children died every year from preventable diseases. *Id.* Clinton seems to agree with Derber on the unregulated nature of the global trade situation, stating that “multinational corporations and their political supporters had largely been content to create a global economy that served their needs, believing that the growth resulting from trade would create wealth and jobs everywhere,” although this growth clearly has not created the jobs and wealth in developing countries that was intended. *Id.* Clinton also seems to agree with Derber on the basic premise of a global New Deal, with Clinton advocating for “giving people hope through economic growth and social justice” as this is “essential” in persuading people “to walk away from the modern horrors of terrorism and weapons of mass destruction and the old conflicts rooted in racial, religious, and tribal hatreds.” *Id.* at 894.

124. *See* DERBER, *supra* note 3, at 148 (discussing the need for a democratic global government).

125. Chu, *supra* note 2, at A16.

126. *See, e.g.*, John Plender, *Capitalism Under Scrutiny*, *FIN. TIMES*, Sept. 1, 2003, at 2 (comparing corporate governance scandals of today to those during the Great Depression, and noting that they have occurred internationally).

127. *See* DERBER, *supra* note 3, at 144–69 (detailing Derber’s vision of a global New Deal, including his plans to reform and possibly abolish the WTO).

B. Brief History of the WTO

The WTO operates on the basis of the Ricardo theory of comparative advantage which, named for its original proponent David Ricardo, posits that “if trade barriers between nations are removed, each nation will come to produce what it can produce most advantageously, and the greatest sum total of world production will occur.”¹²⁸ Following this theory and heeding the lessons of the past (such as avoiding high tariffs which may have exacerbated the Great Depression), the General Agreement on Tariff and Trade (GATT) came into being after World War II.¹²⁹ Originally intended as one treaty in what was to be an International Trade Organization (ITO) (which was intended to be the third of the aforementioned Bretton Woods institutions), GATT was the only provision of this charter ever put into action, as the ITO failed to materialize.¹³⁰ GATT thus assumed the role the ITO would have played, despite its being far from a comprehensive trade regime.¹³¹ GATT functioned through a 1947 treaty, which gave it force despite the failure of the ITO.¹³² GATT grew from twenty-seven signatory countries in 1960 to over 100 when the 1994 agreement bringing the WTO into existence entered into force.¹³³ Eventually, GATT would administer some 80% of world trade.¹³⁴

After years of the various member nations—known as contracting parties—using GATT to promote trade negotiations and lower tariffs, the international community developed the WTO in 1994 to administer GATT and various other treaties.¹³⁵ One major distinction between the WTO and almost any other international body with a similar number of member states is that the WTO has teeth in its enforcement mechanism.¹³⁶ Before

128. Strauss, *supra* note 122, at 792–93. “Under the classic theory, a country gains a comparative advantage in producing certain goods if it has access to factors of production which allow such goods to be produced at a relatively lower cost than in other countries.” *Id.* at 793.

129. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

130. See Uri Litvak, Comment, *Regional Integration and the Dispute Resolution System of the World Trade Organization After the Uruguay Round: A Proposal for the Future*, 26 U. MIAMI INTER-AM. L. REV. 561, 568–69 & n.28 (1995) (discussing the evolution of the GATT system, which was developed along with the International Monetary Fund and World Bank and the development of the WTO).

131. See *id.* at 569 (stating that “the GATT lacked institutional and constitutional foundations”).

132. *Id.*

133. *Id.* at 581.

134. *Id.* at 569 n.29.

135. See *id.* at 581 (noting that the WTO was created to aid in resolving disputes among contracting parties and to enforce rules).

136. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226

reviewing the WTO enforcement mechanism, it is important to understand the WTO's structure and its role.

C. Structure of the WTO

1. The Dormant Commerce Clause Feature

The WTO attempts to eliminate barriers to trade, and in this way, it is similar to the dormant commerce clause of the U.S. Constitution.¹³⁷ The dormant commerce clause functions to protect “out-of-state interests from the parochialism of in-state lawmakers, and forces state lawmakers to consider the effect of their policies on out-of-state interests.”¹³⁸ Dormant commerce clause jurisprudence suggests “a statute that explicitly distinguishes between products on the basis of their place of [origin] is always considered ‘discriminatory.’”¹³⁹ Additionally, when a statute or action is facially neutral, courts nonetheless seek to determine whether the statute or action is implicitly discriminatory.¹⁴⁰

The WTO analogue to the dormant commerce clause flows from its administration of the GATT of 1947.¹⁴¹ GATT “embodies the basic reciprocal commitments to lower tariff barriers that lie at the heart of the WTO system.”¹⁴² Unlike the dormant commerce clause, “GATT constraints imposed on member governments rest on an explicit mandate.”¹⁴³ Pertinent articles of GATT include: Article I, which states the most-favored-nation principle prohibiting discrimination based on national origin; Article III, which puts forth the national-treatment obligation prohibiting discrimination between domestically produced and imported

(1994) [hereinafter Dispute Settlement].

137. U.S. CONST. art. I, § 8, cl. 3; *see also* Driesen, *supra* note 27, at 360 (noting that the Supreme Court has treated the Commerce Clause of the U.S. Constitution as “authority for judicial constitutional oversight of state regulation and taxation potentially impeding interstate commerce” and that “[t]he resulting ‘dormant commerce clause’ jurisprudence of the United States Supreme Court also invokes an anti-discrimination principle to advance free trade”).

138. Gerhart, *supra* note 27, at 40.

139. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1416 (1994).

140. *See id.* at 1416–17 (describing courts’ use of five factors to determine discrimination: discriminatory intent; proxy characteristics; embargo; competitive advantage; and uniformity and consistency).

141. *See* Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 405 (2003) (pointing out that the GATT “was subsumed within the new WTO system in 1995”); *see also supra* note 1 (showing that the GATT is annexed to the WTO agreement).

142. Sykes, *supra* note 141, at 405.

143. Farber & Hudec, *supra* note 139, at 1418. “GATT is a formal international agreement containing specific prohibitions of certain kinds of protectionist trade barriers.” *Id.*

goods; and Article XI, which prohibits quantitative restrictions.¹⁴⁴ Thus, GATT explicitly imposes restrictions where the dormant commerce clause implicitly imposes them, but the effect is similar.¹⁴⁵

GATT has an exception to this dormant commerce clause feature—Article XX.¹⁴⁶ Article XX “authorizes exceptions whenever trade barriers are found to be required by other widely-accepted government regulatory objectives such as health, safety, or law-enforcement.”¹⁴⁷ This exception was once thought to be the vehicle through which member states might protect the environment and laborers; however, this has not been the case—free trade principles have trumped well-intentioned regulations.¹⁴⁸

2. The WTO’s Role

It is crucial to note that the WTO was not established as a world governing body, but rather as a free trade facilitator.¹⁴⁹ Despite this, some commentators have urged that the WTO is, in fact, more than simply a free

144. GATT arts. I, III, XI, *supra* note 1; *see also* Driesen, *supra* note 27, at 292–95 (discussing GATT provisions and GATT case law).

145. Farber & Hudec, *supra* note 139, at 1418.

146. GATT art. XX, *supra* note 1; Farber & Hudec, *supra* note 139, at 1419.

147. Farber & Hudec, *supra* note 137, at 1419. The application of this exception by GATT tribunals requires analysis of “the extent to which claimed regulatory objectives are served by a particular trade-restricting measure.” *Id.*

148. *See generally* PETER UIMONEN & JOHN WHALLEY, ENVIRONMENTAL ISSUES IN THE NEW WORLD TRADING SYSTEM 112–17 (1997) (detailing how Article XX is not well defined relating to its use as an exception for environmental protections, and offering proposals on how to change Article XX to make it more of a vehicle for meaningful environmental protections); Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2139, 2144–45 (1995) (discussing the GATT Tuna/Dolphin decision, which held a U.S. measure to protect dolphins during tuna fishing invalid and finding that Article XX did not apply because the measure would only provide conservation if another country changed its policy, thus making the measure a trade restriction); Matthew T. Mitro, Comment, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223, 1271 (2002) (presenting a hypothetical WTO case involving U.S. measures against importation of products from countries allowing child labor and finding that the measure should be valid); *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 492, 494 (Sean D. Murphy ed., 1999) (analyzing the WTO Turtle/Shrimp decision where the United States was found to have violated GATT when it tried to protect turtles during shrimp fishing and finding that Article XX did not provide an exception because the U.S. measure was arbitrary and unjustifiable discrimination). For the actual decision in the Tuna/Dolphin dispute, see GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) (1993), 30 I.L.M. 1594 (1991). For the Shrimp decision, see WTO Appellate Body, Report of the Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998), *reprinted in* 37 I.L.M. 834 (1998).

149. WTO, *supra* note 1. The WTO is clear on its Web site that it is a body set up to deal with trade issues. It does not assert any intention of being a world government.

trade body.¹⁵⁰ Other commentators, however, argue that implying that the WTO is a world governing body would have negative consequences.¹⁵¹ It is not necessary to resolve that dispute here. The advocates of a New Deal for the WTO implicitly indicate their assumption that the WTO is or should be functioning as a world governing body, even though the WTO has its roots in world trade, not governance. This friction over what the actual role of the WTO is or should be is discussed further in Part III.

D. Side Agreements

The WTO formation included the adoption of side agreements, which were binding and applicable to the dispute settlement process.¹⁵² In fact, the founding of the WTO included multiple side agreements creating many new rights.¹⁵³ These side agreements are even intended to prevail over GATT provisions when they conflict.¹⁵⁴ They are enforced by dispute panels and carry the same force if they are violated as does GATT itself.¹⁵⁵ It would seem that the adoption of side agreements to protect the environment and labor would be the easiest route toward achieving a New Deal for the WTO. For example, in creating the North American Free Trade Agreement (NAFTA), the signatory countries adopted labor and environmental side agreements.¹⁵⁶ However, adopting such side

150. See, e.g., Shaffer, *supra* note 116, at 11–12 (arguing that the WTO is a supranational regime, as compared to an international one, basically asserting that the WTO is more akin to a world governing body than a world trade body).

151. See, e.g., Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 529 (2003) (arguing that supranational lawmaking undermines the U.S. Constitution).

152. See generally Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 313–14 (1998) (discussing the adoption of side agreements and advocating for their use in dispute panel decisions). Side agreements in international treaties are agreements outside of the text of the main agreement, which may or may not be binding, depending on the body adjudicating them. There is more discussion following in this Part about how side agreements are dealt with in the WTO.

153. See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 17 (1999) (discussing new legal rights created in the WTO at the end of the Uruguay Round of 1994 for trade in goods and two new legal areas covered including intellectual property (TRIPS) and trade in services (GATS)).

154. Cho, *supra* note 152, at 338 n.146.

155. See WTO Appellate Body, Report on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adjudicating a WTO dispute and finding a violation of the Agreement on the Application of Sanitary and Phytosanitary Measures), available at [http://www.worldtradelaw.net/reports/wtoab/ec-hormones\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf).

156. See generally Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 439 (1995) (discussing labor and environmental side agreements and the dispute resolution process adopted by NAFTA); Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 405–07 (2000) (noting the role that

agreements is difficult within the WTO structure.¹⁵⁷ In the WTO, all members must accept side agreements and are bound by them, whereas the GATT side agreements were optional.¹⁵⁸ Within this context, the analogue of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) dealing with Intellectual Property (IP) becomes relevant, because it demonstrates a successful side agreement adopted within the WTO structure.¹⁵⁹

1. TRIPS Analogue: The Structure of TRIPS, and Why It Was Necessary

TRIPS “comprises seventy-three articles on a broad range of subjects.”¹⁶⁰ TRIPS’s main “objective is to ‘contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.’”¹⁶¹ TRIPS was necessary because of “the prevalent perception that inadequate global standards for the protection of IP rights, coupled with ineffective enforcement, prejudiced the legitimate commercial interests of states.”¹⁶² It has been strongly suggested that

business leaders played in seeking side agreements, as well as the passage of NAFTA). The issues of side agreements, trade, and NAFTA were central to the Democratic Presidential primary, with two of the leading candidates, Senator John Edwards of North Carolina (the eventual Democratic Vice-Presidential nominee) and Senator John Kerry of Massachusetts (the eventual Democratic Presidential nominee), sparring over trade issues. Senator Edwards said that if elected, he would sign only trade agreements with environmental and labor protections in the text of the agreement, as he argued that side agreements were not often enforced. John F. Harris & Jim VandeHei, *AFL-CIO Backing Gives Kerry a Boost*, WASH. POST, Feb. 20, 2004, at A12. Although this is possibly true for NAFTA, it would not be true for the WTO, as WTO side agreements are enforceable. It is unclear what, if any, difference there would be in terms of enforcement if protections were included in the text of a WTO agreement, as opposed to a side agreement. Edwards was a fierce critic of NAFTA on the campaign trail, noting his disapproval of it and other trade agreements specifically in relation to the loss of American jobs. *Id.* Kerry, who voted for NAFTA (Edwards was not in the Senate in 1993) but denounced President Bush’s enforcement record on labor and environmental issues related to trade, said he would not sign a trade agreement as President that did not protect the environment and labor. *Id.*

157. See Hilary K. Josephs, *Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT’L L. REV. 849, 850 (2001) (noting that the adoption of a side agreement on labor would be difficult, as would amending the WTO).

158. See Suzanne Pyatt, *The WTO Sea Turtle Decision*, 26 ECOLOGY L.Q. 815, 818 (1999) (discussing the WTO environmental decisions and side agreements).

159. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement *supra* note 1, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

160. David Nimmer, *GATT’s Entertainment: Before and NAFTA*, 15 LOY. L.A. ENT. L.J. 133, 141–42 (1995).

161. *Id.* at 142 (quoting TRIPS art. 7).

162. Note, *Tackling Global Software Piracy Under TRIPS: Insights from International*

developing countries were the true target of TRIPS, due to their lax enforcement standards on intellectual property issues.¹⁶³

Although there were two previous conventions on intellectual property—the 1883 Paris Convention and the 1886 Berne Convention—neither established “binding, universal minimum standards.”¹⁶⁴ The world needed a modern agreement. TRIPS “creates international minimum standards for the protection of various forms of IP—including copyrights and related rights, trademarks, industrial designs, patents, lay-out designs of integrated circuits, and undisclosed information.”¹⁶⁵ TRIPS also includes obligations concerning substantive issues, such as software piracy.¹⁶⁶ TRIPS does not prevent member states from establishing higher standards than their domestic laws provide, but it does require that states provide at least the same standard for foreign nationals as they do for their own citizens.¹⁶⁷ This provision of TRIPS is subject to preexisting treaties, and the standards incorporated into TRIPS apply only to obligations of TRIPS, not to other treaties.¹⁶⁸ Most importantly for purposes of considering the adoption of side agreements concerning labor and the environment, TRIPS forces member states to adopt positive obligations that raise standards, instead of the traditional negative obligations that lower trade barriers imposed by GATT through its dormant commerce clause feature.¹⁶⁹ GATT traditionally had not enforced positive obligations on its members; it had provided only mechanisms to restrict laws which restrain trade—thus the positive obligations in TRIPS are the closest that the WTO comes to legislating akin to a governing body.¹⁷⁰

Relations Theory, 116 HARV. L. REV. 1139, 1141 (2003) [hereinafter *Global Software Piracy*].

163. Charles S. Levy, *Implementing TRIPS—A Test of Political Will*, 31 LAW & POL’Y INT’L BUS. 789, 789 (2000). Levy argues that “TRIPS only shores up” the laws and protections provided by developed nations and is not substantially aimed at helping developed nations protect intellectual property. *Id.*

164. *Global Software Piracy*, *supra* note 162, at 1141–42.

165. *Id.* at 1142.

166. *Id.*

167. Nimmer, *supra* note 160, at 144–45.

168. *Id.* at 145.

169. See Levy, *supra* note 163, at 789 (noting that TRIPS was the first agreement to impose the adoption of positive obligations on member states).

170. See DiMatteo et al., *supra* note 119, at 97–98 (discussing how new WTO agreements, such as TRIPS, impose a positive obligation on member nations which traditionally was the domain of domestic legislation).

2. TRIPS Enforcement

As part of the WTO, TRIPS enforcement comes through the dispute settlement process.¹⁷¹ When a member state challenges another member state with violating a TRIPS provision, or any WTO provision for that matter, a WTO dispute-settlement panel convenes.¹⁷² The Dispute Settlement Body convenes a panel unless it decides not to by written consensus.¹⁷³ The panel of three or five independent members with relevant experience receives evidence from the parties and interested third-party member states.¹⁷⁴ The panel also can “seek information and advice from ‘any individual or body which [it] deems appropriate.’”¹⁷⁵ The panel then decides the matter and issues written findings.¹⁷⁶ Appeals are taken to the Appellate Body, which decides only legal issues.¹⁷⁷ The Appellate Body decision is the final decision, unless the Dispute Settlement Body, which could effectively veto the decision, decides otherwise after the report has been seen by all WTO member states.¹⁷⁸

III. COMPARING APPLES AND ORANGES?

A. *Limitations of the Comparison*

Before comparing the circumstances of today to those surrounding the New Deal, and before trying to ascertain whether the New Deal and its provisions provide a proper analogue for the WTO, it is imperative that the limitations of such a comparison be discussed. In an article dissecting the Progressive Era for details as to how it might serve as an analogue for the current era and the WTO, Theodore Posner and Timothy Reif discuss some

171. It should be noted that at present, WTO dispute settlement panels and WTO Appellate Body proceedings are closed to the public. This has been a source of some controversy, as many interested third parties, and even member nations not a party to the dispute at hand, are not allowed to view the proceedings. One former WTO Appellate Body member—a judge who sits for dispute settlements—has recently advocated opening up the proceedings (although obviously not the trade negotiations or the judicial deliberations) that occur during dispute settlement in the WTO. James Bacchus, Editorial, *Open up the WTO*, WASH. POST, Feb. 20, 2004, at A25. This might provide some of the transparency that critics have charged is lacking in the WTO.

172. *Global Software Piracy*, *supra* note 162, at 1144.

173. *Id.*

174. *Id.*

175. *Id.* (alteration in original) (quoting Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement *supra* note 1, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994)).

176. *Id.*

177. *Id.*

178. *Id.*

limitations of such an analysis.¹⁷⁹ The main limitation is the inadequacy of the comparison between the WTO and the U.S. government. Specifically, Posner and Reif note areas where the WTO and the United States differ. One difference is that the WTO is more limited in scope because it has no legislature, and no Commerce Clause grant of authority to create positive legislation.¹⁸⁰ Also included is the fact that the WTO has a diverse group of 140 member states and can make affirmative agreements only through consensus among all of them; that the WTO is new and evolving while building legitimacy; and that the WTO must compete with other multilateral and bilateral trade agreements such as NAFTA, where nations can adopt agreements on issues without being subject to 140 nations' demands.¹⁸¹

In addition to the obvious differences between the WTO and the United States, including the fact that the United States is a democracy whereas the WTO has member nations with a variety of political systems, it is also important to note that the circumstances surrounding enactment of the New Deal were unique. These circumstances are not precisely replicated in the current international environment, or in the current U.S. political environment for that matter. The Great Depression, despite its horror, presented an opportunity. The situation today has that same potential for the world community to use a crisis situation as an opportunity to attack many vexing issues. All limitations considered, there are valid comparisons to be made.

B. The Circumstances of the Great Depression and Today

Professor Derber advocates for a New Deal featuring labor and environmental protections, as well as democratic reform.¹⁸² The circumstances surrounding the Great Depression were economic in nature, although the response to the Depression involved social, as well as economic, change. The circumstances of the international community today regarding labor and the environment are both social and economic crises. While Derber contends that the terrorist attacks of September 11th and worldwide economic slowdown make the global climate fertile for change, it does not necessarily follow that the response to terrorism and economic downturn is to enact social protections such as labor and

179. *See supra* note 21.

180. Posner & Reif, *supra* note 21, at 501.

181. *Id.* at 501–03.

182. DERBER, *supra* note 3, at 147–51.

environmental standards in the WTO.¹⁸³ However, Derber argues that the WTO has lost credibility in the developing world by not delivering sustainable growth and democratic reform as intended and that the alternative to a global New Deal would be “a slide into depression” that could be a “catalyst for violence.”¹⁸⁴ Derber notes that world leaders such as Prime Minister Blair of Britain have at least implicitly recognized the need for “a worldwide commitment to end global poverty as the most cost-effective approach” to ending terrorism.¹⁸⁵

Even if the aforementioned global climate did provide the impetus for enacting portions of Derber’s global New Deal, it is necessary to consider the current global climate as it specifically pertains to labor and the environment when discussing the labor and environmental protections advocated by Derber.¹⁸⁶ During the Great Depression, there was massive unrest in the United States.¹⁸⁷ The situation today is not wholly dissimilar

183. *See id.* at 148–49 (noting the current global situation and how it makes a global New Deal possible). While Professor Derber’s global New Deal reaches well beyond labor and environment and extends to grassroots democracy, as well as changes in global finance, the question of whether global circumstances today can be equated to those during the Great Depression is debatable. The question of whether the circumstances today have laid a fertile ground from which a New Deal, including new global environmental and labor standards, would bloom is also debatable.

184. *Id.* at 149.

185. *Id.* at 156. In the post September 11th world, there needs to be a new discussion of the “underlying systemic conditions creating such deep hatred by the global poor against the world’s rich.” *Id.* According to Derber, the relevance of adding protections such as labor and environmental standards to the WTO can be seen through the lens of fighting terrorism. *Id.* Derber sees these types of protections as strengthening the developing nations, and specifically poor nations, through sustainable growth and employment for those nations, thus perhaps eliminating some of what he sees as the underlying causes of terrorism and violence—namely poverty, hopelessness, lack of democracy, and lack of human rights. *Id.* It is important to note that much is required beyond labor and environmental protections, and much is required in other international institutions beyond the WTO. *Id.* at 148. Derber asserts that some leaders, including Prime Minister Blair and Britain’s Chancellor of the Exchequer Gordon Brown, have discussed the need for more foreign aid and debt relief to fully address the crisis situation in developing nations. *Id.* at 156.

Some scholars see trade as a limited vehicle for reform in the human rights area because wealthy nations, most of which already have some human rights protections, are unlikely to use trade as an incentive to raise human rights standards against each other. Stephen Livingstone, *Economic Strategies for the Enforcement of Human Rights*, in *A HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 181, 191–93 (Angela Hegarty & Siobhan Leonard eds., 1999). Where they do condition trade or foreign aid on human rights improvements, they often are partial to some nations over others, and do not adequately use debt relief as an incentive. *Id.*

Other scholars believe the WTO is doing a good job in attempting to deal with human rights issues given that its primary mission is trade. For a view of what the WTO has accomplished with human rights and how it might do more in this area in the future, see Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 *FLA. J. INT’L L.* 219 (2004).

186. *See DERBER, supra* note 3, at 154, 159–60 (detailing other policy positions that might be considered more pertinent to dealing with the global issues of terrorism and recession).

187. *See MCELVAINE, supra* note 43, at 91 (considering the reactions of various labor groups and congressmen to the Great Depression). No doubt contributing to the unrest was a prevailing feeling

with regard to anti-globalization protests of the WTO, citing the poverty and hopelessness of many underdeveloped nations acting as a cause of unrest.¹⁸⁸ Derber argues that there is great unrest in the developing nations, and he further notes that much of the world lives in conditions that are much worse than the United States faced in the 1930s.¹⁸⁹

During the Great Depression, unrest stemmed both from the economic conditions and the lack of effective governmental action to combat them.¹⁹⁰ Today's situation, globally speaking, is similar because WTO critics are concerned about environmental, labor, and other conditions, as well as the lack of effective redress through the WTO.¹⁹¹ Thus, the crisis situation during the Great Depression might have been far worse than the situation today in America. However, in some ways, such as unemployment, as well as the previously discussed environmental and labor exploitation due to the race to the bottom, the situation today with respect to developing nations is worse than the American experience during the Great Depression.¹⁹² This

among business leaders that the unemployed had no one to blame but themselves. This insensitivity to the harsh economic conditions during the Great Depression may be in some ways mirrored today by those who feel that it is a natural thing for low-wage workers to be out of work, as their jobs are shipped overseas. For a business leader's view on unemployment during the Great Depression, see LEUCHTENBURG, *supra* note 46, at 21. For views today on unemployment due to economic conditions, some due to trade, see *supra* note 120.

188. See, e.g., McGinnis & Movsesian, *supra* note 122, at 512–13 (noting the Seattle protestors' demands for environmental, labor, and other protections); Kevin Sullivan, *Protestors Defend Cause at Trade Talks; Activists at WTO Forum Say Isolated Violence Detracts from Their Message*, WASH. POST, Sept. 12, 2003, at A20 (discussing the violent protests at Seattle and the fact that many states regard the protestors as a security threat).

189. DERBER, *supra* note 3, at 156.

190. See MCELVAINE, *supra* note 43, at 73–94 (detailing the specific effects of the Great Depression on the U.S. economy and the actions taken by the government).

191. See CLINTON, *supra* note 123, at 879–80 (giving former President Bill Clinton's views on the Seattle protests). Former President Bill Clinton discusses the WTO protests in his memoir, stating that many of the protestors in Seattle had "legitimate grievances" and that

the WTO would have to be more open, and more sensitive to trade and environmental issues, and the wealthy countries that benefited from globalization would have to do more to bring its benefits to the other half of the world that was still living on less than two dollars a day.

Id. Clinton "was convinced" that protests would continue until the world "addressed the concerns of those who felt left out and left behind." *Id.* at 880. Clinton implies that the protestors speak not only for themselves, but also for the people in underdeveloped nations who do not have a voice in the debate, in many instances because they live in countries that are not democratic. See generally Carolyn Said, *Protestors Prepare to Decry Globalization*, S.F. CHRON., Sept. 5, 2003, at B1 (interviewing various protestors who were upset with the WTO and the fact that it is not responsive to their protests and the global conditions that prompted the protests).

192. See LEUCHTENBURG, *supra* note 46, at 26 (discussing the mood during the Great Depression). Leuchtenburg disagrees with the ubiquitous sentiment that Roosevelt saved the nation from revolution. *Id.* He does, however, have an interesting observation about the mood during the Great Depression, noting that the nation "was less rebellious than drifting, although there were clearly

comparison is not irrelevant. There does exist, at least in the eyes of some, a global crisis situation today.

The situation is highly relevant when looking at the major issue during the Great Depression, which was the lack of governmental tools available to combat it—or the lack of will by those politicians in power to use the tools they had.¹⁹³ Similarly, the WTO today either does not have the positive grants of authority necessary to remedy the concerns of the protestors and developing nations, or the member states refuse to reach a consensus on how to deal with the issues.¹⁹⁴ It should be noted that the Great Depression

limits to how long it would be willing to drift.” *Id.* The disillusionment that Leuchtenburg attributes to the nation during the Great Depression well could apply to the views of people in underdeveloped nations struggling with poverty. Consider, as well, that unemployment in the world’s developing nations is staggeringly high. According to the International Labour Organization, unemployment for 2003 in Sub-Saharan Africa was 10.9%, the Middle East and North Africa 12.2%, and the Caribbean and Latin American region 8.0%. INT’L LABOUR OFFICE, GLOBAL EMPLOYMENT TRENDS 2 (Jan. 2004), available at <http://www.ilo.org/public/english/employment/strat/download/trends.pdf>. Compare those numbers to a worldwide average of approximately 6%. *Id.* More striking are some anecdotal examples of developing nations’ unemployment rates. According to the United Nations, Algeria had a 27.3% unemployment rate for 2001, Argentina a 15.6% rate for 2003, South Africa an extremely high 29.7% rate for 2003, Slovakia a 17.5% rate for 2003, Poland a 19.6% rate for 2003, and both the Dominican Republic and Venezuela had rates near 16% for 2001 and 2002 respectively. Statistics Div., United Nations, Indicators on Unemployment (Jan. 2005), at <http://unstats.un.org/unsd/demographic/products/socind/unempl.htm>. Adding to the unemployment plague in developing nations is the very limited availability of unemployment assistance or insurance. *Id.* These nations also have high incidences of working poverty, where workers are employed, but do not make anything resembling a living wage. INT’L LABOUR OFFICE, *supra*, at 11. Women and youths have rates much higher than the national averages in many of these nations. For instance, youths have a rate of 25.6% unemployment in the Middle East/North African region. *Id.* at 4.

193. See *supra* Part I.A and notes 58–59.

194. See *supra* Parts I.B, I.C, I.D; see also MYRDAL, *supra* note 18, at 292–95 (listing the issues facing developing nations at the start of the 1970s). Myrdal’s analysis drives home the point that trade is the central issue in combating poverty around the world. While it may not be apparent at first impression that the WTO should be the body to attack world poverty and promote better standards for labor and the environment, Myrdal discusses how “developed countries are now developed” because “they have interfered in the play of the market forces and framed policies that counteracted and corrected the adverse effects of those forces.” *Id.* at 294. This demonstrates how trade plays such a crucial role in helping or hindering developing nations as they attempt to work their way out of poverty. Myrdal’s analysis also attempts to remove the illusion that completely unregulated market forces have contributed to developed nations’ wealth. While unregulated market forces may help sustain wealth already in place, Myrdal contends that unregulated market forces hinder developing nations’ efforts to grow economically. *Id.* at 279. Myrdal further contends that developed nations did not grow by adhering to unregulated market dogma, but rather by strategically using interference in markets to bolster their growth. *Id.* Thus the WTO, as the world’s trade-facilitating body, has a unique responsibility to developing nations that might not be met merely by eliminating trade barriers, but may require some positive action, such as implementing labor, environmental, and human rights standards to help level the playing field instead of maintaining and encouraging the status quo as the current system does.

It is not just the WTO that has a responsibility to developing nations. Developed nations and international institutions must also respond to global poverty. Jeffrey Sachs advocates for five

had headline-grabbing, cataclysmic events such as the stock market crash to heighten the crisis situation, while the current global situation relating to the environment and labor has not had a similar attention-grabbing event. Instead, there has been a procession of smaller, but not necessarily less tragic, events.¹⁹⁵

C. Would a New Deal Equal Labor and Environmental Protection for the WTO?

Having determined that the world today faces economic, social, and environmental situations that, at least in underdeveloped nations, have reached crisis levels similar to the domestic situation in the United States during the Great Depression, the relevant issue is whether the New Deal program as it existed provides a useful analogue for today's WTO. As

major interventions that would aid developing nations and small villages within those nations: improving health; educational investment; electricity; providing clean water and sanitation; and smarter agricultural practices. Jeffrey D. Sachs, *The End of Poverty*, TIME, Mar. 14, 2005, at 42, 50–51. He criticizes the United States for not reaching the goal of providing 0.7% of national income to help poor nations, and he criticizes the IMF and World Bank for acting more as collection agencies than as innovative institutions. *Id.* at 54.

195. See, e.g., Guy De Jonquieres, *Call for Trade Rule Overhaul to Favour Poor Nations*, FIN. TIMES, June 21, 2004, at 8 (reporting on a group of economists who said that poor countries are at a disadvantage due to WTO procedures and that trade agreements have damaged developing countries' economies and raised their unemployment rates); Daniel Elkan, *Fired with Ambition*, THE GUARDIAN (United Kingdom), Apr. 21, 2004, at 12 (discussing the "slash and burn" farming that has caused massive rainforest destruction and species loss because of the need for poor farmers to cut new patches of forest every year or two to provide for themselves, and offering an alternative model of farming in the hopes that these poor farmers will be able to farm the same land repeatedly and avoid the need to destroy more rainforests); Tony Freemantle, *The Nation: A Look Back*, HOUS. CHRON., Dec. 31, 1989, at 12 (detailing the Exxon Valdez oil tanker disaster where a supertanker spilled eleven million gallons of crude oil into unspoiled wilderness in Prince William Sound off of Alaska, killing thousands of species of birds and other animals and costing huge sums of money to attempt to clean up); Derrick Z. Jackson, *Bush Fries Climate Change*, BOSTON GLOBE, June 20, 2003, at A15 (citing a report commissioned by President Bush that noted greenhouse gases were accumulating in the atmosphere and that global warming may cause serious issues regarding coastlines and spread of disease); Christopher Snowbeck, *Pain from Poison Gas Leak Still Haunts Them, Bhopal Survivors Say*, PITTSBURGH POST-GAZETTE, May 26, 2003, at A11 (discussing the tragedy at Bhopal, India—an example of a global multinational corporation (Dow Chemical) located in a poorer country—where the Union Carbide plant leaked poison gas killing over 14,000 people overall and 4000 within a few hours of the leak); Joseph E. Stiglitz, *Why We Should Worry About Outsourcing*, MIAMI HERALD, May 9, 2004, at 1L (commenting on the labor outsourcing crisis that has gripped the United States and offering the advice that government will have to manage globalization to ensure that the benefits are available to all and not just a select few); Fred O. Williams, *'Season of Conscience': Anti-Sweatshop Movement Finding Fertile Ground Here*, BUFF. NEWS, Dec. 15, 2002, at B7 (reporting an anti-sweatshop movement to make consumers aware of the sweatshop labor used in countries abroad where jobs have been relocated from the United States, and discussing various labor issues including child labor and corporate standards relating to living wage and the right to organize for workers abroad). These are just a few examples of the types of events that, when woven together, create the crisis situation regarding global environmental and labor issues.

already discussed, the New Deal provided various forms of economic, social, and labor protections.¹⁹⁶ The aims of the New Deal were not to start a revolution, but to save the democratic capitalist system from its own excesses.¹⁹⁷ Similarly, when discussing a New Deal for the WTO, it must be within the context of the WTO as a free trade body, albeit a body that may need to be saved from its own rigidity in favoring trade over member states' environmental and labor protections.¹⁹⁸

Professor Derber's New Deal theory is essentially that the absence of regulation is a subsidy for business, which business uses to exploit the public.¹⁹⁹ Among other ideas, he proposes adoption of labor and environmental standards as a means of accomplishing a New Deal. The issue is whether his proposal is a proper historical analogue for the WTO.

The answer is a qualified yes. While Derber and many other advocates see a global New Deal as requiring more regulation in order to avoid subsidizing business, and to protect labor and the environment, this is only partially the case. It is clear that the historic New Deal intended to revitalize the economy, stimulate the private sector, and provide social protections. As far as the advocacy of a New Deal for the WTO is in the context of making the WTO a more efficient facilitator of economic growth through the enactment of innovative social protections, the historical analogue is on the mark.

As far as the advocacy of a New Deal for the WTO is in the context of turning the WTO into a world government, something it is not, the historical analogue falls short. The reason is that the New Deal, for all of its myriad provisions, did not attempt to change the system of governance in the United States, only to tweak it. Likewise, the New Deal for the WTO would be an historical successor to the original only if it, too, intended to work within the system in place, not as a revolution against that system. In

196. See *supra* Part I.

197. *Id.*

198. See *supra* note 149 and accompanying text; see also CLINTON, *supra* note 123, at 894 (expressing former President Clinton's views on free trade). Clinton states quite succinctly that the issue regarding the WTO and the global economy, as related to environmental and labor protections, is "whether we could have a global economy without global social and environmental policies and more open governance by the economic decision makers, especially the WTO." *Id.* Clinton stakes out a position that he terms a third way, agreeing neither with the contention that trade did nothing to lift people out of poverty and nations out of isolation, nor with the contention that unregulated trade was all that was necessary to solve global economic and social issues. *Id.* Instead, he seems to agree with the balanced principles of the historic New Deal, offering the need for trade, as well as "a concerted effort" to provide "nations the tools and conditions to make the most of it." *Id.*

199. See DERBER, *supra* note 3, at 148 (stating that "a practical program of global reconstruction [is] essential to turn globalization into an attack on global poverty rather than a feeding frenzy for the rich").

other words, any reform advocating the abolition of the WTO, or the transformation of the WTO from a body mainly concerned with trade to a body mainly concerned with governance, would be a reform which does not pay heed to the historical New Deal's aims and implementation.

A useful means of illustrating the New Deal philosophy is to look to the New Deal's programs. As Professor Ramirez found, "[t]he real legacy of the New Deal's regulatory initiatives lies in innovations designed not to quell but to facilitate market action."²⁰⁰ The New Deal's legislation, and the rationales for passing the legislation, bear out his assertion. For example, the AAA was implemented on a voluntary basis to stimulate the prices for farm goods.²⁰¹ The New Deal pushed public works and environmental conservation as a means of getting the economy moving, with the social and environmental benefits being ancillary to the underlying goal of stimulating the economy.²⁰² The New Deal financial reform acts intended to require adequate corporate disclosure so investors could invest without fear and were intended to consolidate monetary policy in the federal government.²⁰³ The Social Security Act, a landmark piece of social legislation, attempted not to remove subsidy from business, but to create public subsidy and stimulation of business by providing public money for aging workers and others in need.²⁰⁴ The NLRA, also a significant reform, tried not merely to protect workers rights, but also to create a consumer class to stimulate the economy.²⁰⁵ Additionally, the vision of the Third New Deal period, which did not fully come to pass, was to provide new economic rights and new government initiatives, all aimed at creating full employment with the private sector playing the vital role.²⁰⁶ Thus, from examining these examples of New Deal programs, it becomes clear that the New Deal was primarily economically motivated and secondarily socially motivated.

Within that context, one must examine how a proper New Deal analogue would be implemented in the WTO. The means most consistent with the New Deal vision would likely be to implement side agreements to the WTO featuring labor and environmental protections. Professor Andrew Strauss notes a flaw in the comparative advantage theory that the WTO is based on—that if lax environmental standards are a means of gaining

200. Ramirez, *supra* note 31, at 535.

201. MCELVAINE, *supra* note 43, at 148–49.

202. See *supra* notes 75–85 and accompanying text.

203. See *supra* notes 86–93 and accompanying text.

204. See *supra* notes 96–98 and accompanying text.

205. See *supra* notes 99–101 and accompanying text.

206. See *supra* notes 102–09 and accompanying text.

comparative advantage then degrading the environment is a low cost production factor.²⁰⁷ He finds that the appearance of a low cost of production is due to the fact that the producer company and consumer do not pay the cost of pollution; instead, the people who live in the country or area pay.²⁰⁸

Thus, the cost of pollution is externalized by the market; in other words, the market does not deal with it because multinational corporations do not have to pay for it.²⁰⁹ If corporations did have to deal with this cost, the comparative advantage would disappear, and the race to the bottom would not occur. There would be no advantage for developing countries that have lax environmental laws—because the cost of environmental pollution would already be internalized within the market and would provide no benefit to a corporation seeking to do business in a given country.²¹⁰ This argument applies to labor regulations, as well. If there were minimum enforceable standards for wages and labor conditions internationally, there would be no incentive to relax labor regulations in order to invite business investment in developing countries—and this would stanch the loss of jobs in the developed countries that had higher wages and workplace standards.²¹¹ Stated simply, if costs of doing business included labor and environmental costs, the playing field would be more level.²¹²

207. Strauss, *supra* note 122, at 793.

208. *Id.*

209. *Id.*

210. *Id.* at 793–94 & n.70.

211. See generally STORRS, *supra* note 103, at 177–205 (detailing the Third New Deal program, the Fair Labor Standards Act). The Act, which established uniform labor minimum standards, had a similar objective in mind, namely to stop the migration of businesses from state-to-state based on lax state labor standards. *Id.* at 178. This had the effect of simultaneously raising standards for low-wage workers and creating a more stable job market for higher-wage earners. *Id.* at 177; see also Dimitris Stevis & Terry Boswell, *From National Resistance to International Labour Politics*, in GLOBALIZATION AND THE POLITICS OF RESISTANCE 150, 161–64 (Barry K. Gills ed., 2000) (offering ten policy goals for the international labor movement, including international collaboration by labor unions to achieve common goals, which is the type of international labor union cooperation that would likely be politically necessary to push for labor standards for the WTO).

212. See GARY P. SAMPSON, TRADE, ENVIRONMENT, AND THE WTO: THE POST-SEATTLE AGENDA 122–25 (2000) (detailing policy solutions for the global environmental issues relating to the WTO and specifically laying out the needs of the developing nations, over one hundred of which are WTO members). Sampson lays out the issues facing developing nations in the WTO, such as labor-standards issues, the need for technical resource assistance, and the need to modify certain agreements to take into account the needs of developing nations. *Id.* at 124–25. Sampson argues for a middle-of-the-road approach, advocating incentives for developing nations to lift their environmental and labor standards, while relaxing some of the demands on developing nations. *Id.* It seems clear from his critique that developing nations are at a disadvantage in the WTO and need assistance and incentives in the quest to achieve a more level playing field. For more discussion of the issues facing developing countries in the WTO and advocating for more mediation as an incremental step toward improving the dispute settlement apparatus for developing countries, see Hansel T. Pham, *Developing Countries and*

It is with this concept in mind that a New Deal for the WTO would be most analogous to the original New Deal. Instead of changing the WTO, side agreements could be implemented. These side agreements could mirror the TRIPS Agreement—meaning minimum standards for labor wages and conditions, as well as some type of polluter-pays-the-cost-of-pollution principle achieving internalization of environmental degradation costs—and would be enforceable through the Dispute Settlement Process. The side agreements would help to level the economic playing field and create a more efficient trade regime.²¹³ Although adopting such side agreements would be difficult, their adoption would provide New Deal-type protections. Moreover, the side agreements would be in line with the original New Deal's emphasis on creating favorable economic conditions.²¹⁴

By creating labor standards, the same New Deal rationale of the NLRA would be in effect—namely, that the promulgation of such standards would be beneficial in creating a worldwide consumer class.²¹⁵ By creating a

the WTO: The Need for More Mediation in the DSU, 9 HARV. NEGOT. L. REV. 331 (2004).

The idea of leveling the economic playing field has benefits for developed nations as well, mainly the hope that jobs would no longer hemorrhage from developed nations at the exponentially growing rate they are currently. This idea has gained political currency not just in the presidential election, as has been previously discussed in this Note, but also in other federal elections. For one example of a senator discussing the need for a level international economic playing field, see Tom Raithel, *Help May Come for Small Companies*, *Sen. Bayh Reveals Plan for Tax Credit and Increased Loans During Job Fair*, EVANSVILLE COURIER, Aug. 23, 2003, at B6. In Raithel's article, Senator Evan Bayh of Indiana, up for reelection in 2004, called for a level playing field for American workers. *Id.* Bayh, considered a centrist Democrat, won reelection to the Senate despite Republican gains in Indiana and across the country. For more on Bayh's reelection and mention of him as a future presidential candidate, see Deborah Orin, *Bush-Hating Dems Must Find New Way*, N.Y. POST, Nov. 4, 2004, at 6.

213. See DiMatteo et al., *supra* note 119, at 105–08, 112–19, 127–29 (offering proposals to incorporate environmental and labor concerns into the WTO regime, as well as discussing the polluter-pays principle, while accounting for some of the issues raised in regards to developing nations). For thorough consideration of the process by which environmental and labor standards could be incorporated into the WTO, see Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347 (2004).

214. See LEUCHTENBURG, *supra* note 46, at 347 (accounting for many of the previously overlooked groups of people that received attention during the New Deal). Leuchtenburg points out that “[t]he New Deal achieved a more just society by recognizing groups which had been largely unrepresented—staple farmers, industrial workers, particular ethnic groups, and the new intellectual-administrative class.” *Id.* Leuchtenburg does note that many Americans, such as African-Americans and sharecroppers, were not fully included in the “new equilibrium.” *Id.* There can be no doubt that if a New Deal was to be put in place globally, and included raising the labor and environmental standards in developing nations to end the race to the bottom, that this leveling of the playing field would benefit groups of people, and even whole nations, that have been similarly left behind in today's global world; see also *supra* Part II.D.

215. See DiMatteo et al., *supra* note 119, at 119–42 (discussing labor issues, proposals to remedy them within the WTO, and offering related proposals on how to benefit the consumer class through the WTO).

standard whereby business must internalize environmental pollution costs, the New Deal rationale of creating effective and transparent markets would be in effect.²¹⁶ Additionally, if the member states of the WTO decided to enact some type of subsidy or incentive for business to internalize these costs, this would be consistent with the New Deal rationale of the Social Security Act. The Social Security Act removed costs from the private sector, so it would function more robustly.

CONCLUSION

While this Note did not attempt to elaborate on specific side agreement proposals, it is clear that the adoption of environmental and labor side agreements to the WTO is a proper historical analogue to the New Deal. Although it remains unclear whether advocates, such as Derber, would be satisfied with adopting side agreements, much would likely depend on what the minimum standards would be, how they would be enforced, how much cost internalization multinational corporations would bear, and how much developed or developing nations would subsidize multinational corporations. While not a perfect analogue by any means, the New Deal provides useful lessons for the WTO. The New Deal prioritized economic development and set out to make it in synch to the best extent possible with social protections. Despite the circumstances surrounding today's environmental and labor crises being different in many ways from the economic crisis of the Great Depression, there are still basic similarities. These similarities include protests and unrest, as well as hopelessness in developing nations, making the comparison useful.

Professor Derber advocates a wide range of reforms, including replacing the Bretton Woods institutions and creating a more democratic global governance system. This Note examined the aspects of his proposal that conceivably relate to the WTO, and, thus, this critique alone cannot fully judge his proposals. He sees an unregulated global economy today as being similar to the unregulated economy of the pre-Great Depression era, and seeks a comprehensive global democratic reform to implement the protections needed to civilize today's global economy the way the New Deal civilized the Depression-era economy. Many of his proposals attempt to deal with the underlying stresses of poverty, lack of human rights, and lack of democracy that plague many underdeveloped nations. The September 11th attacks make it apparent that there is a need to combat

216. *See id.* at 105–108 & nn.61–63 (discussing various approaches to global environmental issues within the WTO and how they translate various high-minded principles of corporate governance into reality).

terrorism not only militarily, but also through creating hope and winning the hearts and minds of those in underdeveloped nations. Derber's proposals attempt to bring democracy to the global process and alleviate suffering in underdeveloped nations. His proposals may sometimes be unrealistic; however, even in the context of the WTO, his proposals have relevant links to the historic New Deal.

The WTO is not a world governing body. It does, however, have a unique capacity to act due to its enforcement mechanisms. It may well be that the WTO is the vehicle through which social reforms are enacted. If this is the case, the lessons of the New Deal have validity for those seeking to make the WTO live up to its promise as a vehicle for reform and for those seeking to hold the WTO to its stated mission of free trade.

The New Deal was a series of programs meant to stimulate the economy and also to provide social protections. To claim that the New Deal was purely an economic program, or purely a social program, would deny its inherent complexities. Indeed, it may be a common misconception that the New Deal was focused on creating social protections and building a welfare state. The facts do not bear out this assertion, as the New Deal was equal parts economic and social in its goals.²¹⁷

In some sense, the social protections and economic stimulation the New Deal sought to bring about were tied together in achieving New Deal goals. For example, the NLRA was a landmark law that protected workers' rights and raised worker wages. This was the social protection aspect of the law. However the law's other purpose, and one it succeeded in achieving, was to create a consumer class among the now-better-paid workers to stimulate the economy.²¹⁸ Without creating the social protection, there would have been no economic stimulation, and without the underlying goal of stimulating the economy, there might not have been the political desire to pass the NLRA and achieve its social protections for labor. Perhaps here is the ultimate lesson of the New Deal: it is possible and desirable to achieve economic goals while simultaneously providing enhanced social protection because the two may often go hand-in-hand.

217. See LEUCHTENBURG, *supra* note 46, at 338 (detailing that instead of enacting New Deal reforms to achieve "sentimental" social justice, New Dealers were justifying their reforms because they were necessary to "stabilize the economy"). The New Dealers sought to bring more Americans into the middle class for the simple reason that "unless the national income was pretty widely diffused there were not enough customers to keep the plants going." *Id.* (quoting A.A. Berle, Jr., *The Social Economics of the New Deal*, N.Y. TIMES MAG., Oct. 29, 1933, at 4-5). There are certainly economic arguments for implementing labor and environmental standards today, as has been discussed in this Note, and these economic arguments may in the end be more persuasive to the WTO member nations because the WTO is a body primarily concerned with economic matters.

218. See *supra* note 100 and accompanying text.

For present day purposes, it is clear that something should be done to level the playing field between developed and developing nations, as well as to stop the race to the bottom through meaningful enactment of labor and environmental side agreements. Despite the aforementioned limitations of the comparison between the WTO and the New Deal, if working environmental and labor protections are to be implemented in the WTO, nations would do well to heed the lessons of the New Deal. Labor and environmental side agreements to the WTO do not have to be accomplished through a hostile and frontal attack on the WTO's stated purpose of free trade. Rather, the lesson of the New Deal is that these side agreements could provide enhanced and desirable social protections, while furthering the ultimate goal of the WTO—to facilitate free trade.

Trade never would be truly free if multinational corporations were able to avoid paying the costs of environmental pollution by forcing a regulatory race to the bottom, which harms both developed and developing nations. Trade never would be truly free if these same corporations were able to exploit cheap labor in developing nations to encourage a race to the bottom for labor standards. Developed and developing nations lose out in this situation. Environmental and labor side agreements could provide a more truly free market where the actual costs of environmental degradation are recognized. A labor side agreement would recognize the value of labor and would not trivialize labor concerns by encouraging countries to compete with each other for the lowest possible standards in order to attract business. Through labor and environmental side agreements, the WTO could further its goal of creating a freer market and simultaneously provide much needed social protections. This would be in line with the New Deal ideology of combining worthwhile social protections with economic goals to create innovative solutions to seemingly intractable issues.²¹⁹

The lessons of the New Deal clearly remain relevant even in today's evolving global world. These lessons include: cooperation with business interests when possible; transparency; social protections that concomitantly further economic interests; flexibility in the role of the regulating body or government; compassion for the needs of individuals; and innovation in the creation of new programs. For the WTO to fulfill the role of champion of

219. See LEUCHTENBURG, *supra* note 46, at 332–33 (noting that “the New Deal assumed the responsibility for guaranteeing every American a minimum standard of subsistence” as a “matter . . . of right” while protecting “workers and their families from exploitation” and ensuring the “industrial system [was] more humane”). While the WTO should not be responsible as a trade body for ensuring standards of subsistence, as that is the role of individual nation's governments, the WTO can ensure that the current world trade system is more humane and can protect workers and their families, as well as the environment, from exploitation through the enactment of labor and environmental side agreements.

social protection desired by advocates, and the role of free trade facilitator desired by free trade adherents, it would do well to follow the historical analogue of the New Deal.²²⁰

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220. *See id.* at 333 (outlining President Roosevelt's acceptance speech in June 1936). Roosevelt, in advice that the WTO—though not a world government, but still an important world body—might do well to heed, stated that it was preferable to have “the occasional faults of a Government that lives in a spirit of charity than the constant omission of a Government frozen in the ice of its own indifference.” *Id.*