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### Burying the Constitution Under a TARP

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## **BURYING THE CONSTITUTION UNDER A TARP**

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Gary Lawson

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## BURYING THE CONSTITUTION UNDER A TARP

Gary Lawson\*

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Asking whether the modern administrative state is unconstitutional is like asking whether Yale Law School has a tendency to emphasize theory. “Yes” really does not do justice to the question. The modern administrative state is not merely unconstitutional; it is *anti*-constitutional. The Constitution was designed specifically to prevent the emergence of the kinds of institutions that characterize the modern administrative state. Just consider that during the founding era, the grand constitutional disputes about administration involved such matters as whether Congress’s enumerated power to “establish Post Offices and post Roads”<sup>1</sup> allowed Congress to *create* new post roads or merely to *designate* existing state-created roads as postal routes<sup>2</sup> and whether Congress could let the President or Postmaster determine the location of postal routes or instead had to itself designate the routes town by town.<sup>3</sup>

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\* Professor of Law, Boston University School of Law. I am grateful to the Abraham and Lillian Benton Fund for support. This paper is the extended version of remarks delivered at the Federalist Society’s 2009 Student Symposium entitled “Separation of Powers in American Constitutionalism,” held at Yale Law School on February 27-28, 2009.

<sup>1</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>2</sup> See, e.g., Letter from Thomas Jefferson to James Madison (Mar. 6, 1796), in 3 THE FOUNDERS’ CONSTITUTION 28 (Philip B. Kurland & Ralph Lerner eds., 1987) (limiting the postal road power to the ability to “select from those [roads] already made, those on which there shall be a post”). The debate over the scope of the postal power extended throughout the nation’s first half-century, with Thomas Jefferson and James Monroe, inter alia, arguing that Congress had no power to create new roads and James Madison and Joseph Story, inter alia, taking the other side. The issue divided the Supreme Court as late as 1845. For a brief account of the debate, see Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

<sup>3</sup> See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 49-50 (4<sup>th</sup> ed. 2007). The Second Congress, after debate, elected to designate the routes town by town. See Act of Feb. 20, 1792, ch. VII, § 1, 1 Stat. 232.

The founders of the modern administrative state understood full well what they were up against. James Landis's rants against the Constitution in *The Administrative Process* are by now well known to administrative law students and scholars.<sup>4</sup> Just as revealing are the remarks of Frank Goodnow in 1911, when Progressives were still struggling to give administrative governance a firm foothold in the American system:

. . . [S]pecial care was taken [in the Constitution] to secure the recognition of the fact that the new government was one only of enumerated powers, and that powers not granted to such government were reserved to the states or to the people.

For one reason or another the people of the United States came soon to regard with an almost superstitious reverence the document into which this general scheme of government was incorporated . . . .

. . . The question naturally arises before those who have no belief in a static political society or in permanent political principles of universal application . . . -- Is the kind of political system which we commonly believe our fathers established one which can with advantage be retained unchanged in the changed conditions which are seen to exist?<sup>5</sup>

These thinkers grasped that in order to validate the administrative state, you either need a new Constitution, which modern scholars have proven willing to supply in abundance,<sup>6</sup> or a new theory of constitutionalism, which has obligingly emerged under the name of

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<sup>4</sup> See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 2, 10, 12 (1938).

<sup>5</sup> FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 9-11 (1911). For additional examples of Progressive awareness of constitutional problems with the formation of the modern administrative state, see R.J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 *SOCIAL PHIL. & POL'Y* 16 (2007).

<sup>6</sup> Some are willing to supply it directly. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). Others do so indirectly by substituting for the Constitution precedents or practices, see, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 877 (1996), or philosophical constructs, see, e.g., JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006) (arguing for a "constructivist" interpretative methodology that builds from the principles that best explain and justify a given set of fundamental legal materials). Of course, if the Constitution itself contemplated its own replacement by such norms, that would be fine as an interpretative matter. But it does not. See U.S. CONST. art. VI, cl. 1 (declaring "[t]his Constitution" to be the "the supreme Law of the Land") (emphasis added).

“functionalism” – an interpretative theory that effectively takes the administrative state as its starting point and goes on from there.<sup>7</sup> Whatever method of validation the champions of modern governance choose, the Constitution of 1788 is the obstacle that must be avoided or obliterated.

As a practical matter, of course, the New Deal cemented the administrative state firmly in place, and we remain in that cement -- Jimmy-Hoffa-like -- to this day. My goal in this Essay is not to dissolve that cement but merely to demonstrate the purely factual proposition that the administrative state has buried the Constitution beneath it.

To gauge just how far modern administration has veered from the Constitution, consider as a representative case study the Emergency Economic Stabilization Act of 2008,<sup>8</sup> enacted on October 3, 2008, which created the “Troubled Assets Relief Program” (“TARP”). Stripping away two hundred pages of pork, tax preferences, and various oversight, reporting, and fast-track provisions, the substance of the TARP legislation is quite simple. Section 101(a)(1) authorizes the Secretary of the Treasury “to purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary.”<sup>9</sup> Troubled assets are “(A) residential and commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and (B) any other financial instrument that the Secretary, after consultation with the

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<sup>7</sup> For an account of functionalism as a rationalization for the administrative state, see Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U.L.J. 885 (2005).

<sup>8</sup> Pub. L. No. 110-343, -- Stat. – (2008).

<sup>9</sup> *Id.* § 101(a)(1).

Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability . . . .”<sup>10</sup> The Secretary is further empowered “to take such actions as the Secretary deems necessary to carry out the authorities in this Act . . . .”<sup>11</sup> That is the sum total of the operative legal authority under which \$750 billion has been spent.

This statute is a constitutional monstrosity, and many of the problems with it are endemic to the modern administrative state. Congress had no power to enact the program in the first place, Congress violated the nondelegation doctrine when enacting it, Congress and the President may have violated the Appointments Clause in the bargain, and President Bush grossly exceeded his constitutional “executive Power” when implementing it. Not bad for \$750 billion.

## I

To an originalist who is unconcerned about precedent, practice, politics, or anything other than the meaning of the Constitution,<sup>12</sup> the most obvious constitutional problem with this legislation is that there is no “troubled assets” clause in the

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<sup>10</sup> *Id.* § 3(9).

<sup>11</sup> *Id.* § 101(c).

<sup>12</sup> As Lancelot modestly observed, “c’est moi.” To be precise: The meaning of the Constitution is the meaning that would have been attributed to it by a fully informed hypothetical observer at the time of its ratification. See Gary Lawson & Guy Seidman, *Originalism As a Legal Enterprise*, 23 CONST. COMMENTARY 47, 77 n.79 (2006). Precedent may be an important feature of the scheme of governance that has historically emerged from the constitutional order, but it is not part of or constitutive of the Constitution’s meaning. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007). The meaning is a fact irrespective of its normative significance. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

Constitution. There is a copyright clause,<sup>13</sup> a bankruptcy clause,<sup>14</sup> a weights and measures clause,<sup>15</sup> and even an offenses against the law of nations clause,<sup>16</sup> but no clause authorizing Congress to empower the national government to become a gargantuan mortgage broker. Buying mortgages or mortgage-backed securities is not a regulation of commerce with foreign nations, among the several states, or with the Indian tribes.<sup>17</sup> It is not the punishment of counterfeiting,<sup>18</sup> the granting of a letter of marque and reprisal,<sup>19</sup> a needful regulation of the territory or other property belonging to the United States,<sup>20</sup> or anything else that remotely comes within the enumerations of powers of Congress in the Constitution. Nor is it a law “necessary and proper for carrying into Execution”<sup>21</sup> any of these powers. What granted power does it necessarily and properly carry into execution?

There is in fact an obvious modern answer to this last question (if any modern person even deigns to acknowledge the question). The TARP statute spends money -- a whole heaping lot of money -- so surely the Spending Clause plainly authorizes the Act. That might be a good answer if the Constitution actually contained a Spending Clause. But as it happens, there is no provision in the Constitution specifically dedicated to

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<sup>13</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>14</sup> *Id.* art. I, § 8, cl. 4.

<sup>15</sup> *Id.* art. I, § 8, cl. 5.

<sup>16</sup> *Id.* art. I, § 8, cl. 10.

<sup>17</sup> *Id.* art. I, § 8, cl. 3.

<sup>18</sup> *Id.* art. I, § 8, cl. 6.

<sup>19</sup> *Id.* art. I, § 8, cl. 11.

<sup>20</sup> *Id.* art. IV, § 3, cl. 2.

<sup>21</sup> *Id.* art. I, § 8, cl. 18.

authorizing federal spending. There are several clauses in the Constitution that quite sensibly and correctly *assume* that Congress somewhere has the power to spend, such as the provision stipulating that no money may be withdrawn from the Treasury except pursuant to a valid appropriation,<sup>22</sup> but none of these provisions itself authorizes federal spending. The provision most often cited in modern law as a Spending Clause<sup>23</sup> is actually nothing of the sort. Article I, section 8, clause 1 provides that “Congress shall have power [t]o lay and collect Taxes, Duties, Imposes and Excises, to pay the debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”<sup>24</sup> Notwithstanding the existence of a substantial body of jurisprudence and scholarship treating this provision as a spending clause, it is a taxing clause and nothing more. The only power granted by this clause is the power to lay and collect taxes. The clause then specifies the purposes for which taxes may be laid and collected. That is an important specification, because it makes clear that taxes can be used for purposes other than raising revenue, such as protectionism or other regulatory objectives,<sup>25</sup> but the clause confers no power to spend the money raised through taxes, much less a free-standing power to promote the general welfare through spending or other means. In the case of the Emergency Economic Stabilization Act, it is particularly dicey to try to infer the power to spend from

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<sup>22</sup> *Id.* art. I, § 9, cl. 7.

<sup>23</sup> *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>25</sup> This specification addressed a contentious issue in eighteenth-century theories of taxation. For a full account of the Taxing Clause, see the magisterial Jeffrey T. Renz, *What Spending Clause? (Or the President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 JOHN MARSHALL L. REV. 81 (1999).



the power to tax, because a big chunk of the bailout money will come from borrowing rather than taxation, and good luck inferring a power to spend borrowed money from the Taxing Clause.<sup>26</sup>

The power to spend in the Constitution comes from the Necessary and Proper Clause: appropriations laws can be “necessary and proper for carrying into Execution” other federal powers.<sup>27</sup> But then, in the context of the TARP program, one has to find some enumerated power that appropriations to buy mortgages can necessarily and properly carry into execution. If the words “necessary and proper” have any meaning at all, and thus require anything more than a delusional connection between the appropriations law and an enumerated federal power,<sup>28</sup> this is an impossible task. The entire TARP enterprise was unconstitutional from the get-go.

In the modern administrative state, the only thing exceptional about the TARP spending program is its size. The administrative state routinely spends money on matters entirely unconnected to any enumerated federal power; indeed, by almost any measure,

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<sup>26</sup> I am indebted to David Engdahl for this simple but profound insight. See David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U.L. REV. 215, 222 (1995) (“the spending allusion in the Taxing Clause do not even colorably reach borrowed sums”). See also David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 49 (1994) (“nothing in the Taxing Clause even implicitly contemplates spending such funds [from sales of land or other property]”).

<sup>27</sup> Professor Engdahl has tried to locate the federal spending power in the Property Clause, which empowers Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .” U.S. CONST. art. IV, § 3, cl. 2. See Engdahl, *The Basis of the Spending Power*, *supra* note 30. For a structural critique of this argument and a defense of the Necessary and Proper Clause as the most plausible source of federal spending power, see GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 27-32 (2004).

<sup>28</sup> Obviously I think that they do, and I have spent much of my professional life arguing for it. See, e.g., Gary Lawson, *Discretion As Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 242-48 (2005) (explaining that a “necessary” implementing law must have “some obvious and precise affinity” with the implemented power); *id.* at 249-60 (explaining that a “proper” implementing law must conform to background understandings of federalism, separation of powers, and individual rights).

unconstitutionally spending money is surely the administrative state's most common activity. Everything from the Social Security Administration to the Department of Education to the Federal Emergency Management Agency is a monument to the administrative state's war on the Constitution

Indeed, the example of FEMA calls forth another instructive comparison with the constitutional world of the 1790s. On November 26, 1796, the city of Savannah was devastated by a fire, and Georgia representatives asked Congress for \$10,000 in government aid. Nathaniel Macon of North Carolina answered: “[H]e wished gentlemen to put their finger upon that part of the Constitution which gave that House power to afford them relief . . . . He felt for the sufferers . . . but he felt as tenderly for the Constitution; he had examined it, and it did not authorize any such grant.”<sup>29</sup> Andrew Moore of Virginia added that “every individual citizen could, if he pleased, show his individual humanity by subscribing to their relief; but it was not Constitutional for them to afford relief from the Treasury.”<sup>30</sup>

The aid bill was defeated.

## II

Even assuming that Congress somehow has the power to turn the Treasury Department into a subsidiary of Countrywide, the statutory authorization to the Treasury

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<sup>29</sup> 6 ANNALS OF CONG. 1717 (1796) (statement of Nathaniel Macon).

<sup>30</sup> *Id.* at 1718 (statement of Andrew Moore).

in the TARP program violates the constitutional nondelegation principle. It is critical to understand from where that principle comes and what it entails.<sup>31</sup>

The Constitution's nondelegation principle flows from the more basic principle of enumerated powers. Any federal actor or institution can only exercise those powers granted to them pursuant to the Constitution. The President, and through him the Treasury Secretary, is given "[t]he executive Power," which is quintessentially the power to execute laws, not the power to make laws. Lawmaking is generally the purview of the legislative power, a subset of which is vested in "a Congress of the United States."<sup>32</sup> The executive's only shares in this general lawmaking power are the President's presentment and veto power in Article I, section 7<sup>33</sup> and the Vice President's ability to break ties in the Senate.<sup>34</sup> If executive actors are making laws, they are not exercising the only powers granted to them by the Constitution.

To be sure, drawing distinctions among legislative, executive, and judicial power, especially at the margins, can cause nasty problems that, as James Madison put it, "prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."<sup>35</sup> To which the Constitution responds: "Get over it." The Constitution

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<sup>31</sup> The long form of the following brief argument is found in Lawson, *supra* note 28; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV.327 (2002).

<sup>32</sup> U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers herein granted" in Congress). One must say "generally" because there are specific contexts in which the executive power does include what can only be described as a lawmaking component: the President may (and, as a matter of international law, must) govern occupied territory during wartime, exercising what looks to the outside world like legislative power. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 122-23 (2004).

<sup>33</sup> *Id.* art. I, § 7, cls. 2-3.

<sup>34</sup> *Id.* art. I, § 3, cl. 4.

<sup>35</sup> THE FEDERALIST No. 37, at 228 (James Madison) (Clinton Rossiter ed. 1961).

separately identifies legislative power, executive power, and judicial power, and it is therefore incumbent upon honest interpreters to do the best that they can with those distinctions, however tough it might be.<sup>36</sup>

It can be very tough. Some element of discretion in implementation and interpretation is inherent in executive and judicial powers, so some element of ambiguity in statutes is perfectly consistent with the exercise of non-legislative powers by those who must apply the laws. You can execute by interpreting. You can also “interpret” in such a way as to make law, and therein lies the conceptual problem. Whether any particular enactment confers the kind and quality of discretion that crosses the line from permissible ambiguity to impermissible delegation is a question of degree and judgment. As Chief Justice Marshall put it way back in 1825, one must distinguish “those *important* subjects, which must be entirely regulated by the legislature itself, from those of *less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”<sup>37</sup> Two centuries of scholarship and judicial doctrine have not improved upon this vague and circular formulation<sup>38</sup> – which is no doubt why many conservatives, such as Justice Scalia, flee from the nondelegation doctrine as vampires flee garlic.<sup>39</sup> To which the Constitution once again says, “Get over it.” The Constitution does not always instantiate “the rule of law as the

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<sup>36</sup> Madison himself later noted the possibility and necessity of “discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary . . . .” *Id.*, No. 48, at 308 (James Madison).

<sup>37</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (emphasis added).

<sup>38</sup> For the long list of failed attempts to come up with something better than Chief Justice Marshall’s formulation, see Lawson, *Delegation and Original Meaning*, *supra* note XX, at 355-77.

<sup>39</sup> See *Mistretta v. United States*, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (effectively declaring the nondelegation doctrine nonjusticiable).

law of rules”<sup>40</sup> by providing clear answers with no need for judgment. If you truly dance with who brung ya, you have to accept the fact that the Constitution prescribes a fuzzy standard rather than a crisp rule for determining when legislation unconstitutionally delegates legislative power.

Nor can Congress perform an end run around the nondelegation principle through the Necessary and Proper Clause by, for example, passing a vague statute and then specifically instructing executive agents to fill in the meaning, so that the act of interpretative “lawmaking” will formally be execution of a statute.<sup>41</sup> Statutes under the Necessary and Proper Clause must be “necessary and proper for carrying into Execution” other federal powers, and a statute that tries to turn an executive (or judicial) agent into a lawmaker is not “proper for carrying into Execution” those powers. Or put another way, the executive power is best read not as a purely formal power to implement statutes but rather as a power to implement statutes that do not confer the kind and quality of discretion that would convert the executive actor into a lawmaker. Far from authorizing delegations, the Necessary and Proper Clause is a textual vehicle through which the nondelegation doctrine is constitutionalized.

The Emergency Economic Stabilization Act authorizes the Treasury Secretary to purchase any mortgages or mortgage-backed securities originated on or before March 14, 2008 “the purchase of which the Secretary determines promotes financial market stability.” On its face, this looks like a rank delegation to the Secretary. To be sure, the statute does not leave disposition of the funds *totally* at the discretion of the Secretary.

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<sup>40</sup> See Antonin Scalia, *The Rule of Law As the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>41</sup> For an attempt to make this kind of argument, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

The Secretary must “prevent unjust enrichment of financial institutions.”<sup>42</sup> And the Secretary is instructed by Congress to “take into consideration” nine factors (though the Secretary does not actually have to do anything specific with these factors other than consider them):

- (1) protecting the interests of taxpayers by maximizing overall returns and minimizing the impact on the national debt;
- (2) providing stability and preventing disruption to financial markets in order to limit the impact on the economy and protect American jobs, savings, and retirement security;
- (3) the need to help families keep their homes and to stabilize communities;
- (4) in determining whether to engage in a direct purchase from an individual financial institution, the long-term viability of the financial institution in determining whether the purchase represents the most efficient use of funds under this Act;
- (5) ensuring that all financial institutions are eligible to participate in the program, without discrimination based on size, geography, form of organization, or the size, type, and number of assets eligible for purchase under this Act.
- (6) providing financial assistance to financial institutions, including those serving low- and moderate-income populations and other underserved communities, and that have assets less than \$1,000,000,000, that were well or adequately capitalized as of June 30, 2008, and that as a result of the devaluation of the preferred government-sponsored enterprises stock will drop one or more more capital levels, in a manner sufficient to restore the financial institutions to at least an adequately capitalized level;
- (7) the need to ensure stability for United States public instrumentalities, such as counties and cities, that may have suffered significant increased costs or losses in the current market turmoil;
- (8) protecting the retirement security of Americans by purchasing troubled assets held by or on behalf of an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) of the Internal Revenue Code of 1986, except that such authority shall not extend to any compensation arrangements subject to section 409A of such Code; and

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<sup>42</sup> Pub. L. No. 110-343, § 101(e).

(9) the utility of purchasing other real estate owned and instruments backed by mortgages on multifamily properties.<sup>43</sup>

Fairly read, these provisions essentially instruct the Secretary to promote goodness and niceness and to avoid badness and meanness – which means, in the end, that the statute does not actually do anything other than authorize the Secretary to spend three quarters of a trillion dollars on mortgages and related securities. The statute seems on its face to delegate authority to the Secretary, and after a closer look that is exactly what it does. There certainly seem to be plenty of, in Chief Justice Marshall’s words, “important subjects” left entirely to the Secretary, and that kind of discretion certainly seems to exceed the “executive Power” that the Constitution permits the President, and therefore the Secretary, to exercise.

But, alas, things are not always that simple with the nondelegation doctrine. Suppose that Congress appropriates \$50 million to the Treasury Department for “office operations.” Is that an unconstitutional delegation unless Congress specifies how many paper clips, staplers, and/or secretaries must be purchased with the money? Lump sum appropriations have been around for a very long time, and it would be quite startling even to narrow-minded originalists such as myself if Congress had to specify every purchase in a line item for every agency. And if lump sum appropriations of this sort are permissible, is TARP all that different?

It is different: Distributing funds to bail out the financial industry is an “important subject[]” while figuring out whether staplers or paper clips will run the office more smoothly is a matter of “less interest.” Why? Because. Ultimately, analysis under the nondelegation principle is a matter of judgment rather than deduction, and there is

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<sup>43</sup> *Id.* § 103.

nothing to be done about it. If someone truly judges that the Secretary's authority under TARP does not concern "important subjects," I really do not know what to say to them.

As with the spending of money, the only thing noteworthy about the scope of discretion granted to the Treasury Secretary in the context of the modern administrative state is the size of the relevant budget. From a constitutional standpoint, the grant of authority is routine. The authorization to buy up mortgages "the purchase of which the Secretary determines promotes financial market stability" is no more open ended than, for example, the authorization to the Administrator of the Environmental Protection Agency to adopt ambient air quality standards "the attainment of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."<sup>44</sup> That latter authorization was upheld as constitutional by a unanimous Supreme Court, in an opinion authored by Justice Scalia.<sup>45</sup> And the factors that the Secretary of the Treasury are instructed to consider under the TARP program are not materially different from the passel of factors and considerations that the United States Sentencing Commission was supposed to consider when adopting sentencing guidelines under the Sentencing Reform Act of 1984<sup>46</sup>; the Sentencing Commission's authority was found constitutional by an effectively unanimous Court.<sup>47</sup>

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<sup>44</sup> 42 U.S.C. § 7409(b)(1) (2000).

<sup>45</sup> See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

<sup>46</sup> See 28 U.S.C. § 994 (2000).

<sup>47</sup> See *Mistretta v. United States*, 488 U.S. 361 (1989). Justice Scalia dissented because of the peculiar function of the Sentencing Commission, but with regard to whether grants of discretion to executive or judicial actors could ever be so vague as to violate the nondelegation doctrine, Justice Scalia was, if anything, *more* insistent than was the majority on the fruitlessness of that inquiry.



There are perfectly good reasons why one might want to celebrate the demise of the nondelegation doctrine.<sup>48</sup> But consistency with the Constitution is not one of them.

### III

Perhaps the most intellectually intriguing constitutional question surrounding the TARP program – and it is a question with potentially sweeping consequences for the administrative state -- is whether Secretary of the Treasury Henry Paulsen was constitutionally authorized to administer it during the Bush Administration. Henry Paulsen was sworn in as Treasury Secretary on July 10, 2006 after being confirmed by the Senate on June 28, 2006. Paulsen's appointment was in full conformance with the Constitution's Appointments Clause;<sup>49</sup> he was nominated by the President and confirmed by the Senate. But in what capacity was he confirmed? The Senate confirmed him as the Treasury Secretary, not as the Administrator of the EPA or the Secretary of Defense. Suppose that on July 11, 2006, Secretary of the Treasury Paulsen was put in charge of (1) establishing ambient air quality standards under the Clean Air Act, (2) running the Iraq war effort, and (3) representing the United States in the United Nations. Could Secretary Paulsen lawfully perform those functions by virtue of being confirmed as a federal officer under the Appointments Clause? Or did his appointment and confirmation as Secretary of the Treasury *only* authorize him to perform functions reasonably within the contemplation of the appointing authorities, including the Senate that confirmed him?

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<sup>48</sup> For an especially sophisticated normative defense of delegation, see Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

<sup>49</sup> U.S. CONST. art. II, § 2, cl. 2.

The question is actually quite profound. Federal appointees are always confirmed in the context of specific sets of statutory authorizations that accompany their offices. But Congress often changes those statutory authorizations – by expansion, contraction, or modification – during the tenure of the officers. Do the officers have to be re-appointed and (if they require confirmation) re-confirmed each time there is any change at all in their duties? No one has ever thought so; the initial appointment has always been understood, quite sensibly, to include the authority to implement new and changed statutory authorizations. But are there any limits to the new authority that can be given to an existing officer, either by the President through re-assignment<sup>50</sup> or by Congress through statutory amendments, and if so, what are those limits?<sup>51</sup>

The Supreme Court and the community of separation-of-powers scholars have largely managed to duck this question for more than two centuries. David Stras and Ryan Scott, in the only extended academic treatment of this problem of which I am aware,<sup>52</sup> make a good textual and functional case that there must be *some* limit to the extent to which Congress can alter the duties of an officer,<sup>53</sup> but like the rest of us they have a hard

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<sup>50</sup> I am not addressing here the very difficult question whether the President has unilateral authority to reassign duties within the executive department. The case for such a power argues that all “executive Power” is vested personally in the President by Article II, so that the President can personally assume and then delegate any executive authority located anywhere in the United States government. The case against such a power argues that Congress, by virtue of its Necessary and Proper Clause power to create federal offices, can designate which subordinates within the executive department can permissibly exercise certain classes of executive power (though Congress cannot, under the theory of the unitary executive, forbid the President from personally exercising at least a veto power over any use of federal executive power). I lean towards the latter view, but not for any good reason that I can defend here.

<sup>51</sup> Note that a different quorum of the Senate (not to mention a different Senate) might confirm an appointee and then participate in changing that appointee’s authority after confirmation.

<sup>52</sup> David R. Stras and Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 496-506 (2007).

<sup>53</sup> Textually, they argue that only the President and Senate can appoint principal officers and only the President alone, the courts of law, and heads of departments can appoint inferior officers; Congress, including the House of Representatives, has no appointment power. But allowing unlimited changes in and

time coming up with clear guidance about the nature of that limit. The Supreme Court faced the issue in 1994 in holding that military officers can serve as military judges without receiving special appointments for that purpose,<sup>54</sup> but appeared to go out of its way to decide the case without announcing any broad principles for the future. In particular, the majority assumed without deciding that new duties must be “germane” to the pre-existing functions of the officer in order to obviate the need for a new appointment (and found that serving as a military judge was “germane” to serving as a military officer because “all military officers, consistent, with a long tradition, play a role in the operation of the military justice system”<sup>55</sup>). Justices Scalia and Thomas concurred on the ground that germaneness is the unavoidable key to such questions and that the majority had correctly determined that serving as a military judge is germane to military officer-dom.<sup>56</sup> Justices Scalia and Thomas are, I think, correct that germaneness analysis is unavoidable – or at least if anyone has come up with a better term than “germaneness” to describe the constitutionally necessary relationship between new duties and an existing officeholder’s portfolio of responsibilities, I have not heard it.

Is administering the TARP statute germane in this sense to the pre-October 2008 duties of the Secretary of the Treasury? By the nature of the inquiry, there can be no slam-dunk answer, but “no” is at least plausible. The sheer scope of the program may be

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reallocations of the authority of officers would effectively grant Congress appointment power. *Id.* at 495. Functionally, they argue that unlimited reallocations of power can shift appointment authority from the President to Congress and undermine the accountability concerns that underlie the Appointments Clause. *Id.* at 495-96. I would only add to this that the distinction between principal and inferior officers written into the Appointments Clause makes no sense unless each appointed officer has functions defined in some fashion by their appointment.

<sup>54</sup> See *Weiss v. United States*, 510 U.S. 163 (1994).

<sup>55</sup> *Id.* at 175.

<sup>56</sup> *Id.* at 196 (Scalia, J., concurring in part and concurring in the judgment).

enough to require a new appointment for anyone who is going to administer it, and even if scope alone does not do it, the federal government's purchases of ownership stakes in private financial institutions may be sufficiently novel to go beyond the functions of the Treasury Secretary that could have been contemplated by a reasonable President or Senate in 2006. At the very least, it seems like a serious question.

If one acknowledges that the Emergency Economic Stabilization Act presents a serious question about the need for a new appointment for Secretary Paulsen, the consequences for the administrative state may be quite large.<sup>57</sup> Certainly, if one retroactively examines the New Deal, it is quite possible that many of the statutes from that era that gave authority to existing officers went far beyond the duties for which they were confirmed, providing yet another reason (to go along with the numerous more obvious ones) why the New Deal was unconstitutional.<sup>58</sup> And if we are about to embark upon a new New Deal, with ever-increasing forms of government control, the limits of the Appointments Clause may be stretched in the process. At a minimum, it seems like something for which to watch.

#### IV

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<sup>57</sup> The consequences are obviously larger for those appointees who received or required Senate confirmation. In the case of an inferior officer appointed by the President alone, a novel expansion of duties could be accommodated simply by a new presidential appointment, which is really just paper-pushing. There is always a chance, however, that someone who starts out as an inferior officer could become a principal officer through expansion of duties – as long as the definition of a principal officer relies at least in part on the scope of the officer's duties and not just on the formal chain of command.

<sup>58</sup> As an aside, that would also mean that if Bruce Ackerman wants to rescue the New Deal as constitutional, his constitutional moment must also involve an amendment to the Appointments Clause.

One further feature of the TARP program during the Bush Administration bears mention – not because it has broad lessons for the modern administrative statute but because it frosts me more than anything else about the statute.

When Congress failed to bail out the Big Three automakers and their unions in Fall 2008, the Bush Administration on December 19, 2008 unilaterally extended loans totaling \$13.4 billion to General Motors and Chrysler out of the funds available under the TARP program. Indulge for the moment the assumption that obtaining an IOU from an automaker, while not the purchase of a mortgage or mortgage-backed security, is the purchase of “any other [non-mortgage-related] financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability . . . .” The more basic problem is that the TARP program only authorizes purchases of assets from a “financial institution,” which is defined in the statute as “any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States . . . and having significant operations in the United States, but excluding any central bank of, or institutions owned by, a foreign government.”<sup>59</sup> Are automakers really “financial institution[s]”?

Conceivably, a casual textualist could stop at the words “any institution” in the definition of “financial institution” and say that automakers are institutions, so end of story. That reasoning, of course, would also sweep in as “financial institution[s]” antique dealers, ballet troupes, and the Association of Community Organizations for Reform Now (which I gather is now running away from that name as fast as traditional originalists run away from the nondelegation doctrine). I am as much of a textualist as

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<sup>59</sup> Pub. L. No. 110-343, § 3(5).

the next person – probably more so than many of the next people – but if I am approaching this text as a reasonable reader, I will interpolate some synonym of the word “financial” in between the words “any” and “institution” in the definition of “financial institution.” The grounds for this feat of (as a critic might call it) interpretative legislation are that the words “any institution” appear in a definition of “financial institution,” the (non-exhaustive) examples given in the statute all have something to with finance, the two hundred pages of statute surrounding this definition deal with financial matters, and the context in which the statute was enacted fairly screams that “financial institution” means institutions that are in some important sense financial. In all likelihood, the financing arms of the automakers – which have obtained loans of their own apart from the initial \$13.4 billion -- would qualify as financial institutions. Perhaps even pawn shops might make it in. But automakers are no more “financial institution[s]” under this statute than is the New York Times.

How did President Bush explain the legality of this use of funds? In his statement of December 19, 2008 announcing the auto bailout, he said: “Unfortunately, despite extensive debate and agreement that we should prevent disorderly bankruptcies in the American auto industry, Congress was unable to get a bill to my desk before adjourning this year. This means the only way to avoid a collapse of the U.S. auto industry is for the executive branch to step in . . . . So today, I’m announcing that the federal government will grant loans to auto companies under conditions similar to those Congress considered last week.”<sup>60</sup> Perhaps I’m missing something, but this seems to be a claim that if the President considers something important for the country, the President can do it whether

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<sup>60</sup> See <http://detnews.com/apps/pbcs.dll/article?AID=/20081219/AUTO01/812190435/0/AUTO01> (visited February 8, 2009).

or not Congress authorizes it by statute. Presidents have made such claims in the past, sometimes with success<sup>61</sup> and sometimes meeting strong legal resistance,<sup>62</sup> but such claims are always totally inappropriate in a constitution of enumerated powers that merely gives the President “executive Power.” The executive power simply does not include the power to do anything that the President thinks is important for the country.

Interestingly, I spent eight years listening to most of the people around me complain about an imperial presidency, but I have not heard one peep out of anyone in the legal academy decrying this simply outlandish assertion of presidential authority.<sup>63</sup>

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The unconstitutionality of large chunks of the modern administrative state is a fact. But it is also a fact that Neptune is occasionally farther from Earth than Pluto. Both facts have about equal relevance in the contemporary legal world. What does that say about the role of the Constitution in modern life? That, alas, is another conference and another paper. For today, I am just the messenger, and the message is that the administrative state and the Constitution do not mix.

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<sup>61</sup> See Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U.L. REV. 581 (2001) (describing successful executive claims of emergency power to govern California without statutory authority).

<sup>62</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President could not seize domestic steel mills during wartime without statutory authorization).

<sup>63</sup> Professor Christopher Schroeder assures me that he, too, was appalled by this assertion of presidential authority and even drafted an op-ed column about it. So sincere kudos to Professor Schroeder; he is hereby exempted from my tendentious broadside against the left-leaning professoriate.