

## BURYING THE CONSTITUTION UNDER A TARP

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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” 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. The founding generation would have been dumbstruck by the governmental edifice that has arisen from its handiwork. 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 itself to designate the routes town by town.<sup>3</sup>

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1. U.S. CONST. art. I, § 8, cl. 7.

2. 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) (arguing that the postal road power extends only 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, among others, arguing that Congress had no power to create new roads, and James Madison and Joseph Story, among others, taking the other side. The issue divided the Supreme Court as late as 1845. See *Searight v. Stokes*, 44 U.S. (3 How.) 151, 181 (1845) (Daniel, J., dissenting). 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, 294–95 (1993).

3. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 49–50 (4th ed. 2007). The Second Congress, after debate, elected to designate the routes town by town. See Act of Feb. 20, 1792, § 1, 1 Stat. 232–33 (repealed 1794).

The architects of the modern administrative state fully understood the constitutional obstacles in their path. Administrative law students and scholars are familiar with James Landis's dismissive attitude toward the Constitution's separation of powers, as articulated in *The Administrative Process*.<sup>4</sup> Equally revealing are the earlier comments 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 understood that validating the administrative state required either a new constitution, which modern scholars are willing to supply in abundance,<sup>6</sup> or a new theory of con-

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4. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 2, 10–14 (1938).

5. 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 Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 *SOC. PHIL. & POL'Y* 16, 21 (2007).

6. Some are willing to supply it directly. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 34 (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) (arguing that interpretations of the Constitution rely not just on the founding document but also the body of laws since laid out, largely by the courts). Still others substitute abstract philosophical constructs for the Constitution. See, e.g., JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 3–6 (2006) (arguing for a “constructivist” interpretative methodology that builds from the principles that best explain and justify a given set of fundamental legal materials). To be sure, if the Constitution contemplated its own replacement by such norms, these thinkers

stitutionalism, which has obligingly emerged under the name of “functionalism”—an interpretative theory that effectively takes the constitutionality of the administrative state as its starting point and goes 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 firmly cemented the administrative state, 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 highlight the 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> 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> The Secretary is further empowered “to take such actions as the Secretary

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would be correct as an interpretative matter. But it does not. *See* U.S. CONST. art. VI, cl. 2 (declaring “[t]his Constitution” to be the “the supreme Law of the Land” (emphasis added)). I happily grant that any or all of these Constitution-substitutes may well be excellent descriptions of modern practice or interesting normative political theories or both. I object to them here *only* as accounts of the actual Constitution’s actual meaning.

7. 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, 888–90 (2005).

8. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (to be codified in scattered sections of 12 & 26 U.S.C.).

9. *Id.* § 101(a)(1), 122 Stat. at 3767 (to be codified at 12 U.S.C. § 5211). Troubled assets are “(A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that [were] originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and (B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability . . . .” *Id.* § 3(9), 122 Stat. at 3767 (to be codified at 12 U.S.C. § 5202).

deems necessary to carry out the authorities in this Act.”<sup>10</sup> These provisions are the sum total of the operative legal authority under which \$750 billion was authorized to be spent.

TARP 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 with precedent, practice, politics, or anything other than the meaning of the Constitution,<sup>11</sup> the most obvious constitutional problem with TARP is that there is no “Troubled Assets” clause in the Constitution. There is a Copyright Clause,<sup>12</sup> a Bankruptcy Clause,<sup>13</sup> a Weights and Measures Clause,<sup>14</sup> and even an Offences Against the Law of Nations Clause,<sup>15</sup> but there is 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>16</sup> It is not the punishment of counterfeiting,<sup>17</sup> the granting of a letter of mar-

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10. *Id.* § 101(c), 122 Stat. at 3768 (to be codified at 12 U.S.C. § 5211).

11. As Lancelot modestly observed, “c’est moi.” To give a more precise definition: 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. COMMENT. 47, 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, 11–22 (2007). The meaning is a fact irrespective of its normative significance. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834–35 (1997).

12. U.S. CONST. art. I, § 8, cl. 8.

13. U.S. CONST. art. I, § 8, cl. 4.

14. U.S. CONST. art. I, § 8, cl. 5.

15. U.S. CONST. art. I, § 8, cl. 10.

16. U.S. CONST. art. I, § 8, cl. 3.

17. U.S. CONST. art. I, § 8, cl. 6.

que and reprisal,<sup>18</sup> a needful regulation of the territory or other property belonging to the United States,<sup>19</sup> or anything else that remotely comes within Congress's enumerated powers. Nor is it a law "necessary and proper for carrying into Execution"<sup>20</sup> any of these powers. What granted power does it necessarily and properly carry into execution?

There is, in fact, a seemingly obvious modern answer to this last question. The TARP statute spends money—a startlingly huge pile of money—so surely the Spending Clause authorizes it. That might be a good answer if the Constitution actually contained a Spending Clause. I suspect that it will surprise many people to learn, however, that the Constitution simply does not contain a "Spending Clause," in the sense of a provision specifically dedicated to 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>21</sup> but none of these provisions itself authorizes federal spending.

The provision most often cited in modern law as a Spending Clause<sup>22</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, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."<sup>23</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 Congress may lay and collect taxes. That specification is important, because it makes clear that Congress can use taxes for purposes other than raising

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18. U.S. CONST. art. I, § 8, cl. 11.

19. U.S. CONST. art. IV, § 3, cl. 2.

20. U.S. CONST. art. I, § 8, cl. 18.

21. U.S. CONST. art. I, § 9, cl. 7.

22. *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004).

23. U.S. CONST. art. I, § 8, cl. 1.

revenue, such as protectionism or regulatory objectives,<sup>24</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 TARP, it is particularly problematic to infer the power to spend from the power to tax. A big chunk of the bailout money will come from borrowing,<sup>25</sup> 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 of funds are laws “necessary and proper for carrying into Execution” other federal powers.<sup>27</sup> But then, in the context of TARP, 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” require anything more than a delusional connection between the appropriations law and an enumerated federal power,<sup>28</sup> this task is impossible. The entire TARP enterprise was unconstitutional from the beginning.

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24. 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 J. MARSHALL L. REV. 81, 96–136 (1999).

25. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 118, 122 Stat. 3765, 3786–87 (2008) (to be codified at 12 U.S.C. § 5228) (authorizing the Treasury Secretary to use 31 U.S.C. chapter 31, which provides for public debt financing).

26. 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) (“[T]he spending allusion in the Taxing Clause does not even colorably reach borrowed sums.”); see also David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 49 (1994) (“[N]othing in the Taxing Clause even implicitly contemplates spending such funds [from sales of land or other property].”).

27. 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 26, at 243–51. 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 AND AMERICAN LEGAL HISTORY* 27–32 (2004).

28. I have spent much of my professional life arguing thusly. See, e.g., Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 242–48 (2005) (arguing that a “necessary” implementing law must have “some obvious and precise affinity” with the implemented power); *id.* at 249–60 (arguing that a “proper” implementing law must

In the modern administrative state, the only thing exceptional about TARP is its size. The administrative state routinely spends money on matters entirely unconnected to any enumerated federal power; indeed, by almost any measure, 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 (FEMA) is a monument to the administrative state's war on the Constitution.

The FEMA example calls forth another instructive comparison with the constitutional world of the 1790s. A fire devastated the city of Savannah on November 26, 1796, leading southern representatives to ask Congress for \$15,000 to \$20,000 in government aid.<sup>29</sup> 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>30</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>31</sup> The aid bill was defeated.<sup>32</sup>

## 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 in TARP violates the constitutional nondelegation principle. Understanding the principle's origin and what it entails is critical to appreciating fully the unconstitutionality of TARP.<sup>33</sup>

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conform to background understandings of federalism, separation of powers, and individual rights).

29. See 6 ANNALS OF CONG. 1712–14 (1796) (statement of William Smith).

30. *Id.* at 1717 (statement of Nathaniel Macon).

31. *Id.* at 1718 (statement of Andrew Moore).

32. See *id.* at 1727.

33. For a longer form of the following brief argument, see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002) and Lawson, *supra* note 28.

The Constitution's nondelegation principle flows from the more basic principle of enumerated powers. Any federal actor or institution can exercise only those powers granted to it pursuant to the Constitution. The President, and through him the Treasury Secretary, is given "[t]he executive Power,"<sup>34</sup> which is quintessentially the power to execute laws, not the power to make laws.<sup>35</sup> Lawmaking is generally the purview of the legislative power,<sup>36</sup> a subset of which is vested in "a Congress of the United States."<sup>37</sup> The executive department's only shares in this general lawmaking power are the President's veto power,<sup>38</sup> and the Vice President's power to break ties in the Senate.<sup>39</sup> If executive actors are making laws, they are exercising powers other than those the Constitution grants them.

To be sure, it is difficult to draw precise distinctions among legislative, executive, and judicial powers, especially at the margins. As James Madison put it, these interpretive problems "prove the obscurity which reigns in these subjects, and . . . puzzle the greatest adepts in political science."<sup>40</sup> To this the Constitution responds: "Get over it." The Constitution separately identifies legislative power, executive power, and judicial power,<sup>41</sup> and it is therefore incumbent upon honest interpreters to do the best that they can with those distinctions, however tough that might be.<sup>42</sup>

It can be very tough. Some element of discretion in implementation and interpretation is inherent in executive and ju-

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34. U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President.").

35. See, e.g., Lawson, *Delegation and Original Meaning*, *supra* note 33, at 338–43.

36. 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 LAWSON & SEIDMAN, *supra* note 27, at 122–23.

37. U.S. CONST. art. I, § 1 (vesting "[a]ll legislative powers herein granted" in Congress).

38. U.S. CONST. art. I, § 7, cls. 2–3.

39. U.S. CONST. art. I, § 3, cl. 4.

40. THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

41. See Lawson, *Delegation and Original Meaning*, *supra* note 33, at 337–41.

42. 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." THE FEDERALIST NO. 48 (James Madison), *supra* note 40, at 308.

dicial powers, so some element of ambiguity in statutes is perfectly consistent with the exercise of nonlegislative 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 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>43</sup> Two centuries of scholarship and judicial doctrine have not improved upon this vague and circular formulation<sup>44</sup>—which is no doubt why many conservatives, such as Justice Scalia, flee from the nondelegation doctrine as the vampire flees garlic.<sup>45</sup> To which problem the Constitution once again replies: “Get over it.” The Constitution does not always instantiate “the rule of law as a law of rules”<sup>46</sup> by providing clear answers with no need for judgment. If the Constitution prescribes a fuzzy standard rather than a clear rule for determining when legislation unconstitutionally delegates legislative power, that is the Constitution’s business.

Nor can Congress perform an end-run around the nondelegation principle with 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>47</sup> Statutes under the Necessary and Proper Clause must be “necessary and proper for carrying into Execution” other fed-

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43. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (emphasis added).

44. 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 33, at 361–77.

45. See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (effectively declaring the nondelegation doctrine nonjusticiable).

46. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

47. 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, 1725–26 (2002).

eral 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 not a purely formal power to implement statutes but rather 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.”<sup>48</sup> On its face, this looks like an unconstitutional delegation to the Secretary. On more careful consideration, it looks even more like an unconstitutional delegation to the Secretary. In exercising his authority, the Secretary must “prevent unjust enrichment of financial institutions.”<sup>49</sup> And Congress instructs the Secretary to “take into consideration” nine factors, though the Secretary does not actually have to do anything specific with these factors other than consider them.<sup>50</sup>

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48. Pub. L. No. 110-343, § 3(9), 122 Stat. 3765, 3767 (2008) (to be codified at 12 U.S.C. § 5202).

49. *Id.* § 101(e), 122 Stat. at 3768 (to be codified at 12 U.S.C. § 5211).

50. *Id.* § 103, 122 Stat. at 3770 (to be codified at 12 U.S.C. § 5213) (The nine factors to be considered are: “(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 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

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. 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.<sup>51</sup>

But, alas, things are often not 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 secretaries the Treasury must purchase 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 individual purchase 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,” although 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

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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 (9) the utility of purchasing other real estate owned and instruments backed by mortgages on multifamily properties.”).

51. In an important study of the evolution of the TARP bailout, Stephen Davidoff and David Zaring argue that, although Secretary Paulson’s original three-page proposal for bailout authority might have raised constitutional nondelegation concerns, those concerns are presented “less obviously by the congressional statutes that elaborated Treasury’s responsibilities and that followed it.” Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 516 (2009). But the operative legal authority in the original proposal, *see id.* at 514, was no more vague or unconstrained than was the operative legal authority in the final legislation. All that changed from Paulson’s three pages to the final legislation was the addition of enough pork to win passage from reluctant House members and some oversight mechanisms that do not legally constrain the discretion of the Secretary.

of judgment rather than deduction, and there is nothing one can do about it. If someone truly believes that the Secretary's authority under TARP does not concern "important subjects," I really do not know what to say to him.

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 (EPA) to adopt ambient air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on [certain] criteria and allowing an adequate margin of safety, are requisite to protect the public health."<sup>52</sup> That latter authorization was upheld as constitutional by a unanimous Supreme Court in an opinion authored by Justice Scalia.<sup>53</sup> Similarly, the factors that Congress instructs the Secretary of the Treasury to consider under TARP 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>54</sup> An effectively unanimous Court found the Sentencing Commission's authority constitutional.<sup>55</sup>

There are perfectly good reasons why one might want to celebrate the demise of the nondelegation doctrine.<sup>56</sup> But consistency with the Constitution is not one of them.

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52. 42 U.S.C. § 7409(b)(1) (2000).

53. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

54. See 28 U.S.C. § 994(a)(1) (2000).

55. 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 the inquiry. *Id.* at 415–17, 20.

56. Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 108–110 (2009).

## III.

Perhaps the most intellectually intriguing constitutional question surrounding TARP—a question with potentially sweeping consequences for the administrative state—is whether Secretary of the Treasury Henry Paulson was constitutionally authorized to administer the program during the Bush Administration. Henry Paulson was sworn in as Treasury Secretary on July 10, 2006 after being confirmed by the Senate on June 28, 2006.<sup>57</sup> Paulson’s appointment was in full conformance with the Constitution’s Appointments Clause, for he was nominated by the President and confirmed by the Senate.<sup>58</sup> 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 Paulson was put in charge of establishing ambient air quality standards under the Clean Air Act, running the Iraq war effort, and representing the United States in the United Nations. Could Secretary Paulson 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?

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.<sup>59</sup> Do the officers have to be reappointed and reconfirmed each time there is any change 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

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57. 152 CONG. REC. S6615, 6624 (daily ed. June 28, 2006).

58. See U.S. CONST. art. II, § 2, cl. 2 (requiring Presidential nomination and Senate approval); *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856) (“When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.”).

59. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 496 (2007).

statutory authorizations.<sup>60</sup> But are there any limits to the new authority that can be given to an existing officer, either by the President through reassignment<sup>61</sup> or by Congress through statutory amendments, and if so, what are those limits?<sup>62</sup>

The Supreme Court and the community of separation-of-powers scholars have managed largely 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>63</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>64</sup> but they do not offer clear guidance about the nature of that limit. The Supreme Court faced the issue in 1994, holding that military officers can serve as military judges without receiving special appointments for that purpose.<sup>65</sup> The Court went out of its way, however, to decide the case without announcing any broad principles for the future. In particular,

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60. *Id.*

61. 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. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 593–95 (1994). 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). See Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 205 (1993).

62. 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.

63. Stras & Scott, *supra* note 59, at 494–506.

64. Textually, they argue that only the President and Senate can appoint principal officers and only the President, the courts of law, and heads of departments can appoint inferior officers; Congress, including the House of Representatives, has no appointment power. *Id.* at 494–95. But allowing unlimited changes in and 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 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 his or her appointment.

65. See *Weiss v. United States*, 510 U.S. 163, 163–64 (1994).

the majority assumed, without deciding, that new duties must be “germane” to the preexisting functions of the officer in order to obviate the need for a new appointment.<sup>66</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 being a military officer.<sup>67</sup> Justices Scalia and Thomas are correct that germaneness analysis is unavoidable, as no one has come up with a better way to articulate the limits of Congress’s power to change an officer’s authority.

Is administering TARP 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 enough to require a new appointment for anyone who is going to administer it. Even if scope alone does not make the appointment unconstitutional, 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 contemplated by a reasonable President or Senate in 2006.

If one acknowledges that the Emergency Economic Stabilization Act presents a serious question about the need for a new appointment for Secretary Paulson, the consequences for the administrative state are large.<sup>68</sup> If one retroactively examines the New Deal, it is quite possible that many of the statutes from that era gave authority to existing officers far beyond the duties for which they were confirmed, providing yet another reason why the New Deal was unconstitutional.<sup>69</sup> And if we are about

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66. The Court 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.” *Id.* at 174–75.

67. *Id.* at 196 (Scalia, J., concurring in part and concurring in the judgment).

68. 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.

69. 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. See ACKERMAN, *supra* note 6, at 119–20

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.

One further feature of TARP bears mention. When Congress failed to bail out the Big Three automakers and their unions in the fall of 2008, the Bush Administration on December 19, 2008 unilaterally extended loans totaling \$17.4 billion to General Motors and Chrysler out of the funds available under TARP.<sup>70</sup> Indulge for the moment the assumption that obtaining an IOU from an automaker, though not the purchase of a mortgage or mortgage-backed security, is the purchase of “any [non-mortgage-related] financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability.”<sup>71</sup> The more basic problem is that TARP only authorizes purchases of assets from a “financial institution,”<sup>72</sup> which the statute defines as:

[A]ny 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 institution owned by, a foreign government.<sup>73</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 Com-

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(stating that President Roosevelt and the New Deal Congress let the Supreme Court Justices bring about the New Deal’s constitutional legitimacy rather than codify their principles through amendments).

70. See Jim Puzzanghera & Martin Zimmerman, *Bush extends aid to carmakers*, L.A. TIMES, Dec. 20, 2008, at A1.

71. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 3(9), 122 Stat. 3765, 3766–67 (2008) (to be codified at 12 U.S.C. § 5202).

72. *Id.* § 101(a)(1), 122 Stat. at 3767 (to be codified at 12 U.S.C. § 5211).

73. *Id.* § 3(5), 122 Stat. at 3766–67 (to be codified at 12 U.S.C. § 5202).

munity Organizations for Reform Now (ACORN). I am as much of a textualist as 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 (nonexhaustive) examples given in the statute all have something to do with finance, the two hundred pages of statute surrounding this definition deal with financial matters, and the context in which the statute was enacted fairly screams that “financial institution” means institutions that are in some important sense financial. In all likelihood, the financing arms of the automakers—which have obtained loans of their own apart from the initial \$17.4 billion<sup>74</sup>—would qualify as financial institutions. Pawn shops might even make it in. But automakers are no more “financial institution[s]” under this statute than I am.

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>75</sup>

Perhaps I’m missing something, but this statement seems to be a claim that if the President considers something important for the country, the President can do it whether or not Congress authorizes it by statute. Presidents have made such claims in

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74. See, e.g., Neil King Jr. & Deborah Solomon, *GM Finance Arm to Get a Fresh Bailout*, WALL ST. J., May 21, 2009, at A1; Martin Zimmerman, *U.S. to give GMAC a \$5-billion bailout*, L.A. TIMES, Dec. 30, 2008, at C2.

75. Remarks on the American Auto Industry, 44 WEEKLY COMP. PRES. DOC. 1568, 1569 (Dec. 19, 2008).

the past, sometimes with success,<sup>76</sup> and sometimes meeting strong legal resistance,<sup>77</sup> but such claims are always totally inappropriate under 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.<sup>78</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 the irrelevance of significant unconstitutionality say about the role of the Constitution in modern life? That question requires another conference and another essay. 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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76. See Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 615–16 (2001) (describing successful executive claims of emergency power to govern California without statutory authority).

77. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952) (holding that the President could not seize domestic steel mills during wartime without statutory authorization).

78. Interestingly, for eight years many people complained 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. 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.