Accounting for the Lack of Accountability: The Great Depression Meets the Great Recession

by STEVEN PEARSE*

Introduction: An Eerily Similar Situation

"The stock markets in the United States entered upon a period of wild price swings both up and downward. Contemporary observers were badly shaken by these sudden, recurring plunges."[1] Despite this observation's appropriate reflection on modern society, the quotation does not concern the economic struggle that the United States currently faces, but reflects upon the months leading up to Black Tuesday.[2] The present economic situation is eerily similar to the 1929 depression that tested not only the resolve of the American people but also the American Constitution. Almost eighty years have passed since the start of the Great Depression, however, the United States economy tragically finds itself buckling under the weight of the world, awaiting Herculean relief for a second time.[3]

Within ten days, the United States saw "the nationalization, failure, or rescue of what was once the world's biggest insurer, with assets of $1 trillion, two of the world's biggest investment banks, with combined assets of another $1.5 trillion, and two giants of America's

* J.D., University of California, Hastings College of the Law, 2010; B.A., University of California, Los Angeles, 2007.

1. WILLIAM K. KLINGAMAN, 1929: THE YEAR OF THE GREAT CRASH at xvii (Harper & Row 1989).

2. *Id.* at 281–82. On Tuesday October 29, 1929, panic stricken Americans dumped immense blocks of stock on the open market, causing the collapse of the stock markets.

3. According to Greek Mythology, Hercules' eleventh labor prompted him to relieve the Titan, Atlas, from his job of holding up the heavens. EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 172–74 (Warner Books 1999) (1942).

mortgage markets, with assets of $1.8 trillion."[4] These newly discovered truths about some of America's leading companies sent shockwaves throughout an unsuspecting people and greatly diminished the people's faith in the American economy altogether.[5] This loss of faith encouraged Americans to dump their holdings in these companies on the open market.[6]

President George W. Bush and the federal government quickly took action and began to formulate a plan to resolve the economic crisis and restore order.[7] Despite the clamor for action, Congress rejected the first proposed Bailout because no oversight governed the immense power and discretion the proposed bill bestowed upon the Executive Branch.[8] Although the initial plan was not adopted, the proposal that was ultimately selected to draw the American economy out of the chaos still treaded upon constitutionally ambiguous grounds.[9] The oversight written into the proposal failed to adequately protect the American taxpayer's money because amongst other problems, it stripped away any semblance of political accountability. And, despite the addition of more oversight under the TARP Reform and Accountability Act of 2009, true political accountability still remains absent from the situation.[10] Thus, a delegation of congressional power that nullifies the American taxpayer's participation in the governmental system and the sheer magnitude of the delegation make the Bailout constitutionally ambiguous.

The United States, however, has walked this path before. Just as the New Deal programs and agencies attempted to solve the economic collapse that occurred in 1929, the Bailout created a solution that challenged the flexibility of the Constitution. And although flexible, the overbroad delegation and inadequacies of oversight may have flexed the Constitution to a breaking point. Similar to several actions taken to remedy the 1929 Depression, the

4. *The Financial Crisis? What Next?*, THE ECONOMIST, Sept. 20–26, 2008, at 19, *available at* 2008 WLNR 17853104.

5. David Leonhardt, *A 1932-Like Decline*, N.Y. TIMES, Oct. 9, 2008, *available at* http://economix.blogs.nytimes.com/2008/10/09/a-1932-like-decline/?scp=1&sq=%22a%201932-like%20decline%22&st=cse (last visited Oct. 19, 2009).

6. *Id.*

7. Peter G. Gosselin & Maura Reynolds, *Tab for Financial Bailout: $700 Billion*, L.A. TIMES, Sept. 21, 2008, at A1.

8. *Id.* at A24.

9. Carle Hulse & David M. Herszenhorn, *Defiant House Rejects Huge Bailout; Next Step Is Uncertain*, N.Y. TIMES, Sept. 30, 2008, at A1.

10. TARP Reform and Accountability Act of 2009, H.R. 384, 111th Cong. (2009).

hastily instituted Bailout represents an over-delegation of congressional power to the Executive Branch. President Roosevelt's New Deal and President Bush's Bailout share the intention of saving the American economy from complete destruction, but the good intent of these plans does not settle their constitutionality.[11]

An examination of the New Deal non-delegation cases provides support for the notion that the current Bailout follows a similar model and should accordingly be ruled as an excessive grant of congressional power to the Executive. In both instances, fearful people undoubtedly demanded quick action, but Congress's delegation of power to the Executive Branch probably offends the separation of delineated powers the Constitution outlays. Although "[e]xtraordinary conditions may call for extraordinary remedies," such conditions "do not create or enlarge constitutional power."[12] In the current situation, the Bailout left the American people in an uncomfortable situation. Quick relief was granted, but the Constitution has seemingly been undermined. The ability to hold responsible parties accountable for problems with the plan is muddled, and oversight fails to provide such accountability. Ultimately, however, the immediacy of the situation and the fading doctrinal practice of evaluating whether a congressional delegation amounts to an over-delegation will likely leave the situation and Bailout untouched.

This Note first outlines the necessity for delegations to occur within the American governmental system. Following this examination of the essential need for congressional delegation, the next section details the over-delegation doctrine as it emerged during the Depression era. The Note then turns to explore the virtual abandonment of the over-delegation doctrine after the United States recovered from the Great Depression. Subsequent to this exploration, the next section provides an overview of the origins of the current economic situation. Following this overview, the Note examines the reasons for the Bailout and then the oversight attached to it. The next section discusses the reform used to add oversight to the "Bailout." Ultimately, the piece explores the parallels between the Great Depression and the current recession and the reasons for the revival of the over-delegation doctrine.

11. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935).

12. *Id.*

I. Necessary Evil: Shifting Responsibility

Article I, Section 1 of the United States Constitution explicitly declares that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[13] This declaration guarantees that Congress alone shall possess specific powers.[14] Accordingly, the United States Supreme Court declared that Congress "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[15] This declaration seemingly prohibits the delegation of powers by Congress. The Court, however, did not completely close off the idea of delegation.

The Framers did not intend to overburden Congress so much that it would act as an obstacle to a workable National Government.[16] Alluding to a future of permissible delegations, Thomas Jefferson said, "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution."[17] Moreover, the Constitution "has never been regarded as denying to the Congress the necessary resources of flexibility and practicality."[18]

Subsequently, the United States Supreme Court held that "Congress must be permitted to delegate to others at least some authority that it could exercise itself."[19] Therefore, at its discretion, Congress may vest power "in the officer of its choice or in a board or commission such as it may select or create for the purpose."[20] The Court's perspective regarding delegation stems from "a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power."[21] Although delegation has proven to be an indispensable governmental tool, it simultaneously generates many problems. The delegation of congressional power creates a conflict with separation of powers and strips Americans of their ability to hold parties politically accountable

13. U.S CONST. art. I, § 1.

14. *Id.*

15. *Schechter Poultry Corp.*, 295 U.S. at 529.

16. Loving v. United States, 517 U.S. 748, 758 (1995).

17. Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), *in* 5 THE WORKS OF THOMAS JEFFERSON 319 (Paul L. Ford ed., G.P. Putnam's Sons 1904–05).

18. Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

19. *Loving*, 517 U.S. at 758 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825)).

20. *Pan. Ref. Co.*, 293 U.S. at 420.

21. Mistretta v. United States, 488 U.S. 361, 372 (1989).

for any abuse of the delegated power. Thus, although Congress can delegate its authority "sufficient to effect its purposes," these delegations must be examined to assure Congress has not surrendered too much of its power at the expense of both the Constitution and the American people.[22]

Delegation of congressional power inherently grants the Executive or Judicial Branches more power than the Constitution intended.[23] The transfer of legislative powers to the other branches offends the balance of power between the three branches. Increasing the power of one branch through the transfer of power from another creates an imbalance between them and strains the established checks and balances system. In the current situation, Congress's unguided delegation leaves the actions by the Executive Branch virtually unchecked. This, along with the lack of political accountability, should caution the American public against the ignorant acceptance of this particular delegation.

Voting politicians out of office serves as the traditional remedy for political abuses and dissatisfaction. Giving the other branches the powers reserved for Congress, particularly in an election year, circumvents this established practice. The Bailout occurred in the midst of the 2008 election campaign.[24] During this election, thirty-five Senate seats, all seats in the House of Representatives, and the presidency were at stake.[25] With the passage of the Bailout, Congress squarely placed the economic situation on an outgoing presidential administration.[26] Thus, Secretary of the Treasury Henry Paulson's actions between the passage of the Bailout and the beginning of President Barack Obama's administration created a situation where actual accountability was removed. Despite dips to President Bush's

22. Lichter v. United States, 334 U.S. 742, 778 (1948) (emphasis omitted).

23. U.S. CONST., art. I, § 1.

24. David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 4, 2008, at A1.

25. Susan Page, *In Congress, a Democratic wave; Economic concerns fuel a 'turning point' in politics*, USA TODAY, Nov. 5, 2008, at A1.

26. President George W. Bush signed the Bailout bill into law October 3, 2008, warning Americans that "[t]his will be done as expeditiously as possible, but it cannot be accomplished overnight. We'll take the time necessary to design an effective program that achieves its objectives—and does not waste taxpayer dollars." Mark Landler & Edmund L. Andrews, *For Treasury Dept., Now Comes Hard Part of Bailout*, N.Y. TIMES, Oct. 4, 2008, at A1.

approval ratings, which were already on the decline,[27] no real consequences existed for mishandling the financial situation. Therefore, voting in favor of the Bailout effectively left the American people with no remedy to conjure up against this political sleight of hand.

To assure that Congress has not over delegated its powers to another branch or administrative agency, the United States Supreme Court established guidelines to evaluate the delegation. Congress can delegate powers specifically granted to it by the Constitution by declaring a policy and defining "the circumstances in which its command is to be effective."[28] Minimally, Congress must only assert "an intelligible principle to which the person or body authorized to take action is directed to conform."[29] Although the language of these evaluation guides is not definitively constructed, it does provide some guidance on how to determine whether Congress provided sufficient direction to the entity receiving the power. Moreover, because the guidelines for establishing whether a congressional delegation is permissible have been continually relaxed, it makes it more difficult to categorize any delegation by Congress as an over-delegation. Therefore, there is a strong degree of deference to Congress when it determines if a delegation of power is necessary, as shown through the United States Supreme Court's reluctance to enforce the non-delegation doctrine since the New Deal era.[30]

The New Deal era, however, provides several instances in which the United States Supreme Court expressly found delegations by Congress to offend the Constitution.[31] Despite the lenient rules revolving around congressional delegations, Congress too loosely and too greatly gave up its powers in these instances.[32] These over-delegations to the Executive Branch responded to the tumultuous economic period originating in 1929.[33] The current economic situation, again, places the American people in a similar position as it

27. In the final days of his presidency, President George W. Bush's approval rating fell to 22 percent. Megan Thee-Brenan, *Poll Finds Disapproval of Bush Unwavering*, N.Y. TIMES, Jan. 17, 2009, at A11.

28. Opp Cotton Mills, Inc., v. Adm'r, 312 U.S. 126, 144 (1941).

29. J.W. Hampton, Jr. & Co., v. United States, 276 U.S. 394, 409 (1928).

30. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

31. *See, e.g.*, Pan. Ref. Co., v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

32. *Pan Ref. Co.*, 293 U.S. 388; *Schechter Poultry Corp.*, 295 U.S. 495.

33. KLINGAMAN, *supra* note 1, at 259–61.

found itself after Black Tuesday. Although the governmental responses to the 1929 depression and the 2008 recession are significantly different, the reasons behind the delegations create an analogy between the two situations that should not be overlooked. Financial crisis prompted Congress to act in both instances, and an examination of the former should give guidance to the categorization of the latter. Examination of the New Deal non-delegation cases lend support to the idea that the current Bailout follows a similar pattern and should also be ruled as an excessive grant of congressional power to the Executive Branch.

II. Over-Delegation and the New Deal

The dire economic situation that arose in 1929 called for the American government to take quick action to curb the economic downward spiral. As hope became fleeting, the American government began to walk down new paths in search of an answer to its economic woes. And the Constitution fostered such exploration of a positive solution. The genius construction of the Constitution allows the American government to change with respect to its own progression into modernity. Thus, the New Deal ultimately ushered in "a new era of constitutional law and constitutional interpretation, in which the Constitution was adapted to facilitate a new realm of American governance."[34] Despite this trend, the urgency of the situation, and the dismal position of the American people, the Constitution proved to have its limits. The United States Supreme Court firmly asserted that sacrificing the cornerstone of American government was not an option no matter the circumstances.[35]

Although President Roosevelt acted in what he believed to be the best interest of the country, the New Deal non-delegation cases established precedents against permitting the unchecked and overbroad delegation of congressional power to the President. In *Panama Refining Co. v. Ryan*, *Schechter Poultry Corp. v. United States*, and *Carter v. Carter Coal Co.*, the United States Supreme Court found that provisions passed pursuant to the 1933 National Industrial Recovery Act ("NIRA") were over-delegations of congressional powers to the Executive Branch.[36] These cases

34. G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 3 (2000).

35. *Schechter Poultry Corp.*, 295 U.S. at 528.

36. *See Pan. Ref. Co.*, 293 U.S. 388; *Schechter Poultry Corp.*, 295 U.S. 495; Carter v. Carter Coal Co., 298 U.S. 238 (1936).

demonstrate that extraordinary obstacles cannot be overcome at the expense of the Constitution. And, more importantly, they provided a cautionary tale to be heeded by future sessions of Congress.

The NIRA was created to establish cooperative prices for particular American industries.[37] Specifically, Section 9(c) of the NIRA permitted the prohibition of interstate or foreign petroleum trade.[38] Accordingly, President Roosevelt issued several executive orders regulating the interstate and foreign petroleum trade.[39] He justified these executive orders by stating the restrictions would "encourage national industrial recovery . . . foster fair competition . . . and to provide for the construction of certain useful public works."[40] These goals, of course, were outlined as part of an overall plan to reverse the effects of the economic collapse originating in 1929.

Despite these good intentions, Article I, Section 8 of the United States Constitution gives Congress, not the President, the exclusive right to regulate interstate and foreign trade.[41] In *Panama Refining* the Supreme Court found that Section 9(c) of the NIRA was an over delegation of congressional powers to the Executive Branch.[42] The Court declared that Section 9(c) of the NIRA gave "to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[43] Interpretation of the decision, however, progresses the idea that "attachment of a few procedural safeguards to congressional delegations might assuage the Court's constitutional concerns."[44]

After *Panama Refining*, the United States Supreme Court again found an over delegation of congressional power in *Schechter Poultry*.[45] The issue in *Schechter Poultry* was Section 3 of the NIRA, which "authorizes the President to approve 'codes of fair competition.'"[46] The purpose of the codes was to protect consumers, competition, and employees.[47] The legislation itself prevented the

37. WHITE, *supra* note 34, at 110.
38. *Pan. Ref. Co.*, 293 U.S. at 406.
39. *Id.* at 405.
40. *Id.* at 405 n.1.
41. U.S. CONST., art. I, § 8.
42. WHITE, *supra* note 34, at 110.
43. *Pan. Ref. Co.*, 293 U.S. at 415.
44. WHITE, *supra* note 34, at 110.
45. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 495 (1935).
46. *Id.* at 521–22.
47. *Id.* at 522.

forced sale of sick poultry along with healthy ones.[48] Despite the unequivocal worthiness of upholding poultry standards, Congress lost its game of chicken with the Judiciary when the Court found the provision to be an over delegation of power.[49]

Representatives of a given industry, not elected officials, were charged to draft the codes themselves.[50] Afterwards, the proposed drafts were to be sent to the president for approval.[51] This delegation circumvented the accountability principles imagined by the Constitution because unelected agents would be the architects behind the codes.[52] By having unelected persons write the codes, the government stripped the public of its only recourse, which is to hold elected officials accountable.[53] Moreover, Congress failed to provide any guidance for the Executive Branch to follow in terms of the meaning of "fair competition."[54] Based on the construction of Section 3 of the NIRA, "'fair competition' meant, in effect, whatever a group of unelected, industry representatives and the President said it meant."[55]

In defense of the codes, the government asked the Court to view them "in the light of the grave national crisis with which Congress was confronted."[56] Despite the gravity of the economic situation, the "necessity and validity of such provisions . . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[57] Therefore, although the government had good intentions to resolve the dire economic problem, Congress's "delegation running riot" could not be condoned.[58]

Carter Coal further solidified the non-delegation doctrine through the Supreme Court's invalidation of the Bituminous Coal Conservation Act of 1935 ("BCCA").[59] The BCCA, like the NIRA,

48. *Id.*
49. *Id.* at 551.
50. *Id.* at 521–22.
51. *Id.*
52. WHITE, *supra* note 34, at 111.
53. *Id.*
54. *Schechter Poultry Corp.*, 295 U.S. at 531.
55. WHITE, *supra* note 34, at 111.
56. *Schechter Poultry Corp.*, 295 U.S. at 528.
57. *Id.* at 530.
58. *Id.* at 553 (Cardozo, J., concurring).
59. WHITE, *supra* note 34, at 112.

sought to alleviate the pressure the Great Depression put on the American people. The act attempted to stabilize "the [coal] industry though the regulation of labor and the regulation of prices."[60] Despite the good intent of the Act to help establish maximum hours, minimum wages, and fair competition within the industry, Congress once again delegated too much of its powers.[61]

In *Carter Coal*, the Court held that a delegation of congressional legislative power to private persons was grossly impermissible.[62] Justice Sutherland found this particular delegation particularly egregious because it was "not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[63] *Carter Coal* further demonstrated that the Court was unwilling to bend the Constitution to a breaking point despite the gravity of the financial situation.[64]

Although the delegations in *Panama Refining, Schechter Poultry*, and *Carter Coal,* have different components and features than the Bailout, the reasons behind the delegations make the situations analogous. America's desire to strive past its fiscal hardships pushed it to bend the Constitution as much as possible to alleviate the economic pressures bearing down on it. The Court, however, has firmly held that Congress cannot bend the Constitution to a breaking point, no matter how worthy the cause.[65] Presently, Congress has more latitude to establish when it is necessary and proper to delegate its powers to another branch of the government. Since the New Deal era, the Court has affirmed this deference through a series of cases that have permitted delegations of congressional powers.[66]

III. Delegations After the Depression

Panama Refining, Schechter Poultry, and *Carter Coal,* revealed that congressional grants of power to the Executive Branch could potentially be impermissible delegations of power. But since these decisions, no other federal laws have been categorized as

60. Carter v. Carter Coal Co., 298 U.S. 238, 278 (1936).

61. *Id.* at 314–15.

62. *Id.* at 311.

63. *Id.*

64. *See generally Carter Coal Co.*, 298 U.S. 238.

65. *See id.*; Pan. Ref. Co., v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp., v. United States, 295 U.S. 495 (1935).

66. Loving v. United States, 517 U.S. 748, 771 (1996).

impermissible delegations.[67] No matter how broad or substantial any delegation has been, no majority within the Supreme Court has analogized these instances with the New Deal non-delegation cases because it "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[68] Despite this relaxation in policing congressional delegations of power, the Bailout has the most potential to revive the non-delegation doctrine. The sheer magnitude of the power granted to the Secretary of the Treasury may be a sufficient catalyst to resuscitate the presumably dead doctrine.

If Congressional delegations are accompanied by "an intelligible principle," they will not be considered an over-delegation of legislative powers.[69] The inclusion of an "intelligible principle" in the delegation establishes a standard "to which the person or body authorized to [take action] is directed to conform. . . ."[70] This ensures that Congress include "standards to guide" the entity entrusted to wield the congressional power in the manner that Congress intended.[71] Despite the enumeration of this principle, the United States Supreme Court has relaxed the standard, permitting congressional delegations that loosely interpret the meaning of "intelligible principle."[72]

Despite the creation of these standards to evaluate delegations, the last time the Supreme Court declared a delegation impermissible was "over a half century ago."[73] Moreover, the Supreme Court does not always strictly enforce the "intelligible principle" standard, often affirming that delegations made in the "public interest" satisfy the "intelligible principle" benchmark.[74] However, the degree of the delegation should still be weighed to determine whether an over delegation occurred.[75] Accordingly, the limitations of this delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[76] Measuring "the

67. *Loving*, 517 U.S. at 771.
68. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).
69. J.W. Hampton, Jr., & Co., v. United States, 276 U.S. 394. 409 (1928).
70. *Id.*
71. *See* Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).
72. *See* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980).
73. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).
74. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).
75. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).
76. J.W. Hampton, Jr., & Co., v. United States, 276 U.S. 394, 406 (1928).

degree of generality contained in the authorization for exercise of executive or judicial powers in a particular field" further indicates if the delegation "is so unacceptably high as to amount to a delegation of legislative powers."[77] A measurement of the amount of the delegation, particularly in regards to the Bailout, provides a stark indicator of its permissibility.

Although both America and its government have changed tremendously since the United States Supreme Court last used the non-delegation doctrine to declare an act of Congress unconstitutional, the Bailout is unlike anything previously examined. The amount of money involved in this delegation, combined with the lack of sufficient oversight make the Bailout different enough from previous delegations to potentially revive the non-delegation doctrine. In the past, the Court has justified delegations solely because they were based in the "public interest," but the substantial monies involved in the Bailout and the hesitancy of the American people to squander finite financial resources likens the situation more to the New Deal non-delegation cases rather than to the interim period cases. Although the Court has used the non-delegation doctrine sparingly, the degree of authority Congress has delegated to the Executive Branch may be sufficient to resuscitate the doctrine's application. Therefore, the Supreme Court's hesitance to second-guess Congress's decisions regarding delegation and hesitance to make a finding that the Bailout delegation is impermissible can be reconciled through an examination of the degree of power surrendered.

IV. The Great Recession

The present chaos originated through the sub-prime mortgage frenzy, ultimately leading to the tailspin of some of America's most successful financial institutions and the implosion of the American Stock Market.[78] Prominent financial powerhouses could no longer hide behind their names and reputations, and were forced to disclose the grim truth about their financial situations. Bear Sterns, Fannie Mae, Freddie Mac, Lehman Brothers, AIG, Merrill Lynch,

77. *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting).

78. Vikas Bajaj & Louise Story, *Mortgage Crisis Spreads Beyond Subprime Loans*, N.Y. TIMES, Feb. 12, 2008, at A1.

Washington Mutual, Morgan Stanley, and Goldman Sachs either ceased to exist or were on the brink of disintegration.[79]

To prevent a complete collapse of all of these financial institutions and avoid a total breakdown of the American economy, the Executive Branch took quick and decisive action to bail these companies out of their self-inflicted financial crisis.[80] The companies irresponsibly handled their funds, and the American people suffered as a result. Accordingly, President George W. Bush and the Secretary of the Treasury, Henry Paulson, engineered a sweeping proposal that called for the release of $700 billion to the Secretary to buy the troubled assets that burdened these companies.[81] The initial proposal sought to make the Secretary's decisions "non-reviewable and committed to agency discretion" and further stipulated that the decision could "not be reviewed by any court of law or any administrative agency."[82] The inclusion of such an explicit congressional delegation of unchecked power to the Executive Branch ultimately led to the demise of this particular proposal, but a revised version would soon take its place.[83]

Congressional members on both sides of the aisle were not ready to accept the complete absence of oversight that the Executive Branch sought through the bill's original form. The Speaker of the House, Nancy Pelosi, demanded "strong oversight mechanisms," while California Senator Diane Feinstein similarly rejected the lack of legislative and judicial review placed on the Secretary of the Treasury and the unilateral capabilities the Executive Branch would have at its disposal.[84] These sentiments represent the implicit belief that entrusting the Executive Branch with unchecked spending power would be an over delegation of congressional spending power.

Despite these inclinations toward over delegation, on October 3, 2008, a revised version of the Economic Emergency Stabilization Bill

79. THE ECONOMIST, *supra* note 4.

80. Gosselin & Reynolds, *supra* note 7.

81. Heroes Earning Assistance and Relief Tax Act of 2007, H.R. 3997, 110th Cong. (2008).

82. *Id.*

83. Hulse & Herszenhorn, *supra* note 9.

84. Gosselin & Reynolds, *supra* note 7, at A24. Speaker of the House Nancy Pelosi rejected the original plan saying that "[Congress] will strengthen the proposal by ensuring that the government is accountable to the taxpayers . . . implementing strong oversight mechanisms and establishing fast-track authority for the Congress to act on responsible regulatory reform. . . ." California Senator Diane Feinstein flatly rejected the proposal saying "[i]t essentially creates an economic czar with no administrative oversight, no legal review, no legislative review." *Id.*

("EESB") came before Congress.[85] Congress and the President both approved the newly formed Troubled Asset Relief Program ("TARP").[86] Despite the clamor for strict oversight by members of Congress, the mere inclusion of oversight provisions does not necessarily establish that oversight was installed in the new proposal. Oversight protections were included in § 5226 and § 5229 in the form of legislative inspection and judicial review; the Secretary of the Treasury, however, virtually retained unilateral control over $350 billion.[87] Therefore, the delegation of spending power given to the Executive Branch through the Secretary of the Treasury appears to be an overextension of congressional authority based on the degree of power extended.

V. Why Congress Wrote the Check

Article I, Section 8 of the United States Constitution gives Congress the authority "to pay the Debts and provide for the common Defense and general Welfare of the United States. . . ."[88] This constitutional provision specifically gives spending power to Congress. And, the United States Supreme Court held that when "considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."[89] Based on the language used in the Constitution and the deferential position taken by the United States Supreme Court, Congress has wide latitude in determining whether a purpose is for the general welfare when exercising its spending power.

The TARP provides a laundry list of justifications for its implementation.[90] These justifications include protecting "home values, college funds, retirement accounts, and life savings" among other superficial benefits that sufficiently categorize the TARP as being for the "general welfare."[91] Thus, the inclusion of these justifications gives Congress solid ground on which to validate the spending; but, the purposes seem insufficient to justify such a momentous congressional delegation to the Secretary of the

85. Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. (2008).

86. 12 U.S.C. § 5211 et seq. (2006).

87. 12 U.S.C. §§ 5226, 5229 (2006).

88. U.S. CONST. art. I, § 8.

89. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Helvering v. Davis, 301 U.S. 619 (1937)).

90. 12 U.S.C. § 5201 (2008).

91. *Id.*

Treasury. Because the requisite general welfare purpose has been satisfied through the TARP's "purposes" section, Congress can legitimately authorize the spending necessary to accommodate the economic climate.[92] Instead of implementing the spending plan through its own devices, however, Congress chose to delegate the responsibility to the Executive Branch.

By charging the Executive Branch with the responsibility of spending the $700 billion, Congress created a more harrowing dilemma even though the appropriation and spending of the funds is completely justified by the situation. And, although the Bailout pertains to spending rather than the exercise of legislative power in the traditional sense, spending can still be appropriately categorized under the more conventional meaning of legislative powers.[93] Conventionally, legislative powers consist of all powers outlined in Article I, Section 8 of the Constitution.[94] Spending is included in these enumerated powers, and its transfer to a different institution is properly categorized as a delegation of legislative power.[95] Therefore, although the requisite "general welfare" purpose to exercise the spending power has been satisfied, the transfer of the spending power to the Executive Branch remains ambiguous in terms of permissibility. An evaluation of the oversight provision built into the Bailout and the supplemental oversight provided by the TARP Reform and Accountability Act of 2009 demonstrates that the degree of power given to the Secretary of the Treasury still exceeds what should be categorized as permissible.

VI. Oversight?

An examination of the oversight provisions included in the Bailout legislation greatly weighs into the determination of whether the delegation is permissible. Although the Bailout needed to be implemented hastily to avoid further economic backlash, and will hopefully have positive benefits, the finalized law provided scant oversight in relation to the large sums of money allocated. Oversight for the delegation is necessary to continue the system of checks and balances and to assure that the Secretary of the Treasury does not

92. *Id.*

93. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1308 (2003).

94. *Id.*

95. *Id.* at 1310.

abuse or misallocate the funds entrusted to him. And, despite the inclusion of oversight provisions within the Bailout, it insufficiently policed the activities of both the Secretary of the Treasury and the companies that received monies.[96]

As opposed to the original bill's release of the entire $700 billion to the Secretary of the Treasury, the TARP created a staged release of funds. As Section 5225 provides, upon the enactment of the TARP, $250 billion would be released to the discretion of the Secretary of the Treasury.[97] Another $100 billion will be released when the President provides Congress with a written certification that the Treasury Secretary needs the extra funds.[98] Therefore, $350 billion was at the immediate disposal of the Secretary of the Treasury, and was spent before any real oversight was installed.[99] Although not as great a sum as $700 billion, the immediate release of $350 billion provided the Secretary of the Treasury with a virtual blank check to use at his discretion.

Moreover, under Section 5526, the Comptroller General of the United States shall "commence ongoing oversight of the activities and performances of the TARP . . . including vehicles established by the Secretary under this Act."[100] The Comptroller would thus have full access to the records associated with TARP activities and would have to report to the requisite congressional committees and the Special Inspector General of TARP every sixty days.[101] The Comptroller General shall also provide the requisite congressional committees with a financial audit.[102] Furthermore, TARP must also "establish and maintain an effective system of internal control, consistent with the standards prescribed under Section 3512(c) of title 31, United States Code."[103]

96. Matt Apuzzo, *Where'd the bailout money go? Banks aren't saying*, USA TODAY, Dec. 26, 2008, *available at* http://www.usatoday.com/money/industries/banking/2008-12-22-bailout-money-where_N.htm (last visited Oct. 19, 2008).

97. 12 U.S.C. § 5225 (2008).

98. *Id.*

99. Amit R. Paley, *Bailout Lacks Oversight Despite Billions Pledged: Watchdog Panel Is Empty; Report Is Unfinished*, WASH. POST, Nov. 13, 2008, at A1.

100. 12 U.S.C. § 5226 (2008).

101. *Id.*

102. *Id.*

103. *Id.*

Section 5229 further provides for judicial review of the actions carried out by the secretary.[104] Injunctions may be issued to prevent the Secretary of the Treasury from acting in a particular course of action or arrest an action already implemented.[105] Although judicial review exists, its implementation also remains ambiguous. A separate standing issue arises as a byproduct of the judicial review section. Who, if anyone, would have standing to bring an action against the Secretary to forestall his actions? The individual American taxpayer's interest is "shared with millions of others; is comparatively minute and indeterminable" from other taxpayers.[106] Thus, an individual taxpayer would certainly fail to gain standing based solely on the claim of misapplication of his or her individual tax dollars.[107] And, while the institutions that receive the money would be an ideal candidate to test the standing waters, would any of them stop the flow of money to their own companies? The Supreme Court has warned that when "the scope of the delegation is largely uncontrollable by the courts, [it] must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegations."[108] This further demonstrates a lack of adequate oversight safeguards to assure that American tax dollars are spent for the benefit of the American people rather than the benefit of fiscally irresponsible companies. The consequences of the lack of oversight weigh heavily upon both the American people and the continuation of its chosen type of government.

VII. TARP Reform and Accountability Act of 2009

The oversight applied to the original TARP suggests oversight without any teeth. The initial release of funds and the Secretary of the Treasury's use of those funds could be received and spent long before the first required sixty day report would be made to Congress.[109] As it happens $290 billion of the initial $350 billion was pledged to companies seeking relief before the TARP oversight board filled its positions.[110] Senator Judd Gregg of New Hampshire

104. 12 U.S.C. § 5229 (2008).

105. *Id.*

106. Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

107. *Id.*

108. Mistretta v. United States, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting).

109. Paley, *supra* note 99.

110. *Id.*

said "[w]e put in place tremendous regulatory oversight so that there will be absolute transparency."[111] The oversight installed in the original plan, however, has proven more opaque than transparent.

Although the allocation of money from the government to the recipients of TARP funds had been tracked, the public had no way of seeing how these companies spend the money after it is received.[112] JPMorgan Chase received $25 billion though TARP, but the company declined to publicly disclose how the money was spent.[113] Other companies have followed suit and refused to disclose how they used the Bailout money.[114] Despite pleas against hoarding the money or using it for "bonuses, junkets, or to buy other banks.... no process [existed] to make sure that's happening and no consequences for banks that don't comply."[115]

Moreover, the Treasury Department agreed to post every transaction, but only a listing of recipients and the amounts given have been made public.[116] Since companies did not have to disclose how they spend their allocated Bailout funds, accountability vanished. No real evidence existed to demonstrate that the companies used the funds appropriately. Although some companies were censured for misusing funds, no punishment was really accorded.[117] To remedy the situation, House Financial Services Committee Chairman Barney Frank pushed for the addition of more oversight to TARP through an amendment.[118] The TARP Reform and Accountability Act of 2009's ("RAA") purpose was to "strengthen accountability, close loopholes, increase transparency."[119] The RAA provided a more comprehensive and detailed oversight system than TARP originally implemented. Despite the changes, however, the issue of actual political accountability is still left unanswered.

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111. *Id.*

112. Sharyl Attkisson, *Where Is the Bailout Money Really Going?*, CBS, Nov. 12, 2008, *available at* http://www.cbsnews.com/stories/2008/11/12/eveningnews/main4597233.shtml?source=RSSattr=HOME_4597233 (last visited Oct. 19, 2009).

113. Apuzzo, *supra* note 96.

114. *Id.*

115. *Id.*

116. *Id.*

117. David R. Sands, *Bankers deny misusing TARP money: Donors gave House panel $1.8 million*, WASH. TIMES, Feb. 12, 2009, *available at* http://www.washingtontimes.com/news/2009/feb/12/bankers-defend-record-use-bailout-funds/.

118. TARP Reform and Accountability Act of 2009, H.R. 384, 111th Cong. (2009).

119. *Id.*

The RAA made the entire process initiated by TARP more transparent in terms of policing the companies that receive TARP funds, specifically by requiring all companies that receive or will receive funds to provide public accountings of the use of the relief monies.[120] The Secretary of the Treasury and new recipients of TARP funds are also to establish an agreement on how the funds are to be used and meet specified benchmarks to further the goals of TARP.[121] The amendment further restricted the excessive compensation of company executives.[122] Most strikingly, the amendment subtracted from the Secretary of the Treasury unilateral power, allowing for the Financial Stability Oversight Board the power to overturn acts of the Treasury Secretary by a two-thirds vote.[123] The inclusion of more oversight makes the acceptance of the Bailout a more comfortable situation for both the Judiciary to potential affirm the Bailout and for the American public.

Despite the inclusion of more rigorous policing provisions, the degree of delegation remains relatively high in comparison to the provisions previously held as permissible by the Supreme Court. Scrutinizing the companies that receive TARP funds gives more assurances that the allocations are not spent on extravagances, but this scrutiny does not guarantee that the money is being spent correctly. This amendment, however, somewhat misleads the American public by giving the impression that if the funds are not being spent on lavish amenities then they are being spent correctly. Therefore, although congressional delegations are permitted, "it is the hard choices . . . which must be made by the elected representatives of the people."[124] The Treasury Secretary, although policed by the oversight committee and susceptible to judicial review, retains wide latitude in allocating the funds. Decisions pertaining to $700 billion during a period of economic deterioration should be the responsibility of Congress rather than an unelected official.

Blame can always be assessed, but true accountability remains absent from the Bailout even with the amendment in place. Congress transferred a large responsibility to the Executive Branch, and because this transfer occurred during an election year, Congress's

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

motives appear more suspect. Although the Bush Administration encouraged the passage of the Bailout, a two-term president in the waning months of his presidency had little to lose from public disapproval.[125] Furthermore, because the first $350 billion was spent prior to President Obama's taking office, his administration avoids any blame for any inappropriate spending.[126] Thus, the American public has no real recourse against the Executive Branch for the abuse of tax dollars.

VIII. The Common Thread

Similar to the New Deal cases that were found to be over-delegations the Bailout attempted to resolve a catastrophic economic crisis by giving the Executive Branch a free hand to deal with the situation as it saw fit.[127] Although much time has passed since the Supreme Court last found any congressional provision an over-delegation, the degree of the Bailout delegation is more in line with the over-delegations than with those permitted. The lack of political accountability amounts to an obstacle too great to overcome based on the magnitude of the delegation.

The New Deal over-delegations and the Bailout find commonalities not only in the context of the situations that created them, but in the degree of power surrendered by Congress and the Executive Branch's assumption of that power. Like the New Deal provisions found to be over-delegations, the Bailout is a brand of legislation that arose from the necessity of a situation rather than from deliberation and planning. The situational origins make both the New Deal over-delegations and the Bailout more analogous to one another than the cases that occurred in the interim period. These over-delegations represent legislation that responded to problems that required fast action. And, hasty implementation of this type of legislation ultimately overlooked the consequences that simultaneously emerged.

Moreover, the gravity of the situations during both the Great Depression of 1929 and the "Great Recession" of 2008 further illustrate a similar intent. The purpose of the Bailout was to "immediately provide authority and facilities that the Secretary of the

125. Thee-Brenan, *supra* note 27.

126. Paley, *supra* note 99.

127. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Treasury can use to restore liquidity and stability to the financial system of the United States."[128] Similarly, Congress intended the New Deal enactments to curtail the financial hardships that threatened to break the American economy. The good intentions of stopping economic turmoil in either period fail to justify a deviation from the intent of the constitutional Framers. Thus, just as a good intent was insufficient when the Supreme Court heard the New Deal over-delegation cases, it should remain the same today.

More strikingly, however, is the similarity between the degrees of power surrendered by Congress. The New Deal over-delegation cases dealt with very different grants of legislative power from the Bailout, but the amount of congressional power remains within the same arena. Each instance represents an unprecedented cession of power. In both situations, unelected officials wielded tremendous powers better reserved for an elected Congress. The New Deal Court found this transfer of power to unelected officials egregious.[129] Although the Secretary of the Treasury is more qualified and less biased than private groups, he remains immune from the consequences of accountability. Therefore, the amount of power ceded by Congress in the New Deal over-delegation cases is appropriately analogized to the amount of power Congress granted to the Secretary of the Treasury through the Bailout delegation.

The similarities between the two eras of delegation are present, and should not be overlooked because of the time disparity that exists between them. Although over-delegation has not been invoked since the New Deal over-delegation cases, the striking resemblance between 1929 and the present make the situation ideal for a resurgence of the non-delegation doctrine.

Conclusion

The hallowed pages of the Constitution have led the United States through times of war and depression and peace and prosperity. During America's darkest hours it has guided the people back to a bright tomorrow. Despite the drastic changes that have occurred since its creation, the architects behind the Constitution inserted the flexibility necessary for it to progress with the world. To abuse this flexibility for whatever reason threatens to undermine the American way of life. No matter the circumstances, the United States cannot

128. 12 U.S.C. § 5201 (2008).

129. *Id.*

afford to sacrifice the Constitution in any form because to do so would betray the very way of life sought to be protected.

Although the current economic situation has not reached the heights of the Great Depression, Congress felt it necessary to run down the same paths that the Supreme Court previously forbade. The New Deal legislation that the Supreme Court found unconstitutional featured comparable qualities to the "Bailout." Given the similarities between the economic situations of both time periods, analogizing the legislation, despite the passage of time and changes in government, seems appropriate. In an attempt to quell economic unrest, Presidents Roosevelt, Bush, and Obama, and Congress did what they thought was in the best interest of the country. Decisions made in haste, however, fail to contemplate all of the inevitable ramifications. With any congressional act, "Congress can proceed only from legitimate authority, not from good intentions alone."[130]

Despite the changes to the American government and the great deference given to Congress when it chooses to delegate its powers, giving the Executive Branch $700 billion to spend with only the initial façade of oversight in place appropriately prompts questioning. Although the TARP Reform and Accountability Act increased oversight over the monies, only time can determine whether strict enforcement will occur. The American people, although demanding quick action, should not be stripped of their rights concerning accountability, nor should the tradition of separation of powers be so easily cast aside in favor of quick solution that may or may not work.

The nature of the economic situation and the outcry for quick action will probably result in the upholding of the Bailout legislation. The design of the proposal was to quickly allocate the money to curb the downward spiral, and it has in large part been spent. Finding the Bailout unconstitutional is probably moot in terms of reacquiring the funds in the short term. But, finding the act itself unconstitutional would redraw the line between congressionally permissible delegations and over-delegations.

A future finding that the Bailout is unconstitutional will likely not change anything today. This generation failed to heed the warning of the Great Depression. But a future finding of the Bailout as unconstitutional may provide future generations with a more stark

130. Robert A. Levy, *Is the Bailout Constitutional?*, LEGAL TIMES, Oct. 20, 2008, *available at* http://www.cato.org/pub_display.php?pub_id=9729.

warning about the limits of the Constitution. Only time will tell if the Bailout will be a success and help bring America out of the drudgery of economic instability. But, even if it does prove to be successful, saving the American economy may have cost more than any American was willing to pay.