

Constitutional Infirmities of the Emergency Economic Stabilization Act of 2008 (“EESA”)

A Legal Analysis from FreedomWorks Foundation

Executive Summary

On October 3, 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 (“EESA”), giving the U.S. Treasury Secretary a blank check for \$700 billion—and staggering and unprecedented power to intervene directly in our nation’s economy. Congress has never delegated so much power to an executive agency with so little to constrain the agency’s discretion; indeed, the Constitution prohibits Congress from abdicating its lawmaking responsibilities by delegating legislative power to the executive branch. We believe the

EESA statute violates this bedrock constitutional principle. Rather than making the policy choices necessary to guide the Secretary’s discretion, Congress has given the Secretary far-reaching power to intervene in the nation’s economy and effectively to nationalize American businesses—upon the thinnest reed of statutory constraints. And in doing so, Congress has effectively chosen not to make law, but rather to make the Treasury Secretary the lawmaker. That is a classic violation of the nondelegation principle.



Introduction & Summary

On October 3, 2008, Congress wrote the Treasury Secretary a blank check—for \$700 billion. Awash with fear of an impending financial crisis, Congress enacted the Emergency Economic Stabilization Act of 2008 (“EESA”), which gave the Secretary staggering and unprecedented power to intervene directly in our nation’s economy. Not since the National Industrial Recovery Act of 1933 struck down in *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935), has Congress, to our knowledge, purported to give the Executive Branch such broad powers.

When Congress debated this “bailout” bill and explained it to the American people, most expected the Secretary would use his newly acquired authority to purchase “troubled” mortgage-related assets from major banks who were, in the catchword of the moment, “too big to fail.” But with blank check in hand, the Secretary almost immediately began to spend it differently. In the ensuing weeks, the Secretary has funneled (or made plans to funnel) money to small banks as well as large banks, and to other institutions such as insurers and consumer lenders. Even more dramatically, the Secretary has shifted the bailout’s entire approach from purchasing assets to purchasing equity ownership stakes in troubled institutions.¹ And in the most dramatic shift yet, the White House has announced its intention to use over \$17 billion of the funds to prop up failed automakers. Hence, the federal government, which was expected to own troubled assets, will now soon own company equity instead, and the bailout money, which was expected to flow to banking institutions, will now soon support auto companies as well. And talk of more bailouts, in more industries, continues apace.

Putting aside the merits of these various actions, the *process* by which they have taken place should raise alarm. The Secretary was enabled to stray from the originally envisioned approach because EESA granted him enormous power with very few limits on his discretion. Indeed, even though Congress refused to bail out the automakers, the Secretary persisted in doing precisely what Congress had decided not to permit when faced with that particular question. And the Secretary did so with the broad power Congress had already granted him. As the Secretary readily admitted, “While the purpose of [EESA] is to stabilize our financial sector, the authority allows us to take this action [of bailing out the automakers].”² But if so, such a large and unconstrained transfer of power from the legislative branch to the executive branch raises a serious constitutional issue. In our view, EESA violates the core principle, rooted in the Constitution’s separation of powers, that Congress may not delegate its lawmaking authority to the executive branch.

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This memorandum explains the importance of the “nondelegation” principle to our constitutional system and concludes that EESA unconstitutionally violates that principle by delegating such a broad lawmaking power to the Secretary. Part I recounts the original understanding of the nondelegation principle, explaining its roots in the Constitution’s history, text, and structure. Part II explains how the Supreme Court has interpreted and applied the nondelegation principle. Part III applies the principle to EESA, explaining why we believe EESA entails an unconstitutional delegation.

¹ See Remarks by Secretary Henry M. Paulson, Jr. on Financial Rescue Package and Economic Update, Nov. 12, 2008, available at <http://www.treasury.gov/press/releases/hp1265.htm>.

² Secretary Paulson Statement on Stabilizing the Automotive Industry, Dec. 19, 2008, available at <http://www.treas.gov/press/releases/hp1332.htm>.

I. The Constitution's Prohibition on the Delegation of Legislative Power

Though some have questioned whether the nondelegation principle has a basis in the Constitution,³ a review of the Constitution's history, text, and structure confirms that the prohibition is well-rooted in the original understanding of the Framers.

A. History and Origins

The nondelegation principle predates the Constitution itself. It first appeared most prominently in the thought of John Locke and Baron de Montesquieu—the chief intellectual fathers of the separation of powers. The Framers, borrowing heavily from Locke and Montesquieu, would later make both principles—separation of powers and nondelegation—bedrock elements of the Constitution they drafted.

Explaining the separation of powers in his *Second Treatise of Government*, Locke warned that “it may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them.” John Locke, *The Second Treatise of Government* § 143 (1689). Hence, Locke instructed that the “Legislative Power [be] put into the hands of divers Persons who duly Assembled, have . . . a Power to make Laws” and that a different entity “should see to the Execution of the Laws that are made.” *Id.* §§ 143, 144. “And thus the Legislative and Executive Power come often to be separated.” *Id.* § 144.

In explaining the imperative of separating the legislative and executive powers, Locke sought also to delimit them. And here he set forth what has come to be known as the nondelegation doctrine:

The power of the legislative, being derived from the People by a positive

voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.

Id. § 141. In Locke's view, the power to “make laws” did not confer the power to *delegate* the making of laws to a third party—that is, to “make legislators.”⁴ Locke recognized that to permit otherwise, that is, to allow such delegations to other public or private actors, would subvert the particular manner (or “form”) in which the people had authorized the legislative power to be exercised.⁵

More dangerous still was the act of delegating legislative power to a particular third

⁴ Two prominent scholars have attempted a novel reinterpretation of Locke's maxim, reading his reference to “making legislators” and the “legislative” power as not the power to make laws, but simply the power to vote in the legislature. Under this theory, legislators could delegate all discretion and all lawmaking decisions so long as they retained only their right to vote. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002). The theory, however, adopts an absurd understanding of legislative power, and one the evidence suggests was held neither by Locke nor the Framers. For a thorough debunking of the novel theory and a defense of the conventional reading, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003); Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235 (2005).

⁵ “The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, ‘We will submit to rules, and be governed by laws made by such men, and in such forms,’ no body else can say other men shall make laws for them” Locke, § 141. A similar notion also appeared in the writings of William Blackstone, who claimed that members of the House of Lords could delegate to other Lords their rights to vote, but that members of the House of Commons could not delegate their votes because they represented the people rather than themselves. See William Blackstone, 1 *Commentaries on the Laws of England* *162 (1765-1769).

³ See, e.g., *Whitman v. Amer. Trucking Ass'ns. Inc.*, 531 U.S. 457, 488-90 (2001) (Stevens, J. concurring).

party, the Executive. Not only would such delegation subvert the proper exercise of legislative power, but it would also subvert the separation of that power from the executive power. It would thereby concentrate too much power in one person's hands. This was the point of Montesquieu's famous warning that when the executive and legislative powers are "united in the same person, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *The Spirit of the Laws* XI:6 (1748) (Thomas Nugent, trans.) Montesquieu also recognized a tendency for the executive power, if allowed too much discretion in execution, to shade dangerously into the exercise of legislative power. He warned, "Were the executive power to *determine* the raising of public money otherwise than by giving its consent, liberty would be at an end, because it would *become legislative* in the most important point of legislation." *Id.* (emphasis added).

Drawing upon Locke and Montesquieu, the Framers enshrined these principles in the Constitution. The Articles of Confederation had contained an express clause permitting Congress under certain limited circumstances to delegate "the powers of Congress" to the executive-like Committee of the States.⁶ But the new Constitution gave no such permission to Congress. Indeed, in granting powers to the federal government greater than those allowed by the Articles of Confederation, the Constitution took much greater care to separate them. As James Madison explained, citing the "oracle" Montesquieu, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very

definition of tyranny." Federalist 47 (Madison), in Clinton Rossiter, ed, *The Federalist* 269 (Penguin Putnam 1999). And thus, "The magistrate in whom the whole executive power resides cannot of himself make a law." *Id.* at 271.

Nor, thought the Framers, should the legislature be permitted to *lend* to the Executive that power to "make a law." The Framers were no doubt familiar with the common-law maxim "*delegata potestas non potest delegari*"—a delegate cannot appoint another.⁷ And so Congress, exercising the enumerated powers granted by the Constitution, could not delegate those legislative powers to the Executive.

B. Text and Structure

These fundamental first principles found expression in the Constitution's text and structure. Although the Constitution lacks an explicit "nondelegation clause," the Vesting Clause of Article I provides, "All legislative Powers herein granted shall be vested in a Congress of the United States." Article I thus presupposes that legislative powers "*shall*" not be vested elsewhere, for "*all*" such powers reside with Congress. The executive power, in contrast, remains separate and distinct from the legislative power. Under the Vesting Clause of Article II, "The executive Power shall be vested in a President of the United States of America."

It is a clear and necessary consequence of this basic division of responsibilities that Congress alone has the power to make law, and that the President has only the power to execute the law made by Congress (subject, of course, to the

⁶ Articles of Confederation, art. X ("The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.").

⁷ See Joseph Story, Commentaries on the Law of Agency § 13 (1839) ("[O]ne, who has a bare power or authority from another to do an act; must execute it himself, and cannot delegate his authority to another . . ."); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928) ("The well-known maxim 'Delegata potestas non potest delegari,' applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our federal and state Constitutions than it has in private law.").

President's veto). The President has no enumerated power to make law himself. Rather, in the words of Article II, Section 3, he "shall take Care that the Laws be faithfully executed"—a very different power.

There is also nothing in the Constitution empowering Congress to delegate its legislative power to another branch. Because the Constitution creates a government of limited and enumerated powers and because it ties particular grants of power to particular branches, Congress may not make a delegation if it lacks an enumerated power to do so.

Other provisions of the Constitution further emphasize the impropriety of such delegation. Sections 2 and 3 of Article I establish a detailed process for selecting members of Congress, and Section 7 of Article I establishes a detailed process of bicameralism and presentment for lawmaking. Those carefully drawn processes would be rendered superfluous if Congress could so easily transfer its job of making law to the executive branch—a branch unencumbered by the careful limits the Constitution places upon the exercise of legislative power.

Finally, the danger of delegating so much power to an executive branch that both makes and executes the law is underscored by Section 6 of Article I, which bars members of Congress from simultaneously holding positions in the executive branch, and which prevents executive branch officials from getting the benefit of pay increases they may have voted upon while serving in Congress.

For all these reasons, delegation of legislative power to the executive branch does in substance what Section 6 of Article I prohibits in form and by necessary implication: It empowers the

President to act simultaneously as legislator and executive.

Some scholars have nevertheless sought to locate a power to delegate in the Sweeping Clause of Article I, which grants Congress power to "make all Laws which shall be necessary and proper for carrying into Execution" the other enumerated powers. But that is incorrect: It would be decidedly not "proper," in light of the Constitution's overall structure, for Congress to make a law delegating to another branch its power to make laws. The term "proper" was commonly used in eighteenth-century legal discourse to describe a power that is "within the peculiar jurisdiction or responsibility of the relevant government actor." See Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 347 (2002) (observing that). The Sweeping Clause therefore cannot provide a power that the Constitution's text and structure, by necessary implication, deny.

“The Constitution establishes legislative power and executive power as categorically different things, and it labors to place those powers in different branches.”

A survey of the Constitution's text and structure thus illuminates a simple principle: Congress may not shirk its lawmaking responsibilities by delegating them to the Executive. To be sure, the distinction between legislative and executive power can at times be slippery in practice, but that difficulty in practice cannot diminish the Constitution's emphatic aim in principle. The Constitution establishes legislative power and executive power as categorically different things, and it labors to place those powers in different branches.

Accordingly, when Congress delegates so much authority to the executive branch with so few rules to guide its discretion, Congress unconstitutionally transfers its lawmaking power to the Executive.

The Constitution's prohibition on delegation exists for good reason. It protects important

constitutional values of limited government and democratic accountability. By contrast, permitting delegation of legislative power encourages the most representative (and most accountable) branch to outsource the hard choices of lawmaking to a less representative branch. Congress may thus promise everything to everyone, shift blame for failures, and leave the crucial decisions to be worked out by unelected agency officials, with the help of lobbyists. As one scholar has observed after reviewing various case studies, delegation “allow[s] legislators and the president to shift to the agency blame for the costs of complying with the laws, blame for the failure to deliver promised regulatory benefits, and blame for the delay, complexity, and confusion that the process causes.”⁸

That was not the vision of the Framers, who worried about the threat posed by too much power in the executive branch. The Framers made the exercise of power difficult by design—to protect liberty, to force deliberation, and to ensure accountability. The nondelegation principle remains essential to all of those purposes, and to the Constitution’s entire design.

II. The Supreme Court’s Nondelegation Doctrine

In light of the Constitution’s history, text, and structure, courts have long acknowledged the nondelegation principle as a fundamental constitutional imperative. Though modern case law might often be thought to honor that principle in the breach—invalidating few laws on nondelegation grounds—the principle remains, in the words of one scholar, “the Energizer Bunny of constitutional law.” Lawson, *supra*, 330.

Not long after the Constitution’s enactment, the Supreme Court read the Constitution as setting forth a doctrine of nondelegation. Chief Justice Marshall observed that, although “the legislature makes, the executive executes, and the judiciary construes the law,” the “precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). But even so, “[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”⁹ *Id.* at 42-43. The Court ultimately must police the boundary between “those important subjects, which must be entirely regulated by the legislature itself” and subjects “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.” *Id.* at 43. The “character of the power” delegated thus depends to some degree upon “its extent.” *Id.*

Some years later, the Court reemphasized, “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” *Field v. Clark*, 143 U.S. 649, 692 (1892). The Court went on to uphold the statute at issue, however, because the President’s discretion to determine whether a country imposed “reciprocally unequal and unreasonable” trade restrictions was but a small triggering condition in the larger statutory scheme for which Congress had established definite rules.

The next significant elaboration of principles of the nondelegation principle came in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), where the Court set forth the modern and oft-quoted version of the doctrine: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to

⁸ David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 96 (1993); see also Martin H. Redish, *The Constitution as Political Structure* 142 (1995) (“In vesting the legislative power in Congress, the Constitution assures that basic, free-standing decisions of social policy will be made by the branch of the federal government that is most responsive and accountable to the electorate.”).

⁹ Because the Court did not actually rule on the delegation question, Chief Justice Marshall’s exposition of the nondelegation doctrine was technically dictum. See 23 U.S. at 48-49.

fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *Id.* at 409. The Court upheld the statute at issue, finding the requisite “intelligible principle” in Congress’ authorization of the President to alter certain customs duties so as to “equalize the . . . costs of production” between the United States and foreign nations. *Id.* at 401.

The Court applied *J.W. Hampton’s* intelligible-principle test in two decisions that *invalidated* unlawful delegations contained in the New Deal-era National Industrial Recovery Act. For one, the Act authorized the President to prohibit the interstate transportation of petroleum products produced in excess of the amount allowed to be produced under state law.

Though the Act contained a vague list of purposes, such as “promoting the organization of industry” and “remov[ing] obstructions to the free flow of . . . commerce,” the Act did “not state whether or in what circumstances or under what conditions the President is to” exercise his authority. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417, 415 (1935). Those vague purposes were likewise deemed insufficient to support a sweeping delegation of authority to prescribe “codes of fair competition” for industry. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). As the Court explained, “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” *Id.* at 846.

Since *Panama Refining* and *A.L.A. Schechter*, the Court has not struck down a statute on nondelegation grounds. But the nondelegation concern is still alive and well in the Court’s decisions.

Perhaps most important, the Court has invoked that doctrine to construe broadly worded statutes narrowly—precisely to avoid the constitutional question raised by broad delegations. *See, e.g., Industrial Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607, 646 (1980); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974).

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And in recent cases upholding statutes with broad delegations of authority, the Court has justified various delegations only after it has found those delegations to have limited executive discretion in meaningful ways. For example, in *Whitman v. Amer. Trucking Ass’ns, Inc.*, 531 U.S. 457, 473 (2001), the Court permitted the EPA to set air quality standards “requisite to protect the public health,” but only where

the EPA’s discretion applied to a “discrete set of pollutants” and was based on “published air quality criteria that reflect the latest scientific knowledge.” In *Touby v. United States*, 500 U.S. 160, 163 (1991), the Court permitted the Attorney General to designate a drug as a controlled substance if “necessary to avoid an imminent hazard to the public safety,” but only where the emergency designation applied “for a limited time.” In *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), the Court permitted the Secretary of Transportation to establish a system of pipeline user fees, but only where “multiple restrictions” were placed on who fees could be collected from, how fees could be used, and what criteria could be considered. In *Amer. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), the Court permitted the SEC to prevent unfair or inequitable distribution of voting power among security holders, but only where those standards “derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.” In *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943), the Court permitted the FCC to regulate broadcasting licenses according to “public interest,

convenience, or necessity,” but only where the “requirement [was] to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services.” In *Yakus v. United States*, 321 U.S. 414, 426 (1944), the Court permitted the Price Administrator to fix “fair and equitable” commodity prices, but only where the Administrator had “authority to fix prices only when prices have risen or threaten to rise in a manner inconsistent with the purpose of the Act to prevent inflation.” And finally, in *Mistretta v. United States*, 488 U.S. 361, 377 (1989), the Court permitted the Sentencing Commission to issue sentencing guidelines, but only where numerous factors explained in detail what the Commission could and could not consider and where Congress had “legislated a full hierarchy of punishment.”

Moreover, the Court has frequently held that the nondelegation doctrine requires Congress at least to “clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Mistretta*, 488 U.S. at 372-73 (quoting *Amer. Power & Light*, 329 U.S. at 105). But crucially, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *Amer. Trucking*, 531 U.S. at 475; see also *Wayman*, 23 U.S. (10 Wheat.) at 43. The greater the authority afforded to the agency, the more specific rules and principles Congress must provide to guide the exercise of that authority.

“The EESA statute violates this bedrock constitutional principle by investing the Treasury Secretary with too much discretionary authority to exercise too much power.”

III. Why We Believe EESA’s Delegation to the Treasury Secretary is Unconstitutional

As we have seen, the Constitution prohibits Congress from abdicating its lawmaking responsibilities by delegating legislative power to the executive branch. For reasons we now explain, we believe the EESA statute violates this bedrock constitutional principle by investing the Treasury Secretary with too much discretionary authority to exercise too much power. In short, rather than making the policy choices necessary to guide the Secretary’s discretion, Congress has given the Secretary far-reaching power to intervene in the nation’s economy and effectively to nationalize American businesses—upon the thinnest reed of statutory constraints. And in doing so, Congress has effectively chosen not to make law, but rather to make the Treasury Secretary the lawmaker.

First, as noted previously, the nondelegation analysis must take account of the “extent” and “importance” of the power delegated to the Secretary. *Wayman*, 23 U.S. (10 Wheat.) at 43. Under EESA, the “scope of the power congressionally conferred” is considerable. *Amer. Trucking*, 531 U.S. at 475. Section 2 of EESA declares its purpose to “provide authority and facilities” so that the Treasury Secretary may “restore liquidity and stability to the financial system of the United States.” And with that broad mandate, EESA authorizes up to \$700 billion for use by the Secretary to “purchase troubled assets.”¹⁰ EESA § 115(a).

¹⁰ EESA authorized the Secretary to spend \$250 billion upon the effective date of the Act, and the Secretary was permitted to increase that authorization to \$700 billion upon issuing to Congress “a written report detailing the plan of the Secretary.” EESA § 115(a)(3). Under the Act, approval of the written report is not needed to trigger the \$700 billion authorization. The approval requirement thus does little to limit Treasury’s power.

This amounts to the largest industry bailout in United States history. Indeed, the \$700 billion figure constitutes almost a quarter of the entire federal budget. It exceeds the Pentagon's annual budget, the amount paid out each year in Social Security benefits, and the cost of the federal government's expenditures on Medicare and Medicaid.¹¹ Indeed, measured in dollars, EESA delegates to the Treasury Secretary one quarter of Congress's entire annual spending power.

The sheer size of this delegation is significant, and distinguishes EESA from the cases in which various delegations have been found constitutional. The virtually unconstrained authority to spend one quarter of all the money spent by the federal government in a single year is a far greater delegation of power than has previously been upheld under the nondelegation doctrine. And under the Supreme Court's approach, the sheer size of the delegation would be a substantial factor weighing against its constitutionality.

The size of the delegation is exacerbated by the fact that EESA leaves it to the Secretary to determine *how much* to spend. As Justice Kennedy has warned in an analogous context, "if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J. concurring) (holding that the Line Item Veto Act violated the Presentment Clause). And this same principle would seem to apply, not just to the size or "measure" of a tax, but also to the size of an expenditure.

Indeed, the authority to spend *up to* a quarter of the government's budget to purchase considerable stakes in American businesses goes well beyond any of the delegations the Supreme Court has previously approved. Those include

¹¹ See Sudeep Reddy, *The Real Costs of the Bailouts*, Wall St. J., Sept. 28, 2008, available at http://online.wsj.com/article/SB122256539004883001.html?mod=special_page_campaign2008_mostpop.

setting air quality standards for particular pollutants (as in *American Trucking*), temporarily designating drugs as controlled substances (as in *Touby*), setting pipeline user fees (as in *Mid-American Pipeline*), regulating public utility holding companies (as in *American Power & Light*), regulating broadcast licenses (as in *National Broadcasting*), or fixing commodity prices (as in *Yakus*). See *supra* page 7. Each of those cases involved the power to regulate a limited sliver of economic activity confined to a narrow realm of regulatory concern. But the economy-wide power granted by EESA has more in common with the economy-wide power deemed nondelegable by the Court in *A.L.A. Schechter*—the power to enact codes of fair competition "for the rehabilitation and expansion of trade or industry." 295 U.S. at 538.

Second, given the magnitude of the "scope of power" conferred upon the Secretary, the "degree of agency discretion" must be proportionately circumscribed. *Amer. Trucking*, 531 U.S. at 475. Having handed over to the Secretary so much of its power of the purse, Congress must offer unusually definite guidance for the exercise of that power. And Congress must carefully delineate the "boundaries of this delegated authority," *Mistretta*, 488 U.S. at 373 (quoting *Amer. Power & Light*, 329 U.S. at 105), by setting forth a clear "intelligible principle," *J.W. Hampton*, 276 U.S. at 409, to guide the Secretary's discretion. It has not done so here.

To the contrary, EESA grants the Secretary broad discretion "to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions determined by the Secretary." EESA § 101(a)(1). The statute further grants the Secretary discretion to "manage troubled assets," and also discretion "at any time, upon terms and conditions and at a price determined by the Secretary, [to] sell, or enter into securities loans, repurchase transactions, or other financial transactions in regard to . . . any troubled asset." EESA §§ 106(b) & (c). The Secretary may thus purchase, manage, and sell these assets with

nearly all of the “terms and conditions” left to his discretion.

Nor does the term “financial institution” meaningfully limit the Secretary’s discretion. EESA defines “financial institution” as “any institution, including, *but not limited to*, any bank, savings association, credit union, security broker or dealer, or insurance company” EESA § 3(5). Relying on this capacious language—“any institution, including, but not limited to”—the Secretary has applied EESA far afield from the banks and other *financial* institutions originally envisioned. Indeed, under Treasury’s reading of this definition, an auto company is a “financial institution.”

Further, statutory provisions that appear at first blush to be constraints on the Secretary’s discretion are in fact, under closer scrutiny, rabbit holes within which even more discretion can be found. Take, for instance, EESA’s executive compensation and corporate governance provision. The provision directs the Secretary to “require that the financial institution meet appropriate standards for executive compensation and corporate governance” for any financial institution in which the Secretary receives a “meaningful equity or debt position.” EESA § 111(b)(1). As to how much of a position is “meaningful” and what those “appropriate standards” are, however, the provision is largely silent. It provides only a *non-exclusive* list of three required standards. EESA § 111(b)(2). Hence, what appears to be a provision requiring the Secretary to promulgate particular standards is in actuality another broad and undefined grant of authority to regulate the internal corporate governance of corporations.¹² And in any event, those provisions merely deal with the conditions the Secretary might impose once it has *already decided* to spend federal money; they have nothing to do with the Secretary’s decisions on how much to spend, or where.

¹² This provision for regulating internal “corporate governance” also comes close to nullifying the restriction in § 113(d)(1)(A) that the Secretary, if purchasing an equity stake, cannot “exercise voting power.” After all, there is little need for a vote if one has power to design the voting machine.

The statute also lists nine factors that the Secretary must “take into consideration” in exercising his discretion, but those factors are little more than vague banalities. The Secretary must consider, for example, the “interests of taxpayers,” the need to prevent “disruption to financial markets,” the need to “help families keep their homes,” the “long-term viability of the financial institution,” the need to protect the “retirement security of Americans,” and so forth. EESA § 103; *see also* EESA § 2 (declaring the purposes of Act). These factors can hardly be considered the stuff of lawmaking; they are instead the abstract aspirations that ordinarily *prompt* lawmaking. In laying down these aspirations, Congress has thus left the actual lawmaking—with its hard policy choices—to the Secretary.

It is true that the Supreme Court in the past has permitted delegations upon similarly ill-defined “public interest” standards. *See Mistretta*, 488 U.S. at 378; *Yakus*, 321 U.S. at 420; *Nat’l Broad. Co.*, 319 U.S. at 426. But none of those instances involved so large a delegation of power as the delegation here. Moreover, in *Mistretta*, which involved perhaps the next-largest delegation, the vague “public interest” standards were but some of many limits on the Sentencing Commission’s discretion to promulgate sentencing guidelines. The Court found that Congress had “prescribed the specific tool” for the Commission to use in establishing sentencing ranges, had limited those ranges within statutory minimums and maximums, and had directed the Commission to use current average sentences as an empirical “starting point.” 488 U.S. at 374-75. And the Court has subsequently held that the guidelines themselves are merely advisory, not mandatory. *See United States v. Booker*, 543 U.S. 220 (2005).

The significant limits identified in *Mistretta* contrast with the most expansive source of delegated discretion in the EESA statute: the definition of “troubled assets.” The Secretary is empowered to buy them, to manage them, and to

sell them. He is also, it turns out, empowered in large part to determine what they are. The statute defines “troubled assets” as “mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages . . . the purchase of which the Secretary determines promotes financial market stability” and “*any other financial instrument* that the Secretary . . . determines the purchase of which is necessary to promote financial market stability”¹³ EESA § 3(9) (emphasis added). In other words, a troubled asset is *any* financial instrument the Secretary deems necessary to buy in furtherance of market stability.

EESA thus offers no guidance on the kinds of instruments to be bought, the institutions to buy from, or even the meaning of “market stability.” That principle is particularly unintelligible in light of the fact that all markets, particularly as they follow a business cycle from boom to bust, are to some degree inherently unstable. Such a lack of intelligibility, which may be excused when the power delegated is narrow, cannot reasonably satisfy the Constitution when the power delegated is so great.¹⁴

¹³ For clarity’s sake, the ellipses omit two relatively minor requirements for the purchase of “any other financial instrument”—consultation with the Federal Reserve Chairman and notice to Congress.

¹⁴ In *Amer. Trucking*, the Court found it sufficiently intelligible for Congress to direct the EPA to set air quality standards for particular pollutants that were “requisite to protect the public health.” 531 U.S. at 473. But here, in contrast, it is as though Congress had directed the EPA to regulate “the air” and to define a pollutant as anything the EPA simply considers threatening to public health. *Compare id.* (noting that EPA’s authority applies to a “discrete set of pollutants” based on criteria reflecting “the latest scientific knowledge”).

Conclusion

In proposing, passing and implementing the EESA, Congress and the Treasury Secretary undoubtedly have the best of intentions and are seeking to respond as effectively as possible to the crisis in our financial markets. But they must do so in a manner that satisfies the fundamental requirements of the Constitution. And as far as we can tell, Congress has never delegated so much power to an executive agency with so little to constrain the agency’s discretion.

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Justice Kennedy aptly summed up the stakes when he observed: “To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises; first, that the public good demands it, and second, that liberty is not at risk.” *Clinton*, 524 U.S. at 449. The former premise, however, “is inadmissible,” and the latter premise “is flawed.” *Id.* at 449-50. Simply put, “[a]bdicat[i]on of responsibility is not part of the constitutional design.” *Id.* at 452. Yet that is precisely what Congress did in EESA, when it delegated virtually limitless authority to the Secretary to determine what a “troubled asset” is, and then to spend virtually any amount—up to a quarter of the federal budget—purchasing such assets on virtually any basis the Secretary wishes. That is a classic violation of the nondelegation principle.