Federalism and Separation of Powers

The Founders' Intent, Constitutional Provisions, and Limits on Spending Power and Delegation

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Wayne Abernathy: Good morning. Welcome to this symposium, co-sponsored by the Federalist Society and the Chapman University School of Law ["The Financial Services Bailout: Cause, Effect, and the Limits of Government Action." See Multimedia Archive for audio/video; www.fed-soc.org].

I recall not very long ago, Secretary Paulsen rolled out one of the many different programs he put forward last fall to deal with the financial crisis, explaining how this particular program would really turn things around. Well, as we know, that didn't happen, but what has happened since reminds me of a passage in *Don Quixote*. I'm sure Cervantes didn't make it up, but it goes like this: If you turn into honey, you will be eaten by flies. Considering all the bailouts for this and that industry and the long queue that now forms each morning outside of the Treasury Department, we might consider the wisdom of the old Spaniards.

A couple weeks ago, we had an interesting discussion in my office on the question of who owns the Federal Reserve. For an agency that has such an important role in our society, the answer, surprisingly, disturbingly, is not entirely clear. But it is an important question because today the Federal Reserve, in addition to its normal monetary policy role, has taken on some very significant responsibilities. Just one example, a news article much like any that you could find on just about any day of the week, a wire story by *Reuters*: "Fed to Buy Long-Term U.S. Government Debt." Just a couple of brief highlights:

The Federal Reserve on Wednesday said it would pump an additional $1 trillion into the U.S. economy to try to pull out of a deep recession, partly by buying longer-term government debt for the first time in more than 40 years. The decision caught many off guard. U.S. stocks shot higher and yields on U.S. government bonds took their biggest one-day tumble since 1987, while the dollar plunged to a two-month low against the Euro. In addition to purchasing treasury debt, the Fed said it would expand by $850 billion to $1.45 trillion, an existing program to buy debt and securities issued by mortgage finance agencies.

This, in any normal time, would be breathtaking. But it comes after a series of events beginning last fall when, as I mentioned, Secretary Paulsen put forward a number of proposals to deal with the financial situation—and after Congress appropriated a breathtaking $700 billion to buy up the troubled assets of various financial institutions. It may be valuable, by the way, to keep in mind that Congress first voted against that proposition before they voted for it; they have been on both sides of this issue.

Of course, no sooner was the program enacted than Secretary Paulsen announced that he was going to spend the first $250 billion, not on buying troubled assets, but actually making investments in healthy banks to $250 billion of worth at capital purchase program, the other $100 billion spent on a variety of other projects. Now, so far as I can tell, little of the money in the first tranche Secretary Paulsen had control over went to buying troubled assets, and, in one of the most astonishing revelations by any sitting Treasury Secretary, he later owned up to the fact that by the time the President was signing that bill into law, he already knew it would not work and was working on the next project. He recognized buying troubled assets is pretty tough to figure out how to do.

One of my first responsibilities as Assistant Secretary of Treasury from December 2002 through January 2003 was to put into place the Terrorism Risk Insurance Program (TRIP). That program had a very interesting feature to it very few people recognized, a provision I think that is totally unprecedented. It said that TRIP was authorized to appropriate without fiscal year limitation such sums as are necessary to run the program. In other words, there was no limit to how much we could spend on the program. No limit at all. We could have spent trillions. Of course, we didn't; we were very frugal in how we put that system together. But we didn't have to be. There was no limit on the appropriation, either an amount or time, and I have to say today, it frightens me to think what Secretary Paulsen might have done with that authority if he had it to rely upon.

What are we think in the land of "We the People" about such broad grants of financial authority, particularly when we're taught in our civics classes that the power of the purse strings is the way in which Congress maintains its balance in this checks and balances system of government that we have. Here it seems the purse is open and given with very little instruction to the Executive branch; it is run as they see fit.

The questions we will look at today is, is that appropriate? Is that constitutional? Does the need justify the law? And is the need so great that those kinds of actions are necessary? In each case they were enacted, that was the argument: the need was so great that flexibility has to govern the allocation and use of those funds. But are there constitutional lines that we should not cross?

We are very privileged to have two distinguished scholars of the Constitution with us here today. Let us begin with Dean Eastman.

John C. Eastman: Thank you very much, Mr. Abernathy. Chapman University School of Law is delighted to be participating as a co-sponsor of this important program. I flew in from California, 3,000 miles away, last night, and so I am going to give you a bit of a bird's-eye view of some of these

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constitutional issues, not a line-by-line or section-by-section analysis of TARP or TARP II or the spending bill or the stimulus bill or those things. There are hundreds and hundreds of pages in all these bills, as you know, and, if anybody can get standing, the cases are going to work their way through the courts for many years to come. Nor am I going to give you an analysis of what the current precedent supports, because the current precedent supports just about anything. If it is spending, everything qualifies as in the general welfare. All delegations are in the public interest. We don't have to have any more of an intelligible principle than "go forth and do good". Rather, I am going to give you a plea to use this current crisis to reconsider some of those precedents and to ask whether they should not be revisited in light of the catastrophic damage they have caused to the constitutional design bequeathed to us by our nation's founders.

Let me tell you a story from the last election. In our town of Long Beach, California, where my wife and I live, there was a little internal improvements ballot initiative. They wanted to raise money via bonds to expand a couple of roads and fill some potholes and take down some damaged trees. The bond measure failed. The voters who were going to benefit from this spending didn't think it was worth the cost.

Instead of acknowledging the voters' decision, the city leaders immediately said, well, since it failed here, let's get in that line at the Treasury Department and ask for some of the stimulus spending or TARP funds. Now, the question that the City's response brought to my mind was this: If the people who were going to benefit directly, the ones whose houses were along side of the streets that were going to be repaired, didn't think it was worth the money, why in Heaven's name would we think that the people in Rhode Island or Georgia or Arkansas would think it was worth the money? But that is essentially what all these claims to federal largess amount to.

At the time of our founding, there was a Scottish history professor named Alexander Tyler completing a lengthy study of democracies who had a particular book about the fall of the Athenian republic. He wrote a very interesting thing. He said that democracies are always temporary in nature; they simply can't exist as a permanent form of government. The democracy will continue to exist up until the time that voters discover that they can vote themselves generous gifts from the public treasury. From that moment on, the majority always votes for the candidates who promise the most benefits from the public treasury, with the result that every democracy will finally collapse over loose fiscal policy, which is always followed by a dictatorship. The average age of the world's greatest civilizations from the beginning of history, he reported, had been about 200 years. During those 200 years, nations always progressed through the following sequence: from bondage to spiritual faith, from spiritual faith to great courage, from courage to liberty, from liberty to abundance, from abundance to complacency, from complacency to apathy, from apathy to dependence, and from dependence back into bondage. I leave it all for you to figure out where on that continuum we are. I think it's unfortunately too close to the end.

I want to talk about a couple of major challenges or constitutional problems I see with the whole range of federal government efforts lately. The first is the Spending Clause, and the second I will group together under non-delegation of legislative powers problems. Again, on both of these I think the precedent is clearly against me. My question is: Ought it to be?

The Spending Clause in Article I, Section 8 of the Constitution gives Congress the power to tax for the common defense and general welfare. And today we think "general welfare" means anything the Congress decides is going to be good. The fight at the Founding, however, was rather different. James Madison thought this was the trigger clause, that we could raise and spend money to give effect to any of the subsequent enumerated powers in Article I, Section 8. Alexander Hamilton thought otherwise, but even Hamilton, who was among the broadest of federal power interpreters of the time, thought the General Welfare Clause had its own limits in the general or national welfare, not for the local or regional welfare.

I want to give you a couple of examples from the early days of Congress as it confronted just what authority this clause conferred. The first Congress refused to make a loan to a glass manufacturer that needed funding to get up and running—you might call it a stimulus loan—after several members in the House expressed a view that such an appropriation would be unconstitutional. During the second Congress there was a protracted debate that occurred over a bill to pay a bounty to the New England cod fishermen. The purpose of this was to try and bail out a struggling cod fishery industry in New England. The fourth Congress didn't even believe it had the power to provide relief to the citizens of Savannah, Georgia after a devastating fire destroyed the entire city; think Katrina. The requested support was in the local welfare, but it was not in the general welfare, in Congress's view, and the relief effort was therefore thought to be unconstitutional.

I think this debate demonstrates just how solicitous of the general welfare limitation Congress was. Many of these early members of Congress had actually participated in the Constitutional Convention. Representative Gillis contended that paying a bounty on certain occupations was of doubtful constitutionality, and argued that the general welfare limitation was parallel to the requirement of Article 1, Section 9 that direct taxes be levied only in proportion of state population. The Spending Clause afforded no power to gratify one part of the union, he said, by oppressing another, and any other reading of it would render the restriction on direct taxes meaningless.

In remarks that are an uncanny description of contemporary politics, he continued, "Establish the doctrine of bounties. Set aside that part of the Constitution which requires equal taxes and demands similar distributions. Destroy this barrier, and it is not a few fishermen that will enter claiming $10,000 or $12,000, but all manners of people, people of every trade and occupation may enter in at the breach until they have eaten up the bread of our children." That line outside Treasury is longer and longer every day, and we're no longer talking about eating up the bread of our children or even our grandchildren but of our great-great grandchildren.

Now this view of Congress was accepted. It became a contested matter over the election of 1800, with the Jeffersonian "limits on spending" position prevailing. And from 1800 to

1860 almost every president adhered to the same view. As President, Madison vetoed an internal improvements bill that was to build roads and canals in a number of local areas. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of a defined in limited one hereto understood to belong to them. The terms "common defense" and "general welfare" would, if we expand it, include every object and act within the purview of legislative trust. And so he recommended we continue to read a more narrowly.

Andrew Jackson was elected President in part to put to rest the dangerous doctrine that we can spend for any local matter we want. He vetoed as unconstitutional bills that would have appropriated $200 million to purchase stock in the Maysville and Lexington Turnpike Company, again to provide a stimulus that company to help get it up and running. And this was just going to be the direct construction of ordinary roads and canals. So strong was his veto message that Congress didn't even try another bill for another four years, and when they finally did, he responded forcefully with this:

We are in no danger from violations of the Constitution by which encroachments are made upon the personal rights of the citizen. A sentence of condemnation long since pronounced by the American people upon acts of that character will no doubt continue. But against dangers of unconstitutional acts, which instead of menacing the vengeance of offended authority, proffer local advantages and bring in their train the patronage of government, we are, I fear, not so safe.

To suppose that because our government has been instituted for the benefit of the people it must therefore have the power to do whatever may seem to conduce to the public good is an error into which even honest minds are apt to fall. In yielding to this fallacy, they overlook the great considerations in which the federal Constitution was founded.

In consequence of the diversity of interests and conditions in the different states, it was foreseen that although a particular government measure might be beneficial and proper in one state, it could well be the reverse in another. It was for this reason that the states would not consent to make such a broad grant of federal power to the government.

President Polk found before him a bill to provide funding to the territory of Wisconsin. This was appropriate funding under the federal government's plenary powers over the territories, but like many of our bills today, Congress started with a small nugget of constitutional funding and then piled on millions and millions of additional funding that had nothing to do with the constitutional authority. It was $6,000 for Wisconsin, and then another half-million, which was serious money in those days, in the appropriation bill for the improvement of harbors and rivers in other parts of the country.

Polk's veto message is really important. He said, "The Constitution is a wise one that provides important safeguards. Both the state legislatures and Congress have to concur in the act of raising funds. They are in every instance to be levied upon the commerce of those ports which are to be profited by the proposed improvement." In other words, under the Constitution, the one kind of local funding that was authorized was to impose tonnage duties to pay for port improvements, "the expenditure being made in the hands of those who are to pay the money and are going to be immediately benefitted". So there was this tie between money and benefit, unlike the Long Beach example I began with. And as a result of that tie, "the spending will be more carefully managed and more productive of good than if the funds were drawn from the national treasury and disbursed by the officers of the general government, that such a system will carry with it no enlargement of federal power and patronage and leave the states to be the sole judges of their own wants and interests, which only a conservative negative in Congress, upon any abuse of the powers of the states, may attempt." I think, again, what we've lost in this whole discussion in recent decades is this tie between those benefited and those who have to pay for the benefit, and you get the amount of spending in line when you keep that tie.

President Polk then went on to suggest with uncanny prescience what would happen if we adopted the opposite interpretation the Constitution. He said, "When the system of federal funding for internal improvements prevailed in the general government and was checked by President Jackson, it had begun to be considered the highest merit in a member of Congress to be able to procure appropriations of public money to be expended within his district or state, whatever might be the object. We should be blind to the experience of the past if we did not see abundant evidences that if this system of expenditure is to be indulged in, combinations of individual and local interest will be found strong enough to control legislation, absorb the revenues the country and plunge the government into a hopeless indebtedness." This morning's additional 1.2 trillion in spending demonstrates, I think, that we are well past the "hopeless indebtedness" point.

"But a greater practical evil," Polk continued, "would be found in the art and industry by which appropriations would be sought and obtained. The most artful and industrious would be the most successful. The true interests of the country would be lost sight of in the annual scramble for the contents of the Treasury, and the member of Congress who could procure the largest appropriations to be expended in his district would claim the reward of victory from his enriched constituents. The necessary consequence would be sectional discontents and heart burnings, increased taxation and the national debt never to be extinguished."

I won't go into it, but President Buchanan said the same thing, and this view of the limits on the spending power was affirmed by the Supreme Court in *Butler*, not rejected, despite how many people now, in hindsight, view that case.

The point here is that we've completely lost any sense of limits on federal spending and the damages that will flow from that spening. It is true in TARP, or at least the portions dealing with what we might call earmark-type funding. It's certainly true in the stimulus package. It's true in the second half of the current fiscal year's budget bill. It's already starting to be true in the budget for the next fiscal year. And I think it was almost uniformly agreed that the federal Constitution didn't confer this sort of power. And there has been no amendment that would confer it since then.

Let me now switch to a different set of problems with the TARP bill in particular. The standard view of the non-delegation

doctrine is that because the Vesting Clause in Article I of the Constitution says that all legislative powers herein granted are vested in a Congress, Congress can't delegate its lawmaking powers to agencies and certainly not to private actors unless they do so with a sufficiently intelligible principle to constrain or guide the conduct of the agency. Now that limit on the delegation of lawmaking power has long since been ignored. We have allowed for delegations that do everything as broad as the Federal Communications Commission regulating in the public interest. There is no intelligible principle there in theory. So what that means is there's nothing left of the non-delegation doctrine.

But if there's ever a set of circumstances that should force us to reconsider whether we want to impose or reinject some teeth into a non-delegation doctrine, it would seem to me the current mess should be it. Back on September 4, in a letter that was ultimately endorsed by more than 231 economists at American universities around the country, it was noted that one of the major pitfalls in the various bills proposed at the time, which ultimately became TARP, was their ambiguity. Neither the mission nor the oversight were clear. If taxpayers were to buy illiquid and opaque assets from troubled sellers, the terms, the conditions, the methods should have been made crystal clear in order to comply with this intelligible principle. None of that was done.

In fact, just the opposite. We radically changed the understanding of what was going to be accomplished shortly after the bill was passed. Section 101 of the TARP bill talks about purchases of troubled assets; the Secretary was authorized to establish TARP to purchase and make and fund commitments to purchase troubled assets from any financial institution. Part of the initial efforts last fall actually do fit within some of that language, even though if you looked at just that authority, you would think, well, "troubled assets" is pretty clear.

But "troubled assets" is defined more broadly: We're going to pick up the residential or commercial mortgages or any securities or obligations that are based on them. But then there's this second half of the definition—"any other financial instrument that the Secretary determines is necessary to promote financial market stability." That is so open-ended as to not amount to any intelligible principle confining the scope of authority of the Secretary.

You see this immediately play out. The original bill was $250 billion, as Mister Abernathy said in his opening remarks, but the President was allowed to move that up to $350 billion on his own if he just certified that more was necessary. Again, "necessary" based on what?—in his own decision. Under a true non-delegation doctrine principle, that was probably too broad. President Bush immediately did that. Then the additional $350 billion could be released. There was a written report from Congress describing its plan for the money. That was done back in January, again, without much greater definition on what was to be accomplished.

The best example of why I think this violates the non-delegation doctrine is the auto bailout. As Mr. Abernathy said, the first allocation of TARP money was not used to buy up troubled assets but rather was used to buy preferred stock in thriving concerns. It did not seem to meet the purpose of the statute at all. It was outside the intelligible principle, to the extent there was one, of what was authorized. But even if that was a close call because of the broad definition of "troubled assets", the auto bailout was not a close call at all; nobody thought it was. If you remember the early days when the auto bailout effort was run through Congress. Only after Congress refused to adopt the bill did President Bush decide to use, unilaterally, his executive authority to say, well, we'll now treat this as a troubled asset so that we can use TARP funds. Where in the definition could that be done? And if the definition was so flexible as to allow that which one day was impermissible under TARP to suddenly by Executive Order alone become permissible, then TARP has to be in conflict with the non-delegation doctrine. It's something that Congress itself considered and rejected. So how this doesn't violate the non-delegation doctrine is beyond me, if there's anything left of a non-delegation doctrine whatsoever. And again, there's not.

So our question ought to be why not, and can we get back some notion of a non-delegation doctrine? Congress faced this as a legislative policy matter. They rejected it. We ought not let the Executive unilaterally do something that everybody understood at the time was unauthorized.

Let me look at a couple more problems with TARP that I see. Again, precedent supports this, but the question is, should it? Article I, Section 7 of the Constitution requires that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills. Now we have for a long time completely ignored this, or gone through the motions without meeting the substance of this constitutional requirement. What happened here is a good example of going through the motions.

The bill started off as a three-page proposal to the House of Representatives by Secretary Paulsen. The House expanded it 110 pages, and that was offered as an amendment to House Bill 3997. This so far comports with Article I, Section 7's Origination Clause. But that bill failed in the House of Representatives on September 29. The Senate then took a completely unrelated bill, gutted it, and amended it to put it in their version. So HR 1424 becomes the bill, even though the financial revenue enhancing aspects did not in any sense of the discussion originate in the House of Representatives. The Senate approved it, sent it back to the House, they approved it a day later, and the President signed it.

Now this may just be formalistic, but these provisions are in the Constitution for a reason, and our ability to ignore them or find a way around them through this sleight of hand ought to give us all cause for concern.

Another example of constitutional provisions ignored is the Appropriations Clauses (Article 1, Section 9), which provides: "No money shall be drawn from the Treasury,, but in consequence of appropriations made by law." Now it cannot be the case that the appropriation Mr. Abernathy talked about—where you have no limit--that cannot be what the Constitution's limit on appropriations means. And yet the Fed has been operating as if it had such authority—I mean where did they get the $1.2 trillion to buy up all these bonds? They just make it up. Because the federal government is on

the hook, this is an appropriation not made by law, not even by regulation; we're just doing this stuff. These basic decisions about how much debt to take on, spending decisions that are supposed to be made by Congress, are not even going through the constitutional structure here. Let me leave it at that, because I want to get Professor Seidman up here, and he can counter this and then we can open up for questions.

My point, again, is not to say that Supreme Court precedent doesn't authorize these actions. The question is, is what's going on here so severe, with consequences so potentially catastrophic, that it's time to revisit the founders' wisdom that the limits on federal government are there for a reason? And the reason comes home to roost in a big way with these various bills—can we get ourselves out of it by looking back to the original wisdom of the founders?

Thank you.

Abernathy: Thank you, Dean Eastman. The stage is all set. It's now yours, Professor Seidman.

Louis Michael Seidman*: Thank you, Mr. Abernathy, and I want to thank Dean Reuter for inviting me to this event. I just love coming to these Federalist Society events. As I have remarked before, for reasons I'm not sure I want to think about too carefully, I am the Federalist Society's favorite leftist. I get invited here much more often than I get invited to the American Constitution Society. I was telling Dean Eastman this right before the session, and he suggested it was maybe because I was a cheap date—which may be the case.

Eastman: His phrase, not mine.

Seidman: But in all seriousness, there is one thing I really appreciate about doing this. I know there are very few, if any, people in this audience who agree with my perspective. But without fail people are polite, open-minded, and engaged, and I'm really are grateful for that.

One disadvantage of appearing before this organization, however, is that I don't get to frame the topic. If I had, I probably would have framed it a little differently. The topic assumes that we are interested in the intent of the Framers. To put no fine point on it, I would not want to live in a country governed by the intent of the Framers. It would be unrecognizable as the country we live in now. I can give you many examples, but I will confine myself to two.

If we followed the intent of the Framers, racial segregation would be legal in the District of Columbia and probably in the rest of the counrty as well.When Chief Justice Roberts testified at his confirmation hearings he was asked to name his favorite justice, and answered Robert Jackson, at which point I really scratched my head—because Jackson is also my favorite justiceand I thought that one or the other of us has to have this wrong. One of the things I like about Jackson—and this was not known at the time, but it's known now because the Court's conference notes are available—is that, when *Brown* was being considered, Jackson wrote both a draft opinion and a memo to his colleagues, arguing that there was no basis whatsoever for the decision in the Constitution; (Justice Frankfurter said the same thing). It violates the Framers' intent, it violates the text, it violates past precedent. Nonetheless, he wrote, I am for *Brown* on political and moral grounds. It is a good thing.—even though Jackson

Here's another much more trivial example, but one I really like. If one were to follow the text of the Constitution and the intent of the Framers, the Senate as presently constituted would be plainly unconstitutional. Why do I say that? Well, Article I, Section 3 is very precise about the term of office senators are to serve. All serve a six-year term except the first 26 senators, who drew lots and served two-, four- or six-year terms, so that their terms would be staggered. From the time the first new state (Vermont) entered the union to the present we have just flatly, blatantly ignored that provision so that when each new state has entered one of the senators has served less than six years in order to stagger the election.

Last time I noticed, the country hasn't fallen apart. Perhaps our failure to follow this constitutional provision caused the financial collapse, but somehow I don't think so. We've managed quite nicely. God hasn't come down upon us with his wrath because we disobeyed that section of the Constitution. We've just done it.

So I would not frame this debate in terms of the Framers' intent, but I'm stuck with the topic you have chosen, so I will talk about the original intent and the text. Most sophisticated conservatives today think we ought to follow the public meaning of the text, rather than the Framers' intent. But let's talk about them both, and in conjunction with the two topics Dean Eastman mentioned: the spending power and the delegation doctrine.

First, with regard to the spending power, let's start with the basics. Article 1 Section 1 gives Congress the authority to spend in the general welfare. It doesn't say one word about whether the spending has to be local or national. It doesn't say anything about spending being confined by the other powers of Congress. It just says it has to be in the general welfare. That's it. So far as I know, there's nothing in the constitutional debates that suggests anything other than what the language suggests, that it be simply in the general welfare.

It is true that Madison held a non-textual position that spending had to be limited by the other clauses of the Constitution, like the commerce power. And as Dean Eastman indicated, one of the great debates in the 19th century was about internal improvements. The dean cited a number of Democratic presidents who were against internal improvements, but, had he been on the other side of the debate, he could have cited a number of Whigs who were *for* internal improvements. That was a big political debate. But it's also a fact that Madison's view has been rejected for almost a century, that it's now virtually uniformly agreed that Hamilton was right. Indeed, the Roosevelt-era Court that struck down big chunks of the New Deal agreed with Hamilton in the *Butler* case, and that is really unambiguous. The Court says Hamilton was right, Madison was wrong, the Spending Clause means what it says, you can spend money simply in the general welfare.

But let's forget all that. Suppose Dean Eastman is right and

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the Constitution means local spending is unconstitutional, and that spending has to, in some sense, be national. Now the first thing I want to say is I'm not at all clear what the distinction is between local and national. We have some history of dealing with this problem.When the Supreme Court has concerned itself with this, it has repeatedly been unable to define these firms. And I notice that Dean Eastman didn't define them either. But whatever they mean, surely the spending on the stimulus is national.

We are now in the greatest recession or depression since the 1930s. The gross national product went down by six percent last quarter. That is a national problem. This is not something going on in Long Beach. It's something going on in the United States. The gross national product measures the interstate commerce; even in the Madisonian view, Congress has the power to deal with this crisis under the Spending Clause. Maybe the stimulus package is misguided. Maybe it's just a big mistake. Maybe we should do nothing. But, so far as the Constitution is concerned, it seems to me beyond question that the spending addresses a national problem not confined to individual states and not solvable by them. It is a problem about the sharp and radical decline of interstate commerce.

What about delegation? Dean Eastman is a smart man, and very articulate, but I think even he might concede that his position is truly radical. There are many government agencies operating today where the delegated power is much looser than in TARP, where they're told simply to operate in the public interest. The Supreme Court has again and again upheld those delegations.

Why is that? Well, first of all one ought to be careful what one wishes for. Although the Court has not enforced the non-delegation doctrine, Congress has shown increasing interest in and is enforcing it. When it does, what is that called? I'll tell you what it's called: it's called earmarks. That is what enforcement of the Non-Delegation Clause means. Congress says, no, no, we're not going to delegate to some faceless bureaucrat whether to build a bridge to nowhere; damn it, you build it. That's non-delegation. I didn't think the Federalist Society was in favor of that practice, but I guess Dean Eastman is in favor of it.

Now what about the legal basis for this argument? Once again, there's absolutely no basis in the text of the Constitution for this, nor, I think, any basis in the legislative history of the adoption of the Constitution. Very conservative scholars like Adrian Vermeule and Eric Posner have made this point recently. What the text of the Constitution requires is that Congress pass statutes; that's all it says. And Congress passed the statute creating TARP. Ironically, in the name of protecting the right of Congress to pass statutes, what Dean Eastland would do is strike down the statute that Congress passed because he doesn't like it. Well, the Constitution doesn't have any Eastman provision in it that says if you don't like it, you get to strike it down. It's for the Congress to decide what statutes to pass and how much power to delegate.

This gets me to my last point, which I don't think this audience is going to accept, but one I can't resist making. I think this whole debate reflects a misunderstanding about what American constitutional law is all about. It's a very widespread misunderstanding, but a misunderstanding nonetheless. The view here is that constitutional law is some sort of disinterested, political, antiseptic effort to discover the truth about some foundational document or the truth about what some long dead people thought 200 years ago. That's not what it's about. Maybe it should be; I don't happen to think so. But the fact of the matter is that's not how anybody, right, left or center, plays the game.

Let me make two points about this. First, and I'm just guessing here—Dean Eastman is a good sport, taking all this; he can tell me if I'm wrong—but my guess is Dean Eastman did not vote for Barack Obama for president. My guess is that on the merits, on political and economic grounds, he is opposed to TARP. He thinks it's a really bad idea. He thinks the auto bailout is a bad idea. He thinks most of what President Obama has done is a bad idea. And maybe he's right about that. We'll see. But are we really supposed to believe that those views have nothing to do with the constitutional argument he's making today, that it's just a happy coincidence that these political positions are the same as the views that you get from an apolitical, disinterested reading of the constitutional text? Maybe it is, but I have to say I doubt it, and what I doubt even more is this really strange coincidence that Justice Thomas's totally apolitical reading of the text leads him to think that it basically incorporates the platform of the Republican Party, and Justice Ginsburg's totally apolitical reading of exactly the same text leads her to think that it incorporates the platform of the Democratic Party.

This leads me to my second and last point. Whatever the merits of Dean Eastman's argument, it isn't going to happen; and the reason is constitutional law doesn't work never work the way he thinks it works. We've been down this road before. In that other Great Depression, the Supreme Court said the government efforts to stop it violated the Spending Clause (*Butler*) and the non-delegation doctrine (*Schechter*), and you know what happened? It almost destroyed the Supreme Court. It came that close to destroying it completely, and in fact it destroyed the existing Court and replaced it for several generations with a Court of a very different ideological complexion.

Now whatever you want to say about the current justices on the Supreme Court, they are not stupid. They have read that history, and they're not going to repeat that mistake. They're not going to destroy the Supreme Court for the sake of some abstract idea about what James Madison thought 200 years ago.

But I will close with a confession: I hope they try it. As a great president once said, "Make my day." If they try it, you know what's going to happen? It will destroy the conservative political-legal movement in this country for another generation, and I think that would be a very good thing but for the fact that Federalist Society wouldn't exist anymore and I wouldn't be invited these events anymore. That part would be very bad.

Eastman: Let me make a quick response. First, I don't recall mentioning the Obama administration at all; my criticisms were leveled at the Bush administration. And if in fact I voted Republican in the last election, the fact that I'm criticizing the prior Republican president should give one some sense that I am doing so apolitically rather than politically.

Professor Seidman talks about the general welfare. But there is nobody in this room looking at the modern language dictionary because they picked the word "welfare" by design, and "general welfare" means welfare, and that means we can do whatever we want. If we are going to have a Constitution, I will concede that it's not the intent of the drafters, but rather the intent of the ratifiers that ought to govern, because that's what the notion of a higher law that goes through the ratification process means.

The whole basis of judicial review is that the Constitution is superior to ordinary legislation because of ratification, that it represents the embodiment of the people's will and a heightened deliberation time, that it has the force of higher law against which we assess the validity of acts of Congress and of the Executive. So *we have to* figure out the intent of those who ratified it. And if by general welfare, they meant something comparable to common defense, an interest to the *whole* nation (and we find lots of evidence that's exactly what they understood those words to mean), then just because we mean something different by that phrase now *doesn't* mean that those who ratified the Constitution understood "general welfare" to be anything other than national rather than local welfare, as Hamilton said.

In *Butler*, the Supreme Court actually points that out, and it looks at whether Madison was right or Hamilton was right, and nominally sides with Hamilton. Although I actually think the history is stronger in favor of Madison's view, let me concede the point to Hamilton. Hamilton himself said that whatever limits are to be found in the Clause are not to be found in the other provisions of Article I, Section 8 (the enumerated powers) but in the Clause itself, and the only limit is that it be in the national rather than the local welfare. That's what the people who ratified the Constitution understood.

When they used the word "general," it had some import. But then the Supreme Court goes on to reaches a decision in *Butler* that actually affirms the Madisonian view. They strike down the Agricultural Adjustment Act because it didn't further any of the purposes otherwise enumerated in the Constitution. That's Madison's position, not Hamilton's. So it's a rather incoherent decision, but the final holding is that the Constitution has limits on the power of the federal government to spend. That's the actual, and still-governing, precedent; we just don't pay any attention to it any more.

Now Professor Seidman goes on to say that the stimulus spending is of course national because it addresses a national problem. But there is a difference between spending in the national or general welfare and spending on aggregate local problems. Just because I fix every pothole in the country doesn't make that local spending national, even if I distribute the money on an equal basis to every local jurisdiction. And the Whigs lost in all those elections largely because of their view on the spending power. It's just evidence that this was the common understanding at the time.

What you do when you spend money out of Washington, as Polk and Buchanan and Jackson and Madison and Jefferson all said during their campaigns and in their veto messages, is you disconnect the ability of those who benefit from those who have to pay, and encourage the profligate spending we end up getting. So if we're going to look back and think about this, not predictive of what the Court would do but as political philosophy, we have to ask, have we created a public system that is sustainable or one, going back now 60 years from the New Deal, that has in place tectonic pressures that are going to blow it apart?

If you look at federal debt as a function of GNP, the spike over the last year and a half is phenomenal. It's unsustainable, and it's going to have catastrophic consequences on our ability to govern ourselves long-term. I'm not making up some political philosophy, the ideal government. This is the government our Constitution sets out, it has limits on the ability to do such things.

Let me go to earmarks. Yes, on the non-delegation doctrine, I actually do think that Congress—there are two kinds of earmark fights. The one is that we don't have a statute in Congress; we have a committee report that nobody read that lists all the ways you're supposed to spend this money. That doesn't have the force of law, and it doesn't solve the non-delegation problem that some committee staffer is able to get it in a report. But if it's in the statute (assuming it qualifies for general welfare, which is a different problem on the non-delegation thing) that Congress wants to spend money for the bridge to nowhere, let them vote on it. Then you have the political accountability the Constitution designed. When you don't put it in the statute but let some bureaucrat in response to a letter from Congress or a phone call from a member of Congress say this is the way we want to spent it, the ability to have political accountability, which lies at the heart of the non-delegation doctrine and our whole notion of consent of the governed, goes out the window. That's why the non-delegation doctrine is there, and that's why earmarks (assuming they are not local funding, which is unconstitutional) are, on the delegation thing, actually a step in the right direction. (That will be the headline: Eastman supports earmarks. I don't; I think they're all unconstitutional. But they are better than not having them in the statute, where there is no political accountability at all.)

Finally, Professor Seidman says there's no basis in the text of the Constitution for a non-delegation doctrine. I couldn't disagree more. When the Supreme Court heard *Schechter* they rooted their decision in the Constitution, in the Vesting Clause, which says, "All legislative powers herein granted shall be vested in the Congress of the United States." That doesn't mean just that Congress passes statutes; it says if you're exercising legislative power it has to be done by Congress. The non-delegation doctrine flows directly out of that text. You can delegate the administration of legislative judgments as long as what you've delegated has a sufficiently intelligible principle as to what those policy and legislative judgments are. If you're not doing that, if you're just saying go forth and figure this out in the public interest, no legislative policy judgments have been made. The lawmaking power has been delegated, and it's no longer being exercised by Congress. That violates the Vesting Clause, because it doesn't say the legislative powers are vested in Congress and they can delegate those powers to a private actor—say, the head of the New York Federal Reserve Bank—or to an agency whose members are not removable by the president; they have to be exercised by Congress.

The delegation doctrine flows inexorably from that text, and I think it's correct. But we've completely lost sight of why it's there, for political accountability, in favor of the modern view that Congress can do all of the things we'd like government to do. I think Madison and even Hamilton would have said that's one of the reasons we limit this power to Congress: so that they can't take over three quarters of the national economy. That was tried once in the Soviet Union, and it's real hard for one guy sitting over at Treasury to figure out a $14 trillion economy and make sure he gets it right. You just can't do it. The fact that these checks on the powers of government are built into the text of the Constitution was done for the reason that the federal or public sector won't become so large that it becomes unmanageable.

Well, it has now become so large that it's unmanageable. And my plea is not whether the precedent supports it but whether it ought to. As a matter of basic political theory, the lack of accountability, of limits, is going to destroy this place if we don't start thinking in broader terms. The Founders were simply wiser on this one. The fear of an expansive government that could destroy liberty is real and we're living it right now.

Abernathy: Well, they say rules made to be broken; maybe schedules are too. I would like to give a couple minutes to Professor Seidman to respond to that, even if we are infringing a little bit on our break time. So please, Professor Seidman.

Seidman: Well, thank you. I'm not going to respond to everything Dean Eastman said because my hope is there will be some time for questions and comments from the floor. But let me make just three quick points. First, with regard to whether this is in fact an antiseptic, apolitical argument, it's true that Dean Eastman criticized President Bush. But I think he criticized because the Dean is to the right of President Bush, at least on this issue. He thinks—and I don't think he would dispute this—that TARP is a disaster, that it's leading us to become like the Soviet Union. He said as much. And he might be right about that. I don't happen to think so, but he might be. That, however, is a political view, and I just don't think you can listen to his fervor on that subject without thinking that it's influencing the way he's reading the Constitution.

On the General Welfare Clause, the Clause says—and Dean Eastman doesn't disagree—that Congress has the authority to spend money for the general welfare. Now it's true that this money is spent locally. Where else is it going to be spent? If you spend it, it's got to be spent someplace right? And that someplace, unless it happens to be on the border of California and Arizona, is going to be in a local jurisdiction. But that's very different from saying it's not spent for the general welfare. It is the belief of a majority of members of Congress and the President of the United States that the stimulus is in the general welfare, that it is necessary to restore the commerce of the United States, which has come to a halt.

Now maybe what Dean Eastman means is that he doesn't think it's in the general welfare because he doesn't think that the program's going to work. It's a mistake, a step on the road to socialism, but that leads me to my last point. This organization was founded on the principle of judicial restraint. The idea—not my idea, your idea—is that the courts aren't supposed to make judgments about whether they think particular programs are good or bad programs. They're just supposed to enforce the text of the Constitution and therefore, on your view of things, it is completely irrelevant whether TARP is going to work or not. The fact of the matter is Congress thought it was going to work, the President thinks it's working, and that's good enough—unless you can find some textual basis for saying that the Framers outlawed it. The fact that Dean Eastman doesn't like the program is not a textual basis. The Constitution says, like it or not, Congress can spend money for the general welfare.

Abernathy: So I think you sensed that there's a disagreement in our panel here, which is very healthy. It gives us an opportunity to explore this issue and feel good about it. Let's have a couple of questions. Please speak into the microphones so that we can pick up your question.

Audience Participant: I wanted to ask a question about the Whigs. It was my understanding that Lincoln kind of implemented the Whig program: massive federal spending, not just on the Civil War but on the Transcontinental Railroad, land grants, the Moral Acts, homesteading, etc. Likewise, you look at World War II period and you have the G.I. Bill, the Marshall Plan, etc. Federal spending was 45% of GDP, twice as much as today. Does that not suggest that the Whigs had it right? I guess that's a hard question directed to Dean Eastman.

To Professor Seidman, when you look at the Lincoln period, a lot of that spending was financed by Treasury issuing currency directly into circulation, spending it into circulation rather than borrowing it from a privatized central bank like the Federal Reserve and its domestic and foreign banking and bond holding clientele. So I wonder if you have any comments on this, the revenge of the Whigs, as it were.

Eastman: Yes, the Buchanan veto message that I didn't read was the veto of the first Morell Land Grant Act. Lincoln reverses course on that—I think in order to keep some of the Western states on his side in the Civil War, so I'll kind of give him a pass on the unconstitutionality. But I think the railroad is a good example of where the difference between local and national or general spending is, because in the early Congresses in the 1790s, that's exactly where they drew the line. If you wanted to build a local road, you didn't get money out of the federal treasury for it. But if it was part of the interstate postal system, that got funded. The interstate railroad system would get funded. The spur that would serve only a particular local entity would not. If you wanted to build a system of lighthouses along the Atlantic seaboard, that was in the general welfare; if you wanted to dredge the upper reaches of the Savannah River that were almost entirely of benefit to the folks of Savannah, that was not within the general welfare. Now at the margins, it's going to be a hard line to enforce, but it's not hard to enforce at either extreme. Some semblance is what they had in mind with this text of the Constitution. And it's not a claim of judicial activism for the Court to have to assess whether a statute complies with what the Constitution actually spelled out.

Seidman: Thank you. I frankly don't have a view about whether these projects ought to be funded by Treasury appropriations or by the Fed exercising its powers. The one thing I would say is if Congress doesn't like what the Fed is doing, it's not like it can't do anything about it. The Fed is a creature of Congress, and Congress could and maybe should change the law.

Abernathy: One last question. Is there one out here? Please.

Audience Participant: Dean Eastman, you mentioned something about people trying to gain standing to challenge some of these programs on a constitutional basis. I was wondering if there was actually something in the works that you know about, people trying to challenge TARP through litigation or anything like that? If so, could you talk about that?

Eastman: You know, we took a run at that five or six years ago. We took a run at this in challenging the congressional pay raises that violated the 27th Amendment, and it was knocked out on standing grounds, so I don't expect the Court is going to revisit that, which is unfortunate because it just leaves this stuff unaddressed. The Court's standing doctrine on the ability to challenge unconstitutional spending is very bad, in my view. Richard Epstein wrote a 100-page long law review article that we published in our law review at Chapman as a result of a symposium on the Spending Clause some years ago that points out that in Article III, the power of the federal courts includes powers of the courts of law and equity, and it was always part of the equitable powers to take lots of small claims where you didn't have a particularized injury, like these Spending Clause challenges would be, and allow them to be heard in the courts of equity. There's much more nuance in his article than that, but I commend it to your attention.

Abernathy: I think we have a lot of additional questions we'd ask if there were more time, and that's a good thing. The purpose of this panel is to get us thinking, stimulated, and on a very good road for the rest of the program today. Thank you very much to our panelists.