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Tarp, a Just Act

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TARP, a Just Act

Introduction

In September 2008, big businesses were failing and the Nation was losing almost 800,000 jobs a month.[1] The stock market plummeted 770 points, the equivalent of $1.2 trillion, in a single day.[2] The credit markets were freezing up, reaching well beyond the borders of Wall Street and into the home of the average American family. Household wealth had fallen by 17 percent – more than five times the decline in 1929.[3] The circumstances were bad and worsening. It was believed that the Nation was sitting on the precipice of a second Great Depression.

Life was desperate during the Great Depression. To stay warm, to stay alive, some people were forced to search outdoors for lumps of coal or burn nonessentials such as the family piano or kitchen table. Captured within a picture taken during 1931, a wall of skinny men stand in dusty, worn suits with their hands burrowed deep in their pockets. Most of their faces hang towards the ground revealing only the tops of their tattered hats. Despondent weariness is all that is conveyed on the faces of those who stare forward. The men stand in a line but to say "line" implies an element of progression which seems impossible. At the end of the line a sign reads, "Free Soup Coffee and Doughnuts for the Unemployed." As the line of men extends into the distance, one body becomes indistinguishable from the next. The mass continues on and quietly disappears out of frame. There were worse alternatives to waiting in line for hours for a cup of

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[1] US DEPARTMENT OF TREASURY, *WHY TARP WAS NECESSARY*, [Herein, Treasury, Why TARP Was Necessary] http://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/Why-TARP-was-Necessary.aspx (last visited Feb. 28, 2014)

[2] Alexandra Twin, *Stocks Crushed: Approximately $1.2 trillion in market value is gone after the House rejects the $700 billion bank bailout plan, CNN Money* (September 29, 2008), http://money.cnn.com/2008/09/29/markets/markets_newyork/

[3] Treasury, Why TARP Was Necessary, *supra* note 1.

soup or a dough nut. During the Great Depression it was not uncommon to know of someone who starved to death because they simply could not afford or obtain food.

These victims were not only starved of food but of the core goods which give human life meaning. That is, the ability to live and procreate, to seek knowledge, to play, to enjoy aesthetic experiences, to act with reason, and to participate in religion, friendship and community.[4] Another Great Depression would have catastrophically injured these intrinsic values that are the basis of human action (*the good)*. Such unacceptable harm warrants an unprecedented response. Though the Troubled Asset Relief Program was controversial and unprecedented, Congress was justified in enacting it as it was done for the purpose of preventing catastrophic harm to *the good*.

A Backdrop for Congressional Action- The Subprime Mortgage Backed Security:

The root cause of the economic turmoil which climaxed in September 2008, was the expansion of the mortgage backed security market into subprime lending.[5] Other contributing causes, such as low common equity levels, poor liquidity risk management, and uneven regulation of large financial institutions, added to the severity of the crisis.[6] The expanse of the subprime mortgage backed security, however, was detrimental not only because of its vast presence throughout critical financial markets, but also because of the corrosive manner in which it expanded.

A mortgage backed security is a share of the interest which a bank gains by loaning money to a borrower to purchase a home. This interest can be held by the bank or sold, in pieces

[4]John Finnis, Natural Law & Natural Rights, at *102 (Paul Craig eds., Oxford University Press, 2nd ed. 2011).
[5] Neil Fligstein and Adam Goldstein, Catalyst of Disaster: Subprime Mortgage Securitization and the Roots of the Great Recession, Department of Sociology, University of California, at *23. (2009) http://www.tobinproject.org/sites/tobinproject.org/files/assets/Fligstein_Catalyst%20of%20Disaster_0.pdf (Last visited 3/17/2014).
[6] Paul Saltzman et. al., A Spirited Conversation Assessing the Risks and Benefits of Big Banks, 16 NC Banking Inst 1, 7-8 (2012).

or whole, to investors.[7] Mortgage backed securities may be bundled with many other loans and sold in packages to larger banks which then may slice and resell the packages to investors. [8] The larger purchasing banks may also repackage the mortgage backed securities and sell them in the form of collateral debt obligations ("CDOs").[9] This repeated splicing and repacking is significant for two reasons. The practice served to conceal the grade of the underlying security,[10] and it provided the mortgage backed security with various avenues to thoroughly penetrate the financial system.

Standard mortgage backed securities are generally a safe investment tool.[11] When housing prices are on the rise, as they had been up until 2006, there is enough collateral pooled in the market to cover mortgage loan defaults.[12] Under these conditions mortgage backed securities provide a low-risk, high-return investment product.[13] These desirable, safe returns increased the demand for mortgage backed securities to such a degree that lenders were released from all liability for default occurrences.[14] That is, mortgage backed securities were sold so quickly, that when a default occurred it was after the instrument had been transferred to the investor/purchaser. Thus, it became the purchaser of the mortgage backed security who bore the risk of loss. To keep up with high demand, the banks - no longer concerned about loss from uncollectable interests - began loaning aggressively to borrowers who posed higher risks of defaulting ("subprime borrowers").[15] To keep mortgage backed securities desirable and to offset

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[7] Fligstein and Goldstein, supra, at *4.
[8] Richard E Mendales, Collateralized Explosive Devices: Why Securities Regulation Failed to Prevent the CDO Meltdown and How to Fix It, *available at* 2009 U. Ill. L. Rev. 1359 (Last visited 3/17/2014).
[9] Fligstein and Goldstein, supra, at *11.
[10] Id. at *28.
[11] Id.
[12] Id.
[13] Id.
[14] Id. at *13.
[15] Id.

the increased risk presented by subprime defaults, use of adjustable rate mortgages ("ARMs") increased.[16] ARMs begin with an initial period of low fixed interest rates that would adjust to higher rates over time.[17] Commonly the higher rates would become so excessive that borrowers, who had the ability to pay initially, would default when the higher increases took effect. To an investor these were riskier securities but offered higher dividends.[18]

The economic crisis began to erupt in 2006 with the bursting of the housing bubble.[19] At that time, foreclosure rates began to rise as a bulk of early issued ARMs reset to higher interest rates.[20] The release of more homes on the market stalled the historically increasing real estate values.[21] With real estate values declining, some borrowers found themselves in a situation where they owed more for their home than it was worth.[22] This made the option to walk away from a home increasingly attractive raising foreclosure rates even further. The construction industry, unable to compete with a real estate market flooded with discounted foreclosure homes, necessarily had to shrink to adjust for the decreased work load.[23] This further increased already high unemployment rates consequently placing more homeowners in financially stressed situations.[24] As a result of excessive defaults, the subprime mortgage backed security market had completely collapsed.[25]

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[16] Id. at *4, *19. "Increasingly from 2003-2007, the number of mortgages issued that were subprime went from being about 30% of the total to almost 70% of the total."
[17] Id. at *4.
[18] Id. at *19.
[19] Fligstein and Goldstein, supra at *4.
[20] Id. at *19.
[21] Id.
[22] Id. at *21.
[23] ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: Responding to the Economic Crisis Fostering Industrial Restructuring and Renewal at *16. (July 2009) [Herein OECD Report] Available at http://www.oecd.org/sti/ind/43387209.pdf (Last visited 3/17/2014)
[24] "The crisis was causing our economy to collapse. We were losing almost 800,000 jobs a month and household wealth had fallen by 17 percent – more than five times the decline in 1929."
Treasury, Why TARP Was Necessary, *supra* note 1.
[25] Fligstein and Goldstein, *supra*, at *32.

Many financial institutions in the United States and abroad had purchased large amounts of mortgage backed securities and CDOs.[26] When the market for these securities collapsed, the institutions holding these investments found themselves with billions invested in what became worthless assets.[27] This created liquidity crises which resulted in a domino effect of institutional failures (or near-failures) branding subprime mortgages with the appropriate prefix "toxic."[28] By September 2008, the major U.S. financial institutions Bear Stearns, Indy Mac, and Washington Mutual bank had failed and Lehman Brothers was in bankruptcy.[29] Toxic assets were so thoroughly embedded through-out the economy that their depreciated value within the credit markets caused the Nation's financial system to freeze.[30] Americans rely on credit and liquid markets to make our economy function. Frozen credit lines meant consumers could not finance necessities and businesses could not access capital to run their day-to-day business.[31] Business closings were increasing and the nation was losing almost 800,000 jobs a month, further exacerbating lending needs and defaulting rates.[32] Confidence in the financial system nearly evaporated.[33]

On September 29, 2008, just following the announcement of Congress' rejection of the first version of a rescue package, panic erupted with a stock market free fall that resulted in the

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[26] "When the housing market inevitably turned down, starting in 2006, the pace of mortgage defaults accelerated at an unprecedented rate. By mid-2007, rising mortgage defaults were undermining the performance of many investments held by major financial institutions."
U.S. STATES DEP'T OF THE TREASURY, OFFICE OF FINANCIAL ACCOUNTABILITY , CITIZENS' REPORT: ON THE TROUBLED ASSET RELIEF PROGRAM (TARP) (March 2, 2010), available at http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Eighth%20Tranche%20Report_2009%2010%2007.pdf
[27] Id. at *12.
[28] Treasury, Why TARP Was Necessary, *supra* note 1.
[29] Id
[30] Id.
[31] Id.
[32] Id.
[33] Id.

single day loss of 770 points/$1.2 trillion.[34] "Americans were questioning the safety of their money in banks. For the first time in more than 80 years, a generalized run on the nation's banking system was a real possibility."[35] And then AIG, one of the largest and most complex financial firms in the world, announced that it sat on the precipice of failure.[36] The Federal Reserve and Treasury had exercised what actions they could under existing law but it was not enough to decelerate the economy's tumble.[37] "It was out of these extraordinary circumstances that TARP was born."[38]

Congress Acts to Contain Economic Turmoil - TARP's Objectives:

Congress enacted the Troubled Asset Relief Program (TARP) on October 3, 2008, as part of the Emergency Economic Stabilization Act of 2008.[39] The goal of this rescue initiative was to stabilize the economy and thaw the frozen credit markets by providing the Federal Government with the authority to purchase certain types of troubled assets.[40] The presumption was that through this purchase power, the Federal government could create a market for the toxic subprime mortgages (and related assets) which would stir the stagnant lending system and stave off failures of "too-big-to-fail" financial institutions. Restored investor confidence in the market was the anticipated net affect.[41]

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[34] Alexandra Twin, *Stocks Crushed: Approximately $1.2 trillion in market value is gone after the House rejects the $700 billion bank bailout plan*, *CNN MONEY* (September 29, 2008), http://money.cnn.com/2008/09/29/markets/markets_newyork/

[35] Tim Massad, Remarks of Assistant Secretary Tim Massad at the Brookings Institution on TARP, (9/30/2013) http://www.treasury.gov/press-center/press-releases/Pages/jl2175.aspx (last visited Feb. 28, 2014)

[36] Id.

[37] Id.

[38] Treasury, Why TARP Was Necessary, *supra* note 1.

[39] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765 (2008)(12 U.S.C. § 5201 – 5253).

[40] Id. Section, *Synopsis.

[41] "The purpose of the actions taken and programs created under TARP was to make sure our financial system did not collapse. The financial system is the circulatory system for our nation's financial and economic health. The financial system enables people to have a checking account, get a credit card, receive their payroll deposits, buy a home, finance a college education, and save for retirement. It enables businesses to get financing so that they can

The Emergency Economic Stabilization Act sought to improve the declining economic conditions through several mechanisms. The Act provided income tax relief for individuals, tax incentives for energy efficient initiatives and it increased federal deposit insurance on amounts held in banks to $250,000 from $100,000.[42] The TARP provision embodied Congress' most aggressive tactic as it granted authorization to the Secretary of the Treasury ("Treasury") to purchase, and make commitments to purchase, troubled assets[43] from financial institutions.[44] Treasury was given access to $700 billion taxpayer dollars to use as it deemed necessary and in accordance with the Act.[45] Congress provided guiding considerations to which Treasury was obliged to follow in creating a governance policy that detailed the mechanisms, methods, procedures and criteria which it would use in exercising its newly gifted authority.[46] Accordingly, Treasury detailed its developing programs and the disbursements made under those programs in Tranche Reports and Monthly Reports.[47] Under the authority provided by TARP, Treasury implemented programs in five key target areas: Bank Investments, Credit Markets, AIG, Auto Investments and Housing.[48] Of the potentially $700 billion at the program's disposal,

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grow and expand and hire more people. And without TARP and the government's other emergency measures, the pain experienced by Americans would have been far greater, recovery would have been far slower, and the ultimate cost to repair the damage would have been far higher."
See Treasury, Why TARP Was Necessary, *supra* note 23.
[42] Id. Emergency Economic Stabilization Act § 136(a)(1), and § 303.
[43] 12 USCA § 5211, § (9) TROUBLED ASSETS.—The term "troubled assets" means—
(A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and
(B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.
[44] Id. § 5211 (a) – (e).
[45] Id. § 5225 (a)(3).
[46] Id. § 5211 (d)(1)-(4), § 5213 (1) –(9).
[47] UNITED STATES DEP'T OF THE TREASURY, FIRST TRANCHE REPORT TO CONGRESS (November 4, 2008). *Available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Tranche-Reportfinal.pdf
[48] TIM MASSAD, U.S. DEPARTMENT OF THE TREASURY, OFFICE OF FINANCIAL STABILITY, CITIZENS REPORT, FISCAL YEAR 2011 (February 15, 2012). *Available at* http://www.treasury.gov/initiatives/financial-stability/briefing-

a total of $465.5 billion was utilized, most of which was in the area of stimulating the National Banking System.[49]

1) The Bank Investment Programs

Treasury invested approximately $245 billion across five separate banking programs all focused on stabilizing the banking system as a whole.[50] 1) The Supervisory Capital Assessment Program and the Capital Assistance Program provided a two part system focused on identifying and supporting institutions at risk.[51] Designed by the Federal Reserve Bank and implemented in conjunction with the Treasury, the combined goal of these two programs was to ensure that banks would be strong enough to weather worsening conditions.[52] The first program tested the financial stability of individual institutions.[53] If under this test a bank could not raise sufficient private capital, the second program could be utilized to supply government support. The structured procedure to identify and correct potential instability was intended to reinforce investor confidences and thus stimulate lending.[54] 2) The Capital Purchase Program, the first program executed by the Treasury, provided capital to viable financial institutions of all sizes.[55]

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room/reports/agency_reports/Documents/FY%202011%20TARP%20Citizens%20Guide%20%202%2015%2012.pdf

[49]US DEP'T OF TREASURY, SECTION ON TARP, REPORTS. http://www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Tracker.aspx (last visited Feb. 28, 2014)

[50] Add TARP Treasury Banking link http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/Pages/default.aspx

[51] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE SUPERVISORY CAPITAL ASSESSMENT PROGRAM: DESIGN AND IMPLEMENTATION, at *5,*6 (April 24, 2009). *Available at,* http://federalreserve.gov/newsevents/press/bcreg/bcreg20090424a1.pdf

[52] Id.

[53] "19 of the Nation's largest banks were tested,18 were determined to adequate capital the one that did not was able to raise private capital." Id.

[54] "CAP was closed on November 9, 2009 without making any investments. After the stress tests results were released, banks were able to raise hundreds of billions of dollars in private capital."
U.S. DEP'T OF THE TREASURY, TREASURY ANNOUNCEMENT REGARDING THE CAPITAL ASSISTANCE PROGRAM, (11/9/2009) http://www.treasury.gov/press-center/press-releases/Pages/tg359.aspx

[55] UNITED STATES DEP'T OF THE TREASURY, FIRST TRANCHE REPORT TO CONGRESS (November 4, 2008). *Available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Tranche-Reportfinal.pdf

This program focused on stabilizing the financial market as a cohesive whole.[56] While other programs focused on large institutions which presented greater harm had they collapsed, the Capital Purchase Program reinvigorated overall lending to consumers and businesses by addressing a broader spectrum of banking institutions.[57] 3) The Asset Guarantee Program ("AGP") was designed to support institutions whose failure would have caused serious harm to the financial system and broader economy.[58] "This program provides guarantees for assets held by systemically significant financial institutions that face a risk of losing market confidence due in large part to a portfolio of distressed or illiquid assets."[59] Conducted jointly by Treasury, the Federal Reserve and the Federal Deposit Insurance Corporation, this program was not intended to be made widely available.[60] 4) The Community Development Capital Initiative was a program designed to target areas of special need.[61] That was, areas of moderate or low income communities (or communities otherwise) underserved by traditional banks and financial service institutions.[62] The banks, thrifts and credit unions that service these communities, dubbed "Community Development Financial Institutions" ("CDFIs"), were equally affected as the traditional institutions when the credit market began to freeze. The threat posed to the

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[56] Id.
[57] Under CPP, Treasury provided capital to 707 financial institutions in 48 states.
[58] UNITED STATES DEP'T OF THE TREASURY, MONTHLY REPORT FOR DECEMBER 1 2008 TO DECEMBER 31 2008 (January 6, 2009)
http://www.treasury.gov/initiatives/financial-stability/reports/Documents/105Report_010609.pdf
[59] Id.
[60] "Two institutions received assistance under the AGP - Bank of America and Citigroup. The program began in January 2009 and is now closed. To date, taxpayers have earned more than $3 billion in positive returns from the AGP."
US DEP'T OF TREASURY, SECTION ON TARP, REPORTS [Herein, Treasury, Reports – Bank] http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/agp/Pages/default.aspx (last visited Feb. 28, 2014)
[61] US DEP'T OF TREASURY, *Press Release: Treasury Announces Special Financial Stabilization Initiative Investments of $570 Million in 84 Community Development Financial Institutions in Underserved Areas*, [Herein Treasury – Press Release], (September 30, 2010) http://www.treasury.gov/press-center/press-releases/Pages/tg885.aspx
[62] Treasury – Press Release, *supra* note 61.

underserved communities, however, was exacerbated as they had fewer sources available to pursue financing in the first place. Under this program, the CDFIs received investments of capital and the ability to exchange securities received under the Capital Purchase Program, for securities with more favorable terms.[63] 5) The Targeted Investment Program "was created to help stabilize institutions considered systemically significant, to prevent broader disruption of financial markets."[64] This program gave the Treasury flexibility to provide a revolving line of credit to Citigroup Inc. and Bank of America, both deemed systemically significant, to assist them in staving off collapse.[65]

Distributions under all 5 of the banking programs have been concluded.[66] As for the investments which Treasury still owns an interest in, it is in the process of winding them down in a way, "that maximizes returns for the taxpayers and promotes America's financial stability."[67] In all, taxpayers have recovered more than the amount invested in the five banking programs, netting a total gain of $23.4 billion.[68] [69]

2) Credit Market Programs

Through its TARP provided powers, Treasury launched three programs focused on restarting the flow of credit. The Public-Private Investment Program ("PPIP") was designed to

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[63] Eighty four institutions received investments totaling approximately $570 million.
Treasury, Reports – Bank, *supra* note 60.

[64] UNITED STATES DEP'T OF THE TREASURY, FOURTH TRANCHE REPORT TO CONGRESS (January 7, 2009)[Herein 4th Tranche]
http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Fourth-Tranche-Report.pdf

[65] Treasury purchased $20 billion in preferred stock from each Citigroup Inc. and Bank of America.
Id.

[66] U.S. DEP'T OF THE TREASURY, BANK INVESTMENT PROGRAMS: PURPOSE AND OVERVIEW, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/Pages/default.aspx (*Last visited February 28, 2014)*

[67] Id.

[68] US DEP'T OF TREASURY, SECTION ON TARP, REPORTS, http://www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Tracker.aspx (last visited Feb. 28, 2014).

[69] Amount was determined by the reported cash back amount of $273.4 billion minus the amount obligated, $250.5 billion.
Id.

mitigate asset valuation problems relative to mortgage backed securities.[70] When the mortgage backed security market collapsed, financial institutions were left holding portfolios of distressed or illiquid assets which were hard to value.[71] The pressure to build credit and reduce debt forced the value of other financial assets to drop below market prices.[72] To facilitate price discovery, PPIP provided a purchasing program which combined public and private investment dollars.[73]

The Small Business Administration Securities Purchase Program (SBA) 7(a), recognized that obtaining credit was a critical need of small businesses.[74] To resuscitate the flow of credit to small businesses, targeted investments of $368 million were made to purchase working capital, machinery based and equipment based securities.[75] This injection of liquidity into the secondary market was designed to promote small business lending by increasing the capital available to small business loan originators.[76] The Termed Asset Backed Loan Facility program addressed, head-on, consumers' inability to obtain financing. The program did so by facilitating loans to "any qualified borrower that owned eligible collateral."[77]

3) AIG

The American International Group, Inc., (AIG) is one of the largest insurance companies in the world. In September 2008, at the peak of the financial disaster, AIG faced a severe liquidity crisis that placed it on the brink of failure. As the frozen credit markets foreclose the

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[70] U.S. DEP'T OF THE TREASURY, TARP PROGRAMS: CREDIT MARKET PROGRAMS, PUBLIC-PRIVATE INVESTMENT PROGRAM, PROGRAM PURPOSE & OVERVIEW, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/credit-market-programs/ppip/Pages/purpose-and-overview.aspx (last visited Feb. 28, 2014).
[71] Id.
[72] Id.
[73] Id.
[74] U.S. DEP'T OF THE TREASURY,SBA 7(A) SECURITIES PURCHASE PROGRAM: PROGRAM PURPOSE & OVERVIEW, [Herein SBA 7] http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/credit-market-programs/sba7a/Pages/Program-Purpose-And-Overview.aspx (last visited Feb. 28, 2014).
[75] Id.
[76] SBA 7, *supra* note 74.
[77] UNITED STATES DEP'T OF THE TREASURY SECTION 105(A) TROUBLED ASSET RELIEF PROGRAM REPORT TO CONGRESS FOR THE PERIOD DECEMBER 1 2008 TO DECEMBER 31 2008, at *5, (January 6, 2009) *Available at* http://www.treasury.gov/initiatives/financial-stability/reports/Documents/105Report_010609.pdf

availability of private funding solutions, the firm's only survival option was through government assistance. The government, acting initially through the Federal Reserve Bank of New York, provided assistance to the firm based on the belief that had the company failed, its impact on the already crumbling economic condition would have been devastating.[78] The Treasury and the Federal Reserve Bank of New York provided the firm with a combined commitment of $182 billion.[79] In December 2012, AIG completed its repayment plan providing an overall positive return to the government of $22.7 billion.[80]

4) Auto Investments

The reach of the economic crisis extended well beyond financial institutions. Frozen credit markets greatly restricted consumers' ability to obtain financing needed to purchase vehicles.[81] The unavailability of car loans coupled with increasing unemployment rates resulted in a drastic forty-percent decline in automotive sales.[82] The American automobile industry, already teetering on collapse, was thrust even closer to the edge of insolvency. Failure of the large auto manufacturers would have necessarily impacted related services up and down the

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[78] Treasury – Press Release, *supra* note 61.

[79] "September 16, 2008: The Federal Reserve Bank of New York announces it will provide a two-year, $85 billion secured revolving credit facility to AIG. November 10, 2008: In order to hold residential mortgage-backed securities from AIG life and retirement services companies and collateralized debt obligations from counterparties of AIG Financial Products Corp., AIG and the FRBNY establish the Maiden Lane II and III special purpose vehicles (SPVs), respectively. AIG provides $1 billion in subordinated funding and the FRBNY provides up to $22.5 billion in senior funding for Maiden Lane II. AIG provides up to $5 billion in subordinated funding and the FRBNY provides up to $30 billion in senior funding to Maiden Lane III. November 25, 2008: The Treasury invests an additional $40 billion under the Troubled Asset Relief Program in AIG through the purchase of AIG preferred stock. AIG uses the proceeds to reduce its outstanding debt with the FRBNY from $85 billion to $60 billion."
AIG.COM, http://www.aig.com/americas-profit_3171_437856.html

[80] Of the $22.7 billion, Treasury realized a positive return of $5.0 billion and the Federal Reserve realized a positive return of $17.7 billion.
Id.

[81] Org. for Economic Co-Operation and Development: Responding to the Economic Crisis Fostering Industrial Restructuring and Renewal at *16. (July 2009) *Available at:* http://www.oecd.org/sti/ind/43387209.pdf (Last visited 3/17/2014)

[82] U.S. DEP'T OF THE TREASURY, TARP PROGRAMS: AUTO [Herein: Treasury Programs – Auto]
http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/default.aspx
(last visited Feb. 28, 2014).

supply chain thus threatening further the overall economic condition.[83] Treasury responded to this threat by creating the Automotive Industry Financing Program (AIFP). Under the AIFP, Treasury allocated approximately $80 billion to the ailing domestic auto manufacturers.[84] As of early 2014, the Treasury has recovered $66.1 billion of the $79.7 billion disbursed under the program.[85] While the rescued auto manufacturers are now solvent, it is likely this initiative, when considered in isolation, will result in a net loss to the government.

5) Housing Programs

The Emergency Economic Stabilization Act sought to provide assistance to homeowners in two ways. First, in the section titled "HOPE for Homeowners Amendments," it amended the National Housing Act to expand its eligibility requirements.[86] Secondly, it directed the Treasury, under its TARP powers, to modify the terms of mortgages with the precise goal of reducing foreclosure rates.[87] Treasury established two programs, focused on this initiative: 1) The Making Home Affordable program seeks to prevent avoidable foreclosures by providing mortgage relief to qualifying homeowners through several different platforms.[88] Included in one such platform was the Home Affordable Modification Program which serves to permanently reduce mortgage payments to affordable levels for those borrowers who qualify.[89] 2) The Hardest Hit Fund was created to provide equitable relief to those states impacted more significantly by the deteriorating

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[83] UNITED STATES DEP'T OF THE TREASURY, FOURTH TRANCHE REPORT TO CONGRESS (January 7, 2009). *Available at*, http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Fourth-Tranche-Report.pdf
[84] Treasury Programs – Auto, *supra* note 82.
[85] Id.
[86] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765, Section 124 (2008).
[87] 12 U.S.C. § 5219, 5220 (2008)
[88] U.S. DEP'T OF THE TREASURY, TARP PROGRAMS: HOUSING [Herein, Treasury Programs – Housing] http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/default.aspx (last visited Feb. 28, 2014).
[89] UNITED STATES DEP'T OF THE TREASURY, FOURTH TRANCHE REPORT TO CONGRESS [Herein, 4th Tranche] (April 29, 2009).
Available at,
http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Sixth%20Tranche%20Report%20with%20appendix_042409.pdf

economic and housing markets.[90] The criteria used to determine which areas to target as those which were significantly impacted, focused on unemployment levels and housing market decline percentages.[91] In attempt to provide extending assistance, the Housing Programs under TARP are currently ongoing. Applications for these programs may continue to be submitted through December 2015.

Congressional Control of the Treasury

The Emergency Economic Stabilization Act delegates a great deal of authority to the Treasury. The basis for allocating such power was the complexity of the financial crisis and the perceived need for an immediate response. Congress intended for capital to be injected into the financial markets in a way which balanced the efficacy of tax payer dollars with the combined goals of rescuing financial institutions in need, fostering investor confidences and shocking the stalled lending market back into motion.[92] The most difficult task in determining how to inject capital into the deteriorating credit market was how to price troubled assets. Administrative agencies are utilized for this exact task; that is, they provide the government with expert resources that can operate with more flexibility and speed than the electorate process allows. To provide the needed speedy and calibrated approach, it was necessary for Congress to relinquish this authority to an entity which had the expertise and organizational structure to respond to the challenge. While the power granted to the Treasury was great it was not limitless. The Emergency Economic Stabilization Act provided guidelines to regulate Treasury's discretion and a labyrinth of oversight tools detailed as follows.

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[90] Treasury Programs – Housing, *supra* note 88.
[91] Id.
[92] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765, Section Synopsis (2008) (12 U.S.C. § 5201 – 5253).

To ensure that the Treasury did not act in excess of the authority TARP vested in it, the Financial Stability Oversight Board ("FSOB") was created to review that the Treasury exercised its authority in accordance with the policies created by the Emergency Economic Stabilization Act or those policies which the act directed to be created.[93] The actions which the Treasury took relative to appointing financial agents, designating asset classes for purchase, and structuring the vehicles used to purchase troubled assets, were explicitly required to be reviewed.[94] FSOB was granted authority to ensure that Treasury's actions aligned with the guiding principles of the act which were to protect the economic interest of the Nation in a way which minimized long-term costs and maximized benefits for taxpayers.[95] Other responsibilities of the FSOB included making recommendations to Treasury regarding use of its TARP authority, and reporting its observations to Congress and the duly created Congressional Oversight Panel on a designated monthly and quarterly basis.[96]

The Congressional Oversight Panel was responsible for receiving the quarterly reports created by the FSOB, comparing FSOB's findings with the current state of the financial markets and thereon making an assessment of the effectiveness of the TARP actions implemented. [97] Other reporting responsibilities the Congressional Oversight Panel was charged with appraising included: the Treasury's exercise of its TARP powers, the impact of Treasury's purchases on the market, and the effectiveness of foreclosure mitigation efforts *again* from the standpoint of

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[93] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765, Section 104(a)(1)(A) (2008).
[94] Id.
[95] Id. Section 104(e)(1)-(3), Section 113(a)
[96] Id. Section 104(d),(e)(1)-(3),(g); FSOB membership included: the Secretary of the Treasury, the Chairman of the Fed, the Chairman of the Securities and Exchange Commission, the Director of the Federal Housing Finance Agency, and the Secretary of Housing and Urban Development.
[97] 12 U.S.C. § 5233, (a),(b).

minimizing long-term costs and maximizing benefits for the taxpayers.[98] To address the problem of the uneven regulation of large financial institutions, a contributing cause of the economic crisis, the Congressional Oversight Panel was given the duty to compile a "Special Report on Regulatory Reform" by January 20, 2009.[99] It was directed that this inquiry focus on the quality of oversight provided by the regulatory system in overseeing regulated entities and protecting consumer interests.[100]

To further bolster the oversight of authority granted by TARP, the Emergency Economic Stabilization Act established the Office of the Special Inspector General for TARP.[101] Appointed by the President, the Special Inspector General was "responsible for auditing and monitoring the purchase, management, and sale of assets through TARP."[102] The Special Inspector General was mandated to maintain lists of the institutions participating in TARP as well as an accounting of the amounts of assets purchased, held and sold through the program.[103] The Special Inspector General's capacity to investigate purchases was comprehensive as he was additionally obligated to collect an explanation of the reasons the Treasury deemed it necessary to purchase each troubled asset and detailed biographical information on each person or entity hired to manage

[98] 12 U.S.C. § 5233, (a),(b)(1)-(4).
[99] "SPECIAL REPORT ON REGULATORY REFORM.--The Oversight Panel shall submit a special report on regulatory reform not later than January 20, 2009, analyzing the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers, and providing recommendations for improvement, including recommendations regarding whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system, the rationale underlying such recommendation, and whether there are any gaps in existing consumer protections."
Id. Section 125 (b)(2).
[100] Id.
[101] Id. Section 121(a),(12 U.S.C. 5231(a)).
[102] Id. Section 121(b)(c), (12 U.S.C. 5231(b)(c)).
[103] Id. Section 121(c)(1)(A) - (G), (12 U.S.C. 5231(c)(1)(A) - (G)).

such troubled assets.[104] Congress was kept abreast of these investigative efforts through mandated quarterly reports. [105]

In addition to the oversight responsibilities held by the FSOB, the Congressional Oversight Panel and the Special Inspector General, the Emergency Economic Stabilization Act charged the Treasury with detailed reporting requirements to ensure transparency. With respect to the authority the Treasury gained through TARP, it was required to detail all actions related to: agreements made or renewed, all purchases made, the nature of the assets purchased, the types of parties involved in the purchases, the methodology behind each decision, the department's operating expenses, the valuation for pricing each transaction, justification for the prices paid in each transaction, projected costs and liabilities related to transactions, a description of the vehicles established to exercise its authority, descriptions of the impact of its actions on the financial system and the remaining challenges facing the financial system. [106] Just as the Congressional Oversight Panel was assigned with analyzing the problem of the uneven regulation of large financial institutions, so too was Treasury.[107] Where gaps in regulatory oversight were observed, Treasury was required to provide recommendations to promote improvement. [108]

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[104] 12 U.S.C. § 5233, (a),(b)(1)-(4).
[105] Id. Section 125(f)(12 U.S.C. § 5233, (f)).
[106] (a)(3) a detailed financial statement with respect to the exercise of authority under this Act, including—
(A) all agreements made or renewed;
(B) all insurance contracts entered into pursuant to section 102;
(C) all transactions occurring during such period, including the types of parties involved;
(D) the nature of the assets purchased;
(E) all projected costs and liabilities;
(F) operating expenses, including compensation for financial agents;
(G) the valuation or pricing method used for each transaction; and
(H) a description of the vehicles established to exercise such authority.
Id. Section 105, (12 U.S.C. 5215 (a) – (b)(2)).
[107] Id. Section 105(c)(12 U.S.C. § 5215 (c)).
[108] Id. Section 105(c)(1) – (2),(d), (12 U.S.C. § 5215 (c)(1) – (2),(d)).

To protect the integrity of TARP transactions, Congress required Treasury to make available to the public within two days of making a purchase or trade, a description of the transaction and its pricing details.[109] Broad disclosure requirements were placed on the institutions selling to the Treasury in effort to further market transparency.[110] If the Treasury determined that an institution's disclosures were not sufficient to provide the public with notice of potential exposures known to threaten the financial position of the institution, than the Treasury had the authority to recommend to the entity's regulator that certain additional disclosures be made. [111]

Taxpayer Protections

Woven through-out the TARP provisions of the Emergency Economic Stabilization Act is the principle that the authority granted to Treasury could only be exercised in a way which minimized costs to the taxpayer and maximized benefits.[112] Such a guiding principle could easily be manipulated without more instruction. To ensure that the interests of the taxpayers were protected, the Act proscribed safeguards which limited the discretion of the Treasury.[113] One such measure designed to maximize the efficiency of taxpayer resources, was the directive for Treasury to purchase troubled assets through auctions and reverse auctions, when appropriate,

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[109] Id. Section 114 (a), (12 U.S.C. § 5224 (a)).
[110] Id. Section 114 (b), (12 U.S.C. § 5224 (b)).
[111] Id.
[112] Id. Section 113, (12 U.S.C. § 5223). The concept that the Treasury would be required to conduct a cost-benefit analysis of each action is provided through-out the Act. "The Secretary," referred to as Treasury herein, "shall use the authority under this Act in a manner that will minimize any potential long-term negative impact on the taxpayer, taking into account the direct outlays, potential long-term returns on assets purchased, and the overall economic benefits of the program, including economic benefits due to improvements in economic activity and the availability of credit, the impact on the savings and pensions of individuals, and reductions in losses to the Federal Government." Id.; "In exercising the authorities granted in this Act, the Secretary shall take into consideration-- (1) protecting the interests of taxpayers by maximizing overall returns and minimizing the impact on the national debt." Id. Section 103.
[113] *Id.* Section 113, (12 U.S.C. § 5223).

and at the lowest price consistent with the Act. [114] When purchase through an auction was not feasible or appropriate, the Treasury was mandated to pursue additional measures to ensure that prices paid through direct sales were reasonable and reflected the underlying value of the asset.[115]

Congress recognized that some companies' riskier business practices caused their weak financial condition. Such businesses would have been unjustly enriched had TARP relief allowed them to succeed and profit at the expense of the taxpayers. The Emergency Economic Stabilization Act attempted to prevent such an inequitable result by prohibiting Treasury from purchasing troubled assets without receiving certain equitable warrants in exchange.[116] By receiving common or preferred stock in the institution selling the troubled assets, taxpayers were guaranteed to share in any appreciation the institution may enjoy in the future.[117] To protect taxpayers against loss, the warrants contained anti-dilution provisions which protected the interest held by the government from being diluted in stock splits, stock distributions, dividends, mergers, and other forms of reorganization or recapitalization.[118] A conversion provision was required to be included within the requisite warrants which additionally protected taxpayers from loss by converting the government's interest into a senior debt security if the institution's stock became no longer available in public trading exchanges. [119] The conversion provided the Treasury with priority creditor standing, thus placing it in line to be repaid before all other creditors of the institution.[120]

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[114] Id. Section 113(b)(c), (12 U.S.C. § 5223(b)(c)).
[115] Id. Section 113(c), (12 U.S.C. § 5223(c)).
[116] Id. Section 113(d), (12 U.S.C. § 5223(d)).
[117] Id. Section 113(d), (12 U.S.C. § 5223(d)).
[118] Id. Section 113(d)(D), (12 U.S.C. § 5223(d)(D)).
[119] Id. Section 113(d)(C), (12 U.S.C. § 5223(d)(C)).
[120] Id.

Another taxpayer safeguard provided in the act was the prohibition upon executive compensation plans which incentivized unnecessary and excessive risk taking on the part of the institutions' leadership.[121] If a senior executive of a TARP participating institution received a bonus or compensation based on statements of earnings or other criteria later proven to be materially inaccurate, the act provided a mechanism for the institution to claw back the distributed payments.[122] Additionally, if a company had sold troubled assets to the Treasury during an auction process, then the top five executives within the company were precluded from executing "golden parachute" contracts.[123] Such contracts provide excessive compensation to the employee if employment is involuntarily concluded.[124] These measures sought to prevent culpable parties from benefitting unjustly through TARP funding and from gambling unnecessarily with taxpayer dollars.

Congress further sought to protect taxpayers by including a recoupment provision in the Act.[125] The purpose of this provision was to prevent TARP dispensations from increasing the deficit or national debt.[126] It afforded taxpayers the ability to recover from the financial industry the amount distributed under TARP and not returned after five years from the date of enactment of the Emergency Economic Stabilization Act.[127] Upon the report of a shortfall, the President was required to submit to Congress, a proposal to cure the deficiency.[128]

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[121] The act provided that the top five highest executives within an institution which sold troubled assets to the Treasury through a direct-sale, must not be paid in accordance with a compensation plan designed to incentivize unnecessary and excessive risks that threaten the value of the firm while the Treasury holds an ownership interest. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765 (2008) Section 111 (12 U.S.C. § 5221).
[122] Id. (B)(2)(b).
[123] Id. Section 111(b)(2)(C), (12 U.S.C. § 5221 (b)(2)(C)).
[124] Id. § 5223.
[125] Id. § 5239.
[126] Id.
[127] Id.
[128] Id.

Was Congress' Justified in Enacting the Troubled Asset Relief Program?:

To determine if Congress acted justifiable when enacting TARP, what constitutes justice must first be established. The positivist philosophy, premised in analyzing data and empirical evidence, does not require that a law be moral to be justified. A positivist approach isolates the subject areas of law and morality believing them to operate in complete exclusion from one another and at no point overlapping. While such a methodology may be useful in quantifying whether the act had any stabilizing effect on the financial markets or U.S. economy, it would fail to consider the non-empirical factors which made Congress' act controversial.[129] Such a narrow approach may satisfy consequential theorists who evaluate the moral worth of an action solely on the outcome produced. However, the consequential approach is too narrow still, as it fails to value the means used to achieve the ends sought.

Martin Luther King Jr. set forth the notion that an unjust law is but a perversion of a law; while it may be legally binding, it is not binding in terms of conscious. This notion that a just law embodies a combined moral and legal purpose, is the basis of natural law theory. If the state is an ethical establishment, and justice is the purpose for which law exists, then a law can only be justified to the extent it promotes moral good (*the good)*. Therefore, to analyze completely whether Congress acted justifiably, the proper test must contemplate the good that was sought to be achieved. Yet, determining *good* is problematic as the concept of *what is good* is subjective and highly personal. It raises the question, who's idea of *good* should an act by Congress be judged by?

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[129] That is, whether the unprecedented level of government interference in the private market would increase the moral hazard associated with economic risk-taking or whether public anger toward policymakers would irreversibly damage government credibility.

Natural law theory is premised on the view that certain rights are universally cognizable by virtue of human reason. Based on a foundation that reason is intrinsic to human dignity, John Finnis provides a set of guidelines to test for *the good* that cuts across varying belief systems. Finnis' "Basic Requirements of Practical Reasonableness" consists of nine interrelated, objective considerations of what is practically reasonable.[130] This methodology will serve as the basis for analyzing whether Congress was justified in enacting TARP, that is whether Congress reasonably acted to advance the *good*.

1) A Coherent Plan of Life:

The first consideration in determining an acts practical reasonableness is whether the act was part of a "coherent plan of life."[131] For TARP to have been part of a coherent plan, Congress must have enacted it thoughtfully; it could not have been a product of impulse or instinct.[132] TARP must operate in harmony with the other responsibilities and functions of the government.[133] The good which was sought to be achieved should be appropriately placed amongst the hierarchy of other goods or basic values. [134]

TARP was an extraordinary act in that it authorized government intervention in the private market at an unprecedented level. It greatly expanded Treasury's authority and provided $700 billion taxpayer dollars to address one problem. Though extraordinary and unprecedented in some respects, TARP was not inconsistent with the overall purpose of the government which is to protect its constituents. The challenge of stabilizing the economy was great and accordingly required great resources to address it. The interference within the private market, though

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[130] John Finnis, Natural Law & Natural Rights, at *102 (Paul Craig eds., Oxford University Press, 2nd ed. 2011).
[131] Finnis, Id. at *103.
[132] Id.
[133] Id.
[134] The "goods" as Finnis saw them are the distilled basic purposes of human action. They include life, knowledge, play, aesthetic experience, practical reasonableness, religion and friendship/community.
Id. at 60 – 75.

considerable, was executed in a measured fashion. "Minimizing the cost to taxpayer and maximizing the benefit" was a principle repeated throughout the act.[135] This demonstrates Congress sought to act prudently and confine Treasury's discretion and authority to only those acts which were deemed necessary.[136]

The procedural checks and balances of the legislative process insulate, to a degree, Congressional decisions from being the product of impulse or instinct. While this initiative did move through the legislative system quicker than usual, this was necessary to remedy an exigent condition. It was said that, "the cost of doing nothing was [is] greater than the cost of doing something."[137] Drawing a distinction between the result of acting immediately verses waiting to act, demonstrates a degree of consideration was exercised. The House of Representatives voted down the first version of the Emergency Economic Stabilization Act before enacting the final version a week later, further evidencing that the act was not impulsively created.[138] The existence on an urgent condition was confirmed as just following the announcement of Congress' rejection of the first version of a rescue package, panic erupted with a stock market free fall that resulted in the single day loss of 770 points/$1.2 trillion.[139] Therefore since the circumstances were urgent and extraordinary, Congress' prompt and correspondingly extraordinary response was reasonably part of a coherent plan.

2) No Arbitrary Preferences Amongst Values:

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135 12 U.S.C. § 5223 (2008).
136 Id. § 5225 (a)(3).
137 House Representative Lewis, of Georgia, 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108.
138 Emergency Economic Stabilization Act, H.R. 3997, Republican Policy Committee. Senate, (Sept. 28, 2008).
139 Alexandra Twin, *Stocks Crushed: Approximately $1.2 trillion in market value is gone after the House rejects the $700 billion bank bailout plan, CNN Money* (September 29, 2008), http://money.cnn.com/2008/09/29/markets/markets_newyork/; Treasury, Why TARP Was Necessary, *supra* note 1.

The second consideration in determining an acts practical reasonableness is whether one value[140] was preferred arbitrarily over another.[141] "Values" as defined by Finnis, are the most basic goods which drive human action.[142] Any commitment to a coherent plan will necessarily require a shifting in the concentration of one or more of these basic goods.[143] While a shifting in attention is reasonable, it would have been unreasonable for Congress to enact TARP if it irrationally ignored other basic goods.[144] The "goods" as distilled by Finnis include life, knowledge, play, aesthetic experience, practical reasonableness, religion and friendship/community.[145]

Congress enacted TARP out of the fear that the nation would face another Great Depression if liquidity and stability was not immediately restored to the financial system.[146] During the Great Depression household wealth dropped to the point that families found it difficult to purchase food, the sustenance of life. Without preserving life, there can be no enjoyment of anything. It is irrelevant whether the goods are defined as Finnis provides, or whether they encompass more lofty principles such as John Rawls' primary goods (liberty, opportunity, wealth and self-respect). Congress was trying to protect that which is essential to life and all that comes with it. Therefore Congress, in acting to prevent another Great Depression sought to promote all of the basic goods regardless of form. As it did not arbitrarily prefer one value over another, Congress acted reasonably under this second consideration.

3) No arbitrary preference amongst persons

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[140] By "value" Finnis is referring again to the "basic goods" which are the basic principles of human action.
[141] Finnis, supra, at *60 – *75.
[142] Id. at *104.
[143] Id.
[144] Id.
[145] Id. at *60 - *75.
[146] 12 U.S.C. § 5201.

The third consideration in determining an acts practical reasonableness is whether the act arbitrarily prefers one group or class of people over another.[147] With the rationale of avoiding another Great Depression, Congress granted authorization to Treasury to use $700 billion taxpayer dollars to purchase, and make commitments to purchase, troubled assets from financial institutions.[148] Preferences are likely to exist whenever the government distributes resources. It would be inequitable for the government to provide food stamps to the wealthiest citizens, yet not doing so could be called a preference for the impoverished. The preference to save large financial institutions (*Wall Street)* was not an arbitrary decision, it was intentionally done for the primary purpose of protecting the *good* for everyone.

To it critics, TARP0 was perceived as providing preferential treatment to Wall Street and big business at the expense of Main Street.[149] Wall Street and the risky trading practices associated with it, played a role in creating the state of economic upheaval which threatened the nation. That is, risky trading practices propelled the expansion and demise of the mortgage backed security which was a primary cause of the market crash.[150] It was said that, "Wall Street speculators, now the major donors in Federal campaigns, have used their considerable influence inside the halls of government, especially at the U.S. Treasury, to open up the piggy bank. Meanwhile, taxpayers across Main Street, who will pay the bill, will find it has no effect on bettering their lives as unemployment increases, foreclosures increase, and the squeeze on the middle class increases."[151] While TARP in effect rewarded wrongdoing, and its distribution of

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[147] Finnis, supra, at *105.
[148] 12 U.S.C. § 5211 (a) – (e), 5225 (a)(3).
[149] Main Street was a term repeatedly used as Congress debated the act. While Wall Street meant the big financial institutions, Main Street covered the rest of Americans.
[150] See Section 2 herein, A Backdrop for Congressional Action - The Subprime Mortgage Backed Security
[151] Assemblywoman Kaptur, Ohio, 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108 (October 3, 2008).

resources seemed inequitable, it was not done arbitrarily. Congress was acting to preserve the enjoyment of all basic goods which would be lost had an economic depression ensured.

The harm which gripped big financial institutions could not be severed from Main Street. Americans rely on credit and liquid markets to make our economy function. The economic crisis impacted Main Street in three ways. 1) Retirement plans (401K plans, municipal pension funds and private pension programs) are all funded through investments in a vast array of stocks, bonds, and other securities which plummeted along with the mortgage backed security market. While they would have recovered to some degree when the market began moving again, there was a threat they would not recover before access to the assets would be needed.[152] (Drake) 2) The credit system enables people to have a checking account, get a credit card, receive payroll deposits, buy a home, finance a vehicle and pay for college.[153] Without a capital injection into the secondary credit market, which is the larger financial institutions, small businesses and individual borrowers would have been precluded from accessing loans and making the necessary purchases for day to day survival.[154] (Association Letter) 3) Capital projects, such as road work or school maintenance, were additionally hindered because credit was only available at unattainable rates or not at all.[155] The economy is a free flowing circulatory system. One part of it cannot be walled off from another. There was no way to mitigate the impact to Main Street while letting the large financial institutions on Wall Street continue to fail. Congress sought to mitigate harm to the financial institutions so to preserve the basic good for all Americans. As it

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[152] EMERGENCY ECONOMIC STABILIZATION, Congressional Record - House of Representatives; PL 110–343, 122 Stat 3765; 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108 [Herein, House Congressional Rec'd.] (October 3, 2008).
[153] Treasury, Why TARP Was Necessary, *supra* note 1.
[154] House Congressional Rec'd, citing, John C. Drake, Boston Globe, NATIONAL UPHEAVAL, LOCAL SHUDDERS-CREDIT WOES CONVULSE PLANS OF CITIES, TOWNS, (October 3, 2008).
[155] Id. citing "Association Letter."

did not arbitrarily prefer one group over another, Congress acted reasonably under this third consideration.

The philosophy of John Rawls generally centers around concern for the least advantaged. This can be distinguished from Finnis' philosophy which revolves around the good. From a modified (emphasis on modified) Rawls standpoint, TARP can still be considered a reasonable Act. The concept of distributive justice provides that burdens should be distributed to those who can best bear them. The $700 billion was provided by the taxpayers, to inject within the financial institutions. In strictly considering this case, though awkward to picture, it was the taxpayers who were in the best position and the large financial institutions who were the least advantaged. Saving the financial institutions would promote the good to all and since in this scenario they are the least advantaged, it would clearly be a reasonable act. Regardless of this fiction, Congress had a reasonable purpose in preferring Wall Street as that was the only way to protect Main Street. As such, Congress did not arbitrarily prefer one group above another. The Act was reasonable under this third analysis.

4) & 5) Over Commitment to the Pursuit of One Good / Complete Detachment from all Other Goods:

Finnis' fourth and fifth requirements of practical reasonableness are easy to analyze together as they are closely complementary.[156] That is, it is unreasonable for an act to pursue one good so blindly that all other goods are disregarded (detached).[157] These are reminiscent of the first consideration for a coherent plan which provided that TARP must operate in harmony with the other responsibilities and functions of the government in order to be considered

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[156] Finnis, <u>supra</u>, at *109.
[157] <u>Id</u>.

reasonable.[158] Congress enacted TARP to preserve all of the basic goods, as all were equally threatened by an economic depression. Therefore, the *implementation* of TARP did not offend Finnis' commitment/detachment inquiry because, as said, the legislative act sought to preserve all goods together. Congress could have, however, violated this guideline by overcommitting resources to manage the *maintenance* of the TARP program.

In delegating such unprecedented powers to Treasury, Congress retained various oversight responsibilities. Had Congress been so overwhelmed in receiving and managing the various reports from the Financial Stability Oversight Board, the Congressional Oversight Panel, the Special Inspector General and the Treasury, that it failed to respond and enact other needed initiatives, than it would have acted unreasonably. It was more likely, however, that receiving the reports helped Congress to discover, "new and better ways for carrying out one's commitments, rather than restricting one's horizon and one's efforts to the projects, methods, and routines with which one is familiar."[159] Treasury's Monthly Report and Tranche reports demonstrate that the vehicles for dispersing funds were continuously re-evaluated through the course of the program.[160] It was through the authorities which Congress granted to Treasury that made this possible. Such flexibility was the purpose of Finnis including this guideline in the

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[158] Finnis, supra, at *103.
[159] Id. at *110.
[160] "While there is no single action the U.S. government can take to end the financial market turmoil and the economic downturn, the authorities Congress provided to Treasury under the EESA dramatically expanded the tools available to Treasury to stabilize the financial system. Moving forward, Treasury is committed to ensuring that a financial crisis of this magnitude does not happen again. Treasury continues to work with the Federal regulators, Congress, and the Administration to lay out a new framework for a modern regulatory structure that will better enable the Federal Government to address future crises. Treasury is confident that its efforts to restore financial stability will lay a strong foundation for economic recovery and market stability."
UNITED STATES DEP'T OF THE TREASURY, EIGHTH TRANCHE REPORT TO CONGRESS [Herein, 8th Tranche] (October 7, 2009).
Available at,
http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Eighth%20Tranche%20Report_2009%2010%2007.pdf

evaluation. For the reasons stated herein, Congress enacted TARP with built-in vehicles for flexibility that prevented a blind commitment in the pursuit of its objective. Congress therefore acted reasonably under Finnis' fourth and five considerations.

6) The Relevance of Consequences, Efficiency With-in Reason:

The sixth consideration in determining whether the TARP legislation was practically reasonable focuses on whether the act was efficient for its purposes.[161] This consideration is to prevent the waste of opportunities by using inefficient methods.[162] To prevent further economic decline, Congress intended for capital to be injected into the financial markets in a way which balanced the efficacy of tax payer dollars with the combined goals of: rescuing financial institutions in need, fostering investor confidences and shocking the stalled lending market back into motion.[163] Congress relied on testimony from market experts from the Federal Reserve Board, Chairman Ben Bernanke, and from the Treasury, Secretary Henry Paulson to determine what amount Treasury could access. While Congress granted Treasury access to $700 billion dollars, it utilized only $465.5 billion. Whether the $465.5 billion was used efficiently is a difficult question. Hindsight allows us the benefit of knowing that a second Great Depression was successfully avoided. Whether that was the result of the TARP or normal market bounce back it is difficult to determine. In his testimony to the Committee on Banking, Housing and Urban Affairs, Standford University's John B. Taylor stated the difficult challenges in determining the effect TARP had on the market overall.[164] "Even if one can find some stabilizing effects, it is clear that other actions could have been taken that did not have these rollout

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[161] Finnis, supra, at *111.
[162] Id.
[163] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765 (2008) Section 111 (12 U.S.C. § 5221).
[164] John B. Taylor, Written Testimony for the Committee on Banking, Housing, and Urban Affairs United States Senate Stanford University, (March 17, 2011).

costs."[165] While alternative vehicles may have had lowered rollout costs, it is not automatic that it would have increased efficiency over all. One of the rollout costs Taylor noted as an example of what was avoidable, was that "government officials told lawmakers in closed hearings, that America would experience another great depression if the TARP legislation were not passed, and perhaps even if it were passed. Clearly this helped cause panic in the financial markets."[166] Taylor includes empirical data which demonstrates the stock market plummeted just after this. While there are claims such as Taylor's which point to less than efficient elements of TARP execution, these do not prevent the legislative act from being found reasonable under Finnis' sixth consideration.

Finnis warns of the dangers of over-valuing a comparative benefits analysis.[167] He says that methodology centered on maximizing the greatest good is irrational.[168] Finnis supplies three justifications to limit the influence of cost-benefit analysis; he warns that taken to a logical extreme, cost-benefit analysis could allow for blatant evils to occur as long as it supports the *greater good*.[169] Finnis says a cost-benefit analysis is arbitrary because it assumes that goods are commensurable, such an analysis is unreasonable when a decision is not readily quantifiable.[170] Theoretically there can be an infinite number of alternatives available in every decision, since assessment of alternatives could never end, it should not begin.[171] Lastly, Finnis warns that such an analysis is easily manipulated to support a predetermined path or overpowering desire.[172] As provided by Finnis, cost-benefit analysis is not always beneficial. It attempts to quantify non-

[165] Taylor, supra, at * 5
[166] Id. at *3.
[167] Finnis, supra, at *112, 113.
[168] Id.
[169] Id.
[170] Id. at *115.
[171] Id. at *114.
[172]

commensurable concepts. A cost-benefit analysis cannot account for the incalculable costs associated with TARP such as the cost associated with an increase to the moral hazard of economic risk-taking, or the expense related to the damage done to government credibility based on public anger toward policymakers. Built within TARP was the principle that the authority granted to Treasury could only be exercised in a way which minimized costs to the taxpayer and maximized benefits.[173] To ensure that the interests of the taxpayers were protected, the Act proscribed safeguards such as purchasing warrants and recoupment terms.[174] Therefore, because the Act does not lend itself to cost-benefit analysis and since it included protections to prevent against waste, it was reasonably efficient to the address the purpose sought.

Under John Rawls modified cost-benefit analysis, TARP would again likely represent a reasonably efficient action. That is Rawls cost-benefit analysis seeks to determine the "net minimum (or lesser) evil."[175] The $700 billion was taken from tax collections already theoretically held by the government. This employed a concept of distributive justice because while some people contributed more in tax dollars than others, the greater amounts paid were equitably taken from those who had greater ability to pay. If further economic crisis ensued then the distributive calculus would shift to re-account for those who then became the less advantaged. Though the bail-out affected each taxpayer, because the tax system takes less from

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[173] The concept that the Treasury would be required to conduct a cost-benefit analysis of each action is provided through-out the Act. "The Secretary," referred to as Treasury herein, "shall use the authority under this Act in a manner that will minimize any potential long-term negative impact on the taxpayer, taking into account the direct outlays, potential long-term returns on assets purchased, and the overall economic benefits of the program, including economic benefits due to improvements in economic activity and the availability of credit, the impact on the savings and pensions of individuals, and reductions in losses to the Federal Government." *Id.* "In exercising the authorities granted in this Act, the Secretary shall take into consideration-- (1) protecting the interests of taxpayers by maximizing overall returns and minimizing the impact on the national debt."
12 U.S.C. § 5223 (2008).
[174] Id. § 5223(d), 5239.
[175] Finnis, supra, at *114.

those who are least advantaged, the bail-out represented the lesser evil when compared with the unpredictable economic distress which was feared to result.

Someone prescribing to the utilitarian approach will likely staunchly disagree with this finding. To the utilitarian, maximizing efficiency is tantamount to a basic good. As suggested by Finnis, this could lead to a gross abuse and is additionally a near impossible task when the issue is not readily quantifiable. During the peak of the crisis, the circumstances were exigent. There simply was not enough time for Congress to determine the most efficient path. The Act was far from perfect as Congress admits. "Today's bill is not perfect but we have done what we needed to do for the American people. In truth if you gave every Member of Congress a chance to draft a proposal to address this crisis we would have 435 bills in front of us today-the enemy of the good is the perfect."[176] As Congress could not have responded timely if held to the utilitarian standard during the crisis, they should not be judged by such a faulty standard now.

7) Respect For Every Basic Value:

Based on the concept that "reason requires that every basic value be at the least respected in each and every action," Finnis seventh requirement of reasonableness requires that TARP respect every basic value.[177] As stated above, TARP was enacted with the purpose of preventing severe economic hardship to the Nation. The impact of such a catastrophe threatened the enjoyment of all *goods*. As such TARP attempted to preserve all *goods*. However, because of the expense associated with the program, had the act not included protections to secure taxpayer interests, then all of the *goods* which were sought to be protected currently may have

[176] Assemblyman Pelosi, 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108 (October 3, 2008).
[177] Finnis, supra, at *120.

paradoxically been exposed to harm in the future. TARP's design, however, directly addressed this by including various safeguards. [178]

Respect for every basic value also considers the incidental affects an act may have on other *goods*. A test Finnis suggests to consider is whether one would make the same choice to act if they were the person who would be harmed.[179] All of Congress would have suffered the harms of an economic depression or conversely the harms of over exposing the taxpayers to mitigate the feared condition. As such, and because of the built in balance and protection measures, Congress reasonably respected all basic *goods* in implementing the Act.

8) The Requirements of the Common Good

Finnis' eighth consideration for reasonableness requires that an act favor or foster the common good of one's communities.[180] Discussed in detail in the second consideration, TARP was a controversial act based on the perceived preference of assisting Wall Street over Main Street. Discussed in that section, it was concluded that distinguishing between big business and the rest of America was a reasonable act. This eighth consideration requiring a common good, may in effect undercut the argument of those who believed that TARP unreasonably benefitted Wall Street. Wall Street, just like Main Street, is part of the American community. To watch Wall Street fall would not have promoted a *good*, it would have offended the national principle of community.[181] "If there's a hurricane in Louisiana, we all come to the aid of the American

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[178] The protections noted include the warrant program to secure financial injections and the recoupment provision to collect amount owed to the program after a five year period.
Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat 3765 (2008) Section 113(d),134 (12 U.S.C. § 5223(d), 5239).

[179] Finnis, supra, at *123.

[180] Id. 125.

[181] Allowing large financial institutions to collapse would have resulted in massive levels of job loss. This would in effect harm the good as more people, who were not responsible for risky trading decisions, would have lost their livelihoods thus access to the goods which a salary is able to secure.

family. If there's a forest fire in California, we all come to the aid of the American family. If there's a blizzard in New England, we all come to the aid of the American family. And that's precisely what this legislation does [today]. Next week, when people are having difficulty getting a car loan, trying to refinance their mortgage or looking at their 401(k) plan, we acknowledge that they are all members of the American family, and we attempt today to come to their aid. There is relief here for alternative minimum tax victims; 25 million people will benefit. Twelve thousand businesses are waiting for incentives for the R&D credit. Four million families and three million teachers are waiting for their deductions for education expenses. Thirteen million children in low-income families can finally claim the child tax credit… This is a piece of legislation that helps the American family."[182]

While it can be argued that the implementation of TARP secured the common *good*, there is also a contrary position that bailing out big businesses offended the principle of subsidiarity.[183] That is bailing out businesses prevented them from helping themselves, it promoted reliance on government relief in the future. This argument, however, is not moving. The only areas of the TARP package which did not require repayment were the programs which provided relief to mortgage holders. All other TARP funding recipients were required to repay the capital injections they received with interest. This promoted businesses to take responsibility for their business choices.[184] Furthermore, TARP implemented reporting initiatives to determine

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[182] Assemblymen Neal, Massachusetts, 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108 (October 3, 2008).

[183] Finnis, supra, at *146.

[184] $465.5 billion was utilized by Treasury, the government was able to recover a net return of $438.4 billion. US DEP'T OF TREASURY, Section on TARP, Reports, *available at* http://www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Tracker.aspx (last visited Feb. 28, 2014)

the flaws within the regulatory network which polices big business.[185] Through these findings the regulatory scheme has subsequently been addressing the areas identified as needing improvement**.**[186] As such, TARP can be said to have reasonably fostered the common good of one's community because it sought to improve the regulatory system which monitors institutional risks posed to the community, and Wall Street is equally a part of the community as Main Street.

9) Following One's Conscience:

Finnis' ninth consideration requires an actor to follow one's conscience and not perform any act to which his conscious tells him should not be done. TARP legislation was a complicated and controversial act. It unprecedentedly interfered in the private market to a degree which appeared to undermine the foundations capitalism. The justification for the act was premised on the belief that immediate action was necessary. Under the concept of relativism it would have likely come down to vote. This act did require a vote to become law, 74 Yeas from the Senate and 268 Yeas from the House did it though this alone does nothing to evidence morality. Reading through the committee reports it is clear that the common concern was what would happen to the nation if Congress did not implement TARP. Assemblyman Frank summarized Congress' task succinctly when he said, "today is a historic day in the United States Congress as the President has called on us to meet the challenge of the failure of the mortgage market, and

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[185] To address the problem of the uneven regulation of large financial institutions, a contributing cause of the economic crisis, the Congressional Oversight Panel was given the duty to compile a "Special Report on Regulatory Reform" by January 20, 2009. It was directed that this inquiry focus on the quality of oversight provided by the regulatory system in overseeing regulated entities and protecting consumer interests.

[186] Enterprise Risk Reports are now required in certain states where banks and insurers are domiciled, Systemically Important Financial Institutions now include none banking entities and require increased capital reserving and transparency reporting.

our failure to do that would not only cause a crisis in the United States but throughout the world." [187]

In conclusion, the threat from the economic crisis was severe. The coming of a second Great Depression would have substantially threatened the good of the Nation, that is the ability of Americans to live and procreate, to seek knowledge, to play, to enjoy aesthetic experiences, to act with reason, and to participate in religion, friendship and community. Though Congress acted unprecedentedly in enacting the Troubled Asset Relief Program, the act itself sought to protect the most intrinsic and basic human values. TARP, therefore, was a just act.

[187] Assemblyman RANGEL, 154 Cong. Rec. H10712-02, 154 Cong. Rec. H10712-02, 2008 WL 4449108 (October 3, 2008).