



2014

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Recommended Citation

Confronting Chaos: The Fiscal Constitution Faces Federal Shutdowns and (Almost) Debt Defaults, 43 HOFSTRA L. REV. 511 (2014).

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CONFRONTING CHAOS: THE FISCAL CONSTITUTION FACES FEDERAL SHUTDOWNS AND (ALMOST) DEBT DEFAULTS

Charles Tiefer*

I. INTRODUCTION

Recent events raise the question of whether two near-failures in what scholars call the “Fiscal Constitution”¹ may plunge the government into paralysis or chaos. In October 2013, a lapse in congressional appropriations² shut the government down for two weeks. The shutdown³ furloughed hundreds of thousands of federal employees.⁴ It

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1. The Fiscal Constitution provides the framework for borrowing, spending, taxing, and budgeting. See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 796 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)). Besides constitutional provisions, it includes key statutes, regulations, and practices. See Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593, 600 (1988) [hereinafter Stith, *Rewriting*]. It is the legal framework that governs the federal budget process. For discussions of the Fiscal Constitution, see Huq, *supra*, at 796-99; Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1363 & n.97 (1988) [hereinafter Stith, *Congress*]; Kate Stith, *Rewriting, supra*, at 600, 652; Charles Tiefer, “Budgetized” Health Entitlements and the Fiscal Constitution in Congress’s 1995-1996 Budget Battle, 33 HARV. J. ON LEGIS. 411, 415, 418-19, 423-24 (1996) [hereinafter Tiefer, “Budgetized”]; Charles Tiefer, *Congress’s Transformative “Republican Revolution” in 2001-2006 and the Future of One-Party Rule*, 23 J.L. & POL. 233, 234 n.7, 237 nn.39 & 41 (2007) [hereinafter Tiefer, *Congress’s Transformative*].

2. For recent discussions of appropriations, see Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 477 (2011); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1825, 1827 (2012).

3. Paul Kane & Josh Hicks, *So Far on Capitol Hill, No End in Sight over Shutdown*, WASH. POST, Oct. 4, 2013, http://www.washingtonpost.com/politics/obama-cancels-asia-trip-as-shutdown-debate-shifts-from-health-care-law-to-debt-ceiling/2013/10/04/8225784c-2cf5-11e3-8ade-a1f23cda135e_story.html.

caused some agencies, such as the Internal Revenue Service (“IRS”), virtually to close their doors and to curtail their services.⁵

Simultaneously, and potentially even more devastating, the House of Representatives (alternatively “House”) firmly refused during an extremely tense countdown to raise the statutory debt ceiling of the government.⁶ When the government hits that ceiling, it cannot borrow any more money.⁷ The government cannot meet all of its program obligations—like Social Security—without borrowing.⁸ As a result, once the debt ceiling is reached, the government may be unable to meet its debt interest obligations, causing it to default on the national debt.⁹ The nation would face calamity. Nonetheless, tremendous national pressure failed to budge recalcitrants in the House until, with the utmost reluctance, the House finally held a vote on October 17 to allow borrowing, just one day before the government would have hit the debt ceiling.¹⁰

The President had no clear authority to cure the consequences of a congressional refusal, either to appropriate money or to raise the debt ceiling, since he can neither appropriate nor borrow without Congress’s permission.¹¹ In October 2013, the nation pulled through because the

4. *Impact of a Government Shutdown*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/2013-shutdown-federal-department-impact> (last updated Oct. 2, 2013).

5. *Id.*; Brad Plumer, *The Nine Most Painful Impacts of a Government Shutdown*, WASH. POST (Oct. 3, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/01/the-nine-most-painful-consequences-of-a-government-shutdown>.

6. *See* Brad Plumer, *Absolutely Everything You Need to Know About the Debt Ceiling*, WASH. POST (Oct. 14, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/04/absolutely-everything-you-need-to-know-about-the-debt-ceiling>.

7. Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 153 (2005).

8. *See* Ray Martin, *Social Security Offices to Be Impacted by Government Shutdown*, CBS NEWS (OCT. 1, 2013, 11:58 AM), <http://www.cbsnews.com/news/social-security-offices-to-be-impacted-by-government-shutdown>; *see also* Tiefer, “Budgetized,” *supra* note 1, at 416-18 (discussing the budgetary deficiencies of the Social Security Administration over the last thirty years).

9. Jason Lange, *Factbox: How and When Might the United States Default?*, REUTERS.COM (Oct. 16, 2013), <http://www.reuters.com/article/2013/10/16/us-usa-fiscal-qa-idUSBRE99FOR120131016>.

10. Michael D. Shear & Jeremy W. Peters, *Senators Near Fiscal Deal; House Uncertain*, N.Y. TIMES, Oct. 15, 2013, at A1; Lori Montgomery & Rosalind S. Helderman, *Federal Shutdown Ends; Obama Signs Bill*, WASH. POST, Oct. 17, 2013, http://www.washingtonpost.com/business/economy/federal-shutdown-nears-end-as-senate-votes-to-raise-debt-limit/2013/10/17/a65544ba-368f-11e3-ae46-e4248e75c8ea_story.html.

11. *See* Neil H. Buchanan & Michael C. Dorf, *Borrowing by any Other Name: Why Presidential “Spending Cuts” Would Still Exceed the Debt Ceiling*, 114 COLUM. L. REV. SIDEBAR 26, 30 (2014) (“[T]he U.S. Constitution explicitly confers upon Congress the powers to spend, tax, and borrow.”).

House yielded.¹² A question remains of obvious interest: what could the President do if faced with another, longer shutdown, or, even more devastating, the actual hitting of the debt ceiling? There has been surprisingly little scholarly discussion of these specific questions. The author of this Article was invited to participate in television, radio, and newspaper coverage of the October 2013 problems. Certain proposals that were alluded to in the media receive their first developed presentation here.¹³

Part II of this Article deals with shutdowns.¹⁴ The Executive Branch analyzed what it could legally do on several occasions: in the key 1980 Attorney General Opinion (“Civiletti Opinion”);¹⁵ during the similar shutdown in 1995;¹⁶ and in 2011.¹⁷ However, in none of those analyses did the government get beyond a static approach to the problems that follow a shutdown. It assumed that the same considerations about what government activities should be brought to a halt that apply on Day One of a shutdown would continue to apply in just the same way on Day Fifteen or Fifty. In contrast, taking a dynamic view would permit the government to change directions as the shutdown ensues. Recognizing that the adverse impact of the shutdown increases over time, the government could bring back workers from furloughs, agency by agency, as the shutdown continues.

Emphatically, seeking methods of mitigating the worst possible consequences of hitting the debt ceiling by developing a playbook should not be seen as minimizing those awful consequences. Going “over the fiscal cliff” entails a failure to carry out key responsibilities,

12. See Montgomery & Helderman, *supra* note 10.

13. Jim McElhatton, *Fed Shutdown Forces Courts to ‘Limbo Land,’* WASH. TIMES, Aug. 25, 2014, at A6; Andrew Cohen, *The Odd Story of the Law that Dictates How Government Shutdowns Work*, ATLANTIC (Sept. 28, 2013, 8:00 AM), <http://www.theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047>; Scott Horsley, *A Short History of Government Shutdowns*, NPR (Sept. 30, 2013, 3:32 AM), <http://www.npr.org/2013/09/30/227292952/a-short-history-of-government-shutdowns>; S.A. Miller, *Government Restart Will Cost Billions*, N.Y. POST (Oct. 17, 2013, 10:45 AM), <http://nypost.com/2013/10/17/panda-cam-is-back>; *The Cycle: President Obama Has More Cards to Play* (NBC News radio broadcast Oct. 10, 2013).

14. See *infra* Part II.

15. Scott Horsley, *The Lawyer Who Raised the Shutdown Stakes*, NPR (Apr. 8, 2011, 3:00 PM), <http://www.npr.org/2011/04/08/135247483/who-raised-the-stakes-in-government-shutdown>.

16. See Kelly Phillips Erb, *Government Shutdown 101: What Happens When the Lights Go Off?*, FORBES (Sept. 20, 2013, 10:42 AM), <http://www.forbes.com/sites/kellyphillipserb/2013/09/20/government-shutdown-101-what-happens-when-the-lights-go-off>.

17. Christopher D. Dodge, Note, *Doomed to Repeat: Why Sequestration and the Budget Control Act of 2011 Are Unlikely to Solve Our Solvency Woes*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 835, 858-59 (2012).

and could easily lead to a nightmare default scenario.¹⁸ Those who would use the false excuse of an orderly handling to trigger a giant fiscal disaster are like those who would use the excuse of limited missile defenses to bring on a war with nations having extensive nuclear arsenals. With this caveat about false optimism, it would still be better to react constructively to default in whatever ways are possible than to collapse helplessly like run-over road kill.

As to hitting the debt ceiling, two leading legal scholars,¹⁹ among others,²⁰ have postulated that the President could act to borrow without congressional authorization (or that there could be some other major reallocation of constitutional borrowing and spending powers) by relying on some relatively abstract constitutional, theoretical approaches; from reasoning based on the nature of the constitutional separation of powers, they argued that the rarely-invoked “Public Debt Clause”²¹ (section four of the Fourteenth Amendment),²² supports this approach.²³ Abstract constitutional theory has its place, but this time it crashed and burned when President Barack Obama summarily disclaimed any intention of invoking it, or of issuing a trillion dollar platinum coin.

As a result, the pragmatic issue we confront is how, without resorting to imaginative, but questionable, constitutional theories, the President can act within the existing framework of separated powers to

18. There is a technical distinction: hitting the debt ceiling means the government cannot borrow any more money. Since the budget is at a deficit, the government cannot, without borrowing, pay all of its spending responsibilities. However, the further question is whether the government manages, while falling short on other spending responsibilities, to pay interest on the debt. Only when the government does not pay interest on the debt does it go into debt default.

19. Neil H. Buchanan & Michael C. Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, 113 COLUM. L. REV. SIDEBAR 32, 36 (2013) [hereinafter Buchanan & Dorf, *Bargaining*]; Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1182 (2012) [hereinafter Buchanan & Dorf, *How to Choose*]; Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option*, 112 COLUM. L. REV. SIDEBAR 237, 239 (2012) [hereinafter Buchanan & Dorf, *Nullifying*].

20. Daniel Strickland, *The Public Debt Clause Debate: Who Controls This Lost Section of the Fourteenth Amendment*, 6 CHARLESTON L. REV. 775, 794-95 (2012); Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227, 1248-50 (2013); Kelleigh Irwin Fagan, Note, *The Best Choice Out of Poor Options: What the Government Should Do (or Not Do) If Congress Fails to Raise the Debt Ceiling*, 46 IND. L. REV. 205, 227, 230 (2013).

21. For a valuable discussion on the invocation of the Public Debt Clause, see generally Stuart McCommas, Note, *Forgotten but Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment*, 99 VA. L. REV. 1291 (2013).

22. U.S. CONST. amend. XIV, § 4.

23. *Id.*; see Buchanan & Dorf, *Bargaining*, *supra* note 19, at 36-40.

salvage public credit and avoid chaos in a debt limit crisis. This is virtually uncharted territory, and there is very limited information available;²⁴ no one has seriously sought to develop a “playbook” for how the President might go about avoiding such chaos without Congress. However, the President may attempt this with the assistance of the Federal Reserve, which has powers that could mitigate crises in the sphere of credit.²⁵ The President has some control over the machinery of disbursing payments, and the Federal Reserve may deploy the dramatic type of lending facilities it opened in the crash of 2008 to sustain besieged credit sectors.²⁶ To create such a playbook will require a ground-level crawl through how Washington actually disburses and lends money.²⁷

The problem is not merely that “[t]he federal government now has to borrow about forty cents of every dollar it spends.”²⁸ Nor is the problem, merely, that during a debt default, the government will face a mountain of spending requirements that amount in total to more than it can satisfy. These include: interest on the national debt; Social Security

24. There are two important sources of information. One 2012 source mentioned some Treasury views. Letter from Eric M. Thorson, Chair, Council of the Inspectors Gen. on Fin. Oversight, to Orrin G. Hatch, Ranking Member, Senate Comm. on Fin. (Aug. 24, 2012) [hereinafter TIGTA Report]. As Deborah Solomon and Dan Strumpf have noted:

During the last big debt-ceiling standoff, in the summer of 2011, the Treasury Department was in advanced internal discussions about prioritizing interest payments on government debt ahead of other bills, but the decisions didn’t have to be activated because Congress raised the debt ceiling, according to a person familiar with the planning.

Deborah Solomon & Dan Strumpf, *Bankers Warn on Debt Proposal*, WALL ST. J., Oct. 8, 2013, at A1. For not just the best, but rather, the only analysis of what happens after reaching the debt limit, see generally BIPARTISAN POLICY CTR., DEBT LIMIT ANALYSIS (Sept. 2013) [hereinafter DEBT LIMIT ANALYSIS]. Invaluable as these are, they did not remotely approach a “playbook” of what the government could do. For example, neither mentions a role for the Federal Reserve. For a good overview of the Debt Ceiling analysis, see generally MINDY R. LEVIT ET AL., REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS (2013). However, as to the feasibility of any version of prioritization, it does not add to the other sources.

25. For background, see generally *Constitutional Law—Separation of Powers—Congress Delegates Power to Raise the Debt Ceiling*, 125 HARV. L. REV. 867 (2012) [hereinafter *Constitutional Law*]. For an overall treatment of history as a basis for Presidential power, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

26. See Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737, 1758-59 (1992) (discussing the ways in which the President can influence fiscal policy); *What Were the Federal Reserve’s Emergency Lending Facilities During the Financial Crisis?*, FED. RES., http://www.federalreserve.gov/faqs/banking_12842.htm (last updated June 17, 2011) [hereinafter *Emergency Lending Facilities*] (discussing the steps the Federal Reserve took in the wake of the 2008 financial crisis).

27. See generally Fitts & Inman, *supra* note 26.

28. G.I., *The Debt Ceiling and Default*, ECONOMIST (Jan. 13, 2011, 5:48 PM), http://www.economist.com/blogs/freexchange/2011/01/americas_debt.

benefits; Medicare, Medicaid, and other health care; defense and civil contractors; defense and civil pay, and other operating costs; entitlements like benefits for federal retirees and veterans; and so on.

Rather, the Treasury asserts a worse problem than the scale of its responsibilities, namely that it cannot itself achieve, logistically, any prioritizing of its own three million payments daily. The Financial Management Service (“FMS”) in the Office of the Fiscal Service of the Treasury²⁹ combines these streams of payment obligations and payment requests from scores of agencies.³⁰ It does not have an accounting system for sorting them out by priority.³¹ Moreover, the Federal Reserve may not nakedly lend the Treasury the money to meet its needs, something outside of the government’s experience.³² Rather, the President has to use his overall executive authority over the effectuation of spending, and perhaps some additional authority from the Public Debt Clause, to take steps that the public will accept due to their resemblance to normal executive disbursement, albeit stretched to the maximum.³³

Part III of this Article deals with the steps the government may take when it hits the debt ceiling: paying interest comes separately and with priority; disbursements get treated separately from Treasury, Defense, and health care (each may disburse in single-day blocs); corporate taxpayers may make early deposits; and the Federal Reserve may defer federal debt interest and principal repayments, handle contractors and health care providers, and perhaps even “deem” the Social Security payments manageable.³⁴

At the outset of the analysis, in order to spare the nation the long-lasting tragedy ensuing from even a temporary credit default on the interest on the national debt, the President and his Treasury will move heaven and earth to pay the interest in full, through a separate channel from the three million combined daily Treasury payments.³⁵

Subsequently, the Treasury would execute the one course of action it quietly hinted it might adopt in 2011: disburse, in staggered sets, its

29. David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 210 (2010).

30. See *id.* at 210-11; Neal Wolin, *Treasury: Proposals to “Prioritize” Payments on U.S. Debt Not Workable; Would Not Prevent Default*, U.S. DEP’T TREASURY (Jan. 21, 2011), <http://www.treasury.gov/connect/blog/pages/proposals-to-prioritize-payments-on-us-debt-not-workable-would-not-prevent-default.aspx>. Neal Wolin was Deputy Secretary of the Treasury. Wolin, *supra*.

31. Plumer, *supra* note 6.

32. See Colleen Baker, *The Federal Reserve as Last Resort*, 46 U. MICH. J.L. REFORM 69, 84-87 (2012); Buchanan & Dorf, *How to Choose*, *supra* note 19, at 1183-84.

33. U.S. CONST. amend. XIV, § 4; see, e.g., Strickland, *supra* note 20, at 792.

34. See *infra* Part III.

35. See Fagan, *supra* note 20, at 233-38. The note is good on this one issue, but does not provide a playbook about a range of strategies.

own enormous daily sets of payments, each set representing one whole day's requests.³⁶ Each set would be disbursed one or more days after the original target date for payment.³⁷ It would thereby pay off, subject to increasing delays, its obligations other than interest, such as payments to defense and civilian contractors, military and civilian pay, Social Security payments,³⁸ and health provider claims for Medicare and Medicaid.³⁹ Paying each day's set, on a staggered basis, would be the one way the Treasury could, as it has hinted, match its titanic streams of incoming and outgoing payments, without resorting to the external borrowing precluded by hitting the debt ceiling.⁴⁰

This Article's playbook, though, notes that the Treasury would not be alone.⁴¹ Contrary to popular understanding, the Treasury's fiscal arm—FMS—does not disburse all the government's payments entirely by itself in its own single Treasury stream.⁴² The fiscal arms of the government for defense—Defense Finance and Accounting Services (“DFAS”)—and health care—Center of Medicare and Medicaid Services (“CMS”)—may function separately from the Treasury.⁴³ FMS, DFAS, and CMS may husband the government's resources by staggered payments, each one able separately to put off each of its own day's set of payments for some days. Beyond this, DFAS and CMS may be able to hold back on some categories, like contractor and medical provider payments, within their own overall flow of disbursements.⁴⁴

36. DEBT LIMIT ANALYSIS, *supra* note 24, at 8, 26; TIGTA Report, *supra* note 24, at 6.

37. DEBT LIMIT ANALYSIS, *supra* note 24, at 26.

38. For the legal context of Social Security, see generally Neil H. Buchanan, *Social Security and Government Deficits: When Should We Worry?*, 92 CORNELL L. REV. 257 (2007); William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461 (1996); Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865 (2004); June E. O'Neill, *Why Social Security Needs Fundamental Reform*, 65 OHIO ST. L.J. 79 (2004); Benjamin A. Templin, *Full Funding: The Future of Social Security*, 22 J.L. & POL. 395 (2006).

39. For the legal context of Medicare and Medicaid, see generally Elizabeth Andersen, *Administering Health Care: Lessons from the Health Care Financing Administration's Waiver Policy-Making*, 10 J.L. & POL. 215 (1994); Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge to Federalism*, 51 OHIO ST. L.J. 855 (1990); Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

40. See DEBT LIMIT ANALYSIS, *supra* note 24, at 26; Plumer, *supra* note 6.

41. See *infra* Part III.D.

42. See *All About Us: An Overview*, TREASURY.GOV, <http://www.fms.treas.gov/aboutfms/index.html> (last visited Feb. 15, 2015); *infra* Part III.D.

43. As discussed below, DFAS in the Department of Defense (“DoD”) pays its own stream of disbursements, and the CMS, in the Department of Health and Human Services (“HHS”) Office of Financial Management, each processes its own separate stream. See *infra* Part III.D.

44. For example, it may be that most of CMS payments go to health providers. When CMS holds back disbursements as a whole, it principally holds back provider payments. These go to

Most aggressively, the President may tell the Treasury to accelerate its receipt of revenues, such as by requiring corporate taxpayers to make an early deposit of their next corporate quarterly estimated tax payment. The Treasury's assertion of powers in this regard would face tough questions. But, in the moment of crisis, the Treasury might manage to secure—without creating new taxes or rates—a vitally-needed acceleration in the timing of its receipt of an incoming stream of revenues.⁴⁵

Turning, then, to what the Federal Reserve can do,⁴⁶ it would have an even wider range of possible courses of action, from moderate to extremely aggressive. The Federal Reserve could stretch its own powers to bolster the economy in the crisis; this would also reduce the Treasury's need to put its own scarce dollars in the hands of those awaiting government funds.⁴⁷ Since the Federal Reserve has a \$2.8 trillion balance sheet, of which more than \$1 trillion is already in Treasury securities, it has all the financial weight it needs to help handle this crisis for a while.⁴⁸

The Federal Reserve might open a facility to acquire as much as possible of the interest payments and principal repayment responsibilities that would otherwise fall upon the Treasury—and then defer them.⁴⁹ It could also open a facility for lending to the categories of business creditors, like government contractors and health care providers, whose expected payments from DFAS and CMS might have been delayed.⁵⁰ In doing all this, the Federal Reserve would neither lend

entities that can stand a short delay—a delay, which the Federal Reserve may mitigate, as discussed below. See *infra* text accompanying notes 277-87.

45. For guidance on how the Treasury and IRS circumvent normal rulemaking procedures, see Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1544, 1612 (2006); Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 294-95, 308-09 (2012).

46. This Part draws on the discussions of the Federal Reserve's tools, a general discussion of which can be seen in Baker, *supra* note 32; José Gabilondo, *Financial Hospitals: Defending the Fed's Role as a Market Maker of Last Resort*, 36 SEATTLE U. L. REV. 731 (2013). See also Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1629-30 (2009).

47. See, e.g., Baker, *supra* note 32, at 121-24.

48. Phil Izzo, *A Look Inside the Fed's Balance Sheet*, WALL ST. J. BLOG (June 21, 2011, 4:49 PM), <http://blogs.wsj.com/economics/2011/06/21/a-look-inside-the-feds-balance-sheet-11>.

49. Moderate steps would include the Federal Reserve deferring interest payment and principal repayment on its own \$4 trillion balance sheet while making very large additional purchases of short-term Treasury bills.

50. The Federal Reserve may greatly bolster a Treasury demand for advance deposit of corporations' next estimated payment, by lending a sum equal to their deposit.

directly to the Treasury, nor violate the debt limit. It would simply do what it did, starting in 2008, to mitigate an economic crisis.⁵¹

As its most aggressive step, the Federal Reserve could take on the 800-pound elephant in the room: the huge Treasury disbursements owed monthly to Social Security beneficiaries.⁵² The Federal Reserve could arrange with the Treasury to have, temporarily, a new status. Namely, Social Security beneficiaries would receive, nominally, a “loan” to them in the amount of each scheduled Social Security payment.⁵³ This would technically recharacterize the distributions as loans from the Federal Reserve’s balance sheet (which does not count as borrowings subject to the debt ceiling) rather than as Treasury disbursements (that would push borrowing over the debt ceiling). Social Security’s special status would elicit the strongest possible public support. To find sufficient legal support, the President could draw legitimately on the legal doctrine of ratification, discussed by many scholars,⁵⁴ including the author,⁵⁵ as justification in the crisis.⁵⁶

While much of this Article does analyze new situations and proposals, the Article is far from unsupported guesswork. The analysis draws upon many past actions that serve as precedents. These include: the Civiletti Opinion and other opinions on shutdowns from then through 2011; the views of the Treasury in 2011 about how it might disburse payments after hitting the debt ceiling; current flexibility in the existing tax laws; the broad array of lending facilities mobilized by the Federal Reserve after the 2008 economic crisis; and the judicial opinions

51. This will technically re-characterize the payments by DFAS and CMS, without interruption, in a way that the disbursement would be deemed an outflow from the Federal Reserve. These will not constitute a payment that pushes the Treasury above the debt ceiling.

52. FED. RESERVE SYS., PURPOSES & FUNCTIONS 98 (9th ed. 2005).

53. These are like Federal Reserve loans to the government’s contractor and health provider creditors. Correspondingly, now that these beneficiary payments have become Federal Reserve loans, the Federal Reserve will make an immediate remittance to the Treasury on the scale of these beneficiary payments. The Federal Reserve reimburses the Treasury, fairly, for the Federal Reserve converting its distributions to the beneficiaries, into loans from the beneficiaries to the Federal Reserve. This is the Federal Reserve sustaining the Treasury’s creditors and beneficiaries, since the Treasury temporarily lacks the means to do so.

54. For information on Presidential ratification, see, for example, David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155, 178-80 (2002); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 36-38 (1993); Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 406, 407 & n.88 (2011) (Book Review); Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1817, 1819, 1830 (2006).

55. Charles Tiefer, *War Decisions in the Late 1900s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 19-21 (1999).

56. See *supra* notes 54-55 and accompanying text.

approving the doctrine of ratification from the Civil War to the Vietnam War.⁵⁷

Part IV of this Article is a very brief conclusion.⁵⁸ That Part justifies the relatively small-bore approach of the playbook compared to the imaginative constitutional approaches others have propounded by comparing the presumptively valid inductive approach⁵⁹ to the constitutional separation of powers it adopts with the deductive approach of other proposed solutions.⁶⁰ That is, this Article's approach does not deduce lofty propositions from the wording, background, and structure of the Constitution as expounded by the Supreme Court. Rather, the playbook approach builds up inductively from the specific practical details of the activities of lending and disbursement.⁶¹ This approach creates a realistic picture of how the constitutional separation of powers might work to mitigate a crisis.

II. SHUTDOWN

A. *Shutdown Sequence*

1. From 1981

Two precedents, broadly speaking, shaped the 2013 shutdown.⁶² Analyzing them suggests how a certain kind of executive flexibility could mitigate such shutdowns.

In 1981, Attorney General Benjamin Civiletti issued what is known (and has been referred to) as the Civiletti Opinion regarding what shall occur during a lapse of appropriations for a substantial part of the government.⁶³ An opinion issued in the previous year had put together

57. See Monaghan, *supra* note 54, at 35-38. See generally *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); Auth. for the Continuance of Gov't Functions During a Temp. Lapse in Appropriation, 5 Op. Att'y Gen. 1 (1981) [hereinafter Civiletti Opinion]; THE FEDERAL RESERVE AND THE FINANCIAL CRISIS [hereinafter THE FEDERAL RESERVE], available at <http://www.federalreserve.gov/newsevents/lectures/about.htm>; Solomon & Strumpf, *supra* note 24; Memorandum from Jacob Lew, Dir., Office of Mgmt. & Budget (Apr. 7, 2011) (on file with the *Hofstra Law Review*).

58. See *infra* Part IV.

59. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 813-24 (1995). See generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

60. See *infra* Part IV.C.

61. See *infra* Part IV.A.

62. See generally Civiletti Opinion, *supra* note 57.

63. *Id.* at 1-12.

the basic rationale for furloughing large numbers of federal employees.⁶⁴ The Anti-Deficiency Act⁶⁵ precluded allowing federal employees to work without pay.⁶⁶ Otherwise, their rightful demands for appropriated pay—necessitating deficiency appropriations—force Congress to appropriate what it had not.⁶⁷ This was a relatively new and tenuous interpretation. Traditionally, agencies continued functioning during appropriation lapses, confident that Congress would end the lapse and provide retroactive funding.⁶⁸

In addition to regulating general obligations in advance of appropriations, the Anti-Deficiency Act further provides that: “No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.”⁶⁹ Hence, agencies must send their employees home.

However, the Anti-Deficiency Act has some potentially wide-open exceptions for “emergency” non-furloughed employees. The second prohibition contained in the Anti-Deficiency Act bars acceptance of “voluntary service” for the United States except in cases of emergency involving the safety of human life or the protection of property; the prohibition entered the statute in 1884 to prevent unauthorized regular or overtime service followed by claims for compensation.⁷⁰

The Civiletti Opinion found a congressional intention to treat this broadly.⁷¹ That opinion gave some suggestive examples.⁷² Among the examples were: FBI criminal investigations; legal services by the Department of Agriculture, in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967; and, protection and management of commodity inventories by the

64. *Id.* at 1-2.

65. *See* 31 U.S.C. § 665 (1976).

66. § 665(b); CLINTON T. BRASS, CONG. RESEARCH SERV., SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 3-4 (2014).

67. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-9 (2d ed. 1992).

68. BRASS, *supra* note 66, at 4.

69. § 665(b).

70. *See* Civiletti Opinion, *supra* note 57, at 7-8.

71. *Id.* at 6. As in the other section of the statute, the Office of the Attorney General (“OAG”) focused on the exception, here for cases of emergency. *Id.* at 7-8. Based on a language change in 1950 and administrative construction of a related statutory provision that uses the same language, the OAG construed the emergency exception broadly, to require only a reasonable relationship between the possible harm to life or property and the funded activity. *Id.* at 6-8.

72. *Id.* at 10.

Commodity Credit Corporation.⁷³ Also, the Office of Management and Budget (“OMB”) memorandum included tax collection.⁷⁴ Thus, not only could the Veterans Administration continue to operate hospitals and air traffic controllers to direct planes, but building guards, food inspectors, and law enforcement officials could also continue to perform their services, even in the absence of an appropriation.⁷⁵ Still, these examples all dealt with problems so immediately serious that they require employees on duty from Day One.

The Civiletti Opinion expressed what this Article describes as the static view of shutdown—to decide, based on what shuts down on Day One of the appropriations lapse, what shuts down at all as the appropriations lapse continues.⁷⁶ This made sense only in the original context of the Civiletti Opinion. The opinion naturally focused on the immediate shutting down on Day One, for that was murky enough, and required, by far, the most advance planning and guidance.⁷⁷ The Civiletti Opinion did not need to go to a hypothetical later moment and speculate what problems might get worse by then.

Then, from 1995 to 1996, the “train wreck” occurred.⁷⁸ The Gingrich House imposed a government-wide lapse in appropriations to pressure President Bill Clinton into acceding to its budget program.⁷⁹ For twenty-one days, the government shut down.⁸⁰ As with the Civiletti Opinion, the 1995-1996 train wreck resulted in the provision of guidance from the new Justice Department⁸¹ and OMB,⁸² the opinions of which were along the same lines, having a static view of shutdown—the criteria for what shut down on Day One largely continued as the days went on.⁸³

73. *Id.*

74. *Id.* at 10-11.

75. *See, e.g., id.* at 7-10.

76. *Id.* at 1-4.

77. *See id.* at 1-3.

78. Chad Pergram, *Breakdancing Around Nitroglycerin*, FOX NEWS (Sept. 29, 2010), <http://www.foxnews.com/politics/2010/09/29/breakdancing-around-nitroglycerin>; *see* Krishnakumar, *supra* note 7, at 156.

79. Krishnakumar, *supra* note 7, at 156.

80. Glen Kessler, *Lessons from the Great Government Shutdown of 1995-1996*, WASH. POST, Feb. 25, 2011, http://voices.washingtonpost.com/fact-checker/2011/02/lessons_from_the_great_governm.html.

81. Memorandum from Walter Dellinger, Assistant Attorney Gen. I (Aug. 16, 1995) (on file with the *Hofstra Law Review*).

82. Memorandum from Jacob Lew, *supra* note 57, at 1.

83. Memorandum of Walter Dellinger, *supra* note 81, at 1-2, 4, 8-9. A few exceptions did occur. Notably, the Social Security Administration initially sent home its tens of thousands of employees who answer questions from, and give help to, the public. Initially, that agency reasoned it only needed to keep the Social Security checks moving, since that mattered from Day One. *See*

2. 2011 to 2013

From 2011 to 2013, the Obama Administration prepared for shutdowns.⁸⁴ OMB issued two advisory bulletins, roughly in line with the Civiletti Opinion and the process followed in the 1995-1996 train wreck.⁸⁵ Pursuant to these bulletins, each agency published its own plan for what and how to shut down on their website.⁸⁶ Then, for approximately two weeks, the Administration shut down the government.⁸⁷ All this followed, more or less, the guidance from the Civiletti Opinion and the 1995-1996 train wreck.⁸⁸

However, during the shutdown, it became evident that problems would worsen at a substantial number of agencies.⁸⁹ Agencies might get by the first couple of days, but problems would pile up later. The Defense Department posed an extreme example.⁹⁰ Following the Civiletti Opinion and the 1995-1996 train wreck, the armed forces stayed on duty, but a large fraction of the Defense Department civilians did not.⁹¹

This was a problem Congress recognized. It sped through a brief statute that let the Defense Department pay civilians who were necessary for support of the troops.⁹² Strikingly, the Defense Department did not merely figure out what the troops immediately and urgently needed for support. Rather, the Defense Department paid a large number of the civilians it had furloughed—approximately 350,000 civilians.⁹³

History of SSA 1993-2000, SOC. SECURITY ADMIN., <http://www.ssa.gov/history/ssa/ssa2000chapter1.html> (last visited Feb. 15, 2015). However, as the shutdown lasted, the Social Security Administration realized the bafflement, and even fear, resulting from its not responding adequately to inquiries. *See id.* In effect, the agency pioneered a dynamic view. On the first day of the lapse, the problem of responding to the public might not rise to the level of urgency requiring the advisory employees to remain at their post. Afterwards, though, the agency saw that the problem did rise, in fact, to the level of urgency and it brought the employees back. *Id.*

84. *See generally* Memorandum from Jacob Lew, *supra* note 57.

85. *See* BRASS, *supra* note 66, at 23. *See generally* Memorandum from Jacob Lew, *supra* note 57.

86. BRASS, *supra* note 66, at 11.

87. *Id.* at 3.

88. *See generally* Civiletti Opinion, *supra* note 57.

89. *See Impact of a Government Shutdown*, *supra* note 4 (describing the effects the shutdown will have on a number of agencies).

90. *See* Craig Whitlock, *Hagel: Pentagon Lawyers Hoping to Minimize how Many Defense Workers Are Furloughed*, WASH. POST, Oct. 1, 2013, http://www.washingtonpost.com/world/national-security/hagel-pentagon-lawyers-hoping-to-minimize-how-many-defense-workers-are-furloughed/2013/10/01/87cbff96-2a7f-11e3-97a3-ff2758228523_story.html.

91. *Id.*

92. Ed O'Keefe, *Obama Signs Bill Ensuring Military Pay During a Shutdown*, WASH. POST (Sept. 30, 2013, 10:54 PM), <http://www.washingtonpost.com/blogs/post-politics-live/liveblog/liveupdates-the-shutdown-showdown/?id=2ad125d7-98a9-4165-a6fc-d41b43aa87fa>.

93. Craig Whitlock, *Pentagon to Recall Most Furloughed Workers*, *Hagel Says*, WASH. POST,

Moreover, virtually no one criticized the Defense Department for doing so. The Pentagon successfully rejected the static view that it only mattered what troops needed on Day One.⁹⁴ Rather, the Pentagon took the dynamic view that the problem of defense civilians not doing longer-term tasks would worsen if no action was taken.⁹⁵

Examples of the dynamic developments in worsening problems accumulated during the shutdown. The National Institutes of Health postponed, in the first days, their start of new drug trials.⁹⁶ Whatever the limited effect on the first days, over time, cancer patients desperate to try potential treatments made their angst felt.⁹⁷

The IRS idled over ninety percent of its employees, and that did not create an acute situation for the first day.⁹⁸ Yet, over time, idling the IRS staff—whose help to process refunds—would increasingly strain needy taxpayers who depend on getting refunds. Health and safety agencies, from the Environmental Protection Agency (“EPA”) down to the Chemical Safety Board, might skip work the first day.⁹⁹ Over time, the inspection of risky permittees and sites of current disasters would drop, the evidence would get more difficult to follow, and the threats and risks would multiply.

B. *Dynamic Approach*

In short, the experience in 2013 supported a dynamic view for bringing employees back to work. Moreover, if agencies adopted a pragmatic view of precedents, a dynamic approach would not be inconsistent. Certainly, the Civiletti Opinion focused heavily on the Day One situation.¹⁰⁰ The Civiletti Opinion took a narrow view of what

Oct. 5, 2013, http://www.washingtonpost.com/politics/pentagon-to-recall-most-furloughed-workers-hagel-says/2013/10/05/eb7ed346-2deb-11e3-8ade-a1f23cda135e_story.

94. See *Impact of a Government Shutdown*, *supra* note 4; Whitlock, *supra* note 93.

95. See Jim Garamone, *Half of DOD Civilians Will Be Furloughed if Appropriations Lapse*, U.S. DEP’T DEF. (Sept. 27, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=120874>; *infra* Part II.B.

96. Joel Achenbach, *NIH Trials Turn Away New Patients as Shutdown Obstructs Work of Scientists, Researchers*, WASH. POST, Oct. 2, 2013, http://www.washingtonpost.com/national/health-science/shutdown-sequestration-cuts-zap-scientists-and-researchers/2013/10/02/bdfb0896-2ab6-11e3-b139-029811dbb57f_story.html.

97. See Brad Plumer, *The Shutdown Could Prevent Kids with Cancer from Getting Treatment*, WASH. POST (Oct. 1, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/01/the-shutdown-could-prevent-kids-with-cancer-from-getting-treatment>.

98. *Impact of a Government Shutdown*, *supra* note 4 (“About 88 percent of the 110,000 employees working for Treasury Department agencies will be placed on furlough, including nearly 90 percent of the IRS workforce.”).

99. See, e.g., Plumer, *supra* note 5.

100. Civiletti Opinion, *supra* note 57, at 8-9.

constituted immediate necessity.¹⁰¹ But, it did not discuss the context presented after a few weeks of shutdown, or what would become necessary if no action were taken for such an interval.¹⁰²

As for the 1995-1996 train wreck, it lasted for twenty-one days.¹⁰³ It stands as a precedent that appropriation lapses do lead to shutdowns that idle a substantial fraction of the federal workforce for a few weeks.¹⁰⁴ But, it did not establish a rule for negating any dynamic view. Rather, it left open the possibility that starting after a number of days, and especially after a couple of weeks, the government could take a view of the situation for starting agencies up. The Civiletti Opinion itself laid the groundwork for a very broad view of the “safety” exception to shutting down.¹⁰⁵

It began by contrasting earlier statutory language with the modern version.¹⁰⁶ The Civiletti Opinion went on to show the logic of non-furloughed employees having a connection with safety or property.¹⁰⁷ Then, the Civiletti Opinion bolstered this broadening view with interpretation by OMB and its predecessor.¹⁰⁸ With this legal support,

101. *Id.* at 8-10.

102. *See generally id.*

103. Kessler, *supra* note 80.

104. *See* Erb, *supra* note 16; Kessler, *supra* note 80.

105. Civiletti Opinion, *supra* note 57, at 9-11. The Civiletti Opinion stated:

Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided the interpretation of § 665(e).

Id. at 10.

106. According to the Civiletti Opinion:

In 1950, however, Congress enacted the modern version of the Antideficiency Act . . . [Officials] proposed that “cases of sudden emergency” be amended to “cases of emergency,” “loss of human life” to “safety of human life,” and “destruction of property” to “protection of property.” These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern § 665(b).

Id. at 9 (citation omitted).

107. *Id.* at 9-10. The Civiletti Opinion continued by stating that:

Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment. In essence, they replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general.

Id. at 9.

108. *Id.* at 9-11. In regard to OMB, the Civiletti Opinion stated:

the Civiletti Opinion laid out examples of activities that should not shut down even on Day One.¹⁰⁹

Additionally, the Civiletti Opinion stressed that Congress had not responded to the broadening view with any change in the statute.¹¹⁰ This background supports a dynamic view. “Safety of human life” requires some kind of health and safety activity from Day One, such as agriculture’s work with state meat inspection and aircraft accidents.¹¹¹ Moreover, it requires resuming health and safety activity for which the problems accumulate over time, like those of polluting permittees watched by the EPA.¹¹²

Two objections warrant consideration. First, from the presidential viewpoint, taking a dynamic view might reduce some of the pressure to end shutdowns. With the worst problems getting resolved by bringing employees back, Congress might feel less public pressure to end the remaining shutdown.

But, neither from 1995 to 1996, nor in 2013, did the public seem in the slightest degree susceptible to indifference about the overall undesirability of a federal shutdown.¹¹³ Media reports of specific instances of disorder in the administrative operations, or loss or risk due to idled agencies, provided a focus for public indignation.¹¹⁴ Still, the

This interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget, of 31 U.S.C. § 665(e) . . . [They] have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property.

Id. at 9-10.

109. *Id.* at 10.

110. *Id.* In discussing the broadening view, the Civiletti Opinion opined that:

Most important, under § 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).

Id.

111. *Id.*

112. See, e.g., *id.*; Joel A. Mintz, *Government Shutdown and the EPA: Environmental Dangers of Congressional Recklessness*, HILL BLOG (Oct. 8, 2013, 4:00 PM), <http://thehill.com/blogs/congress-blog/energy-a-environment/327029-government-shutdown-and-the-epa-environmental-dangers-of-congressional-recklessness>.

113. Art Swift, *Americans See Current Shutdown as More Serious than in '95*, GALLUP (Oct. 4, 2013), <http://www.gallup.com/poll/165260/americans-current-shutdown-serious.aspx>.

114. See, e.g., Jonel Aleccia, *No Food Poisoning, Flu Surveillance During Shutdown, Federal Health Agencies Say*, NBC NEWS (Oct. 1, 2013, 12:32 PM), <http://www.nbcnews.com/health/kids-health/no-food-poisoning-flu-surveillance-during-shutdown-federal-health-agencies-f8C11308806>; *Impact of a Government Shutdown*, *supra* note 4; Kelli Wynn, *Local People React to Government Shutdown*, DAYTON DAILY NEWS, <http://www.daytondailynews.com/news/news/local-people-react->

federal government carries out so many important activities that there would continue to be plenty of focus for public alarm and anger even with some mitigation of some specific problems.¹¹⁵

Second, from the Civiletti Opinion viewpoint, the text itself of the Anti-Deficiency Act might seem to require a kind of Day One immediacy.¹¹⁶ The Anti-Deficiency Act itself does make it hard to imagine keeping most federal employees active on Day One.¹¹⁷ But, as days go by, the problems from an idled federal workforce do affect “persons” and “property.” The safety agencies—like the EPA—guard “persons” against health threats that are just as real as forest fires, albeit developing more slowly.¹¹⁸ And, the IRS’s failure to process refunds affects needy taxpayers in their “property” against personal problems that are just as real as weather disasters, affecting a much larger number of people in a way that may be individually less devastating, but is nevertheless collectively problematic.¹¹⁹

III. DEBT LIMIT

This Part starts by laying out the problem of hitting the debt ceiling.¹²⁰ It summarizes the President’s power to deal with the problem, recognizing that this power does not include borrowing without Congress’s approval.¹²¹ Rather, the Executive Branch takes advantage of how the river of its disbursements actually divides itself into more manageable sub-parts, some of which could be withheld in an emergency.¹²² The President might require an accelerated deposit of some tax payments.¹²³

to-government-shutdown/nbcCFX (last updated Oct. 1, 2013).

115. See Dan Balz & Scott Clement, *Poll: Major Damage to GOP After Shutdown, and Broad Dissatisfaction with Government*, WASH. POST, Oct. 22, 2013, http://www.washingtonpost.com/politics/poll-major-damage-to-gop-after-shutdown-and-broad-dissatisfaction-with-the-government/2013/10/21/dae5c062-3a84-11e3-b7ba-503fb5822c3e_story.html.

116. Civiletti Opinion, *supra* note 57, at 7-8; see 31 U.S.C. § 665 (1976).

117. § 665.

118. See Mintz, *supra* note 112.

119. See Michael Wayland, *Another Government Shutdown Effect: Slowed 2014 Tax Season May Cause Service-Need Spike*, NONPROFIT Q. (Oct. 24, 2013, 2:56 PM), <https://nonprofitquarterly.org/policysocial-context/23131-another-government-shutdown-effect-slowed-2014-tax-season-may-cause-service-need-spike.html>.

120. See *infra* Part III.A.

121. See *infra* Part III.C.

122. See *infra* Part III.D.

123. See *infra* Part III.E; see also Buchanan & Dorf, *How to Choose*, *supra* note 19, at 1211-12 (“[The President] could, for example, simply instruct the tax authority to increase withholding on all regular paychecks, under the income tax or the Social Security and Medicare taxes.”).

A. *Sequence of Hitting the Debt Ceiling: In Theory and in 2013*

In order to borrow funds to finance the deficit, Congress delegates authority to the Treasury to borrow up to a debt ceiling, which is known as the debt limit.¹²⁴ As the total debt rises toward the debt limit, Congress must enact a law to raise that limit.¹²⁵ If Congress does not raise the limit, the Treasury cannot borrow.¹²⁶

Once the Treasury cannot borrow, the Treasury will quickly run out of the money needed to pay its combined obligations. A temporary delay in paying government obligations to beneficiaries of programs like Social Security differs from a debt default. A government that does not pay the interest on its debt goes into credit collapse in a very disastrous way.¹²⁷

For both the national economy and the world economy, a debt default by the United States creates a catastrophe. The formal credit rating of, and the informal confidence in, the U.S. government plunges immediately.¹²⁸ This crisis in business and international confidence deal the gravest possible shocks to the national economy, and even the world economy. Just from that shock, a national or even a world recession may ensue.

As a prestigious committee advised in 2011, among “damaging consequences” from “even a technical default:”

[F]oreign investors, who hold nearly half of outstanding Treasury debt, could reduce their purchases A sustained 50 basis point increase in Treasury rates would eventually cost U.S. taxpayers an additional \$75 billion each year.

[E]ven an extended delay in raising the debt ceiling, could lead to a downgrade of the U.S. sovereign credit rating. . . .

[T]he financial crisis . . . could trigger a run on money market funds

[A] Treasury default could severely disrupt the \$4 trillion Treasury financing market, which could . . . possibly lead to another acute deleveraging event.

[T]his deleveraging event would have damaging consequences for the still-fragile recovery of our economy.¹²⁹

124. Buchanan & Dorf, *How to Choose*, *supra* note 19, at 1183-88.

125. See Montgomery & Helderan, *supra* note 10.

126. Krishnakumar, *supra* note 7, at 157-58, 160.

127. Yalman Onaran, *A U.S. Default Seen as Catastrophe Dwarfing Lehman's Fall*, BLOOMBERG (Oct. 7, 2013), <http://www.bloomberg.com/news/print/2013-10-07/a-u-s-default-seen-as-catastrophe-dwarfing-lehman-s-fall.html>.

128. See *id.*

129. Letter from Matthew E. Zames, Chairman, Treasury Borrowing Advisory Comm., to

Starting from that point, interest rates on Treasuries may rise sharply from lost confidence, especially abroad, either immediately or eventually,¹³⁰ thereby increasing the already-high portion of American revenues annually siphoned off merely to pay debt service. Creditor nations holding hundreds of billions of dollars in Treasuries, like China and Japan, may irrevocably decide to diversify at least a portion of their holdings. As such nations and other holders of Treasuries try to sell off their Treasuries, a serious weakening of the dollar ensues. This makes the United States the unfortunate poster-child for financially weak nations. The bad effects worsen and persist for many years.

All of the aforementioned issues merely concern the failure to pay interest on the debt. But, also, the United States would fail to timely pay its creditors and entitlement beneficiaries, such as contractors and Social Security recipients, respectively.¹³¹

Like rapidly falling dominoes, the failure to make payments on federal programs has severe knock-on effects. As Pentagon contractors do not receive expected payments, they consider slowing down their activity and laying off workers.¹³² As millions of Social Security beneficiaries do not receive expected payments, they individually experience personal hardships.¹³³ They also curtail some of their spending as consumers.¹³⁴ Great harm befalls the economy as business and consumer confidences alike receive a great shock.

Until recent decades, Congress could fulfill, without great difficulty, its duty to raise the debt limit to accommodate borrowing.¹³⁵ Recently, that action has become increasingly controversial.¹³⁶ Challengers running for Congress cite the many trillions of dollars of

Timothy Geithner, Sec'y, Dep't of the Treasury 1-2 (Apr. 25, 2011) (on file with the *Hofstra Law Review*).

130. Ironically, in the very short term, interest rates on long-range U.S. bonds may, well, drop. These are taken by the world as the safe haven in any crisis—even a crisis in the United States. However, over time, the short-term purchasing for safe haven purposes would give way to medium-term massive selling as the market moves to price in the new, much lower U.S. credit rating.

131. See, e.g., Buchanan, *supra* note 38, at 283-84.

132. Whitlock, *supra* note 93 (“Moreover, Hagel’s decision could bring some relief to thousands of private contractors who work for the Defense Department but had faced the threat of layoffs because of the government shutdown.”).

133. See, e.g., Solomon & Strumpf, *supra* note 24 (“Sucking money out of the economy by not paying . . . Social Security—many seniors rely on those checks for most of their income—would hamper growth.”).

134. See Robert Gallardo & Al Myles, *The Economic Impact of Social Security*, DAILY YONDER (Dec. 19, 2011), <http://www.dailyyonder.com/economic-impact-social-security/2011/12/18/3649>.

135. Buchanan & Dorf, *How to Choose*, *supra* note 19, at 1184-85.

136. *Id.*; *Constitutional Law*, *supra* note 25, at 867-69.

debt.¹³⁷ They blame the other party in general elections; the Tea Party candidates also blame less extreme figures in their own party primaries.¹³⁸ They blame these political “fall guys” for supposedly facilitating massive spending, which they characterize as caused by raising the debt ceiling itself.¹³⁹

In the past, Congress used several approaches to mitigate the difficulty of the controversial vote to raise debt limits.¹⁴⁰ Moreover, the party of the Administration accepted a duty to its President to vote to follow his recommendation in raising the debt.¹⁴¹ With the rise in 2010 of the Tea Party wing of the Republican House, the problem of getting the House to vote for a debt limit increase became acute.¹⁴² The Tea Party wing felt the Democratic President should make major policy concessions in order to get a debt limit increase.¹⁴³ In 2013, President Obama categorically ruled that out.¹⁴⁴

137. Susan Bonnell, *7th District Congressional Candidates Lance and Larsen Debate in Advance of June 3 Republican Primary Election*, THEALTERNATIVEPRESS.COM (May 29, 2014, 9:01 PM), <http://www.thealternativepress.com/articles/7th-district-congressional-candidates-lance-and-l>; Mike Siegel, *Congressional Candidate Phil Liberatore “Celebrates” Tax Day with a Message for the IRS: “I’m Coming to Washington DC to Limit Your Power!”*, MIKESIEGEL.COM (Apr. 20, 2012), <http://www.mikesiegel.com/conservative-talk-radio-2/congressional-candidate-phil-liberatore-celebrates-taz-day-with-a-message-for-the-irs-im-coming-to-washington-dc-to-limit-your-power>.

138. Olympia Snowe on Debt Ceiling Debate: ‘I’ve Never Seen a Worse Congress,’ HUFFINGTON POST, http://www.huffingtonpost.com/2011/08/10/olympia-snowe-debt-ceiling-deal_n_923348.html (last updated Oct. 10, 2011).

139. *Id.*

140. Plumer, *supra* note 6. The House had a “Gephardt rule” that automatically performed, without a separate vote, the House’s duty to raise the debt limit up to the level specified in the annual budget resolution adopted by the House. *Id.*

141. See Fitts & Inman, *supra* note 26, at 1756. Most Congressional Democrats find it easier, speaking in the very broadest terms, than Congressional Republicans, to raise the debt ceiling. Buchanan & Dorf, *Bargaining*, *supra* note 19, at 51. In many states and districts, most Democratic voters do not attach so much blame to the vote to raise the debt limit. Such voters simply do not believe the country could have a flat, zero deficit without unacceptably radical cuts in sacrosanct entitlement programs such as Social Security, Medicare, and Medicaid. Dauster, *supra* note 38, at 469, 471, 475, 488, 502.

142. See Shane Goldmacher, *GOP Congressman Rips Tea Party Colleagues: ‘I’m Not Sure They’re Republicans’*, NAT’L J. (Oct. 16, 2013), <http://www.nationaljournal.com/congress/gop-congressman-rips-tea-party-colleagues-i-m-not-sure-they-re-republicans-20131016>. The Republican House rejected the Gephardt rule. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 7 (2012). Moreover, the Republican majority party in the House felt no strong loyalty to follow the Democratic President’s recommendation in raising the debt. Goldmacher, *supra*.

143. Donna Cassata & Martin Crutsinger, *Boehner to Obama: No Debt Hike Without Concessions*, AP (Oct. 6, 2013, 2:21 PM), <http://bigstom.ap.org/article/weekend-washington-yields-little-shutdown>.

144. Aaron Blake, *Obama: I Will Not Negotiate on the Debt Ceiling*, WASH. POST (Sept. 16, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/09/16/obama-i-will-not->

The day-by-day events in 2013 depict how Congress really may let the Treasury approach the calamity of hitting the debt ceiling. The Treasury had announced it would hit the ceiling on October 17.¹⁴⁵ On October 15, under enormous pressure to avoid the impending disaster, Speaker John Boehner caucused with his party.¹⁴⁶ His Tea Party wing apparently stood absolutely firm. At first, the House Rules Committee said it would prepare for a leadership bill on October 15.¹⁴⁷ Presumably, Speaker Boehner could devise a bill to have the party's backing and could pass just in time.

However, on the evening of October 15, the House Rules Committee announced it would not meet.¹⁴⁸ This meant the House Republican party would not send a bill of its own to the House floor. At this point, it appeared entirely possible that nothing would pass the Congress on October 16, and the Treasury would hit the debt ceiling the next day, on October 17. Hitting the ceiling seemed only too imminent at that moment.

To understand what came so close to happening at that point, the press said, at the time, that the true calamity would occur later than October 17.¹⁴⁹ Although at that date the Treasury could no longer borrow, the Treasury did have \$30 billion in cash not yet spent.¹⁵⁰ And, revenues dribbled in—not on the scale of paying all of the Treasury's combined obligations coming due—but still on the scale for paying a substantial fraction.¹⁵¹

The press speculated that the Treasury may continue paying all obligations, using cash on hand and incoming revenues, until some day between October 22 and November 1.¹⁵² But, there was no way this

negotiate-on-the-debt-ceiling.

145. Plumer, *supra* note 6 (“We estimate that, at [October 17], Treasury would have only approximately \$30 billion to meet our country’s commitments’ . . .”).

146. Montgomery & Helderman, *supra* note 10; see Aliyah Frumin, *Obama: Boehner ‘Can’t Control His Caucus,’* MSNBC, <http://www.msnbc.com/hardball/obama-boehner-cant-control-his-caucus> (last updated Oct. 15, 2013, 6:33 PM).

147. *House Rules Committee to Propose Debt Deal* (CNBC television broadcast Oct. 15, 2013), available at <http://www.nbcnews.com/video/cnbc/53288270#53288270>.

148. Pete Kasperowicz, *House Rules Panel Postpones Meeting on GOP Debt Bill*, HILL BLOG, <http://thehill.com/blogs/floor-action/house/328695-rules-committee-suspends-meeting-on-gop-bill> (last updated Oct. 15, 2013, 7:02 PM).

149. Christopher Matthews, *When Will U.S. Actually Run Out of Time on the Debt Ceiling?*, TIME (Oct. 8, 2013), <http://business.time.com/2013/10/08/when-will-u-s-actually-hit-the-debt-ceiling>.

150. *Id.*

151. See Annie Lowrey, *Tracing the Calendar Down to the Last Cent*, N.Y. TIMES, Oct. 10, 2013, at A18.

152. *Id.*; Matthews, *supra* note 149.

would go past October 30.¹⁵³ On November 1, huge obligations came due that went far beyond even an optimist's view of what the Treasury could pay.¹⁵⁴ Very bad things would happen between October 17 and a week later.¹⁵⁵ Once the world press reported that the United States may not borrow and would soon default, world business confidence would suffer, and the economic consequences of defaulting on the combined obligations would hit.¹⁵⁶

On October 16, Speaker Boehner gave in to public pressure and impending calamity.¹⁵⁷ He brought to the House floor the compromise proposal that the majority and minority party had put through the Senate.¹⁵⁸ It passed the House, but with only about forty percent of the House Republican Party supporting it together with the whole House Democratic Party.¹⁵⁹

This did not make it seem, in retrospect, that the House had created an illusion of the potential for a calamity. On the contrary, the House Republican party really could not come together on a workable proposal, and the House Republican party might have put off letting the other party or the other chamber get a vote. There was no sign of a principle that would universally protect the country from failing to meet its combined obligations.

*B. The Treasury's First Step: Putting Payment of Interest Above All Else*¹⁶⁰

For the purpose of this Article, the question is a legal one regarding what the Treasury does to respond to the chaotic condition after some date that corresponds to what may be called "November 1," the date in 2013, when the Treasury stops paying a large part of its combined

153. Lowrey, *supra* note 151; Brad Plumer, *A Very Simple Timeline for the Debt-Ceiling Crisis*, WASH. POST (Oct. 8, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/08/a-very-simple-timeline-for-the-debt-ceiling-crisis/> ("If . . . the Treasury Department doesn't have enough money to make interest payments on the debt . . . due on Oct. 30 . . . then we could have a full-blown financial crisis.").

154. Lowrey, *supra* note 151.

155. *Id.*

156. Zachary Goldfarb, *Long Debate Over Debt Ceiling Could Harm Economy, Reports Says*, WASH. POST, Oct. 3, 2013, http://www.washingtonpost.com/politics/long-debate-over-debt-ceiling-could-harm-economy-report-says/2013/10/03/992c482e-2c35-11e3-b139-029811dbb57f_story.html.

157. See Billy House, *Senate Plans to Take First Vote on Debt Deal, House to Follow*, NAT'L J. (Oct. 16, 2013), <http://www.nationaljournal.com/congress/senate-plans-to-take-first-vote-on-debt-deal-house-to-follow-20131016>.

158. See *id.*; Montgomery & Helderman, *supra* note 10.

159. Montgomery & Helderman, *supra* note 10.

160. DEBT LIMIT ANALYSIS, *supra* note 24, at 20.

obligations. There is no magic cure. There is no abstruse, inscrutable, constitutional doctrine by which the Treasury disburses all its obligations. Once it cannot do so, serious problems develop in business confidence and in the national and world economy.¹⁶¹ Nothing said here disputes or undermines the Obama Administration's position that hitting the debt limit creates true and awful calamity, not to be reduced to acceptable levels by whatever the Executive does at this point.¹⁶²

Still, if and when that point comes, the Treasury will not fall down like dead road kill. It will do what it can. Partly, the Treasury faces a logistical question of what it can do, and partly, the Treasury faces a legal question of what it has the authority to do. For there is one key goal that the President may direct the Treasury to achieve even in the "November 1" situation, as long as the President has the legal authority and the Treasury has the logistical means.

While the Treasury cannot meet all of its obligations, it puts above all, its goal to pay the interest on the national debt.¹⁶³ In fact, the Treasury, in 2011, headed toward putting interest first.¹⁶⁴ The Treasury does this even though the Treasury thereby intensifies its shortfall in paying other obligations in a timely fashion.¹⁶⁵ That is, the Treasury pays the interest even though it moves the Treasury even further away from paying the rest of its combined obligations on time, including what the government owes to its contractors, employees, Medicare providers, and Social Security and veterans' beneficiaries.¹⁶⁶ Moreover, collectively, the economy takes a hard blow from nonpayment to consumers of the range of government obligations.

It may be asked, why it is prudent to do this, given the extremely grave personal problems to beneficiaries resulting from not paying them on time.¹⁶⁷ At this point, the Treasury cannot pay all of its combined

161. Goldfarb, *supra* note 156. Chairman Ben Bernanke stated that going past the debt ceiling date "would no doubt have a very adverse effect very quickly on the recovery. I'm quite certain of that." DEBT LIMIT ANALYSIS, *supra* note 24, at 19.

162. See Lowrey, *supra* note 151.

163. LEVIT ET AL., *supra* note 24, at 9.

164. Solomon & Strumpf, *supra* note 24.

165. See, e.g., Brad Plumer, *If We Hit the Debt Ceiling, Can Obama Choose Which Bills to Pay?*, WASH. POST (Oct. 7, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/if-we-hit-the-debt-ceiling-can-obama-choose-which-bills-to-pay-2>.

166. *Id.*

167. For example, millions of Social Security beneficiaries feel they have earned these payments as a matter of right, to pay for food and shelter. Solomon & Strumpf, *supra* note 24. Millions of food stamp recipients, including millions of children, need payments to avoid hunger. Some might ask why the interest payments to relatively well-heeled persons, and to entities including the Chinese government, take precedence over payments to millions of needy beneficiaries. *Id.* ("Among the White House's concerns about prioritization is the political consequences of paying Chinese debt holders ahead of veterans or Social Security recipients.")

obligations, due to a political situation involving Congress. The choice to pay interest differs qualitatively from prioritizing any other spending over some other type of spending. First, a very, very short delay in paying beneficiaries does not have an instantly calamitous effect on national economic prospects. If the crisis ends quickly, and full payments to beneficiaries catch up quickly, the worst ill effects on the beneficiaries do not last long. And, the adverse effect on the economy may deliver a blow, but it also does not last long.

In contrast, an interest default—even though not for long—produces a radical immediate downgrading with limited recovery.¹⁶⁸ The creditworthiness of the United States, both formally through credit ratings, and informally through the viewpoint of foreign and domestic debt-holders, takes an enormous one-way blow even from a short default. The Treasury will desire, above all else, to avoid such a default on debt interest. The Treasury takes, as its mission, maintaining the public credit of the United States.¹⁶⁹ By paying the interest, the Treasury avoids the catastrophic event of a debt default, which, even for just the day of “November 1,” would shock the nation and the world with a lasting loss of world confidence in American creditworthiness, and a lasting discrediting of American debt.

Second, logistically, it turns out that the Treasury has fairly good ways of putting separate interest payments first, compared with its combined stream of three million payments to other creditors or beneficiaries.¹⁷⁰ The Treasury keeps interest payments separate from all other payments,¹⁷¹ making these through a different agency, the Bureau of the Public Debt,¹⁷² and a distinctly separate channel of payment¹⁷³ of the banking system called Fedwire.¹⁷⁴ Moreover, the Treasury acts with

168. Letter from Matthew E. Zames, *supra* note 129, at 2; Solomon & Strumpf, *supra* note 24.

169. Department of the Treasury (TREAS), PERFORMANCE.GOV, <http://www.performance.gov/agency/departments-treasury#overview> (last visited Feb. 15, 2015).

170. Brad Plumer, *Which Bills Will Be Paid?*, COURIER-J., Oct. 13, 2013, at H.1, H.3 (“One possible way this might work is that the Bureau of the Public Debt would keep making payments to bondholders through Fedwire, and Treasury would halt the computer systems that make payments to other government agencies and vendors.”).

171. The Treasury’s Bureau of the Fiscal Service combines its million of non-interest payments to creditors and beneficiaries. The Bureau of the Fiscal Service uses a mechanism called the Automated Clearing House (“ACH”), to make the vast majority of disbursements other than for interest on the debt. *Overview*, BUREAU FISCAL SERVICE, <http://www.fms.treas.gov/ach/index.html> (last updated Mar. 14, 2014).

172. Zaring, *supra* note 29, at 210.

173. DEBT LIMIT ANALYSIS, *supra* note 24, at 20 (“Interest on the federal debt would likely be prioritized in either scenario – it is paid on a separate computer system (FedWire).”). For a detailed description of Fedwire, see FIN. MGMT. SERV., CASH MANAGEMENT MADE EASY 58-59 (2002). The government makes its other electronic payments through the ACH. *Id.* at 56, 71.

174. Plumer, *supra* note 170, at H.3.

the expectation that public, business, and international pressure will reach overwhelming levels as to Congress, or even a recalcitrant group like the Tea Party.

*C. Executive Power and the “Public Credit”
Clause Executive Power*

The Constitution gave Congress, not the President, the power to borrow and spend.¹⁷⁵ Moreover, the nation’s history confirms that distribution of powers.¹⁷⁶ Just as Congress decides the dimensions of appropriations, so too does Congress decide the dimensions of borrowing.¹⁷⁷ In previous eras, Congress authorized each individual public debt offering.¹⁷⁸ Then, in the twentieth century, Congress let the Secretary of the Treasury plan the specific debt offerings, but still set, and periodically raised, an overall debt ceiling.¹⁷⁹

On the other hand, as with other congressional powers, the President has a great deal of responsibility about execution. Congress legislates, but the President has the executive power from the U.S. Constitution.¹⁸⁰ For two centuries, the Fiscal Constitution has recognized that the President supervises the administration of the laws, especially, for relevant purposes, the fiscal laws.¹⁸¹

For example, Congress does have the power to decide the scale of appropriations.¹⁸² Yet, OMB develops the President’s budget proposals, detailing how to spend overall sums on each program, project and activity.¹⁸³ When Congress votes, OMB apportions the spending rate over the fiscal year.¹⁸⁴ And, OMB divides up the line items of appropriations into sums on each program, project, and activity.¹⁸⁵ The issue here does not concern any contention that when Congress sets a debt limit, the President may issue public debt over it. Rather, the issue

175. U.S. CONST. art. I, § 8, cl. 1–2.

176. Buchanan & Dorf, *How to Choose*, *supra* note 19, 1198–99.

177. U.S. CONST. art. I, § 8, cl. 2, § 9, cl. 7.

178. Krishnakumar, *supra* note 7, at 143.

179. *Id.* at 143–48.

180. U.S. CONST. art. II, § 2.

181. See, e.g., Huq, *supra* note 1, at 796–97, 799 & n.101 (discussing the President’s influence and control over fiscal legislation).

182. Stith, *Congress*, *supra* note 1, at 1348–50.

183. *The Mission and Structure of the Office of Management and Budget*, OFF. MGMT. BUDGET, http://whitehouse.gov/omb/organization_mission (last visited Feb. 15, 2015).

184. EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, OMB CIRC. NO. A-11, PART 1: GENERAL INFORMATION 2-3 (2014).

185. EXEC. OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, OMB CIRC. NO. A-11, PART 4: INSTRUCTIONS ON BUDGET EXECUTION 7-8 (2014); U.S. GOV’T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 12 (2005).

concerns whether the President may control the mechanics of disbursement and other distributions, the treatment of interest coming due, the coordination with the Federal Reserve, and so forth, to mitigate the effect of hitting the debt ceiling—matters Congress has not controlled by legislation.¹⁸⁶ Other presidential powers come into play, like the Commander-in-Chief clause as to defense management.¹⁸⁷

Section four of the Fourteenth Amendment, the Public Credit Clause, represents a constitutional commitment against default: “The validity of the public debt of the United States, authorized by law . . . shall not be questioned.”¹⁸⁸

This Article does not seek to deduce from the Public Credit Clause any sweeping principle that negates the debt ceiling. This Article does not argue that the Constitution provides the President with the power to borrow without Congress. The Public Credit Clause gets a nod here for a relatively minor role: it underlines the constitutional support efforts, like those discussed, to fend off chaos in a debt ceiling crisis.¹⁸⁹ Frankly, even without a mention of this clause, this Article does not change all that much.

In any event, that Public Credit Clause had its origins in a post-Civil War situation,¹⁹⁰ with the clause blocking repudiation of the Union’s financing.¹⁹¹ And, the proponents of the Public Credit Clause drafted it broadly.¹⁹² As the Supreme Court commented on the one occasion the Public Credit Clause came before it:

186. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 185, at 12-14.

187. U.S. CONST. art. II, § 2. A great deal of the spending relates to defense needs, handled by payments by DFAS; the non-military spending needs presidential orchestration for it not to crowd out defense needs. See *Agency Overview*, DEF. FIN. & ACCT. SERVICE, <http://www.dfas.mil/pressroom/aboutdfas.html> (last visited Feb. 15, 2015). The President’s Commander-in-Chief powers do not let him spend or borrow without Congress. See U.S. CONST. art II, § 2. But, those powers do let him manipulate the mechanics of disbursement and the Federal Reserve’s role to facilitate defense. Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*, 81 IOWA L. REV. 79, 97 (1995). For example, the great Supreme Court case upholding borrowing activity took place regarding the greenbacks of the Civil War. *Ajit V. Pai, Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535, 538 & n.7 (1998).

188. U.S. CONST. amend. XIV, § 4.

189. See *Public Debt of the United States Shall Not Be Questioned: The 14th Amendment and the Debt Ceiling*, DAILY KOS (Dec. 9, 2012, 10:00 AM), <http://www.dailykos.com/story/2012/12/09/1168027/-Public-debt-of-the-United-States-shall-not-be-questioned-the-14th-Amendment-and-the-debt-ceiling#>.

190. After the Civil War, Northern Republicans feared that the representatives of the reconstructed South would repudiate the debt taken on by the Union during the war. McCommas, *supra* note 21, at 1305-09.

191. *Id.*; Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out*, N.Y. TIMES (July 24, 2011), http://www.nytimes.com/2011/07/25/us/politics/25legal.html?_r=0.

192. See *Perry v. United States*, 294 U.S. 330, 354 (1934).

While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle Nor can we perceive any reason for not considering the expression ‘the *validity* of the public debt’ as embracing whatever concerns the integrity of the public obligations.¹⁹³

In modern terms, economists today would say that the Abraham Lincoln Administration monetized the federal debt.¹⁹⁴ It financed the Civil War, not by selling debt instruments, but by using greenbacks as an expanding part of the money supply.¹⁹⁵ So, the Public Credit Clause reflects, condones, and supports bold tactics for handling the fisc, of which the monetization of federal debt is a prime example.¹⁹⁶

So long as the Executive Branch does not issue public debt, this suggests the Federal Reserve has broad authority to expand the money supply and, in a way, to monetize the amount of additional needs when the debt limit precludes straightforward issuance of public debt.¹⁹⁷ The distributions this Article discusses come from expansion of the Federal Reserve’s balance sheet, to get lending to those left out, because no public debt borrowing making disbursements to them may occur. The Federal Reserve can make these distributions, in the form of loans, because its loans increase its balance sheet, but do not increase the public debt. This Federal Reserve balance sheet expansion, looked at another way, simply expands the nation’s money supply at a propitious moment. From the perspective of the Federal Reserve’s monetary

193. *Id.* Looking closely at the clause’s background, the Northern Republicans feared that members of Congress from the South might oppose paying the massive Civil War debt, particularly because they wanted to pay the war debt of the individual southern states and perhaps even the debt of the Confederacy. McCommas, *supra* note 21, at 1305-09. Those Northern Republicans sought to protect, at that point, a matter of public credit far beyond American experience. *Id.* They had financed the Civil War with massive issuance, as legal tender, of greenbacks that lacked the backing of gold or silver. Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393, 424, 440-41 (1999).

194. See Jeffrey Rogers Hummel, *Civil War Finance: Lessons for Today*, 12 CHAP. L. REV. 591, 594-97, 600 (2009); Kahn, *supra* note 193, at 440-41.

195. Hummel, *supra* note 194, at 600. For a discussion on monetization, see Roger L. Torneden, *Will Devaluation of the Dollar Pull the U.S. Out of Depression Once Again?*, NEXUS: CHAP. J.L. & POL’Y, 2009-2010, at 67, 81-82.

196. Liptak, *supra* note 191.

197. Terry Burnham, *Is the Federal Reserve Printing a Free Lunch*, PBS NEWSHOUR (Sept. 17, 2014, 10:00 AM), <http://www.pbs.org/newshour/making-sense/federal-reserve-printing-free-lunch>. The presidential power translates in straightforward terms for Congress. On the one hand, the President leaves to Congress the raising of the debt ceiling and the issuance of more public debt. On the other hand, the President announces steps he will take, as part of his duty to protect the public credit.

concerns, such expansion buffers the economy against crisis, while not at all counting as the issuance of public debt.¹⁹⁸

The President can stretch his execution powers to the utmost. Disbursement of funds in normal times may seem ministerial, noncontroversial, or prosaic. In a debt ceiling crisis, the steps, in disbursement of hundreds of billions of dollars monthly, take on real significance in the separation of powers.

D. Dividing Up, More Manageably, the Stream of Disbursements

The big issue regarding the President's powers is not whether, in the abstract, he has the legal authority to order the Treasury to divide up the stream of payments. Rather, the Treasury faces whether its authority may accomplish the goal as a practical matter. The Treasury takes the position that its FMS lacks the logistical means to prioritize its three million daily payments.¹⁹⁹ The Treasury—specifically its Bureau of the Fiscal Service and FMS—have a torrent of payment requests; its website explains that it annually “disburses more than a billion payments, with an associated dollar value of more than \$2.4 trillion.”²⁰⁰ The Treasury says that it “disburses approximately [eighty-five] percent of all federal payments.”²⁰¹ The difficulty posed by this huge daily stream of payments will present the single biggest challenge to the President mitigating the debt limit crisis.

Logistically, it may seem the FMS's enormously large-scale, combined payment stream precludes turning anything important on or off. However, the Treasury allows the fostering of an impression of helplessness, which looks differently upon focusing on the facts. This has great importance both because of what the Executive agencies may do alone, and further, how the Federal Reserve may help them, as discussed below.²⁰²

Contrary to the impression the Treasury fosters, the Treasury alone does not disburse all the government's payments, entirely by itself, in one sole Treasury stream.²⁰³ The Treasury's figure of eighty-five percent

198. A Treasury cut back on payments, plus a nasty spill by consumer and business confidence, produces a deflationary shock. Expansion of the Federal Reserve balance sheet zeroes provides the best medicine for this deflationary shock.

199. Plumer, *supra* note 165 (“[T]he Treasury Department has long insisted that its payment systems simply aren't set up for prioritization.”).

200. *All About Us: An Overview*, *supra* note 42.

201. *The Office of Legislative and Public Affairs: Fact Sheets*, BUREAU FISCAL SERVICE, http://www.fms.treas.gov/news/factsheets/pmt_mgmt.html (last updated Mar. 14, 2014).

202. *See infra* Part IV.A.

203. *The Office of Legislative and Public Affairs*, *supra* note 201.

skirts two facts.²⁰⁴ When the Treasury speaks more precisely, it says it makes eighty-five percent of non-Department of Defense (“DoD”) payments, meaning its percentage of all payments falls considerably below eighty-five percent.²⁰⁵ Moreover, for other reasons, the Treasury’s asserted eighty-five percent shrinks further when closely examined.²⁰⁶ Defense Finance and Accounting Services in the DoD makes its own disbursements, completely unconnected to the stream of disbursements by the Treasury.²⁰⁷

The Division of Payment Management, for the CMS, in the Department of Health and Human Services (“HHS”) processes huge separate streams of disbursement.²⁰⁸ In HHS, CMS’s accounting system has “45 million providers and beneficiaries”²⁰⁹ and will “[p]ay nearly 3 Million healthcare claims a day.”²¹⁰ In one year, CMS processed “approximately \$600 billion in total payments/disbursements.”²¹¹ It may

204. *See id.*

205. FIN. MGMT. SERV., *supra* note 173, at 44 (“A few Federal agencies issue their own payments, most notably the Department of Defense []. However, the Financial Management Service [] issues approximately 85 percent of all Federal Government payments for most of the other agencies.” (emphasis added)).

206. Treasury counts its percentage by the number of disbursements, which provides it with a high figure since it makes millions of relatively non-large payments to Social Security beneficiaries. *See Fast Facts & Figures About Social Security, 2010*, SSA.GOV, http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2010/fast_facts10.html (last visited Feb. 15, 2015); *The Office of Legislative and Public Affairs*, *supra* note 201. Payments for government contracts and medical providers may get largely or wholly processed by DFAS and CMS. *Agency Overview*, *supra* note 187. CMS’s recipients, such as health care providers, have higher average disbursements so that Treasury has a lower percentage of federal payments by amount, than of federal payments, by numbers of payments. *Administrative Program Accounting*, CMS.GOV, http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/HIGLAS/Administrative_Program_Accounting.html (last updated Mar. 1, 2013, 5:22 PM).

207. *See, e.g., Agency Overview*, *supra* note 187.

208. FIN. MGMT. SERV., *supra* note 173, at 71. The Payment Management System is described as being:

[O]perated by the Division of Payment Management (DPM) of the Department of Health and Human Services (HHS). . . . [PMS] performs the following functions: . . . 4) Transmit the authorization to the Federal Reserve Bank for ACH (next day) payments . . . ; 5) Record the payment transactions and the corresponding disbursement transactions”

Id.

209. *Healthcare Integrated General Ledger Accounting System (HIGLAS)*, CMS.GOV, <http://cms.hhs.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/HIGLAS> (last updated Apr. 2, 2013, 2:42 PM) [hereinafter *HIGLAS*].

210. *Id.*

211. *Healthcare Integrated General Ledger Accounting System Highlights*, CMS.GOV (Aug. 2013), <http://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/HIGLAS/Downloads/HIGLAS-Newsletter-August-2013.pdf>. It is clear that DFAS makes its own final disbursements; that is, it sends out the checks or electronic payments. FMS has sometimes not been clear about CMS. In any event, CMS does all the processing of payment requests, all the way to readiness to disburse.

be that CMS, in general, disburses its own payments.²¹² Effectively, the trio of FMS, DFAS, and CMS split the government's disbursements into a much more manageable trio of three separate streams.²¹³

Treasury officials told the HHS's Inspector General how they might respond in a debt limit crisis:

Delay of Payments

Treasury officials told us that it was the Department's organizational view that the least harmful option available to the country at the time, of these very bad options, was to implement a delayed payment regime. In other words, no payments would be made until they could all be made on a day-by-day basis.²¹⁴

A public interest group, the Bipartisan Policy Center's *Debt Limit Analysis*, explained this more fully, as it explored a couple of scenarios:

Scenario #2: Make all of each day's payments together once enough cash is available.

—Treasury might wait until enough revenue is deposited to cover an entire day's payments, and then make all of those payments at once. (For example, upon reaching the X date, it might take two days of revenue collections to raise enough cash to make all of the payments due on day one. Thus, the first day's payments would be made one day late. This, of course, would delay the second day's payments to a later day.)

—In the 2012 OIG report, some senior Treasury officials stated that they believed this to be the most plausible and least harmful course of action.²¹⁵

212. FMS has commented on CMS's payment system, stating:

The Payment Management System (PMS) is operated by the Division of Payment Management (DPM) of the Department of Health and Human Services (HHS). . . . The system . . . performs the following functions . . . Receive payments requests . . . Edit these payment requests . . . Transmit the authorization to the Federal Reserve Bank for ACH (next day) payments or through the Treasury's Electronic Certification System for Fedwire (same day) Payments . . .

FIN. MGMT. SERV., *supra* note 173, at 71. This FMS guide seems to say that CMS makes its own disbursements of the kind that go through ACH but sends the typically larger, more timely disbursements through Treasury's Electronic Certification System for Fedwire. That may mean the government has great control over these larger, timelier CMS payments, because Fedwire is a separate rivulet of such payments compared to the millions of ACH payments.

213. There are other departments that have authority to make their own disbursements, but these are the key ones. See, e.g., *Farm Service Agency Disbursement Statements*, FSA, http://www.fsa.usda.gov/Internet/FSA_File/disbsmt_statemts.pdf (last visited Feb. 15, 2015).

214. TIGTA report, *supra* note 24, at 6.

215. DEBT LIMIT ANALYSIS, *supra* note 24, at 26.

So, the government starts out with options. As stated, it can make all of its disbursements on a segregated day-by-day basis.²¹⁶

The President, using his powers in this crisis, has a further option, missed by the insufficiently detailed accounts to date.²¹⁷ He can choose to make segregated day-by-day disbursements from DFAS, CMS, or the Treasury. For example, the government might conclude that for one reason or another, it could hold off on CMS disbursements.²¹⁸

The Treasury has said it does not itself have, in-house, the capacity to prioritize payments.²¹⁹ The payment requests come to the Treasury and get combined, and the Treasury asserts it cannot prioritize the ingredients of the combination.²²⁰ However, it does not answer the question of whether the government can do anything; it just notes that the Treasury cannot treat payments for different purposes differently once it combines them. The Treasury cannot do the job itself, but agencies might. As the Bipartisan Policy Center noted: “One other mechanical possibility for the prioritization scenario is that Treasury (via the OMB) would instruct agencies to withhold processing of certain groups or types of bills so as to prevent them from entering Treasury’s system.”²²¹

Without knowing the complete answer to the feasibility of this approach, it may be suggested that DoD, CMS, and the Treasury may find ways to control the processing of agencies’ requests for particular categories of payment.²²² Agencies engage in considerable processing before they produce requests, grouped in schedules or batches, going to the trio of the Treasury, DFAS, and CMS.²²³ Agencies do transmit

216. *Id.* at 24.

217. *See generally id.*

218. Perhaps CMS providers will continue to provide services while awaiting payments. Or, perhaps, the Federal Reserve fills the funding gap for providers. That allows the government to husband its revenues for non-CMS uses. Furthermore, the President may try to have agencies divide up their requests for payment in partial streams, and process some partial streams before others.

219. DEBT LIMIT ANALYSIS, *supra* note 24, at 20.

220. *See id.* at 20-26.

221. *Id.* at 25.

222. Technically, agencies provide certified requests of batches of payments. *All About Us: An Overview*, *supra* note 42. These are agency requests for payment or disbursement, rather than agencies themselves making payment or disbursement. *Id.* With these requests in hand, the disbursing officers at Treasury’s Fiscal Service—DoD’s DFAS, and (probably) CMS’s Payment Management Service—then go ahead with disbursement, namely, payment either by electronic transmission or by paper check. *Id.* (“Through [Treasury’s Financial Management Service’s] state-of-the-art information technology systems, for example, agencies are able to submit certified requests for payment disbursements, [and] determine the status of disbursements . . .”).

223. *Detailed Information on the Financial Management Service Payments Assessment*, EXPECTMORE.GOV, <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/expectmore/detail/10004102.2005.html> (last updated Sept. 6, 2008). In regard to the payments program:

requests for disbursement in batches this way.²²⁴ This may create readily separable streams of payment, like HHS's separate stream of grant payments to states, or maybe even some of the Social Security stream of beneficiary payments.

Take any large-scale set of payments. Military pay comes up in schedules or batches, for disbursement on one set day per pay period.²²⁵ DFAS may have some capacity to take military pay through to disbursement while holding back all other DoD payments.²²⁶ If not, at least DFAS may have some capacity to let military pay (for the pay period) plus all other disbursements that same day go through to payment while side-tracking other DoD payments due on other days. For a monthly period used as a scenario during the 2013 crisis, military pay and retirement costs \$10 billion, whereas defense vendors cost \$28 billion.²²⁷ When DFAS takes the pay of individuals through to disbursement while holding back defense vendors, it gives the President some logistical ability to handle DoD disbursements.

During the same period, out of a total of about \$290 billion (minus the two DoD categories above), Medicare and Medicaid, collectively, cost \$69 billion, most of which goes to health care providers.²²⁸ If CMS has the logistical capacity to hold back the payment of providers, it gives the President some logistical ability to handle civilian government disbursements.

Still, this by no means constitutes all the ways for the President to use his power in a debt limit crisis. This Article next discusses the tax approach.²²⁹ Subsequently comes the large role of the Federal

The purpose of the payments program [of the Financial Management Service] is to issue Federal payments on behalf of Executive Branch Federal Program Agencies (FPAs) timely, efficiently, and accurately. FPAs certify payment schedules to FMS, which initiates electronic payments and produces check payments as requested by the FPAs. This includes a variety of payment types such as lifeline payments (benefit payments like Social Security), vendor payments, and tax refunds.

Id.

224. *Administrative Program Accounting*, *supra* note 206. ("HIGLAS batched all approved awards and transmitted them to the Payment Management System (PMS) for disbursement.").

225. *2014 Active Duty Pay Day Schedule*, DEF. FIN. & ACCT. SERVICE, <http://www.dfas.mil/militarymembers/payentitlements/2014adpaydays.html> (last updated Jan. 6, 2014).

226. *See, e.g., Obama Signs Bill to Ensure Military Will Be Paid During Shutdown*, N.Y. TIMES, Sept. 30, 2013, http://www.nytimes.com/news/fiscal-crisis/2013/09/30/obama-signs-bill-to-ensure-military-will-be-paid-during-shutdown/?_php=true&_type=blogs&_php=true&_type=blogs&_r=3 (discussing which military programs will continue to be funded in the event of a shutdown).

227. DEBT LIMIT ANALYSIS, *supra* note 24, at 22.

228. *Id.* at 22-23.

229. *See infra* Part III.E.

Reserve.²³⁰ During that discussion, the topic recurs of focusing on particular separate streams of payments, such as to contractors and providers.²³¹ The Federal Reserve may have the most important means to mitigate the problem of stream of payments.

E. Advance Tax Deposit

A separate point warrants attention. The rest of this Article concerns how to deal with the debt limit by management of distributions.²³² However, the President may have some means to accelerate revenue at the period of crisis. While Congress decides on tax legislation, Congress and the courts leave great discretion for the Treasury to administer the tax system.²³³ This Article picks a particular example of how to do so, but solely to illustrate the kind of thing that the Treasury may do. The example's purpose is to make the notion of speeding up revenues concrete. It may well be that other examples would work as well or better.

Statutorily, Congress enacted 26 U.S.C. § 7805(a),²³⁴ a sweeping general grant of power for the Treasury to adopt regulations. In 2011, in an opinion written by Chief Justice Roberts, a unanimous Supreme Court bolstered the Treasury's power in *Mayo Foundation for Medical Education and Research v. United States*.²³⁵ In *Mayo Foundation*, the Court held that the Treasury regulations deserve a highly deferential standard.²³⁶ Of course, this becomes a context for maximum employment of the President's broad powers on the details of execution.

For example, Congress leaves it to the Treasury to determine certain details²³⁷ as to when²³⁸ corporate taxpayers perform their

230. See *infra* Part IV.A.

231. See *infra* Part IV.A.

232. See *infra* Part IV.C.

233. Clifford M. Sloan et al., *Supreme Court's Mayo Foundation Opinion Grants Chevron Deference to Treasury Regulations*, TAX EXECUTIVE, Spring 2011, at 35, 35, 40, available at http://www.tei.org/news/articles/Documents/TTE_Spring11_MayoChev_SloanWilliamsFoster.pdf.

234. 26 U.S.C. § 7805(a) (2012) (authorizing the Treasury Department to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code).

235. 131 S. Ct. 704 (2011).

236. *Id.* at 713. Moreover, the Court accorded that the *Chevron* standard should even be applied to regulations derived from the Treasury's umbrella grant of power for all its regulations, and not just to regulations in which Congress enacted a specific statutory section emphatically authorizing regulations for a specific statutory tax program. *Id.* at 713-14.

237. Commentators have noted the significance of the Treasury changing its regulations to control quarterly estimated corporate taxes. See Jonathan D. Bush, *New Changes to the Annualization Method for Determining Estimated Taxes*, CORP. TAX'N, Mar./Apr. 2010, at 3, 8.

238. The Treasury provides procedures for businesses to obtain an advance refund payment. *How to Make the U.S. Treasury Work for You Up Close*, GRANT THORNTON, <http://www.granthornton.com/staticfiles/GTCom/files/Industries/Consumer%20&520industrial%20>

quarterly estimates.²³⁹ With the Treasury in trouble, it may use the same kind of authority to obtain an advance deposit. To deal with the debt limit crisis, the President may direct the Treasury to see that corporations deposit, presently, their next due quarterly tax estimated payment. That is, if the next date for quarterly estimates is January 15, and the crisis hits in late October, the Treasury may issue a call for deposit of the funds on November 1 or November 5.²⁴⁰

Opponents of this move may protest this effort. Some in Congress, or in the business world, might paint the call for deposits as a usurpation of taxation powers belonging exclusively to the legislature.²⁴¹ The Treasury may disarm the opposition²⁴² by putting it, to a large measure, to the business community itself to decide which to do.²⁴³ The deciding factor, to encourage businesses actually to get the deposits in, may lie in the following Parts of this Article that discuss the role of the Federal Reserve.²⁴⁴ Few will appreciate better than the business community the peril of the moment, and the need to follow the Treasury and the Federal Reserve as they lead toward safety—especially when it costs a firm nothing.²⁴⁵ And so, with that particular example of the Federal Reserve's

products/IRS%20Procedures%20for%20cash-starved%20businesses%20TRANSPORT.pdf (last visited Feb. 15, 2015). This supports a weakened economy. *Id.* (“As a result of the unanticipated downturn in the economy during 2008, many companies are finding they have overpaid their estimated taxes substantially. . . . [A] corporation can file Form 4466 and receive a ‘quick refund’ of overpaid estimated tax.”).

239. *General Instructions*, IRS, <http://www.irs.gov/instructions/i1120w/ch01.html> (last visited Feb. 15, 2015) (noting that “installments generally are due by the 15th day of the 4th, 6th, 9th, and 12th months of the tax year”).

240. The Treasury Department will simplify all the details by emergency regulation. To avoid calculation problems, corporations will have a “safe harbor” if they deposit eighty percent of their most recent quarterly payment.

241. The current statutory provision regarding the penalty for failure to make payments says nothing about the making of any deposits, just payments, and it sets forth specific dates each quarter for payments. 26 U.S.C. § 6655 (2000). Opponents can make a straightforward case that the Treasury lacks any authority to make a move that resembles accelerating the statutorily fixed dates for quarterly payments.

242. Although this is a legal issue, the key audience for this issue consists of a legally-informed business community, rather than courts. The fast pace of the debt crisis, compared to the crawling speed of the exhaustion and jurisdictional principles of tax cases, makes it quite impractical for a high court to make a ruling that mattered on the large scale.

243. On the other hand, to build an approach with maximum support from the business community, the Treasury may eschew threats or sanctions against firms that fail to follow the guidance to make a timely deposit.

244. *See infra* Part IV.A.

245. Compliant businesses—which make an early deposit of estimated quarterly taxes—may receive an offsetting interest-free no-strings loan, in the amount of their tax deposit, from a lending facility of the Federal Reserve. With the right hand, they deposit the cash in the Treasury; with the left hand, they receive it from the Treasury, and the Federal Reserve may make it easier than that. The corporate fiscal officer could simply tell a Federal Reserve lending facility to make the deposit on behalf of the corporation. For the corporation, it is an inconsequential accounting procedure. The

powers to get the nation through this crisis, this Article turns to the Federal Reserve.

IV. FLEXIBLE RESPONSE TO HITTING THE DEBT LIMIT CEILING

A. *Enter the Federal Reserve*²⁴⁶

The Federal Reserve is, of course, the nation's central bank.²⁴⁷ To guide the economy, it buys and sells securities, including Treasuries, on a massive scale, thereby regulating the size of the money supply.²⁴⁸ To fund these activities, it does not borrow.²⁴⁹ It has the power to create funds by entering their creation on its books, using these bank-created deposits as its funding.²⁵⁰ Its creation of these funds does not have any effect on the national debt, and specifically does not raise the debt to the debt ceiling.²⁵¹

Traditionally, it has the function and the very broad legal authority to step in during financial crises and function as the "lender of last resort."²⁵² In the financial crisis of 2008, and the ensuing years of recession and high unemployment, the Federal Reserve demonstrated the scale and range of its powers as the lender of last resort. One key measure was that the Federal Reserve had a balance sheet of \$1 trillion during the crisis.²⁵³ By ordinary reckoning, it expanded its balance sheet to \$3.6 trillion in late 2013.²⁵⁴ As cited by Colleen Baker, "Bloomberg News estimates that the Federal Reserve's assistance to the financial

transaction would not make a dent in the corporation. This is part of the highly developed system that the Treasury has created for corporate tax payments. *See generally* DEP'T OF THE TREASURY, ELECTRONIC FEDERAL TAX PAYMENT SYSTEM: FINANCIAL INSTITUTION HANDBOOK (2010), available at http://fms.treas.gov/eftps/marketing/eftps_handbook.pdf.

246. This Subpart is based on Baker, *supra* note 32, and Gabilondo, *supra* note 46.

247. Baker, *supra* note 32, at 81-82.

248. *Id.* at 82-83.

249. *See, e.g.*, Ann Saphir, *The Fed's QE3: How Does It Work and What Are the Risks?*, REUTERS (Sept. 13, 2012), <http://www.reuters.com/article/2012/09/13/us-usa-fed-easing-idUSBRE88C1CT20120913>.

250. Baker, *supra* note 32, at 82-84.

251. *What Is the Difference Between Monetary Policy and Fiscal Policy, and How Are They Related?*, BD. OF GOVERNORS FED. RES., http://www.federalreserve.gov/faqs/money_12855.htm (last updated July 21, 2014).

252. Baker, *supra* note 32, at 84-87.

253. *See* Matt Phillips, *The Federal Reserve's Balance Sheet Will Hit a Mind-Boggling \$4 Trillion any Day Now*, QUARTZ (Dec. 13, 2013), <http://qz.com/157198/the-federal-reserves-balance-sheet-will-hit-a-mind-boggling-4-trillion-any-day-now> (indicating the drastic increase in the Federal Reserve's balance sheet since 2008).

254. Kjetil Malkenes Hovland, *Fed's Evans Suggests Tapering Could Start Later than October*, WALL ST. J. BLOG (Sept. 27, 2013, 9:43 AM), <http://blogs.wsj.com/economics/2013/09/27/feds-evans-suggests-tapering-could-start-later-than-october>.

system reached approximately \$7.7 trillion.²⁵⁵ Clearly, its operations have the scale to shore up the Treasury in a short-term debt limit crisis.

A second key measure was that in the financial crisis of 2008, and after, the Federal Reserve demonstrated its flexibility as the lender of last resort.²⁵⁶ A series of key, non-bank firms, like Bear Stearns and AIG, faced financial collapse.²⁵⁷ Moreover, the market collapsed for certain categories of financial instruments.²⁵⁸ These ranged from money market funds to commercial paper, and from short-term repurchase agreements for financial assets (“repos”) to mortgage-based securities.²⁵⁹ The Federal Reserve fought the crisis by creating “lending facilities,” so that the Federal Reserve could make loans to holders of these troubled financial assets.²⁶⁰ The Federal Reserve accomplished its goal. It kept the adverse financial and economic conditions from causing a complete freeze and collapse of credit.²⁶¹

What the Federal Reserve did in that kind of financial crisis adumbrates what it may do in the credit crisis as the government hits the debt ceiling. Hitting the debt ceiling, and signaling that the United States hovers on the edge of a credit default, will strike the financial community, both in the United States and in the world, like an earthquake. The Federal Reserve’s own historic mandate, not some partiality for the FMS, DFAS, or CMS, calls it to take up arms against the crisis.²⁶² In the face of a sudden, huge potential credit crisis, the Federal Reserve’s historic mandate drives it to the limits of the vast scale, range, and flexibility of its powers.

As previously quoted, a prestigious advisory committee laid out the danger posed by the shock of hitting the debt ceiling and the further danger from a default on interest obligations.²⁶³ In taking action, the Federal Reserve does not meddle officiously in the problems of others. It does its own job.

Moreover, this Article does not propose that the Federal Reserve nakedly make a loan to the Treasury or cancel Treasuries, as

255. Baker, *supra* note 32, at 78.

256. THE FEDERAL RESERVE, *supra* note 57, at 28-29.

257. *Id.* at 45.

258. FIN. CRISIS INQUIRY COMM’N, FINANCIAL CRISIS INQUIRY REPORT 27 (2011).

259. *Id.* at 27, 29-30.

260. These included emergency-liquidity programs for securities firms, corporations, money market mutual funds, plus facilities to swap securities, buttress the repo market, and boost commercial paper and money market mutual funds. Gabilondo, *supra* note 46, at 769-71.

261. FIN. CRISIS INQUIRY COMM’N, *supra* note 258, at 386; Gabilondo, *supra* note 46, at 771.

262. *Developments in Banking and Financial Law: 2007-2008*, 27 REV. BANKING & FIN. L. 239, 243-44, 254-55 (2008).

263. See *supra* text accompanying note 129.

some have suggested.²⁶⁴ There would be questions about the statutory authority for the Federal Reserve to make naked loans to the Treasury or to cancel Treasuries.²⁶⁵

Rather, the Federal Reserve may pursue the strategy of distributing money to those temporarily not receiving similar money as a Treasury disbursement. While the Treasury makes “disbursements” or “payments,” which constitute government spending, the Federal Reserve makes “distributions,” which puts cash in recipients’ hands but which nominally, until the debt crisis ends, may be deemed loans.²⁶⁶ That is, the Federal Reserve lends on a no-strings, interest-free basis to those entitled to, but potentially lacking assurance of, immediately receiving government payment. The Federal Reserve would make a distribution (termed a loan) for those to whom the Treasury does not make a distribution (termed a payment or disbursement).

Recipients freely spend what they get. This Federal Reserve distribution, in place of the Treasury distribution, buffers those delayed creditors and payees from shock of the Treasury slowing down payment. The Federal Reserve does not let a financial panic or deleveraging event occur. That accords with how the Federal Reserve acted in 2008 and thereafter.²⁶⁷

264. Alan Grayson, *Dear Bernanke: Please Use Your Powers to End the Debt Limit Crisis*, BUS. INSIDER (Oct. 11, 2013, 6:45 PM), <http://www.businessinsider.com/bernanke-could-end-the-debt-limit-crisis-2013-10>.

265. For one thing, some would argue that the simplest, naked Federal Reserve loans to the Treasury count as “public debts,” which the Treasury cannot take above the debt ceiling. LEVIT ET AL., *supra* note 24, at 1, 2 & n.8 (stating that “[a]lmost all of the federal government’s borrowing is subject to a statutory limit”). After all, ordinary Treasury bills, notes, and bonds held by the Federal Reserve do count as public debt for purposes of the debt limit statute. U.S. GOV’T ACCOUNTABILITY OFFICE, FEDERAL DEBT: ANSWERS TO FREQUENTLY ASKED QUESTIONS 5-7, 54-57 (2004), available at <http://www.gao.gov/assets/250/243712.pdf>. The list of entities to which the Federal Reserve may lend is broad but does not expressly include the Treasury. 12 U.S.C. § 343(3)(a) (2012); BD. OF GOVERNORS OF THE FED. RES. SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 45-46, 49 (2005), available at http://www.federalreserve.gov/pf/pdf/pf_complete.pdf. For the Federal Reserve to cancel some of its \$2 trillion Treasuries outright, as suggested by Alan Grayson, is quite a step to take—a last resort rather than a first resort. Grayson, *supra* note 264. The various lending facilities discussed in this Article all entail a kind of lending from the Federal Reserve to private entities, as has always been done and properly so.

266. *Currency and Coin Services*, BD. GOVERNORS FED. RES. SYS., http://www.federalreserve.gov/paymentsystems/coin_about.htm (last updated Sept. 5, 2014); *Duties & Functions of the U.S. Department of the Treasury*, U.S. DEP’T TREASURY, <http://www.treasury.gov/about/role-of-treasury/Pages/default.aspx> (last visited Feb. 15, 2015).

267. The letter quoted above expressly characterizes hitting the debt ceiling as like the “deleveraging” events of 2008 that triggered the great recession. Letter from Matthew E. Zames, *supra* note 129, at 2.

This course of action also makes it more feasible for the Treasury to defer disbursements to the unpaid creditors, providers, and payees. Thus, the Treasury properly husbands its funds to use for other purposes.

So what may the Federal Reserve do? The Federal Reserve may create a “Federal Creditor and Payee Facility,” similar to the lending facilities it created in the post-2008 crisis.²⁶⁸ In this way, the Federal Reserve becomes the lender of last resort for unpaid government creditors and other payees. It has the statutory authority to handle emergencies this way, starting in the Great Depression, expanded in 1991,²⁶⁹ and further refined after the recent financial crisis by the Dodd-Frank Act.²⁷⁰

For the purest example, government contractors and providers with government invoices, processed and ready for payment, may find themselves in line for, but not receiving, a disbursement that DFAS or CMS delays.²⁷¹ The Federal Creditor Facility would dispense with the usual delays and formalities for commercial bank lending against such receivables. Immediately, the lending facility provides a no-strings, interest-free distribution, styled as a loan, to the contractor. Instead of a contractor getting an expected, but deferred, \$1 million DFAS or CMS payment check on Day Fifteen, the contractor gets a \$1 million Federal Credit Facility no-strings “loan” check on Day One or Day Two. The Federal Reserve tells those receiving these distributions that they not only may, but shall, treat these identically to a Treasury disbursement.

In doing this, the Federal Reserve seeks, first and foremost, to prevent (or at least to reduce) the financial fallout from the hitting of the debt ceiling.²⁷² The contractor or provider knows that at some point, presumably soon, Congress will end the crisis.²⁷³ And, it knows that

268. See Baker, *supra* note 32, at 87-88.

269. *Id.* at 87-88, 89 & n.130.

270. *Id.* at 87-89.

271. More aggressively, the Federal Reserve may “deem” entire streams of daily contractor and provider payments to be its loans. The Federal Reserve will reimburse the Treasury for taking over a loan interest on these payments, and concretize this by direct lending relations to the maximum number of contractors and providers. For any categories of contractors or providers not easily diverted from DFAS and CMS payment, the Federal Reserve could make a daily estimated payment to the Treasury on the scale of these contractor and provider disbursements.

272. Using the Federal Creditor Facility loans—which are similar to Treasury disbursements—contractors and providers will confidently meet their own financial obligations. They will cover their own payrolls and make their own purchases. And, they will have the motivation and the wherewithal to continue their work for the government. Thus, the country avoids the deleveraging event of failing to pay its contractors.

273. In the abstract, the contractors’ books would not show incoming disbursements from the Treasury liquidating the government obligations to pay them. Rather, the contractors’ and providers’ books would show still-unliquidated government receivables, coupled with no-strings loans from the Federal Creditor Facility.

when the crisis ends, DFAS will take care of the loan from the Federal Creditor Facility.

And so, in terms of mechanics, DFAS defers disbursing payments to those contractors and providers on Day One, and thereafter. It would still have unliquidated government obligations on the government's books for what it had deferred paying. Those unliquidated government obligations do not count toward the debt ceiling.²⁷⁴

Although several complicating aspects of this receive discussion below, the basic sequence seems clear.²⁷⁵ Hopefully, an agency could hold back readily some whole category or categories of payments. In an ideal sorting-out, DFAS and CMS might defer categories of relatively large payments to larger contractors, vendors, and providers. For the lending facility to handle this would produce the least chaos.²⁷⁶

This would give time for mitigation approaches. Hopefully, the agencies could use the additional days to separate out vendors and contractors to arrange for accessing the Federal Reserve's Federal Creditor Facility.²⁷⁷

For another example, the President could usefully give specific direction to those agencies that work on the greatest amounts of

274. Such obligations do not bear any resemblance to Treasury bonds, notes, and bills sold to the public. Hence, the Treasury could defer treating its finances as the government paying those contractors, and instead, take its funds from incoming taxes or whatever other source, and use them to pay interest on the debt or for some other purpose.

275. For now, to summarize and simplify this sequence: (1) agencies defer payment requests for contractors and providers; (2) the creditors and payees who basically have a government IOU take this to the Federal Reserve facility's window; (3) the Federal Reserve discounts the anticipated government payment, puts no-strings cash in the pockets of the contractors and providers, and its Federal Creditor Facility carries this as one more loan on the Federal Reserve's huge balance sheet; (4) the contractors and payees continue operating and spending, and do not create a risk of financial collapse or recession—the Federal Reserve's facility buffers the potential injury to the economy; and (5) the Treasury husbands its funds for other needs. As for the documentation, this is a practical problem. At one end of the spectrum, ideally the agencies' accounting programs would generate the kind of advice document that normally accompanies payment. At the other end of the program, the contractor has a credible invoice and some reason to suggest that a government payment is timely. The contractor's chief financial officer simply presents a statement and a figure to the facility. It is a practical program—what documentation to request from those coming to the Federal Reserve window. However, there is no reason to consider it a profound problem that the documentation for a Federal Reserve loan has some imperfection; it is a loan being made in an emergency that serves the interest of both the government and the recipient.

276. The large contractors and vendors due to receive large payments could make the most orderly transition to resort to a Federal Reserve facility for federal creditors. Far better, if possible, would be for the biggest contractors to realize that they should seek and obtain Federal Reserve loans, than to put all the employees awaiting paychecks to the task of doing so.

277. Conversely, agencies might have some ability to separate out, and to process early, whatever few payments had special urgency as to the precise day of disbursement. Above all, by phasing or staggering the invoicing information from all the different payment agencies, FMS could better control what it disburses each day, and not be overwhelmed by too many agencies all at once.

payments, like DFAS and the CMS. CMS works on provider invoice streams, such as those related to Medicare hospital payments.²⁷⁸ CMS might have some capacity, even on Day One, but if not then at some point, to separate out providers receiving large payments. It would be far better, if possible, that ten or one hundred Medicare hospitals should seek and obtain these special Federal Reserve facility no-strings, no-interest “loans,” than to put millions of the civilian agency employees of the government to the task of doing so for their own paychecks.

B. Federal Public Debtholders Facility

A completely separate approach offers strong opportunities for calming the credit markets while also relieving complementary strain on the Treasury. This is aggressive, and draws heavily on presidential power, as well as on the Federal Reserve’s broad authority as the lender of last resort.

First, the Federal Reserve can inform the Treasury it defers payment of interest on its own holdings of Treasury bills, notes, and bonds. Actually, this follows the substance of practice. Traditionally, the Federal Reserve may pay ninety-eight percent of this back to the Treasury, keeping only the comparatively small sums for its own operations.²⁷⁹ For example, in 2012, the Federal Reserve contributed \$76.9 billion to the Treasury.²⁸⁰

Second, the Federal Reserve naturally buys up Treasury bills, notes, and bonds maturing during the period of the debt ceiling crisis.²⁸¹

278. See HIGLAS, *supra* note 209.

279. See SETH CARPENTER ET AL., THE FEDERAL RESERVE’S BALANCE SHEET AND EARNINGS: A PRIMER AND PROJECTIONS §§ 2.2.4–2.2.5 (2013), available at <http://www.federalreserve.gov/pubs/feds/2013/201301>.

280. Binyamin Appelbaum, *Fed Turns over \$77 Billion in Profits to the Treasury*, N.Y. TIMES, Jan. 11, 2012, at B5. For the Federal Reserve to change from waiting until year’s end to pay the Treasury to deferring the payment of interest during the period of the debt ceiling crisis, amounts to a change of form, not substance.

281. There is another reason that the Federal Reserve will buy Treasury bills in particular (as contrasted with notes and bonds). The Federal Reserve balance sheet at normal times (i.e., when the debt limit does not produce a crisis) has almost entirely notes and bonds, not bills. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., QUARTERLY REPORT ON FEDERAL RESERVE BALANCE SHEET DEVELOPMENTS 8 (2014). Normally, to affect the availability of long-term funds for purposes like home mortgages, the Federal Reserve does not need bills. See, e.g., Mark Koba, *The Federal Reserve: CNBC Explains*, CNBC (July 28, 2011, 12:43 PM), <http://www.cnbc.com/id/43752521#> (discussing the ways in which the Federal Reserve can affect U.S. citizens’ buying decisions). In contrast, to affect a debt limit crisis, the Federal Reserve must greatly increase its exposure to short-term bills. MINDY R. LEVIT ET AL., REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS 16 (2013) [hereinafter LEVIT ET AL., REACHING THE DEBT LIMIT NOVEMBER].

Otherwise, those Treasury markets may become disorderly.²⁸² The Federal Reserve defers payment of interest on these holdings, too.

Some critics might object to the concept of deferring, that is, of informing the Treasury not to make an interest payment.²⁸³ They may argue that the deferred interest counts as an additional quantum of public debt, which the Treasury cannot allow to occur because it counts toward the debt limit.²⁸⁴ However, interest will not count as a disbursement until paid. Like deferring any other amount owed, deferring when interest gets paid defers when it counts as a disbursement, and keeps up the balance in the Treasury.²⁸⁵ Frankly, for the Federal Reserve to elbow its way to the Treasury and demand payment at such a time would strike observers as greedy and irrational.

Even with such a program, the Federal Reserve still holds only a fraction of the interest the Treasury must pay on the public debt.²⁸⁶ Thus, the Federal Public Debtholders Facility (“FPDF”), which the Federal Reserve will establish, temporarily buys up the set of bills, notes, and

282. In October 2013, just before the Treasury would hit the debt ceiling, Treasury bills for that period and the following month had an intense shortage of buyers and a corresponding rise in their interest rates. See LEVIT ET AL., REACHING THE DEBT LIMIT NOVEMBER, *supra* note 281, at 16; *Daily Treasury Bill Rates Data*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billRatesYear&year=2013> (last visited Feb. 15, 2015) (select “Daily Treasury Bill Rates” from the “Select type of Interest Rate Data” drop-down then select “2013” from the “Select Time Period” drop-down). As with the interest payments on Treasuries, the Federal Reserve may defer payment on those Treasury securities coming due. See Robert Lenzner, *The Federal Reserve Will Lose Billions But It Just Doesn’t Matter*, FORBES (June 8, 2013, 6:08 PM), <http://www.forbes.com/sites/robertlenzner/2013/06/08/the-federal-reserve-will-lose-billions-but-it-doesnt-matter>. That would be pointless because the Federal Reserve would simply buy more Treasuries to replace the redeemed ones. Either way, these provide a relatively small piece of the Federal Reserve’s huge balance sheet of Treasuries.

283. See, e.g., Plumer, *supra* note 6.

284. The government always has payments it must make at some later time, like interest accumulating on an unpaid contract, but these future payments do not count as debt. *Fiscal Outlook: Understanding the Federal Debt*, U.S. GOV’T ACCOUNTABILITY OFF., http://www.gao.gov/fiscal_outlook/understanding_federal_debt/overview (last visited Feb. 15, 2015) (exhibiting which of the government’s payments and holdings counts toward the federal debt). For that matter, the government knows that on any day it must soon pay next week’s and next month’s interest. But, although interest payments must be paid soon, they do not count as debt. *Id.*

285. See Lenzner, *supra* note 282. Moreover, it would be silly to blame the Federal Reserve as somehow not maximizing its income because it defers the payment of interest. What the Federal Reserve receives, it pays back to the Treasury. See *FAQs: Fed Basics*, FEDERALRESERVEEDUCATION.ORG, http://www.federalreserveeducation.org/faw/topics/fed_basics.cfm (last visited Feb. 15, 2015). The difference between receiving the interest payment from the Treasury sooner versus later, and eventually paying it back to the Treasury, has an infinitesimal effect on the government.

286. See generally G. THOMAS WOODWARD, MONEY AND THE FEDERAL RESERVE SYSTEM: MYTH AND REALITY (1996), available at <http://home.hiwaay.net/~becraft/FRS-myth.htm>.

bonds nearing their date to receive interest payments.²⁸⁷ Then,²⁸⁸ the Federal Reserve defers payment of that interest by the Treasury.²⁸⁹

As a further step, the Treasury could contact other countries' governments and their central banks. As the press reports, "foreigners held \$5.455 trillion, or roughly one third of total U.S. debt. China holds \$1.155 trillion and Japan owns \$1.131 trillion."²⁹⁰ So, the Treasury would contact the very big holders of Treasuries, namely Japan and China.²⁹¹ It may ask them, too, to defer payment of interest.²⁹²

287. The FPDF may inform the Federal Reserve to defer that interest. After the date upon which interest comes due, the Federal Reserve may sell the securities back to the market. Or, the Federal Reserve may simply retain the securities for its balance sheet. A bond price in the market is called the bond's "dirty price." Glyn A. Holton, *Bond Accrued Interest*, RISK ENCYCLOPEDIA, <http://riskencyclopedia.com/articles/bond-accrued-interest> (last visited Feb. 15, 2015). A buyer who obtains the bond in time to obtain the accrued interest pays the full "dirty price." *Id.* Subsequently, the market price drops since a new owner will not receive the accrued interest. *Id.* The price without the changing amount of accrued interest is called the "clean price." *Id.* What is suggested here is that the Federal Reserve would buy the Treasury debt at the full dirty price, just before the day of receiving accrued interest, and sell it back at the pure clean price, without any accrued interest. The Federal Reserve would defer the Treasury's payment of that interest. It is similar to the stock market. The day after the dividend is recorded, as due to the shareholders, the stock will be sold—to use the technical term, "ex-dividend." *Ex-Dividend*, INVESTOPEDIA, <http://www.investopedia.com/terms/e/ex-dividend.asp> (last visited Feb. 15, 2015). The market expects the stock will sell at a slightly lower price at that point to reflect that stockowners are past the period when they would receive that dividend. *See id.*

288. There are two ways: (1) the Federal Reserve may simply go into the Treasuries market and buy what has an approaching date to pay interest; or, more elegantly, (2) the Federal Reserve may offer repurchase agreements ("repos") on such Treasuries. For example, take a bond with an interest payment due to the holder on November 1: the Federal Reserve would buy repos on those bonds. Thus, the Federal Reserve would buy the bond just before interest payment, hold it during the period when the interest is to be paid, and sell it back to the prior owner after the date for interest payment. That repo need not last more than one or two days. The repo's terms will specify that the interest belongs to the Federal Reserve, and be priced accordingly.

289. *See, e.g.,* Lenzner, *supra* note 282.

290. Kimberly Amadeo, *The U.S. Debt and How It Got So Big*, ABOUT.COM, http://useconomy.about.com/od/fiscalpolicy/p/US_Debt.htm (last updated Sept. 5, 2013).

291. *Id.*

292. Japan and China know that when the crisis ends, they will receive the interest. It is not to their benefit to make the crisis more intense. And, they have the model of the United States' own central bank doing this to the rest of the Treasuries market. They know the United States does not just ask them to do it by themselves, but rather that the Federal Reserve is taking care of the entire rest of the Treasuries market. *See Credit and Liquidity Programs and the Balance Sheet*, BD. GOVERNORS FED. RESERVE SYS., http://www.federalreserve.gov/monetarypolicy/bst_openmarketops.htm (last visited Feb. 15, 2015). China might not agree simply to defer interest. It made clear during the 2013 debt crisis it did not approve of the United States going near the debt ceiling. *See* Ian Katz & Michael C. Bender, *China Presses U.S. Lawmakers to Lift Debt Limit*, BLOOMBERG (Oct. 15, 2013), <http://www.bloomberg.com/news/2013-10-15/china-presses-u-s-to-lift-debt-limit-as-tea-party-says-butt-out.html>. China perceives America not behaving responsibly about its debt as an unkind way to treat China—disrespecting China for taking responsibility and funding the American deficit. Robert A. Profusek & Andrew M. Levine, *Things*

By aggressive use of these various approaches, the Federal Reserve may develop a system in which almost all the interest for the Treasury to pay during the interval of the debt crisis instead gets deferred. This would have several beneficial effects. The Treasury market, itself, gains a large measure of confidence by the Federal Reserve vigorously taking action in a focused way to prevent any illiquidity. Moreover, it stabilizes the credit markets. These markets will see that the Federal Reserve has backed up the Treasury by making it all but impossible for the Treasury to default on its debt, quite apart from all the other measures taken by the Treasury. It bears saying again, that such meliorating steps will not reduce the intense and desperate political pressure to raise the debt ceiling. A bank analysis “estimates that if we blow past the debt ceiling and [the] Treasury starts prioritizing payments, the S&P 500 could lose 10 percent of its value. And that’s *without* an actual default on the debt.”²⁹³

Meanwhile, it defers the burden on the Treasury of interest payments. Deferring \$1 billion of interest payments provides considerably more relief than deferring \$1 billion dollars of payments to contractors.²⁹⁴

C. Social Security Beneficiaries Facility

The Federal Reserve may try the most aggressive measure of all: financing Social Security distributions. Without Federal Reserve help, at best, Social Security beneficiaries would have to wait several weeks beyond their normal date for their first distribution, and increasingly longer delays for distributions after that. The Treasury handles Social Security specially.²⁹⁵ The large sum of monthly Social Security

Are Looking Up: The Outlook for M&A Transactions in 2014, in *MERGERS & ACQUISITIONS LAW 2014: TOP LAWYERS ON TRENDS & KEY STRATEGIES FOR THE UPCOMING YEAR*, at *5 (2013). If China refuses, at least it may agree to a repo arrangement similar the one just described for private holders of Treasuries. See *supra* note 288. That is, China might agree to sell repos to the Federal Reserve when interest comes due, getting the securities back the next day, and letting the Federal Reserve defer the interest while paying China the Federal Reserve’s own repo reimbursement. This would ask China for reasonable cooperation, as opposed to a favor.

293. Plumer, *supra* note 170 (emphasis added).

294. As described above, the Treasury must move heaven and earth to make sure it pays every dollar of interest, in order to fend off, even briefly, defaulting on the debt. See *supra* text accompanying note 35. By taking the interest fears off the Treasury’s mind, it frees the Treasury to act more freely in juggling the other obligations of the government, including its obligation to needy beneficiaries. The Treasury has the least flexibility in whether it pays interest on its debt, and much greater flexibility in timing its other responsibilities.

295. FIN. MGMT. SERV., *supra* note 173, at 44 (“FMS issues payments from four Regional Financial Centers (RFCs) located in Austin, TX; Kansas City, MO; Philadelphia, PA; and San Francisco, CA.”). The main stream of Social Security payments goes through one separate FMS

payments at the start of the month requires that many days of tax revenues build up before the Treasury's FMS may make the large-scale disbursement for that Social Security payment day.²⁹⁶ As a result, the group of Social Security beneficiaries would face delays in getting money.²⁹⁷

Unlike other creditors, it is impractical to have millions of individual Social Security beneficiaries apply individually for "loans" at the Federal Reserve's discount window. No system could cope with an enormous volume of applications suddenly and hastily made. And, the millions of senior citizens lack business experience and may not readily understand a complexly justified, suddenly devised procedure.

Yet, it is as desirable with this group—if not more so—to produce the same end-state as with the other creditors. Before discussing the justification, look at the end-state sought here of a Federal Reserve lending facility like the others. Other creditors bring their documentation, like a Medicare provider bringing a statement of sums expected now for disbursement, to the Federal Reserve discount window.²⁹⁸ They end up with a cash distribution in hand, without strings, interest-free, nominally only lent by the Federal Reserve.²⁹⁹ So, similarly, the Federal Reserve may establish a Social Security Beneficiaries Facility. At the beginning of each month, on the day when the Treasury sends out checks, it should take two steps.

First, the Social Security Administration posts on its website, and announces by other means, that the Social Security distributions nominally have the status of loans by the Federal Reserve. They remain regular distributions without strings or interest, which beneficiaries cash and spend in the usual way. The Treasury website further explains that the nominal loan "deeming" ends promptly and automatically when Congress raises the debt limit. At that time, the Federal Reserve squares accounts with the Social Security Administration and deems the loan satisfied. The Social Security Administration further states an expectation that Congress will review its actions, and the Social Security

financial center in Kansas City. *Id.* at 108. Perhaps, the Treasury may open, or close, the Social Security stream there.

296. See, e.g., DEBT LIMIT ANALYSIS, *supra* note 24, at 26-27; Plumer, *supra* note 165.

297. See, e.g., DEBT LIMIT ANALYSIS, *supra* note 24, at 26.

298. See Baker, *supra* note 32, at 89-90 (discussing the collateralization of discount window loans under Dodd-Frank).

299. See *id.* at 83-84, 89-90. The agency owing them payment, like CMS, carries on its books an unliquidated obligation to the creditor until the debt crisis passes. *Id.* at 84-85. When the debt ceiling eventually gets raised, the agency will square accounts with the Federal Reserve, by CMS liquidating the obligation, and, the Federal Reserve will deem the loan against the creditor satisfied. See text accompanying notes 243-66.

Administration throws itself on the judgment of Congress to consider ratifying its maintaining of Social Security distributions during the crisis.

Second, as the Treasury sends out the Social Security checks and electronic deposits, it submits an approximate total figure to the Federal Reserve and requests that the Federal Reserve provide a sum corresponding to the tens of billions of dollars just distributed. That is: (1) the Treasury makes its distributions to the individual beneficiaries of this “loan;” (2) the Treasury immediately accepts the Federal Reserve’s provision of the total sum of all those distributions; and (3) the Federal Reserve receives, from the Treasury, an assignment by the Treasury of the total of the individual “loans” that the Treasury is making to individual beneficiaries. Nominally, the distributed money is owed to the Federal Reserve, not by the Treasury, but by the individual beneficiaries. The Federal Reserve has great discretion in what it deems acceptable justification for a loan in an emergency.³⁰⁰

In doing this, the Treasury acts on behalf of the group of Social Security beneficiaries.³⁰¹ These Treasury roles both arise from the manifest impracticality of anyone other than the Treasury’s FMS generating the enormous set of electronic deposits and checks going to the Social Security beneficiaries.

The end-state for the Social Security beneficiaries parallels the end-state described above for creditors at other facilities. They have cash distributions in hand, nominally deemed loans of the Federal Reserve, but not in any way affecting their use.³⁰² And, the Treasury’s own level of funds survives unreduced by the Social Security distributions, so that it stays under the debt ceiling.³⁰³

300. The Dodd-Frank reform has the effect that “it requires that the collateralization of discount window loans be sufficient to protect taxpayers from loss.” Baker, *supra* note 32, at 89. In this instance, the Federal Reserve has a type of assignment or subrogation right from the statutory obligation of the government to pay Social Security beneficiaries. While this is not a right that an ordinary creditor can ordinarily obtain, the impediment here is the debt limit crisis, not the unrelated desire of Congress that creditors not come between beneficiaries and their payments. So, the Federal Reserve may use these assigned rights as collateral to buy the “loan” from the Treasury.

301. To deal with the impracticality of tens of millions of Social Security beneficiaries from applying individually, the Treasury itself applies to the Federal Reserve for their loan collectively. To deal with the impracticality of transferring to the Federal Reserve, the task of sending tens of millions of Social Security benefits to the right location, the Treasury itself acts as the Federal Reserve’s agent for making distributions.

302. See *supra* text accompanying note 299.

303. The Social Security Administration carries, on its books, an unliquidated obligation until the debt crisis passes. When the debt ceiling eventually gets raised, the Social Security Administration will square accounts with the Federal Reserve, by the agency liquidating the obligation in favor of repaying the Federal Reserve, which will deem the lien satisfied.

The powerful doctrine of ratification applies with singular aptness to the Treasury and Federal Reserve actions in the crisis in general, and the actions as to Social Security beneficiaries in particular.³⁰⁴ That doctrine most famously applied to President Lincoln's sweeping actions at the start of the Civil War, setting the Union forces in motion.³⁰⁵ Lincoln maintained he had authority for those actions, although it did not appear from statutes and the existing doctrines of unilateral presidential power hardly sufficed.³⁰⁶

Famously, Lincoln prodded Congress to ratify his actions.³⁰⁷ It did, by an express statutory provision.³⁰⁸ The case of ships captured by the Union blockade brought the issue to the Supreme Court.³⁰⁹ A divided Court upheld the President's actions.³¹⁰ It spoke favorably about his authority, but very definitely noted Congress's express ratification.³¹¹ The ratification doctrine has become applicable in present-day society.³¹²

An administration facing an emergency crisis, like hitting the debt ceiling, may properly invoke the ratification doctrine, especially if it does so in a well-supported way. Even though the President knows that when the crisis passes, the debt limit will go up, the President cannot simply breach the debt ceiling and justify beefing up the public debt on his own by waving a magic wand and saying that Congress will later ratify his action. The use of the doctrine proposed here has much more support than just a blanket invocation.

First, politically, arranging payments for Social Security beneficiaries will have public support beyond anything else the President may do. Consider if the Social Security payments do not come. Every congressional office will have its phone banks crashed, its websites overcome, and its inboxes flooded, with fear, outrage, and anger. The public does not see Washington as having the power to treat Social Security as some kind of policy football. Rather, the public sees Social Security payments on the regular monthly date as a vested right.³¹³

304. See, e.g., Adler, *supra* note 54, at 174-75 (discussing the historical roots of ratification); Monaghan, *supra* note 54, at 27-29 (citing President Lincoln's action during the Civil War and his belief of the need for congressional ratification of presidential action).

305. Monaghan, *supra* note 54, at 27, 28 & n.136.

306. *Id.* at 27-28, 67-68.

307. Adler, *supra* note 54, at 179; Monaghan, *supra* note 54, at 28 & n.136.

308. Monaghan, *supra* note 54, at 179.

309. See generally Prize Cases, 67 U.S. (2 Black) 635 (1862).

310. *Id.* at 670-71, 699.

311. *Id.* at 670-71.

312. For another well-known example, an important opinion during the Indochina War, see generally *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971) (holding that Congress had impliedly ratified the Nixon Administration's war policies).

313. See, e.g., Elmer F. Wollenberg, *Vested Rights in Social-Security Benefits*, 37 OR. L. REV.

Washington must not get in the way—that is all. Any approach that keeps those checks and electronic distributions coming will win out over the alternative of failing to do so.

Popularity alone would not deal with an insurmountable legal problem. But, it does show why the President confidently seeks and expects ratification. He may aim at implied ratification, such as the simple raising of the debt limit without further action. But, he may aim at seeking an express provision in the debt limit bill, approving the Social Security action.

Second, as numerous law review articles have analyzed, existing statutory policy reflects special treatment of Social Security.³¹⁴ Social Security has its elaborate apparatus of Social Security Trust funds.³¹⁵ These include the deposit in the fund of special Treasury securities reflecting amounts owed by the government for expenditure, as to future payments to beneficiaries.³¹⁶

Third, and potentially most important, section four of the Fourteenth Amendment, itself, holds an important indication.³¹⁷ Section four states in relevant part: “The validity of the public debt of the United States, authorized by law, *including debts incurred in payment of pensions* and bounties for services in suppressing insurrection and rebellion, shall not be questioned.”³¹⁸ Although the section uses language of the Civil War era, the classic commentator on the provision’s history noted that “the draftsman had in mind the possibility of future” government problems, not just the then-present one.³¹⁹

This is the one place in the Constitution where the word “pension[]” appears.³²⁰ It is no accident that the Public Debt Clause provides authority for almost anything the President can do to continue distributions to senior citizens.³²¹ As said by a leading student of the debates underlying the Public Debt Clause: “Powerful political interest

299, 354 (1958).

314. See sources cited *supra* note 38.

315. Buchanan, *supra* note 38, at 270-73.

316. LEVIT ET AL., REACHING THE DEBT LIMIT NOVEMBER, *supra* note 281, at 28 & n.114. In a different vein, “[i]n early 1996, Treasury announced that it had insufficient cash to pay Social Security benefits for March 1996, because it was unable to issue new public debt.” *Id.* at 5. So, “[t]o allow benefits to be paid in March 1996, Congress authorized Treasury to issue securities to the public in the amount needed to make the March 1996 benefit payments and specified that, on a temporary basis, those securities would not count against the debt limit.” *Id.*

317. U.S. CONST. amend. XIV, § 4.

318. *Id.* (emphasis added).

319. Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L. Q. 1, 18 (1933).

320. U.S. CONST. amend. XIV, § 4.

321. See McCommas, *supra* note 21, at 1319.

groups, including bondholders and former soldiers and sailors, organized to pressure members of Congress to protect the federal debt, *including pensions*.”³²² Moreover, “[o]ver two million people fought for the North between 1861 and 1865,” and “[b]y the close of the year 1864, the subject of pensions was playing a large part in national affairs.”³²³ And, “[t]he new pensioners had a large interest in the federal debt . . . if the federal government defaulted, the veterans would likely not receive their pensions.”³²⁴

Pointedly, the draftsman had in mind the huge veterans’ and survivors’ pension system of that time, probably the closest, before the New Deal, the country ever came to a pension system on the scale of Social Security.³²⁵ Again, this Article does not propose recondite speculations about lofty Fourteenth Amendment theories, or the efficacy of actions eliminating the debt limit. Rather, it draws on the nuances of the wording and background of the Fourteenth Amendment as a concrete expression of a practical concern in factual reality: pension distributions.

Critics may argue that whatever Congress has done, by statute or by the Fourteenth Amendment, does not excuse future Social Security payments from the debt limit. However, the pressing issue does not concern a pitch that Social Security’s status baldly nullifies the debt ceiling. A Federal Reserve lending facility does the work here—a facility with some notable qualities, to be sure, but still one that produces an end-state that makes sense when placed alongside the Federal Reserve lending facilities in the crash of 2008-2009.³²⁶ Economists, like political leaders, recognize Social Security as a great stabilizer against financial shocks.³²⁷ Quite apart from the Treasury’s predicament, it makes sense in the economic world for the Federal Reserve to stabilize the economy in a debt limit crisis by establishing a Social Security Beneficiaries Facility.³²⁸ These other legal points just bolster the case that the President may act in anticipation of ratification.³²⁹

As for the “ratification principle” itself, it calls for: (1) the President to have a legally colorable basis for authority before its exercise; (2) the notification of Congress; and (3) the express or implied approval

322. *Id.* at 1316 (emphasis added).

323. *Id.* at 1317-18 (quoting 4 JOHN WILLIAM OLIVER, HISTORY OF THE CIVIL WAR MILITARY PENSIONS, 1861-1865, at 10 (1917)).

324. *Id.* at 1318.

325. *Id.* at 1317-19.

326. *Emergency Lending Facilities*, *supra* note 26.

327. *See* Solomon & Strumpf, *supra* note 24.

328. *Id.*

329. *See supra* text accompanying notes 304-28.

by Congress.³³⁰ President Lincoln's actions at the start of the Civil War epitomize this principle. The President asserted novel and expansive views of his powers, took action, and asked Congress for its express approval.³³¹

The President did this partly as a legal case, for the Supreme Court ultimately approved his action,³³² but also as a political case, for he pressured Congress to expressly come on board his war policies, which it did.³³³ The U.S. Court of Appeals for the Second Circuit similarly applied the ratification principle to the Vietnam War in *Orlando v. Laird*.³³⁴

A President's coordination with the Federal Reserve to provide the Social Security Beneficiaries Facility accords with this model. The legal authority laid out here provides colorable authority. The strength of the political case for continuing Social Security distributions enables him to anticipate congressional ratification. Congress will approve actions for Social Security distributions, confirming that emergencies require special procedures.³³⁵ Ratification applies, first and foremost, in emergency situations, which hitting the debt ceiling surely is.³³⁶

V. CONCLUSION

Some may feel disappointed that this Article approaches the debt ceiling issue as a matter of details about disbursing agents and Federal Reserve facilities. They may prefer the soaring abstract constitutional theories constructed around the rarely invoked section four of the Fourteenth Amendment.³³⁷

Those theories had their place before the 2013 debt ceiling crisis. President Obama did not choose to rely on them.³³⁸ It is time to go beyond arguments that the debt ceiling is somehow not a ceiling.

Analysts of the separation of powers may employ two types of theories, drawing on an old distinction in science. The deductive theories start with great principles about the edifice of the constitutional system, the conceptual frameworks of the Framers, the general reasoning about

330. See, e.g., G. Sidney Buchanan, *A Proposed Model for Determining the Validity of the Use of Force Against Foreign Adversaries Under the United States Constitution*, 29 HOUS. L. REV. 379, 417 (1992).

331. Monaghan, *supra* note 54, at 27, 28 & n.136, 29.

332. Prize Cases, 67 U.S. (2 Black) 635, 670-71 (1862).

333. *Id.* at 670.

334. 443 F.2d 1039, 1042 (2d Cir. 1971).

335. See *supra* text accompanying notes 313-16.

336. See *supra* text accompanying notes 305-21.

337. See *supra* text accompanying notes 19-23.

338. Strickland, *supra* note 20, at 801-02.

the President and Congress, and so on.³³⁹ From these, scholars deduce some theory for some context. Deductive separation of powers theories have their use. But, by their very nature, they connect with factual reality in only a limited way.

On the other hand, inductive theories start with a great deal of information about the relations between the President and Congress, and so on.³⁴⁰ One approach to executive privilege consists of reviewing many important clashes about it. Those writing about war powers may review many instances of presidential action, or instances of what Congress does.³⁴¹ A great work about executive agreements traces two centuries of them.³⁴² The list goes on.

This Article takes an inductive approach to the separation of powers.³⁴³ It builds up a sense of the President's powers from the concrete specifics of what he has done and may do.³⁴⁴ It seeks to work out the details in difficult, low-visibility subjects—executive mechanics of disbursements by different agencies, the arrangements of the interest-payment and tax-deposit worlds, and potential Federal Reserve lending to Social Security payees.³⁴⁵

From these aspects of fiscal life, it derives its separation of power notion.³⁴⁶ Namely, it concludes that the Executive Branch has enough power to arrange its distributions, and to coordinate with Federal Reserve lending facilities, so as to not fall into disorder and chaos from hitting the debt ceiling.³⁴⁷

Both types of theories of the separation of powers have their merits. A deductive theory achieves a degree of clarity and consistency. It soars above trivia. It connects larger theories to smaller contexts, creating an elaborate edifice of thought and shedding light on everything involved.

However, frankly, the debt limit kind of clash in the separation of powers does not get decided from rarified and recondite abstractions. With interest rate payments coming due, the President does not just say “abracadabra,” state some deep understanding of the constitutional structure, and make the debt ceiling vanish. When the nation gets through the awful event of a hitting the debt ceiling, it will not owe doing so to abstrusely articulated principles. Government functioning

339. *See supra* text accompanying notes 56-70.

340. *See supra* text accompanying notes 58-61.

341. *See generally* Monaghan, *supra* note 54.

342. *See generally* Ackerman & Golove, *supra* note 59.

343. *See supra* text accompanying notes 60-61.

344. *See supra* Parts II-IV.

345. *See supra* Parts III.C-IV.A.

346. *See supra* Parts III.C-IV.

347. *See supra* Part IV.

will depend on those conducting the effort having a set of tools and tactics to handle the situation—concrete, detailed, reality-based tools and tactics. It is hoped that an inductive kind of approach, as introduced by this Article, will aid them.
