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# How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the 2011 Debt Ceiling Standoff

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**How to Choose the Least Unconstitutional Option:  
Lessons for the President (and others) from the 2011 Debt Ceiling Standoff**

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**How to Choose the Least Unconstitutional Option:  
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Abstract

The current successor to a federal statute first enacted in 1917, and widely known as the “debt ceiling,” limits the face value of money that the United States may borrow. Congress has repeatedly raised the debt ceiling to authorize borrowing to fill the gap between revenue and spending, but in the summer of 2011, a political standoff nearly left the government unable to borrow funds to meet obligations that Congress had affirmed earlier that very year. Some commentators urged President Obama to ignore the debt ceiling and issue new bonds, in order to comply with Section 4 of the Fourteenth Amendment, which forbids “question[ing]” “[t]he validity of the public debt.” Others responded that such borrowing would violate the separation of powers and therefore that the President instead ought to refuse to spend funds that Congress had appropriated. In the end, eleventh-hour legislation averted the crisis, at least for the moment, but absent a substantial political realignment, there is reason to believe that a similar standoff could occur again.

This Article analyzes the choice the President nearly faced in summer 2011, and which he or a successor may face again, as a “trilemma” in which he had three unconstitutional options: Ignore the debt ceiling and unilaterally issue new bonds, thus usurping congressional power to borrow money; unilaterally raise taxes, thus usurping congressional power to tax; or unilaterally cut spending, thus usurping congressional power to make spending decisions and arguably violating Section 4 of the Fourteenth Amendment as well. We argue that faced with this choice among unconstitutional options, the President should choose the “least unconstitutional” course—here, ignoring the debt ceiling. We argue further, though more tentatively, that if the bond markets would render such debt inadequate to close the gap, the President should unilaterally raise taxes rather than unilaterally cut spending. We then use the debt ceiling impasse to develop general criteria for political actors to choose among unconstitutional options. Although we offer no algorithm, we emphasize three guiding principles: 1) Minimize the unconstitutional assumption of power; 2) minimize sub-constitutional harm; and 3) preserve, to the extent possible, the ability of other actors to undo or remedy constitutional violations.

## **I. Introduction**

In the spring of 2011, federal officials observed that at some point later in the year, the federal government would be unable to meet all of its obligations unless the federal debt ceiling were raised. That was not an economic problem. Interest rates on United States Treasury Bills were close to zero percent, and the government could readily issue new debt to cover its expenses, if only Congress would go through the formal process of raising the debt ceiling to conform with the budget that it itself had then only recently approved.<sup>1</sup> There was a political problem, however. Expressing concern about long-term fiscal deficits, Republicans in Congress—especially those allied with the Tea Party movement—insisted on a dollar of current spending cuts for every dollar increase in the debt ceiling.<sup>2</sup> Even as Keynesian economists warned of the dangers of premature austerity, Democrats, including President Barack Obama, accepted the Republican view that deficit reduction was imperative, but they insisted that increased tax revenues had to be part of the formula for achieving that goal.<sup>3</sup> A standoff ensued.

As the day of reckoning approached with no deal in place, some observers advanced a creative solution. Section 4 of the Fourteenth Amendment, they noted, forbids the questioning of “[t]he validity of the public debt of the United States,”<sup>4</sup> and therefore, they argued, the debt ceiling is unconstitutional insofar as it forbids the federal government from honoring its existing financial commitments.<sup>5</sup> Accordingly, these observers contended that in the event that Congress and the President failed to reach an agreement, the President would be authorized, or perhaps even constitutionally obligated, to simply ignore the debt ceiling.<sup>6</sup> This proposed gambit was quickly dubbed the “nuclear option,”<sup>7</sup> and it garnered support from some prominent politicians, including former President Bill Clinton.<sup>8</sup>

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<sup>1</sup> See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

<sup>2</sup> See Alan Silverleib and Tom Cohen, *Latest Deficit Talks End With a Tense Exchange*, CNN (July 13, 2011), [http://articles.cnn.com/2011-07-13/politics/debt.talks\\_1\\_debt-ceiling-short-term-extension-debt-ceiling-hike](http://articles.cnn.com/2011-07-13/politics/debt.talks_1_debt-ceiling-short-term-extension-debt-ceiling-hike)

<sup>3</sup> *Id.*

<sup>4</sup> U.S. CONST. amend. XIV, § 4.

<sup>5</sup> See Elspeth Reeve, *Is the Debt Ceiling Unconstitutional?*, THE ATLANTIC WIRE (June 29, 2011), <http://www.theatlanticwire.com/politics/2011/06/debt-ceiling-unconstitutional/39408/>.

<sup>6</sup> See *id.*

<sup>7</sup> E.g., Aaron Blake, *Obama Won't Find Safe Harbor in 14th Amendment*, WASHINGTON POST (June 29, 2011, 12:44PM), [http://www.washingtonpost.com/blogs/the-fix/post/why-the-14th-amendment-is-not-a-good-option-for-obama/2011/07/29/gIQAynPOhI\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/why-the-14th-amendment-is-not-a-good-option-for-obama/2011/07/29/gIQAynPOhI_blog.html)

<sup>8</sup> See Joe Conason, *Exclusive Bill Clinton Interview: I Would Use Constitutional Option to Raise Debt Ceiling and “Force the Courts to Stop Me,”* THE NATIONAL MEMO (June 19, 2011)

The nuclear option had its own problems, however. For one thing, it could backfire. As a hedge against the possibility that the government would later default on debt issued by a President acting without Congressional authorization, bond purchasers might demand very high rates of interest for the “radioactive” bonds, thus destabilizing rather than calming financial markets.<sup>9</sup> But even if the President’s unilateral authorization of new debt would pacify the markets, it would apparently avoid a violation of Section 4 of the Fourteenth Amendment only by violating separation of powers.<sup>10</sup> After all, Article I of the United States Constitution gives to Congress, not the President, the power “To borrow Money on the credit of the United States.”<sup>11</sup>

Thus, Treasury Secretary Timothy Geithner quickly announced that the Administration would not rely on the Section 4 nuclear option.<sup>12</sup> Perhaps that was simply a ploy to increase pressure on Congress to strike a deal. If so, it worked, because at the eleventh hour Congress did indeed pass legislation raising the debt ceiling and punting to a newly created bi-partisan congressional “super-committee” the question of how to achieve the deficit reduction that was also mandated by the legislation.<sup>13</sup> With the super-committee now having failed to send a legislative proposal to Congress for consideration, automatic spending cuts will occur, unless Congress enacts superseding legislation.<sup>14</sup>

The foregoing events will likely have important political and economic implications, but this Article focuses mostly on the constitutional questions that were raised in the days and weeks before Congress reached its crisis-delaying deal in August, 2011. With influential members of Congress having indicated that they intend to use the debt ceiling as leverage in future battles over fiscal policy, a replay of the debt-ceiling standoff remains a very live possibility. Moreover, the summer 2011 crisis raised an important, but mostly unrecognized, issue in constitutional law more generally: What should government officials do when all of their options are unconstitutional? This Article uses the 2011 debt ceiling crisis as a case study to begin to explore that question.

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12:03AM), <http://www.nationalmemo.com/article/exclusive-former-president-bill-clinton-says-he-would-use-constitutional-option-raise-debt>.

<sup>9</sup> Cf. Bruce Bartlett, *The Debt Limit Options President Obama Can Use*, THE FISCAL TIMES (Apr. 29, 2011), <http://www.thefiscaltimes.com/Columns/2011/04/29/The-Debt-Limit-Option-President-Obama-Can-Use.aspx> (noting the rapid turnover of three-month Treasury bills should quickly resolve these fears and limit the impact of the problem).

<sup>10</sup> See Laurence H. Tribe, *A Ceiling We Can’t Wish Away*, N.Y. TIMES, July 8, 2011, at A23.

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 2; see Tribe, *supra* note 10.

<sup>12</sup> See *This Week* (ABC television broadcast July 24, 2011), transcript available at <http://abcnews.go.com/Politics/week-transcript-timothy-geithner/story?id=14147682>; See also Letter from George W. Madison, Gen. Counsel, Treasury Dep’t, to New York Times (July 8, 2011), available at <http://www.treasury.gov/connect/blog/Pages/FACT-CHECK-Treasury-General-Counsel-George-Madison-Responds-to-New-York-Times-Op-Ed-on-14th-Amendment.aspx>

<sup>13</sup> See Budget Control Act of 2011, Pub. L. No. 112-25, §401, 125 Stat. 240, 259 (2011).

<sup>14</sup> See *id.* at §302, 125 Stat. at 256.

Under a plausible description of the options President Obama would have faced had Congress failed to strike a debt-ceiling deal in August, 2011, every realistic option open to him would have violated some constitutional provision: Failure to pay bondholders, contractors, employees, and other persons entitled to money under federal law would violate Section 4 of the Fourteenth Amendment and, in addition, the President's obligation to "take Care that the Laws" creating the relevant obligations "be faithfully executed";<sup>15</sup> issuing new debt without congressional authorization would violate separation of powers; so too would other unilateral actions to increase government revenue, such as a Presidential decree raising taxes or a Presidential sale of government property without congressional authorization;<sup>16</sup> simply printing additional dollars and crediting them to the government's account would violate the federal statute that limits the amount of money in circulation,<sup>17</sup> along with the power reserved to Congress to coin money and regulate the value thereof,<sup>18</sup> and thus could be said to violate separation of powers and the Take Care Clause as well.

To be sure, legitimate arguments can be made for the conclusion that President Obama would have had some constitutional options even if Congress had not acted in August, 2011. Some commentators argue that Section 4 of the Fourteenth Amendment only bars a limited category of defaults—failure to pay bondholders but not other obligees (for example, Social Security recipients) in one view,<sup>19</sup> or more narrowly still, only failure to pay principal but not interest on federal bonds.<sup>20</sup> Other commentators have advanced exotic solutions, such as Professor Jack Balkin's arresting suggestion that the United States could mint two one-trillion-dollar platinum coins, or sell the Federal Reserve an "exploding option" to purchase government property for two trillion dollars, and then keep

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<sup>15</sup> U.S. Const., art. II, § 3.

<sup>16</sup> See U.S. CONST., Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

<sup>17</sup> See 31 U.S.C § 5115(b) (2006) ("The amount of United States currency notes outstanding and in circulation . . . may not be more than \$300,000,000").

<sup>18</sup> See U.S. CONST. art. I, § 8, cl. 5.

<sup>19</sup> See Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 Tulsa L.J. 561, 580 (1997) [hereinafter Abramowicz, *Beyond Balanced Budgets*]; Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* 43-45 (Geo. Wash. Pub. Law & Legal Theory Paper No. 575, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1874746](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874746) [hereinafter Abramowicz, *Train Wrecks*]; John Berlau, *Constitutional Nonsense on Debt*, NAT'L REV. ONLINE (July 8, 2011, 12:00PM), [www.nationalreview.com/articles/271329/constitutional-nonsense-debt-john-berlau](http://www.nationalreview.com/articles/271329/constitutional-nonsense-debt-john-berlau).

<sup>20</sup> Cf. Garrett Epps, *Our National Debt 'Shall Not Be Questioned,'* THE ATLANTIC (May 4, 2011 7:00AM) <http://www.theatlantic.com/politics/archive/2011/05/our-national-debt-shall-not-be-questioned-the-constitution-says/238269/> (mentioning that perhaps only outright repudiation of obligations is barred, but not temporary default or delay in payment); Michael Stern, *Threatening Default*, POINT OF ORDER (July 1, 2011 6:04PM), <http://www.pointoforder.com/2011/07/01/threatening-default-a-response-to-professor-balkin/> (arguing that there is a difference between default and the questioning the validity of public debt).

the money (credited to the government's account by the Federal Reserve) after the option expires (or explodes).<sup>21</sup> We explore these and related exotica below<sup>22</sup> because they help contextualize the issue, but our analysis suggests that the President's only *realistic* options were all unconstitutional. At a minimum, we are willing to *assume* that that is true. If it turns out not to have been true in 2011, it may well be true in future crises.

The Article proceeds in four further Parts. Part II describes in greater detail the nature of the options that confronted President Obama in the summer of 2011. It elaborates on an exchange of views between Professor Laurence Tribe and one of the current authors that first appeared in essays in the *New York Times*,<sup>23</sup> the online magazine *Verdict*,<sup>24</sup> and the eponymous blog of the other of the current authors,<sup>25</sup> to show that the real issue was not whether the debt ceiling limit violated Section Four of the Fourteenth Amendment, but which unconstitutional option the President ought to have chosen had the day of reckoning arrived.

Part III answers that question. For simplicity, we focus on three options and rank them in order, based on different criteria, from worst to least bad. We conclude that the nuclear option would have been the President's least bad option. Readers may be surprised at our further conclusion. We tentatively suggest that a unilateral tax increase by the President comes in second place, less bad than the option that the President and nearly every other politician appeared to favor: unilaterally cutting spending.

Part IV draws general lessons about how the President and other government officials should choose among unconstitutional options. We contend that the task of a government official in choosing among unconstitutional options is to choose the "least unconstitutional" one, rather than simply to make a policy choice. Policy considerations inevitably inform the analysis of what counts as least unconstitutional, in part because the Constitution itself nowhere allows that government officials may sometimes be required to disobey one or more provisions in order to satisfy one or more other provisions. Nonetheless, the decision whether to violate one rather than another constitutional provision (or to violate a single provision in one way rather than another) is not, in our view, to be

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<sup>21</sup> See Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN (July 28, 2011), [http://articles.cnn.com/2011-07-28/opinion/balkin.obama.options\\_1\\_debt-ceiling-congress-coins](http://articles.cnn.com/2011-07-28/opinion/balkin.obama.options_1_debt-ceiling-congress-coins). 31 U.S.C. §5112 (k) grants the Secretary of the Treasury the discretion over the denomination and issuance of platinum bullion coins, which could arguably be used to circumvent this statutory limit over currency notes.

<sup>22</sup> See *infra*, Part IV.

<sup>23</sup> See Tribe, *supra* note 10 **Error! Bookmark not defined.**

<sup>24</sup> See Neil H. Buchanan, *The Debt Ceiling is Unconstitutional: A Reply to Professor Tribe*, VERDICT (July 11, 2011), <http://verdict.justia.com/2011/07/11/the-debt-ceiling-law-is-unconstitutional>; see also Neil H. Buchanan, *The Debt Limit Crisis*, VERDICT (July 7, 2011), <http://verdict.justia.com/2011/07/07/the-debt-limit-crisis>.

<sup>25</sup> See, e.g., Laurence Tribe, *Professor Tribe Replies to Professor Buchanan Replying to Professor Tribe Replying to . . .*, DORF ON LAW, (July 21, 2011 12:20 AM), <http://www.dorfonlaw.org/2011/07/professor-tribe-replies-to-professor.html>

decided by an all-things-considered policy judgment. Instead, as we explain at greater length in Part IV, distinctively *constitutional* policies—such as preservation of the balance of powers among the branches—should be given extra weight. We also explore whether the least unconstitutional option ought, in virtue of that fact, to be deemed constitutional. We ultimately disapprove of such post-hoc re-labeling because it risks obscuring real conflicts among constitutional requirements and values.

Part V concludes.

## **II. The Budget Process, the Debt Ceiling, and the Political Crisis**

To understand the nature of the choices President Obama nearly faced in the summer of 2011, and the choices that a future President could face should the crisis recur, this Part begins by placing the budget standoff in context. In this Part we show how the debt ceiling operates in tandem with a larger web of statutory and constitutional constraints on Presidential action.

### **A. The Annual Federal Budget**

The federal government of the United States is funded on an annual cycle, with the political branches engaged each year in a process that plays a large role in determining the levels of spending and tax collection that the government may undertake.<sup>26</sup> Those policy decisions, in combination with other, longer-term policy decisions, determine who receives various benefits and who bears certain burdens, as a result of the various programs and activities funded and operated by the federal government, and the means by which funds to finance the government are collected.<sup>27</sup> Taken together, the short-term and long-term policies also shape, to a very important degree, the level and nature of economic activity at any given time, as well as the likely path of future economic growth, the extent of environmental harms and remediation, the provision of education at all levels, and a myriad of other variables that affect the lives of current and future citizens.

The budget process is, therefore, political in every sense of the word. Federal budgetary decisions matter deeply in the day-to-day lives of people, and they often determine the political fates of members of Congress and the President.<sup>28</sup> And as the political culture has become less cooperative over the past

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<sup>26</sup> See generally 31 U.S.C. § 1105 (2006) (detailing the requirements for the yearly budget submitted by the President).

<sup>27</sup> Annual decisions do not fully determine spending and taxing levels, because some spending (so-called “entitlements”) and most of the tax code is enacted in statutes that remain in force from year to year. See, e.g., 42 U.S.C. § 401 (a) & (b) (2006) (appropriating funds collected out of various income taxes to the Federal Old-Age and Survivors Insurance trust fund as well as the Federal Disability insurance trust fund).

<sup>28</sup> See ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 3 (3d ed. 2007) (“In national politics, it is now the age of budgeting.”)



few decades, the budgetary process has come under increasing strain.<sup>29</sup> It is thus increasingly likely that we will soon enter uncharted territory, with budgetary gridlock forcing the President to take actions that test constitutional limits.

#### B. The Debt Ceiling's Purported Limitation on Borrowing

The annual federal budget authorizes government agencies to carry out functions that require the expenditure of funds.<sup>30</sup> When a budget is passed, the Treasury Department is authorized to issue funds under the federal government's array of programs and contracts.<sup>31</sup> The budget must include both the authority to undertake specific activities (to build bridges, to pay medical benefits, and so on), and the appropriation of money to spend on those activities.<sup>32</sup>

The final appropriations bills thus provide the legal authority to take money that is in the federal government's possession and spend it on authorized programs. The money in the government's possession at any moment includes revenues collected from taxation and other sources (such as various fees).<sup>33</sup> If the money available at any given moment is inadequate to fund the appropriated programs, the law authorizes the Treasury to borrow funds sufficient to cover the shortfall.<sup>34</sup> If the current levels of appropriated spending fall short of annual revenues (that is, if the government runs a surplus), the remaining funds are used to repay previously issued debt obligations, as those debt obligations come due.<sup>35</sup>

Each year's budget process, therefore, implies a change in the overall level of outstanding federal debt.<sup>36</sup> If appropriated spending exceeds authorized taxes, then Treasury is instructed to borrow more money, under Congress's Article I

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<sup>29</sup> *Id.* at 2-4, 108-110 (noting increased political gridlock as federal budget size grew).

<sup>30</sup> Generally, federal agencies cannot use funds until they have been appropriated, whether that is via the yearly budget or some other statutory authorization. *See* 31 U.S.C. § 1347 (2006) ("An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law.")

<sup>31</sup> *See* 31 U.S.C. § 321 (a) – (a)(3) ("The Secretary of the Treasury shall . . . issue warrants for money drawn on the Treasury consistent with appropriations").

<sup>32</sup> *See* § 1105 (a)(12)-(22).

<sup>33</sup> *See* § 3302(b) (requiring deposit of all public funds into the Treasury); § 3720 (requiring money collected by other agencies to be deposited with the Treasury). For an example of the various fees collected by the Treasury, see the FOIA fee schedule detailed by 31 C.F.R. § 1.7 (2012).

<sup>34</sup> *See, e.g.*, 31 U.S.C. § 3104 (a) (2006) ("The Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law . . ."); § 3102 (a) (allowing the Treasury Secretary to issue bonds); § 3103 (a) (allowing the Treasury Secretary to issue notes).

<sup>35</sup> Net repayment of debt last occurred during the late Clinton administration, as the public debt shrank from \$3,772.3 billion dollars in 1997 to \$3,319 billion dollars in 2001. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK 126 (2010), *available at* <http://www.cbo.gov/doc.cfm?index=10871&type=1>.

<sup>36</sup> Reflecting this reality, every federal budget must include an up to date report to Congress on the level of federal debt. *See* § 1105(a)(10) & (36).

power to borrow money on the credit of the United States.<sup>37</sup> This instruction includes borrowing any funds necessary to repay the principal and interest on the debt obligations from previous years that have come due, allowing the aggregate level of debt to rise even while the federal government honors its contractual commitments to its creditors.<sup>38</sup>

From an economic perspective, the annual change in the aggregate level of the federal government's debt, therefore, is necessarily determined by the difference between spending and tax revenues authorized in the annual budget.<sup>39</sup> If, for example, the total debt is ten trillion dollars at the beginning of the fiscal year, and spending appropriations exceed tax revenues by one trillion dollars during the fiscal year, then the debt will go up to eleven trillion dollars (putting aside daily compounding of interest and similar factors). The budget itself both determines the necessary change in aggregate borrowing, and authorizes engaging in any new borrowing that is required to carry out the will of Congress, as expressed in its duly-enacted budget.

In that way, there has always been an informal "debt ceiling." That is, when Congress and the President each year determine the levels of spending and revenues, they also determine the path of the national debt. The debt will be as high as Congress permits, and no higher. Various agencies of the federal government issue estimates of how any budget will change the aggregate level of debt, providing that information to Congress, the President, and the public as part of the negotiations over each year's budget choices.<sup>40</sup> Subject to unexpected changes in the economic conditions that can alter tax revenues or require different levels of expenditures,<sup>41</sup> the passage of a new budget is necessarily a statement that the government is planning to owe a certain amount of money at each point in time.

Even though the budget process itself is both necessary and sufficient to empower Congress to limit the government's debt, the total level of debt has become a politically salient (albeit highly inaccurate) measure of the government's "fiscal responsibility."<sup>42</sup> As the national debt level has risen over

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<sup>37</sup> See *supra* note 34.

<sup>38</sup> See § 3111, allowing the Treasury to issue new obligations in order to redeem or refund outstanding bonds, notes, bills, and certificates.

<sup>39</sup> See, e.g., JACQUELINE MURRAY BRUX, *ECONOMIC ISSUES AND POLICY* 393 (4th ed. 2008).

<sup>40</sup> See § 1105 (a)(21)(B); see also OFFICE OF MGMT. & BUDGET, *ANALYTICAL PERSPECTIVES: FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT* 115-118 (2012) [hereinafter *Analytical Perspectives*], *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf>

<sup>41</sup> See, e.g., *Analytical Perspectives*, *supra* note 39, at 119.

<sup>42</sup> See, e.g., 157 CONG. REC. H5678 (daily ed. July 28, 2011) (statement of Rep. McNerney) ("Democrats and Republicans agree that raising the Federal debt is unsustainable, that the default is absolutely unacceptable, and that we must set our country on a course of fiscal responsibility"); 157 CONG. REC. H5854-55 (daily ed. Aug. 1, 2011) (statements of Rep. Reed) ("Mr. Speaker, \$14.4 trillion; \$1.6 trillion every year added onto that national debt. The people in November, 2010, spoke loudly. . . . They want us to get our fiscal house in order.")

time, politicians and the public have expressed concern that this trend might harm the economy, now or in the future.<sup>43</sup> This concern is often manifested in claims that the debt level is impoverishing “our children and grandchildren,”<sup>44</sup> who will purportedly bear the burdens of the nation’s debt, yet receive none of the benefits of the activities that gave rise to the debt.<sup>45</sup>

In the face of concerns that the debt might be rising in an uncontrolled fashion—even though, as noted, Congress maintains complete control over the level and path of federal debt—Congress began in the early Twentieth Century to impose a purported limit on total federal debt. Originally enacted in 1917,<sup>46</sup> and imposed in its current form beginning in 1939,<sup>47</sup> the debt ceiling law<sup>48</sup> imposes an upper limit on the face amount of debt that the U.S. government can owe at any time.

This limit is, however, imposed in a peculiar fashion. It includes in the total measure of the debt owed by the federal government the value of loans that the federal government has made to itself.<sup>49</sup> That is, when the government’s internal accounts treat interagency obligations as “government borrowing” (without noting that the government is also lending money), then that accounting convention increases the debt of the United States, as defined by the debt ceiling statute.<sup>50</sup> Moreover, with the economy growing over time, the government’s ability to finance its obligations improves as well. The debt ceiling, however, is

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<sup>43</sup> See Pew Research Ctr. for the People & the Press, *Frustration with Congress Could Hurt Republican Incumbents* 17 (2011) (finding that 76 percent of respondents believe that the debt is a “major threat” to the national economy), available at <http://www.people-press.org/files/legacy-pdf/12-15-11%20Congress%20and%20Economy%20release.pdf>.

<sup>44</sup> See, e.g., 175 CONG. REC. H7637 (daily ed. Nov. 16, 2011) (statement of Rep. McCaul) (“Our debt burden in this country is so heavy, it is no longer simply a financial issue; it is a moral issue. We have spent and spent, racking up astronomical debt that will dampen the American Dream for our children and grandchildren”).

<sup>45</sup> This is a grossly inaccurate view of the underlying reality, in no small part because money borrowed today may be put to productive use that will benefit those very children and grandchildren, as, for example, if the government purchases land they can use for recreation or pays teachers to educate them. But this is not the place for us to argue against the view that the government faces a long-term fiscal crisis or to suggest that even if such a crisis looms, efforts to redress it should be delayed until a period of sustained economic growth. The salient point is that the widespread perception of the need for deficit-reduction has been lately driving federal budgetary priorities.

<sup>46</sup> See Second Liberty Bond Act of 1917, Pub. L. No. 65-43, 40 Stat. 288 (1917).

<sup>47</sup> See Pub. L. No. 76-201 (1939); D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL 31967, *THE DEBT LIMIT: HISTORY AND RECENT INCREASES* 4 (2011).

<sup>48</sup> 31 U.S.C. § 3101 (2006).

<sup>49</sup> See SCHICK, *supra* note 28, at 124.

<sup>50</sup> This is not an insignificant sum. At the end of Fiscal Year 2011, gross federal debt was approximately \$15.5 trillion, while the debt actually held by the public (which includes all lenders, foreign and domestic, as well as the Federal Reserve System), was approximately \$9.9 trillion. See *US Federal Debt by Year*, USGOVERNMENTSPENDING.COM (Feb. 16, 2012), [http://www.usgovernmentspending.com/federal\\_debt](http://www.usgovernmentspending.com/federal_debt). The difference—more than one-third of gross debt—was mostly the internal obligations in the Social Security Trust Funds.

denominated in dollars, rather than as a percentage of national income,<sup>51</sup> which effectively lowers the debt ceiling over time, unless Congress acts to increase it.

As history has unfolded in the years since the debt ceiling statute was first enacted, Congress has generally acted to increase the debt ceiling as necessary, in line with the new accumulated borrowing needs implied by annual budgets.<sup>52</sup> Prior to 2011, there were brief political standoffs over proposed increases in the debt ceiling, with Congresses under the control of one political party using the debt ceiling vote to try to extract concessions from a President of the opposite party<sup>53</sup>—or simply using the debt ceiling vote as a moment to make speeches about fiscal responsibility.<sup>54</sup> While these standoffs have arisen occasionally over the decades, the mid-2011 political crisis was the first time that it appeared that Congress might simply refuse to increase the debt ceiling, even though its own budget required more borrowing to fund its required spending levels, given its decisions about tax revenues.

Although that crisis was ultimately defused, the Minority Leader in the United States Senate subsequently announced that the debt ceiling would henceforth become a weapon in budget negotiations.<sup>55</sup> No longer will disagreements over spending, taxes, and borrowing be worked out only through the budget process itself, with Congress then agreeing to raise the debt ceiling to comport with the projected increase in debt that its own decisions require. Congress (or, under certain circumstances, a blocking minority of the Senate) might in the future refuse to increase the debt limit, engaging in political brinksmanship to extract concessions on policy from the other party's leadership. Such maneuvers differ from the brinksmanship in normal budget negotiations, where members of Congress can block the government from agreeing to *future* obligations, because a refusal to increase the debt ceiling makes it impossible for the government to honor its *current* obligations, to which it committed when it passed its budget.

Furthermore, although the most recent debt ceiling standoff was focused on federal spending itself—with newly-authorized increases in borrowing tied to future decreases in spending by the federal government<sup>56</sup>—there is nothing to

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<sup>51</sup> See 31 U.S.C. § 3101(b) (“The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury), may not be more than \$14,294,000,000,000, outstanding at one time . . .”).

<sup>52</sup> See AUSTIN & LEVIT, *supra* note 47, at 20 tbl. 2.

<sup>53</sup> See *id.* at 11-15.

<sup>54</sup> See, e.g., 148 CONG. REC. H3756 (daily ed. May 22, 2002) (statement of Rep. Turner) (“The statutory debt ceiling is a law that provides the maximum amount that our Federal Government can go into debt. It is one of the few tools that we have to promote fiscal responsibility and require fiscal discipline in this House.”)

<sup>55</sup> See 157 CONG. REC. S5219 (daily ed. Aug. 2, 2011) (statement of Sen. McConnell) (“[N]ever again will any President, from either party, be allowed to raise the debt ceiling . . . without having to engage in the kind of debate we have just come through.”)

<sup>56</sup> See Budget Control Act of 2011, Pub. L. No. 112-25, §251A, 125 Stat. 240, 256 (2011); Alan Silverleib & Tom Cohen, *White House, Congressional Leaders Reach Debt Deal*, CNN (July 31,

prevent the debt ceiling from being held hostage to non-budgetary demands. A sufficiently motivated bloc in Congress could require changes in various social policies, or national security policies, or any other politically contentious area of the law, before agreeing to increase the debt ceiling. Such tactics could force the government to choose between violating its own commitments and making changes in policies that are unrelated to those existing commitments.

With the emergence of this apparently real threat—that Congress might one day soon refuse to back up its budgetary commitments with sufficient borrowing authority—it is now possible to imagine a situation in which Congress and the President will reach a fatal impasse, failing to agree to increase the debt ceiling when obligations come due. This would, for the first time, put the United States government in the position of being politically and legally unable to pay what it has promised to pay.

### C. The Applicability or Irrelevance of Section 4 of the Fourteenth Amendment

If we reach such an impasse, it will become impossible for the President to honor his responsibilities under the Constitution to faithfully execute the laws of the United States. One way to view the problem, should such a crisis arise, is to say that the existence of the debt ceiling law itself creates the impasse, where none need exist. Without the debt ceiling, after all, the President could simply collect the revenues implied by the tax laws, and expend the funds implied by the appropriations laws, borrowing any necessary additional funds, as authorized by Congress.<sup>57</sup>

In this vein, some commentary emerged during the summer of 2011, suggesting not only that the debt ceiling statute is an unnecessary (and needlessly dangerous) law, but that its existence might violate the Constitution.<sup>58</sup> Section 4 of the Fourteenth Amendment states, in pertinent part: “The validity of the public debt of the United States, authorized by law, . . . shall not be questioned.”<sup>59</sup> Under one plausible reading of that provision, the debt ceiling statute—because it raises the possibility that the United States will fail to meet some of its legal obligations to pay money, as promised under the law—will bring the validity of the debt of

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2011), [http://articles.cnn.com/2011-07-31/politics/debt.talks\\_1\\_debt-ceiling-debt-deal-deficit-reduction](http://articles.cnn.com/2011-07-31/politics/debt.talks_1_debt-ceiling-debt-deal-deficit-reduction).

<sup>57</sup> See *supra* notes 33-34, and accompanying text.

<sup>58</sup> See, e.g., 157 CONG. REC. H5296 (daily ed. July 21, 2011)(statement of Rep. Lee); Garrett Epps, *The Speech Obama Could Give: “The Constitution Forbids Default,”* THE ATLANTIC (Apr. 28, 2011, 3:56 PM), <http://www.theatlantic.com/politics/archive/2011/04/the-speech-obama-could-give-the-constitution-forbids-default/237977/>; Jack Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, BALKINIZATION (June 30, 2011), <http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html>; Johnathan H. Adler, *Is the Debt Limit Constitutional – Part Deux*, THE VOLOKH CONSPIRACY (July 3, 2011, 1:09 PM), <http://volokh.com/2011/07/03/is-the-debt-limit-constitutional-part-deux/>.

<sup>59</sup> U.S. CONST. amend. XIV § 4.

the United States into question. If that is true, then the constitutional provision invalidates the statutory enactment, and the debt ceiling statute must be deemed invalid. The President would then ignore the debt ceiling, ordering the Treasury Department to issue debt otherwise authorized by Congress. This reading of the Constitution, as noted in Part I above, has become known as “the nuclear option.”<sup>60</sup>

Although this interpretation is not the only plausible reading of Section 4, and although (as we discuss below) it is ultimately only one way to conclude that the debt ceiling must be set aside, there is much to be said for it. The difficulty is in defining the word “questioned” in a limited and meaningful way. The only guidance on this question from the Supreme Court was issued during the Great Depression, in *Perry v. United States*<sup>61</sup>:

We regard [Section 4] as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted. 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.

This language from *Perry* offers a broad reading of Section 4 that suggests that the validity of the debt of the United States is brought into question *whenever* the government acts, or threatens to act, in a way that suggests that it will not honor *all* of its obligations. This is, therefore, a statement recognizing the possibility (indeed, the likelihood) that holders of federal debt—that is, the people who have loaned money to the United States—will have reason to seriously question whether the United States will repay the money that it borrowed, if they see that the federal government has failed to live up to its other obligations. Even if the government is currently paying all interest and principal on existing government debts, current and potential lenders will have reason to question the validity of the debt if, for example, they observe the federal government refusing to pay promised Social Security benefits or refusing to reimburse a vendor for services rendered to the Defense Department.

Under this view, then, the debt ceiling is constitutionally infirm, at least as applied during a politically manufactured standoff, because its existence causes the public reasonably to question whether the federal government will soon choose not to honor its debt commitments. A court that strikes down the debt ceiling statute or a President who ignores it, under this reading, can guarantee that the commitments made by the government in its duly-enacted annual budget will be met.

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<sup>60</sup> See *supra* note 8 and accompanying text.

<sup>61</sup> 294 U.S. 330, 354 (1935).

Although we have considerable sympathy for the “nuclear option,” we recognize that the reading of Section 4 that underlies it is not beyond question. The quoted language from *Perry*, though appearing in the controlling opinion of the case, was not endorsed by a majority of the Justices of the Court.<sup>62</sup> It is, therefore, arguably dicta. While we are persuaded that the quoted language is correct on the merits—that is, that it is dangerously short-sighted not to suspect that any defaulted obligation will bring into question the validity of the public debt—the Supreme Court has not definitively endorsed that view in a legally binding fashion.

In addition, it is plausible to argue that Section 4 should be interpreted narrowly, especially in light of the circumstances surrounding its enactment in the aftermath of the Civil War.<sup>63</sup> Read in context, Section 4 chiefly targets the worry that, once fully readmitted to the Union, Senators and Representatives from Southern States (not to mention President Andrew Johnson) would deliberately refuse to repay debts incurred in suppressing the Confederate rebellion.<sup>64</sup> One might concede that Section 4’s literal language does not limit the provision’s application to Civil War debts, but nonetheless take a narrow view of what constitutes “questioning” or “public debt,” by, for example, treating government failure to pay vendors for services rendered or entitlement beneficiaries their statutory benefits as outside the scope of the Amendment.<sup>65</sup> Under an extremely narrow view, bringing the validity of the debt into question would mean that bond holders would only “question” the validity of the debt if they were told directly that the government had decided not to pay what it had promised under the terms of its debt instruments (which are legally-binding contracts).<sup>66</sup>

Yet still narrower readings are available. Consider the question of whether the “debt” owed to bond holders means the principal alone, or the principal plus the interest. The interest payments, after all, only become part of the national debt when they are paid, and only if they are paid by borrowing money from other lenders. In that way, interest payments on the debt are no different from veterans’ benefits, or the salaries of FBI agents.<sup>67</sup> None are *currently* owed by the federal government, yet all are promised to be paid in the future under contracts entered into by the federal government.

Even the deceptively simple move of stretching the definition of “questioned” sufficiently to sweep interest payments into Section 4 is, therefore, a non-trivial interpretive exercise. We must either allow the *Perry* language to have

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<sup>62</sup> The case was decided by a 5-4 vote. Although Justice Stone nominally concurred, rather than concurring only in the judgment, he wrote separately to indicate that he did not endorse the portion of the majority opinion in which the discussion of Section 4 of the Fourteenth Amendment appeared. *See Perry*, 294 U.S. at 359 (Stone, J., concurring).

<sup>63</sup> *See Abramowicz, Beyond Balanced Budgets, supra* note 19 at 581 n. 94 (noting the narrowest possible construction of § 4 would limit it to Civil War debt only).

<sup>64</sup> *See id.* at 582-87; Balkin, *supra* note 58.

<sup>65</sup> *See Abramowicz, Beyond Balanced Budgets, supra* note 19, at 582-87.

<sup>66</sup> *See Michael Stern, supra* note 20; Abramowicz, *Train Wrecks, supra* note 19, at 23.

<sup>67</sup> *Cf. Abramowicz, Train Wrecks, supra* note 19, at 43-45.

some force, or we absurdly reduce the meaning of Section 4 to the point where even holders of government debt can be the victims of contractual breach without ever questioning the validity of the debt. This *reductio* strongly suggests (at least to us) that the *Perry* language—which gives Section 4 something like its natural every-day meaning—is most plausible, and that the narrower readings are inappropriately cramped.

Nevertheless, there remains the opposite danger of reading the constitutional provision too broadly. Even if the word “questioned” should not be interpreted as narrowly as described above, one can reasonably worry that the word’s meaning might be inappropriately expanded to include nearly anything that might make people think twice about the federal government’s creditworthiness. Surely it would go too far to find a violation of the Fourteenth Amendment in any situation in which Congress seems to be unable to act responsibly. While it is true that an embarrassing public spectacle on the floor of Congress might make people question whether the federal government is run by fools, and thus lead them to question whether the government will be forced to default on its debt at some future time, it is unreasonable to say that every embarrassing moment on the congressional floor actually violates Section 4 of the Fourteenth Amendment.

Even under a less expansive reading of Section 4, however, there are still arguments that are simply wrong. For example, economic libertarians might argue that the issuance of debt itself could be seen to violate Section 4, because to issue debt is to raise the possibility that it will not be repaid. The practical import of that argument is that any *increases* in public debt (that is, new borrowing, to cover annual deficits) bring into question the validity of the public debt by making it possible that the government will not be able to repay the debt.<sup>68</sup> Even in the absence of the debt ceiling, this argument suggests, it is possible for the federal government to issue so much debt that it will someday be forced to default.<sup>69</sup>

This reasoning is flawed, for a very simple reason. All current United States debt is denominated in dollars, which the federal government alone is empowered to create.<sup>70</sup> Therefore, when the federal government issues new debt, lenders know that they will be repaid with dollars, and that the entity to which they loaned money can create those dollars as its own means of repayment.<sup>71</sup>

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<sup>68</sup> See Ron Paul, *Default Now, or Suffer a More Expensive Crisis Later*, BLOOMBERG (July 22, 2011), <http://www.bloomberg.com/news/2011-07-22/default-now-or-suffer-a-more-expensive-crisis-later-ron-paul.html> (arguing the government has already exceeded its capability ever to repay its debt).

<sup>69</sup> See *id.*

<sup>70</sup> See 31 U.S.C. § 5118 (2006). The Gold Reserve Act of 1934 forbade issuance of U.S. government obligations repayable in gold, although foreign central banks were still able to exchange dollars held for gold. The Nixon administration ended the latter practice in 1971. See DAVID M. ANDREWS, *INTERNATIONAL MONETARY POWER* 25 (2006). By contrast, the bonds at issue in *Perry* were payable in gold. 294 U.S. at 347.

<sup>71</sup> See 31 U.S.C. § 5114 (authorizing the Treasury to print money). Additional power to expand the money supply rests with the Federal Reserve System. See *THE FEDERAL RESERVE SYSTEM*,



That is why, until the summer of 2011, financial markets have treated United States debt securities as the equivalent of cash.<sup>72</sup> When a security denominated in dollars is backed by the full faith and credit of the United States, there should be no risk of default.<sup>73</sup>

There are, of course, policy and prudential reasons why a government might not wish to embark on a path that will require the creation of too much money, which is why all debt securities (public and private) face inflation risk.<sup>74</sup> Until now, only federal debt securities have carried no default risk.<sup>75</sup> Here, the key term from Section 4 is not “questioned” but rather “validity.” As a technical matter, the validity of the debt securities of the United States is beyond question, unless Congress arbitrarily prevents the Treasury from doing what is necessary to honor those debts by imposing a binding debt ceiling.

In short, despite a legitimate range of reasonable disagreement over the meaning of Section 4, we think it is best read to obligate the federal government to pay all of its obligations but not to limit federal borrowing. Thus, during an impasse of the sort that was narrowly avoided in August, 2011, Section 4 would require the President to refuse to honor the debt ceiling, if doing so would cause the government to fail to meet any of its financial obligations in a timely manner. But, as we now explain, a Presidential decision to avoid violating Section 4 of the Fourteenth Amendment would not necessarily ensure that the President avoided violating *other* constitutional obligations.

#### D. Is the Debt Ceiling Really the Source of the Problem?

Notwithstanding the controversy over the meaning of Section 4 of the Fourteenth Amendment, however, there is an independent argument—one that does not rely upon the Fourteenth Amendment at all—that leads to the conclusion that a President must violate the debt ceiling in order to carry out the terms of the annual budget.

In his popular writings about the debt ceiling crisis during the summer of 2011, Professor Tribe pointed out that the debate might have been inappropriately focused on the debt ceiling law in isolation, rather than viewed in the broader

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PURPOSES & FUNCTIONS 16 (9th ed. 2005), available at [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf).

<sup>72</sup> See Francis A. Longstaff, *The Flight-to-Liquidity Premium in U.S. Treasury Bond Prices*, 77 J. BUS. 511, 512 (2004) (noting the high liquidity of U.S. Treasury bonds).

<sup>73</sup> *Id.* at 525.

<sup>74</sup> See SURESH SUNDARESAN, *FIXED INCOME MARKETS AND THEIR DERIVATIVES* 19-20 (3d ed. 2009).

<sup>75</sup> See TIMOTHY W. KOCH & S. SCOTT McDONALD, *BANK MANAGEMENT* 493 (7th ed. 2009) (noting that even full “faith and credit” municipal bonds as well as securities backed by Treasuries are still assigned a default risk).

context in which the debt ceiling might become binding.<sup>76</sup> If we conceive of the annual budget process as creating two laws—a tax law, and a spending law—then it is not the debt ceiling alone that causes any Fourteenth Amendment problem, but rather the arithmetic implications of the three laws in combination—the difference between tax collections and expenditures, relative to any remaining room under the debt ceiling.<sup>77</sup>

Under this view, even if one accepts our *Perry*-based argument above regarding the meaning of “questioning” the validity of the debt, it is wrong to blame the debt ceiling specifically for any problems that arise during a budget stalemate. We could, for example, say that the tax law violates the Constitution, because it fails to collect sufficient revenues to make an increase in the debt ceiling unnecessary. Similarly, the spending law brings the validity of the debt into question, by obligating the government to spend more money than it can raise from authorized taxes and authorized borrowing.

There is, as we discuss further in Part III below, much to this argument. Even so, it is worth considering the unique nature of the debt ceiling law, to determine whether there is anything to the idea that there is a unique problem with the debt ceiling that would make it—and it alone—constitutionally problematic.

As noted earlier, the debt ceiling is a relatively recent invention.<sup>78</sup> The nation existed for well over a century without a debt ceiling, passing annual budgets that combined taxes and spending in various amounts. Although the federal government and its debt were both relatively small during that time period, the debt did exist, and it did fluctuate over time, in response to differences in taxing and spending.

The debt ceiling, therefore, is an appendage that was added to the system long after the federal government had been operating successfully. To be sure, fiscal conservatives may view the debt ceiling as a very useful appendage. Each time the debt approaches the debt ceiling, citizens and politicians who believe that government is too large can use that fact to impose fiscal discipline in two ways: First, as in the 2011 impasse, they can demand concessions from their political adversaries as the price of agreeing to raise the debt ceiling; and second, they can make their case to the public that the need to raise the debt ceiling reflects government profligacy. Never mind that the charge need not be true: Even if the ratio of debt to GDP shrinks, and even if the government only runs deficits that are sustainable over the long term, economic growth will mean that Congress repeatedly runs up against the limit of the dollar-denominated debt ceiling. The important point is that the debt ceiling is a visible and useful tool for imposing fiscal discipline—whether needed or not. And so for those who believe that fiscal discipline is needed, the debt ceiling may serve an important function.

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<sup>76</sup> See Laurence H. Tribe, *Guest Post on the Debt Ceiling by Laurence Tribe*, DORF ON LAW (July 16, 2011 5:33 PM), <http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html>.

<sup>77</sup> See *id.*

<sup>78</sup> See *supra* notes 46- 48 and accompanying text.

But even granting that, the debt ceiling is hardly *essential* for imposing fiscal discipline. As noted above, fiscal discipline, or any other plausible policy goal that the debt ceiling might help to accomplish, can be achieved in the absence of the debt ceiling.<sup>79</sup> If Congress and the President think that the debt is too high, then they can combine tax increases and spending reductions to address that problem.

By contrast, the federal government could not function without spending laws and tax laws. Those laws must be specific enough to allow the executive branch to know how to spend money, and from whom to collect how much in revenues. Allowing the debt ceiling to override one or both of the tax and spending laws would, therefore, create a legal vacuum, leaving the executive branch without guidance from the legislative branch about how to change taxes or spending, while maintaining a level of debt below the ceiling.<sup>80</sup>

We do not, however, view this argument as essential to our ultimate conclusion. While there are strong reasons to view the debt ceiling as a “lesser” law than the tax and spending laws, it is sufficient for our purposes to accept Professor Tribe’s point that there is an interaction problem among the laws. And as we explain in the next Part, the problem is not simply that the laws conflict, but that they conflict in a way that gives the President no constitutional options. Once one recognizes that a President cannot simultaneously carry out all three laws, without violating the Constitution, it is necessary to determine how a President should decide which law to set aside. With nothing but unconstitutional choices, what should a President do?

### **III. The President’s Trilemma: Which Duty Must He Ignore, When He Faces Three Unconstitutional Choices?**

The interaction of the spending law, the tax law, and the debt ceiling law potentially creates an unsolvable problem. For example, if Congress were to authorize spending that exceeds tax collections by one trillion dollars in a year, at a time when the existing federal debt is only one-half trillion dollars below its statutory ceiling, then the President could not execute all three laws as written. Faced with that impossible choice, the President risks impeachment no matter what he might do, because he will have failed to execute at least one duly-enacted law of the United States.<sup>81</sup> He thus faces a “trilemma”: choosing one of three bad

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<sup>79</sup> See *supra* text accompanying notes 39 - 42.

<sup>80</sup> Congress *could* specify, in advance, how taxes should be increased or spending reduced, in the event that the debt ceiling kicks in, through “fallback” provisions in the relevant statutes. See Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007) (discussing the policy and constitutional implications of fallback provisions). But it has not done so.

<sup>81</sup> See U.S. CONST. art. II, § 3. See also Julie R. O’Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2203 (1998) (quoting 1 ANNALS OF CONG. 594 (1789) (Joseph Gales ed., 1834)) (“What are [the President’s] duties? To see the laws faithfully executed; if he does not do this effectually, he is responsible. To whom? To the people. Have they the means of calling him to account, and punishing him for neglect? They have secured it in the Constitution, by impeachment, to be presented by their immediate representatives . . .”).

options, all of which are unconstitutional.<sup>82</sup> While it is also possible for the President to *combine* unilateral actions on taxes, spending, and debt, we find it more useful to discuss the three separately. This Part offers constitutional and prudential grounds in support of the conclusion that, faced with the trilemma, the President should set aside the debt ceiling law. Then Part IV draws broader lessons about the criteria the President and other actors should use for choosing among unconstitutional options.

#### A. Three Powers Reserved to Congress

Article I of the Constitution grants to Congress, rather than to the President, all three powers at play in this debate: taxing, spending, and borrowing.<sup>83</sup> Under Section 8, Congress has “power to lay and collect taxes,” to “borrow money on the credit of the United States,” and to “provide for the . . . general Welfare” through the expenditure of money.<sup>84</sup>

While there are timeless controversies over the extent of Congress’s powers under Article I,<sup>85</sup> the point here is that any such powers are in Congress’s hands, not the President’s, at least absent a valid delegation by Congress to the President. For a President to choose unilaterally to collect taxes in a way not authorized by Congress, or to spend money in a way not authorized by Congress, or to borrow money in amounts not authorized by Congress, violates the separation of powers enshrined in the Constitution.<sup>86</sup>

If Congress, either by choice or by default, puts the President in the position of having to violate his oath of office, how should the President proceed? The most aggressive approach would be for the President simply to assume all powers otherwise reserved to Congress, on the theory that he cannot be expected to obey the contradictory dictates of a dysfunctional body.

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<sup>82</sup> As noted in Section I, we are aware that there are some plausibly constitutional methods by which the President could raise money to finance the difference between spending and taxes. Selling national parks, selling options to the Federal Reserve, and similar ideas are innovative and clever, but they strike us as perfect examples of the type of action most directly implicating even the thinnest reading of Section 4 of the Fourteenth Amendment. That is, if the President were seen selling Alaska back to the Russians, or minting large platinum coins, or anything along those lines, then any reasonable person would question the validity of the debt of the United States. No functioning government could engage in such Hail Mary desperation plays without fatally undermining public confidence in all of its finances.

<sup>83</sup> U.S. CONST. art. I.

<sup>84</sup> U.S. CONST. art. I, § 8.

<sup>85</sup> See Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 GEO. L.J. 119, 120 (2006) (noting that the question of “the scope of Congress’s enumerated powers” is “constitutional law’s oldest debate”).

<sup>86</sup> “When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), which do not include those powers expressly granted by Article I, Section 8, to Congress.

But this framing of the question may be misleading. Congress does not act alone, and so the President may share responsibility for its dysfunction. Did the President sign the budget bill that put Congress on a collision course with the debt ceiling? Did he threaten to veto a bill raising the debt ceiling if it contained (or did not contain) some other provision he disapproved (or insisted upon)? The trilemma occurs as a result of a systemic failure rather than simply from Congressional dysfunction.

Moreover, as we elaborate at greater length in Part IV, even if the President bears no substantial responsibility for the trilemma, the better approach is to determine the path that would do the least violence to the constitutional prerogatives of Congress, allowing the President to engage in the most minimal course of action possible, while doing everything possible to allow the Congress later to undo what the President does, if Congress ultimately determines that the President's extraordinary (but necessary) exercise of power was unwise.

This suggests that Congress itself could provide guidance regarding its priorities among the three possible courses of action, explaining or revealing which of the three powers it cares about the least. Naturally, any such analysis is comparative, because Congress should rightly be concerned about guarding all of its enumerated powers. The question is not which choice is best, but which is least bad.

Among the three possibilities, the taxing power would seem to be the most important power reserved to Congress.<sup>87</sup> From the founding, the notion of limited government was, in significant part, a commitment to a limitation on the power to tax.<sup>88</sup> "No taxation without representation" is only the most memorable of the expressions of this idea, reserving to the people's representatives the power to collect taxes.<sup>89</sup> That power is also the first of Congress's powers listed in Section 8 of Article I.<sup>90</sup> Certainly, we are unaware of any situation in which a President has attempted to collect taxes without authorization by Congress; and it is difficult indeed to imagine any Congress acceding to such a usurpation of its powers.

Regarding the spending power, the picture is a bit more nuanced. In the early years of the Republic, Congress passed laws that authorized the President to spend "up to" certain sums of money, and the President would accordingly be

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<sup>87</sup> See, e.g., *Tucker v. Ferguson*, 89 U.S. 527, 575 (1874) ("The taxing power is vital to the functions of government. It helps to sustain the social compact and to give it efficacy. It is intended to promote the general welfare. It reaches the interests of every member of the community.").

<sup>88</sup> See Charles Lockhart, *American and Swedish Tax Regimes: Cultural and Structural Roots*, 35 COMP. POL. 379, 385, 391–92 (2003) (explaining that the United States' tax revenues remain low in relation to other industrial countries because of its historical "fidelity to a neo-Lockean conception of limited government" which stems from the time of the American Revolution).

<sup>89</sup> See e.g., Judge Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378 (2008) (noting that the phrase has become the "'mother's milk' of American history education").

<sup>90</sup> U.S. CONST. art. I, § 8.

able to carry out his constitutional duties while spending money in amounts not precisely specified by Congress.<sup>91</sup>

In most areas of the federal budget, however, that practice has long since ended. Congress now typically specifies precise amounts of money (or, in the case of so-called entitlement programs, precise formulae to determine the amounts of money to be spent) that the President must spend for each authorized program.<sup>92</sup> When Congress appropriates the money necessary to fund those authorized programs, it effectively orders the President to spend no more and no less than those amounts. It would be odd, indeed, if a President were to assert that he could choose to, say, send Medicare beneficiaries less money than they would be entitled to receive under the relevant statute.

Moreover, we need not speculate about what would happen if a President were to assert such authority. The impoundment controversy during the Nixon Administration involved a direct confrontation between the executive and legislative branches, with Congress objecting to Nixon's theory of an "imperial Presidency," in which the President would have the power to selectively reduce certain spending programs at his discretion.<sup>93</sup>

The result was the Impoundment Control Act of 1974, under which the President may only propose "rescissions" of appropriated spending.<sup>94</sup> Congress, however, need not act on such proposals, and the President's power to withhold funds ends after forty-five days.<sup>95</sup> Congress, therefore, has made a strong statement of principle, affirming its power under the Constitution to set the exact sums of money to be spent on each program, not merely the upper limits.

Arguably, moreover, the Impoundment Control Act was unnecessary to affirm Congress's powers. While other provisions of that law have surely helped to create mechanisms for resolving disputes among the branches, lower courts ruled uniformly against President Nixon's attempts to impound funds, on constitutional grounds, even before Congress acted.<sup>96</sup> Passage of the Act mooted

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<sup>91</sup> See Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 22–30 (2001) (discussing early laws under which "President Washington was given broad discretion over appropriations through the use of 'lump-sum' appropriations" to expend funds or leave funds unexpended as he saw fit).

<sup>92</sup> See *W. Cent. Mo. Rural Dev. Corp. v. Donovan*, 659 F.2d 199, 202 (D.C. Cir. 1981) ("Unexpended appropriations are generally subject to congressional action."). For further discussion of direct-spending legislation and entitlement programs, see ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 57–81 (3d ed. 2007).

<sup>93</sup> See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 235–40 (1973); Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 POL. SCI. Q. 209, 215–16 (1980).

<sup>94</sup> Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 681–688 (2006). See Cronin, *supra* note 47, at 221.

<sup>95</sup> 2 U.S.C. § 683 (2006). See SCHLESINGER, *supra* note 47, at 477.

<sup>96</sup> See SCHLESINGER, *supra* note 47, at 397. See, e.g., *Pennsylvania v. Lynn*, 362 F. Supp. 1363, (D.D.C. 1973) ("It is not within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees."); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 700 (E.D. Va. 1973) (holding that an impoundment of 55%

those cases before they reached the Supreme Court, but the fundamental idea that the power to spend implies the power to spend *in exact amounts* is persuasive, in our view, and also strongly implied by the Supreme Court's invalidation of the Line Item Veto Act in *Clinton v. City of New York*.<sup>97</sup>

For the immediate purpose of determining Congress's priorities, however, it is the passage of the Impoundment Control Act itself that provides useful guidance for future controversies. Congress has demonstrated, both by passing the Act and by refusing to grant subsequent presidential rescission requests, that it wishes to guard its power to spend against presidential encroachment.

Finally, what about Congress's power to authorize the borrowing of money? The existence of the debt ceiling law, of course, suggests that Congress wishes to limit the amount of money that the government can borrow.<sup>98</sup> In practice, however, Congress has generally treated the debt ceiling as a symbolic measure or at most, a bargaining chip. Each time an increase in the debt ceiling has been resisted, it was generally understood that the dollar limit of the debt ceiling was being used opportunistically.<sup>99</sup> Even President Obama, when he served in the Senate, once voted against a debt ceiling increase, with no indication that he was doing so because of concerns about the specific limit involved.<sup>100</sup> Taking a stand on the national debt was politically useful, but no one doubted that Congress would ultimately raise the debt ceiling.

Yet this line of reasoning might suggest the importance of the debt ceiling in case of a real impasse. That is, if Congress ever actually were to refuse to raise the debt ceiling, then that would be a surprising and unmistakable statement that it cares deeply about the level of debt. As we argue below, however, it is difficult to reconcile that inference with Congress having passed tax and spending laws that would otherwise require an increase in the debt. In any case, Congress's refusal to change any of the three laws—which is the situation that gives rise to this entire analysis—gives us no reason to think that it cares *more* about its power to limit borrowing than about its other powers. At most, through a failure to raise

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of funds allocated to the Water Pollution Control Act was a “flagrant abuse of executive discretion” and, therefore, void).

<sup>97</sup> 524 U.S. 417 (1998). Even Justice Scalia, who dissented in *Clinton*, acknowledged that President Nixon was mistaken in his assertion of a constitutional power to impound appropriated funds in the teeth of a Congressional command to spend those funds. *See id.* at 468 (Scalia, J., dissenting) (citing *Train v. City of New York*, 420 U.S. 35 (1975)).

<sup>98</sup> *See* 31 U.S.C. § 3101 (2006).

<sup>99</sup> *See* Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 156 (2005) (stating that Congress has used “votes on debt limit increase legislation . . . as a vehicle for passage of budget-reform or other unrelated legislation”). The debt ceiling law has been treated “as a dangerous ‘weapon’ used by Congress to force the President to make uncomfortable compromises on issues unrelated to the debt.” *Id.* at 138 & n.18.

<sup>100</sup> *See* U.S. Senate Roll Call Votes 109<sup>th</sup> Congress – 2<sup>nd</sup> Session, United States Senate, [www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00054](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00054) (last visited Feb. 19, 2012) (listing then-Senator Obama as voting “Nay” on H.J. Res. 47 in 2006).

the debt ceiling, Congress could be read to be saying that it no longer cares *less* about protecting its borrowing powers.

It is not surprising that reading Congress's collective mind regarding these foundational principles is difficult. Each specific power granted to Congress under the Constitution is important on its own merits. As a comparative matter, however, it is difficult not to view the debt ceiling as the least important manifestation of Congress's efforts to protect its prerogatives, as we now elaborate.

## B. Rules of Interpretation, As Applied to the Debt Ceiling Controversy

When legal provisions are in conflict, or in cases of ambiguity, various interpretive doctrines are available to resolve the issues at stake. In the case of the debt ceiling, the two most useful doctrines both point in the same direction, suggesting that the debt ceiling should give way when it is in conflict with the taxing and spending provisions of the government's budget.

The "last in time" rule suggests that Congress's most recent enactments provide the best guide to its priorities.<sup>101</sup> Congress legislates in light of existing law, and thus it presumably knows when it is passing new legislation that would make it impossible for the President to meet his obligations under both the older and newly-enacted laws.

In the case of the debt ceiling, the Congress in Spring 2011 passed a budget.<sup>102</sup> According to all estimates available at the time, that budget implied that the government would reach its official debt limit in May, and all of the executive branch's permissible delaying tactics would be exhausted by early August, before the end of the fiscal year.<sup>103</sup> Yet the budget called for levels of spending and taxes that would require increases in the debt to levels beyond the

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<sup>101</sup> See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (noting that when two legal instruments conflict, "the one last in date will control the other"); *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991) ("When two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will.").

<sup>102</sup> See Janet Hook, *Congress Puts Hagglng Aside to Pass 2011 Budget*, WALL ST. J., Apr. 15, 2011, <http://online.wsj.com/article/SB10001424052748703983104576263143090402796.html>.

<sup>103</sup> See James Risen, *Debt Ceiling Increase is Expected, Geithner Says*, N.Y. TIMES, Apr. 17, 2011, <http://www.nytimes.com/2011/04/18/us/politics/18debt.html?ref=federalbudgetus> ("The administration says the legal debt limit, now just over \$14 trillion, will be reached next month [in May]. Many economists have warned that if the ceiling is not raised, the United States will soon begin to default on its debt, and that could set off an international financial crisis."); Press Release, U.S. Dep't of the Treasury, Treasury: No Change to August 2 Estimate Regarding Exhaustion of U.S. Borrowing Authority (July 1, 2011), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1225.aspx>; Erika Gudmundson, *Secretary Geithner Sends Debt Limit Letter to Congress*, TREASURY NOTES BLOG (Apr. 4, 2011), <http://www.treasury.gov/connect/blog/Pages/letter-to-congress.aspx> (describing the tactics available to the executive branch in order to delay a default).



statutory limit.<sup>104</sup> If the last-in-time doctrine has any purchase here, it leads to the conclusion that Congress must not have wanted the President to enforce the debt ceiling. If Congress had cared about the debt ceiling, it had all of the tools necessary to avoid a conflict that would lead to the President's trilemma.

Another useful interpretive doctrine states that "the specific dominates the general."<sup>105</sup> This maxim captures the idea that general statutes adopt policy goals that have some weight, but that drafters of statutes legislate in more detail when they mean to specify a particular result. If the general statutes can be carried out without conflicting with other laws, then they must be followed. If not, however, then Congress's attention to detail should trump its more general statements.

Of course, the debt ceiling is in one sense very specific. It states a precise number beyond which the national debt may not rise.<sup>106</sup> But the taxing and spending laws are much *more* specific than the debt ceiling statute, in that they express Congressional will on a host of specific details, rather than just one number. For the reasons discussed in Part III.D below, that specificity should strongly point the President towards setting aside the debt ceiling when he is faced with the trilemma. To put the point briefly, the legislative effort inherent in the taxing and spending laws represents such a delicate balancing act that we must presume that Congress's intent would be frustrated to a much greater degree by a President who elevates the blunt instrument of the debt ceiling above those other, highly nuanced laws, than by a President who subordinates the debt ceiling to Congress's decisions about spending and taxes.

But suppose Congress wanted the President to observe a *hard* debt ceiling—one that would prevail over budget and tax laws that called for spending that leaves a shortfall which would otherwise necessitate borrowing beyond the debt ceiling. Does our application of the canons of construction render such a choice impossible? Hardly.

If Congress really wanted a hard debt ceiling, it could so specify in the debt ceiling and/or its budget and tax bills. For example, the debt ceiling statute might state something like the following: "In the event that any future Act appropriates funds in amounts that cannot be paid without borrowing beyond the limits of this debt ceiling, such future Act shall be construed to authorize the President to decline to spend such sums as he, in his sound discretion, deems appropriate to impound." *That* sort of debt ceiling law would work a partial

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<sup>104</sup> See MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., R41633, REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS 14–15 (2011) (noting that "the federal government will have to issue an additional \$738 billion in debt on net above the current statutory limit to finance all obligations for the second half of [fiscal year 2011].").

<sup>105</sup> See, e.g., *Thompson v. Calderon*, 151 F.3d 918, 929 (9th Cir. 1998) (noting that "a more recent and specific statute" controls over a general statute); *Greene v. U.S.*, 79 F.3d 1348, 1355 (2d Cir. 1996) ("When two statutes are in conflict, that statute which addresses the matter at issue in specific terms controls over a statute which addresses the issue in general terms, unless Congress has manifested a contrary aim.").

<sup>106</sup> 31 U.S.C. § 3101 (2006) (stating that the federal government may not at any time have outstanding debt obligations exceeding \$14,294,000,000,000).

repeal of the Impoundment Control Act and if Congress were then to pass a budget that required borrowing beyond the debt ceiling, the budget would be construed in light of the debt ceiling law as prioritizing budget cuts. But in such a scenario, the President would not be cutting spending because cutting spending would be less unconstitutional than ignoring the debt ceiling; in such a scenario, cutting spending *would not be unconstitutional at all* (so long as the particular spending cuts did not violate Section 4 of the Fourteenth Amendment or some other constitutional provision). Put differently, Congress can insist on a hard debt ceiling, but it may have difficulty prospectively insisting on a hard debt ceiling as a favored *unconstitutional* option.

### C. The Practical Issues Raised by Presidential Unilateralism

Beyond Congress's own indications of its priorities, there are practical questions that arise when considering which of the three powers of Congress the President might usurp, when faced with a trilemma. Examining the ease or difficulty of carrying out one or another option might offer guidance about the President's best course of action, thereby helping to answer the question of which unconstitutional option is least unconstitutional. We return to the question of why such pragmatic considerations bear on the relative measure of unconstitutionality in Part IV.

#### 1. When the President Cuts Spending

President Obama, along with many commentators, concluded in the summer of 2011 that he would be forced to violate the Constitution by spending less than Congress had authorized and appropriated, in the spending law.<sup>107</sup> If he had followed through, how would that have happened?

Those who were worried about the validity of the public debt—either for constitutional reasons, or out of concern that failing to pay the nation's creditors could create a financial and economic crisis—suggested that the President could simply set aside funds to pay those obligations that he deemed to be the most important.<sup>108</sup> So long as the President did not use the opportunity to exact political retribution, or to impermissibly target certain groups in a way that would violate equal protection, this approach would simply entrust to the President the power to decide who should not be paid.

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<sup>107</sup> Of course, the President did not say that spending less than Congress had appropriated would violate the Constitution, but the conclusion follows from our discussion of the impoundment controversy. *See supra*, text accompanying notes 91-97.

<sup>108</sup> *See, e.g.*, Rep. Tom McClintock, *McClintock: Debt Reduction Means Difficult Decisions*, WASH. TIMES, Jul. 27, 2011 ("President Obama has both the legal authority and constitutional obligation to prioritize payments to prevent a default. The problem is that a lot of other bills would go unpaid . . ."), available at <http://www.washingtontimes.com/news/2011/jul/27/debt-reduction-means-difficult-decisions/>. *See also* LEVIT, *supra* note 59, at 13 (discussing different legislation proposals made by congressmen that would prioritize the payment of certain obligations, such as the principal and interest on debt or Social Security benefits, over other obligations).

As it turns out, however, doing so would be surprisingly difficult under the laws and procedures that usually govern federal spending. Because tax revenues arrive at the Treasury daily, in varying amounts, the government's ability to pay its bills without borrowing will depend on which bills happen to come due on the days when it happens to be collecting sufficient tax revenues.<sup>109</sup> A Social Security check that could not be paid on Tuesday might be payable on Wednesday. However, even if the Tuesday payment is not made, there will be other payments that are due on Wednesday. If the amount of tax revenue coming in during Wednesday would be enough to pay Wednesday's bills, but not both Tuesday's carryovers plus Wednesday's bills, then someone will still not be paid.

Under current law, if the government has enough money in the Treasury on any given day to pay the bills that are then due, it must pay those bills.<sup>110</sup> The debt ceiling does not override that requirement, because there would be (by assumption) sufficient non-borrowed funds to cover the day's required expenditure. If the President tried to argue that he must prioritize the older unpaid bills over the current bills, Wednesday's would-be recipients could reasonably argue that there is no principle under the law that authorizes the President to set priorities in that way. Tuesday's recipients should, under an equally plausible argument, be out of luck until there is enough money to pay a particular day's recipients plus all unpaid carryover bills. And if such a day never comes, then there is no reason why the earlier obligations are more binding than the later ones. The short-term timing of these payment streams is, in most cases, a matter of happenstance.

The analysis could also be affected by the nature of the payments that are due. In some cases, a day's or week's delay is little more than an annoyance, while in others, justice delayed is truly justice denied. For example, a person who is owed money by the federal government could be relying on that money to fund a down payment on a house, where even a day's delay can be sufficient to unravel an entire sale—or even a series of sales, where the seller in one deal expects to use her proceeds to become the buyer in a related sale. Again, the nearly-random timing of the specific payment obligations, in conjunction with the equally random timing of tax receipts, suggests that it would be difficult indeed to create a principled priority system that forces some recipients to wait while others are paid.

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<sup>109</sup> The Financial Management Service publishes a Daily Treasury Statement that reports the amount of revenue received by the Treasury, daily withdrawals, and debt transactions on a given day. See FINANCIAL MANAGEMENT SERVICE, *Overview*, DAILY TREASURY STATEMENT (Dec. 4, 2009), [www.fms.treas.gov/dts/overview.html](http://www.fms.treas.gov/dts/overview.html).

<sup>110</sup> See LEVIT, *supra* note 59, at 7 (stating that the U.S. Treasury is required “to make payments on obligations as they come due” because it “lacks formal legal authority to establish priorities to pay obligations”). See also Binyamin Appelbaum, *Treasury to Weigh Which Bills to Pay*, N.Y. TIMES, Jul. 27, 2011 (noting that Social Security benefits might go unpaid if the debt limit is reached because of the requirement that the Treasury make payments as they become due), available at <http://www.nytimes.com/2011/07/28/business/economy/treasury-to-weigh-which-bills-to-pay.html>.

This problem would become even more difficult if the President were to try to hoard funds from day to day, in anticipation of high-priority obligations that are expected to arise in the near future. For example, if the President knows that certain interest payments to government bond-holders will be due on Friday, and he does not expect there to be enough money coming in on Friday to cover those payments, he might refuse to make payments earlier in the week, even when the concurrent flow of tax revenues would otherwise be sufficient to cover the payments due on those days. If Treasury is required to pay money due, when it is due, so long as there is money on hand, then certainly the disappointed would-be recipients of those payments could bring actions against the government.

But, one might ask, wouldn't the President make these decisions at the wholesale level? The President could establish a formula of the following sort: Bondholders and military personnel get paid in full; the remaining shortfall is then made up by an equal percentage cut among all prospective federal payees, based on Treasury's projection of the size of the shortfall. Such an algorithm would not require Treasury or the President to decide whom to pay and how much on a day-by-day basis.

We concede that it is possible to rewrite the laws and procedures to allow any set of priorities to be met, but the process of doing so requires more changes to the law and to executive procedures than might at first be obvious. Moreover, even if the President does not engage in the kinds of impermissible favoritism that unilateral spending cuts might allow, assumption of the power to choose among decision procedures greatly expands the power of the President to make choices that cross the line into policy decisions—without any delegation of that power to him by Congress. Setting up rules that protect would-be recipients of certain payments, of course, necessarily disfavors others. For the President to make such choices without prior Congressional authorization is for him to assume significant legislative power.<sup>111</sup>

In short, seemingly simple rules like “across-the-board cuts” or “prioritization of bond holders” turn out, on the ground, to be anything but simple. Telling the President to pick winners and losers is both to confer awesome power and to increase the likelihood of arbitrary harm to innocent parties.

## 2. When the President Increases Borrowing

If the President, instead of cutting spending, decides to ignore the debt ceiling, how would he proceed? The issuance of government debt is significantly less complicated than the determination of government spending levels, because debt is a relatively undifferentiated (and completely monetizable) asset. Whereas spending cuts can result in something as serious as missed chemotherapy treatments, or as inconsequential as delays in reimbursing a person's travel expenses, borrowing money is a simple concept. No one is forced to lend money, and the government simply borrows as much as it needs to cover its appropriated

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<sup>111</sup> See *supra* notes 63–65 and accompanying text (explaining that the U.S. Treasury, an executive department, does not have the legislative authority to prioritize payments).

spending, and no more.<sup>112</sup> Other than the details of the maturities of the debt instruments, the process is straightforward and unremarkable.

From an administrative standpoint, therefore, the issuance of debt poses no difficulties. There are federal employees who regularly go through the process of issuing new federal debt, using well-established mechanisms to interact with potential lenders in the financial markets.<sup>113</sup> If the President wishes to issue additional debt, even if that debt would bring the government's total borrowing level above the current ceiling, he can easily issue an order to do so. The recipients of that order would know exactly what to do, without having to make judgment calls, and without needing to alter any other laws or procedures that are currently in place.

As a practical matter, therefore, exceeding the debt ceiling is the essence of simplicity, especially compared to cutting spending. The more difficult practical question, however, is how the potential lenders to the United States would react to the offer of new debt securities that appear to violate the borrowing clause of Article I, Section 8.<sup>114</sup> Would such lenders assume that the new debt is still backed by the full faith and credit of the United States, even though only the President has authorized the borrowing?

In part, the answer to this question depends upon the degree of political dysfunction that attends the crisis at hand. If it appears that the negotiations passed the witching hour by mere bad luck, but that things will soon return to normal, then it is easy to imagine that the subsequent legislative compromise will include an after-the-fact guarantee of the validity of what we will call the "Presidential bonds." If, however, it appears that the political crisis will be longer-lasting, then the risk to lenders is higher, making them likely either to refuse to lend, or to require higher interest payments (thus exacerbating the government's long-term borrowing problems).

If the government simply defaults up front, we can expect markets immediately to respond badly, making it more difficult and expensive to return the government to its status as a preferred borrower.<sup>115</sup> Avoiding default by issuing potentially illegitimate debt, however, can lead to the same result.<sup>116</sup> The irony, therefore, is that a President's attempt to avoid default on government

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<sup>112</sup> See LEVIT, *supra* note 59, at 2.

<sup>113</sup> The Bureau of the Public Debt is the agency within the U.S. Department of the Treasury that issues debt obligations to the public in order to finance government operations. This agency handles the sale of government securities on the primary and secondary markets. It also auctions about \$4.5 trillion in securities annually. See BUREAU OF THE PUBLIC DEBT, U.S. DEPARTMENT OF THE TREASURY, STRATEGIC PLAN: FISCAL YEARS 2009–2014 8 (2008), available at <http://www.publicdebt.treas.gov/whatwedo/bpdstrategicplan09-14.pdf>.

<sup>114</sup> U.S. CONST. art. I, § 8.

<sup>115</sup> See also LEVIT, *supra* note 59, at 11–12 (noting that a default could lead to "a downgrade of the U.S. credit rating, an increase in federal and private borrowing costs, damage to the economic recovery, and broader disruptions to the financial system.").

<sup>116</sup> The issuance of potentially illegitimate debt could reduce investor confidence in the federal government's commitment to meet its obligations. A loss of investor confidence could result in much higher interest rates on the potentially illegitimate debt. See *id.* at 11.

obligations might cause precisely the real-world problem that it is designed to avoid.

The difference, however, is in degree. A straight default on obligations, especially debt payments, ends any pretense that the government is a reliable financial player.<sup>117</sup> Issuing bonds of uncertain reliability will almost surely increase borrowing costs, but any such increase can be no more than the increase that would attend an up-front default.

Moreover, the underlying factors that could make the Presidential bonds less valuable are factors that would independently have even more catastrophic effects on the economy as a whole. If, even after failing to make an eleventh-hour compromise, Congress and the President still cannot come to an agreement to end the trilemma, then there will be reason to worry for the future of the nation. Even the regular budget process, which precedes the possible creation of any trilemmas, would be so broken as no longer to permit the proper functioning of the government.

Accordingly, if the President had good reason to conclude that the market would demand intolerably high interest rates for Presidential bonds, then on that basis he might appropriately rule out ignoring the debt ceiling as the solution to the trilemma. But in such a scenario, it would be a policy consideration—the sub-junk status of the prospective Presidential bonds—rather than a constitutional consideration per se, that would take the issuance of new debt off the table. Conversely, however, if the President had good reason to believe that financial markets would only demand a tolerably small interest premium for the Presidential bonds, so that issuing them would make financial sense, then our analysis suggests that this path should be constitutionally preferred because the key constitutional consideration—how much legislative power the President must usurp in order to carry out the solution—favors issuing new debt over canceling appropriations.

In short, while unauthorized issuance of debt would hardly be ideal, and would carry with it risks of financial and economic disruption, it would be a more rational and administrable process than asking the President to enact unauthorized spending cuts. If it would work, it would thus be a *less unconstitutional* course than unilateral Presidential spending cuts for two reasons.<sup>118</sup> First, ignoring the debt ceiling would usurp less legislative authority than would unilateral Presidential spending cuts, thus making the former a less severe violation of separation of powers. Second, ignoring the debt ceiling would also prevent the government from failing to meet its legal obligations to pay its bills and thus violating Section 4 of the Fourteenth Amendment.<sup>119</sup>

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<sup>117</sup> Again, at least initially, the lack of confidence would not be based on any underlying economic reason, but solely because the political system is creating a false crisis and a wholly unnecessary trilemma for the President. Once the crisis takes hold, of course, the damage could spread to the real economy.

<sup>118</sup> We elaborate more fully on what we mean by degrees of constitutionality in Part IV, *infra*.

<sup>119</sup> U.S. CONST. amend XIV, § 4.

### 3. When the President Increases Taxes

Finally, what are the practical issues that would arise if the President resolved the trilemma by increasing taxes, to levels above those authorized by Congress under the tax law? Taxes lie somewhere between debt and spending in terms of their heterogeneity. Asking a government to “borrow money” is (again, other than certain technical matters, especially the maturity dates of the new debt) a rather unambiguous request. Asking it to “collect taxes” necessarily implicates a broader range of questions, covering the tax base (that is, what to tax), the rates of taxation, and the likelihood of tax evasion and avoidance.

Because of these unknowns, the decision to increase taxes automatically confers powers upon the President (who, throughout this analysis, is assumed to be acting without authority of Congress), with significant policy implications. For example, if the President decided to collect the necessary funds by increasing estate taxes, that would have quite different effects than if he authorized an increase in excise taxes.

Even so, increasing taxes appears to raise somewhat fewer issues of complexity than cutting spending. Collecting more money from people than they expected to pay might cause hardship, and it might unravel some transactions that would otherwise take place, but the tax collectors would not face all of the types of questions that budget cutters would face in the scenarios described above.

From a purely administrative standpoint, moreover, collecting more taxes is fully within the capacities of the agencies over which the President exercises authority.<sup>120</sup> He 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. This process is fully automated, and the President’s authorization would be all that was needed to collect additional funds. Some refusals to pay might follow, but because the employers withholding the taxes are not paying those taxes, the process could be expected to be administratively simple.

Deciding to increase the taxes that are easier to collect is, of course, a policy choice of its own. The burdens would not be shared equally. This would be one of many reasons that the President would be sure to face fierce political resistance to any attempt to increase taxes. The administrative simplicity, however, is a strong argument for increasing taxes, rather than cutting spending, in the event that the financial markets rule out the possibility of Presidential bonds.

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<sup>120</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2329 (arguing that “Congress’s delegations of power to the President logically coexist with a presumption that the President has ultimate control over all executive agency decisions”). The Internal Revenue Service, which is responsible for collecting taxes is a bureau of the Department of the Treasury—an executive department controlled by the President.

D. The Prudential Issues Raised by the President's Choice

The analysis above set aside many policy issues, focusing instead on the practical implications of each possible solution to the trilemma. At least as important, however, are the prudential questions that are raised by different types of unauthorized presidential actions. Such considerations suggest a different set of tradeoffs, based on the likely effects of a President's choice, both in the immediate crisis, and the precedent that he would set for the country going forward.

The political branches of government are at their most political (in both good and bad senses) when taxing and spending are involved. While Congress has agreed over the years to delegate its authority to coin and regulate money,<sup>121</sup> for example, it has never allowed technocratic agencies to determine the levels and types of taxes and spending that the government undertakes. Election campaigns are often fought over issues of taxes and spending, and any compromises are designed to trade off important priorities, benefits, and costs.<sup>122</sup>

When Congress agrees to a spending law, it therefore is making a statement about the importance of various choices, both absolutely and relatively. If Congress as a whole determines that there should be a certain level of social spending versus military spending, for example, it is almost surely true that each member of Congress would have preferred a different balance. The ultimate spending bill, therefore, represents in raw form the political balance of power in any given year.

Similarly, the tradeoffs involved in designing the tax laws is also deeply political. A Senator who would prefer a pure consumption tax allows the income tax to continue, on the condition that certain types of saving are exempt from taxes. A believer in low corporate tax rates negotiates a compromise in which she allows somewhat higher rates, on the condition that the recognition of certain corporate income can be deferred. The nature and complexity of the political choices is limited only by the imaginations of the parties to the negotiations.

Putting the taxing and spending decisions together, as the process of determining the budget and appropriations proceeds, multiplies the ways in which the result is best viewed as a set of quid pro quos and understandings that each

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<sup>121</sup> See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE SYSTEM, PURPOSES AND FUNCTIONS 85 (2005) ("Each of the twelve Reserve Banks is authorized by the Federal Reserve Act to issue currency, and the Department of Treasury is authorized to issue coin."), available at [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf).

<sup>122</sup> See William G. Jacoby, *Public Attitudes toward Government Spending*, 38 AM. J. POL. SCI. 336, 336 (1994) (noting that government spending is a "significant policy issue" in U.S. election campaigns); Susan A. MacManus, *Taxing and Spending Politics: A Generational Perspective*, 57 J. POL. 607, 607 (1995) ("[T]axing and spending issues are increasingly at the forefront of most elections."); Gerald F. Seib, *Taxes Emerge as Defining Issue for 2012 Campaign*, CAP. J., Sept. 19, 2011 (arguing that taxes are an important issue in every election, but will be particularly significant in the 2012 election because of the nation's economic distress), available at <http://online.wsj.com/article/SB10001424053111903374004576580710594126704.html>.



member of Congress expects to be honored. These tradeoffs and balances fully satisfy no one, of course, but they are hammered out in the atmosphere of a representative body that is constitutionally empowered to make just such difficult choices.

The debt ceiling could be viewed as merely part of this mixture of tradeoffs. When Congress passed the 2011 budget in spring 2011,<sup>123</sup> perhaps it did so in the full knowledge that what its members were agreeing upon would never be enacted. If that were true, however, it would suggest that the debt ceiling was being used as a bait-and-switch mechanism, with one side acting in bad faith, never intending to honor the compromises over taxing and spending to which it had agreed.

In any event, the question posed by the trilemma is not whether the will of Congress might be frustrated by the President's choice about how to proceed. The key issue is *which choice* least threatens Congress's higher priorities. If Congress passes a budget that implies a level of borrowing, yet it also leaves in place prior legislation that purports to forbid that new level of borrowing, a President who ignores the debt ceiling will honor the most recent—and, we would argue, most important—of Congress's stated priorities, allowing the absolute and relative magnitudes of taxes and spending mandated by Congress to be carried out.

The worst that can happen in such a case is that Congress would need to undo the damage in a future budget. That is, if the President's guess is incorrect, and Congress's highest priority was to prevent the national debt from exceeding a certain dollar amount, then Congress has the power to pass budgets in future years with surpluses sufficient to return to the debt level that it prefers.<sup>124</sup> The damage that might be wrought in the meantime, or by having to live under a more austere budget in future years than otherwise, is a cost of ignoring Congress's will today. The costs of allowing a President to violate the balance of Congress's priorities in taxing and spending, however, are much more difficult to undo.

Finally, the prudential tradeoffs inherent in the trilemma can be framed as a question of how much power each choice confers on the President. For the foregoing reasons, it seems clear that the President would minimize his assumption of power by issuing debt than by rebalancing taxing and spending choices. Or, to put it in partisan political terms, which choice would be the least worrisome, from the standpoint of a member of Congress who is not from the President's party? While reasonable people might offer different answers to that question, giving the President the power with the least latitude—and that is most easily reversed—strikes us as the prudent choice, no matter which parties control the various political bodies.

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<sup>123</sup> See Hook, *supra* note 57.

<sup>124</sup> Indeed, as noted above, *see supra* text accompanying notes 106-107, Congress can even prospectively couple a "hard" debt ceiling with a delegation to the President of the power to impound appropriated spending.

### E. The Hierarchy of Choices

Our analysis, therefore, is not designed to favor one party or ideology over another. We believe that anyone who values the separation of powers, and who wishes to protect Congress's prerogatives under the Constitution, would be best served in the first instance by making sure that no President is ever faced with such a choice. If the political system fails, however, the President can best honor the balances inherent in the Constitution by ignoring the debt ceiling.

But as we noted above, markets could react so badly to the prospect of Presidential bonds as to reduce the President's trilemma to a dilemma: unilaterally cut spending or raise taxes. Which of these options would be less unconstitutional? Surprisingly, our hierarchy of choices tentatively suggests that the President's second-best choice would be to raise taxes.<sup>125</sup> In addition to the administrative advantages noted above, raising taxes rather than cutting spending would not shortchange persons who are legally entitled to government funds. Thus, raising taxes, like ignoring the debt ceiling, avoids a violation of Section 4 of the Fourteenth Amendment,<sup>126</sup> whereas spending cuts, depending on their size and apportionment, could violate Section 4 in addition to separation of powers.

It is curious that during the summer of 2011 so many commentators and politicians considered the choice to cut spending as not merely the least bad choice, but actually a constitutionally valid choice.<sup>127</sup> We, by contrast, recognize that all of the President's choices would be unconstitutional, and we believe that the *worst* choice would be for the President to seek to cut spending below the levels authorized by Congress.

What explains this difference in perspective? Partly, we candidly admit that our own conclusion about the relative constitutional merits of the President's unilaterally cutting spending versus raising taxes is substantially less certain than our conclusion that ignoring the debt ceiling is less bad than either of the other options. After all, the tax code is filled with deductions and credits that serve the same economic function as spending,<sup>128</sup> and so increases in taxes, even when

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<sup>125</sup> Note also that the President's choices to increase taxes would be immediately justiciable, once a person paid their higher level of tax liability and sought a refund.

<sup>126</sup> U.S. CONST. amend. XIV, § 4.

<sup>127</sup> See Binyamin Appelbaum, *Debt Ceiling Has Some Give, Until Roof Falls In*, N.Y. TIMES (May 4, 2011), <http://www.nytimes.com/2011/05/05/business/economy/05debt.html> (noting that the Republican plan to prioritize interest payments if the debt limit is reached necessarily requires spending cuts); Sen. Jim Demint, *More Spending Is a Threat to America*, POLITICO (Jan. 24, 2011, 4:50 AM), <http://www.politico.com/news/stories/0111/48020.html> (suggesting that government spending is a greater threat to the full faith and credit of the United States than increasing the debt limit); Carl Hulse, *Boehner Outlines Demands on Debt Limit Fight*, N.Y. TIMES (May 9, 2011), <http://www.nytimes.com/2011/05/10/us/politics/10boehner.html> (reporting that Speaker Boehner demands "trillions of dollars in federal spending cuts in exchange for [Republican] support of an increase in the federal debt limit).

<sup>128</sup> See Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706–07 (1970) (explaining that tax expenditures are similar to direct spending because they promote governmental aims and giving examples of tax expenditures found in the tax laws).

easier to administer than cuts in spending, may implicate the very same sorts of policy tradeoffs. From the perspective of separation of powers, therefore, the two could be seen as equally unconstitutional.

In addition, there is a palpable sense that unilateral increases in taxes by the President are unthinkable in a way that unilateral spending cuts by the President are not.<sup>129</sup> We fully acknowledge that, as noted above, this sense that a President *just can't do that* would certainly constrain the President from raising taxes as a matter of politics. Still, it is not clear that this political constraint is a constitutional constraint. To be sure, longstanding practice is a factor in constitutional interpretation, and while there is a tradition of Presidents spending less money than Congress appropriated,<sup>130</sup> there is no tradition of Presidents raising taxes. But there is less to this point than meets the eye, because there is also no tradition of Presidents spending less money than Congress appropriated, *when Congress has required that the appropriated sums be fully spent*.

Thus, we would stick with our tentative conclusion that, if faced with the dilemma of unconstitutionally raising taxes or unconstitutionally cutting spending, the President would act less unconstitutionally by raising taxes. We are substantially more confident in our conclusion that he would act still less unconstitutionally by ignoring the debt ceiling, so long as the bond markets cooperated sufficiently to convert the dilemma into a trilemma,

By now, however, readers may be wondering exactly what we mean when we say that one course of action is *more or less* unconstitutional than another. Isn't constitutionality an on/off condition, like pregnancy? We hope that the discussion so far shows why the answer is no. In the next Part, we build on the foregoing analysis to develop a more general account of degrees of unconstitutionality.

#### **IV. Beyond the Debt Ceiling: The General Problem of No Constitutional Options**

The prior Parts of this Article conceptualized the choice President Obama nearly faced in the summer of 2011 as a choice among unconstitutional options. We also offered views about how a President ought to choose among the particular unconstitutional options of unilaterally raising taxes, unilaterally cutting spending and unilaterally issuing debt. Readers may disagree with our ordinal rankings. Readers may even disagree with our contention that the only realistic options during the debt ceiling crisis were all unconstitutional. But we hope that most readers will agree with us that the general problem warrants further consideration. In this Part, we analyze the problem in general terms: How should government officials choose among unconstitutional options?

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<sup>129</sup> See *supra* notes 41–44 and accompanying text. See also MacManus, *supra* note 76, at 623 (discussing a survey of different age groups that showed “all age groups overwhelmingly prefer spending cuts to tax increases.”).

<sup>130</sup> See *supra* notes 45–47 and accompanying text.

One might think that when faced with no constitutional options, the President (or some other legal actor) is freed of constitutional constraint, at least where the President (or other legal actor) has not himself created the circumstances necessitating a fateful choice. For concreteness, suppose that Congress had failed to raise the debt ceiling in the summer of 2011 and that Congress alone bore responsibility for that failure. President Obama might then have reasoned as follows: *Congress has put me in the untenable position of having to violate the Constitution, so Congress cannot now be heard to complain if I usurp one, rather than another, of its powers.* Although we have some sympathy for such a sentiment,<sup>131</sup> we think it is ultimately wrong, and dangerously so.

The costs of constitutional violations will be borne by the People, not just Congress, both in a practical sense—because people will be required to forgo payments or pay higher taxes now or in the future—and in a constitutional sense—because structural constitutional provisions ultimately serve the People, not the institutions they directly protect.<sup>132</sup> Thus, even when Congress has wholly avoidably created a constitutional trilemma (or other multi-lemma) for the President, he cannot use that fact as a reason to, in effect, punish the People.

Furthermore, the “all bets are off” line of reasoning has no logical stopping point. If the necessity of violating the Constitution in *some* way empowers the President to violate the Constitution in *any* way, then a constitutional multi-lemma gives the President potentially unlimited power. To stick with the debt ceiling example, he could, in violation of the constitutional allocation of war making powers,<sup>133</sup> unilaterally order the armed forces to invade Venezuela or Iran, sell its oil on the world market, and use the proceeds to make up any shortfall between appropriations and revenues from authorized taxing and borrowing. He could, in violation of Alaska’s equal suffrage in the Senate (and other constitutional limits),<sup>134</sup> sell Alaska back to Russia. And so forth. We think it clear from these and other examples that might be adduced that not all constitutional violations are equivalent.

Once one recognizes that some constitutional violations are worse than others, however, there arises the difficult question of developing metrics for comparison. We do not attempt to formulate an algorithm but we do think that some general principles can be stated, most of them implicit in our discussion of the debt ceiling crisis in Parts II and III. After explaining why the problem is less

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<sup>131</sup> Below we explain that reasoning of this sort may warrant the conclusion that the courts generally should treat a political actor’s choice among unconstitutional options as presenting a non-justiciable political question. *See infra* text accompanying note 201.

<sup>132</sup> *See* *Bond v. United States*, 564 U.S. \_\_\_, 131 S.Ct. 2355, 2364 (2011) (“States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.”) (citation omitted).

<sup>133</sup> *See* U.S. CONST. art. I, § 8, cl. 11-18.

<sup>134</sup> *See, e.g.*, U.S. CONST. art. IV, § 4 & amend. XVII.

rare than one might think, the balance of this Part elucidates three criteria to guide the choice: Minimize the unconstitutional assumption of power; minimize sub-constitutional harm; and preserve, to the extent possible, the ability to undo or remedy constitutional violations.

#### A. The Scope of the Problem

There is virtually no legal doctrine governing the choice among unconstitutional options. That absence partly reflects the fact that the Constitution's commands are almost entirely negative, forbidding rather than requiring certain actions. For example, government officials may not *deprive* persons of life, liberty or property without due process, but they generally need not take any affirmative steps to *provide* persons with various protections and benefits.<sup>135</sup> Accordingly, when faced with the temptation to act unconstitutionally, government actors can usually satisfy the Constitution by simply doing nothing.

However, government actors sometimes labor under affirmative duties. Two such duties were at issue in the debt ceiling crisis. The Take Care Clause imposes one duty. The President's duty to take care that the laws are faithfully executed is best understood as an affirmative duty to execute the law.<sup>136</sup> Thus, although justiciability doctrines limit the ability of private parties to seek court orders to the Administration to carry out the law,<sup>137</sup> the duty exists nonetheless. A President who refused to execute some law would, at a minimum, need to explain to the public (and perhaps to members of Congress seeking to impeach him) that the law is either unconstitutional<sup>138</sup> or that refusal to execute the law in some set of circumstances was a valid exercise of prosecutorial discretion.<sup>139</sup> Simple non-enforcement would be, *prima facie*, a breach of constitutional duty.<sup>140</sup>

Section 4 of the Fourteenth Amendment indicates another affirmative duty of the President. Suppose that some bonds or other government bills came due. Suppose further that, under the best interpretation of Section 4, failure to pay the bondholders and other bill submitters would call into question the public debt, and thus violate Section 4. That conclusion is a conclusion that Section 4 imposes an affirmative obligation. Phrased in the passive voice ("shall not be

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<sup>135</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 201-02 (1991); *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 195-96 (1989).

<sup>136</sup> See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1471 (1988).

<sup>137</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>138</sup> See *Presidential Auth. to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994).

<sup>139</sup> See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293 (2006).

<sup>140</sup> See *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) ("Article II, Section 3 . . . does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary.")

questioned”),<sup>141</sup> the provision’s language draws no distinction between *acts* that would call the public debt into question and *omissions* that would do so. Indeed, one would expect that in the usual course Section 4 would most frequently apply to omissions (namely, failures to pay).

Nor is the President the only government actor with affirmative obligations under the Constitution. For example, government officials have affirmative duties to persons in their custody, such as prisoners.<sup>142</sup>

Or consider the situation of a trial judge faced with a request by a criminal defendant to restrict press access to courtroom proceedings in some way in order to guarantee a fair trial. Doing nothing is not in any meaningful sense an option. To be sure, the trial judge could order that the indictment be dismissed on the ground that there is no way to fully honor both the defendant’s Sixth Amendment rights and the First Amendment rights of the press. In a sense, that would be doing nothing. But we think—and as we explain below, the courts think—that this is too high a price to pay to avoid choosing the lesser constitutional evil.

In light of the fact that government actors will, from time to time, need to choose among unconstitutional options, how should they make that choice? We next elaborate three salient principles.

#### B) Minimize the Unconstitutional Assumption of Power

In our discussion of the practical dimensions of the various horns of the trilemma in Part III, we noted how a Presidential decision to ignore the debt ceiling would require a smaller exercise of distinctively policy judgment than would be required by a decision to cut spending or raise taxes. That factor matters for the comparative constitutional analysis because of the nature of the underlying violations. Any Presidential decision to tax, borrow, or spend (or not spend) without congressional authorization violates the principle of separation of powers because the powers to tax, to borrow and to spend (or not spend) are all allocated to Congress, not the President.<sup>143</sup> But in so allocating power, the Constitution also allocates to Congress the power to make the innumerable policy tradeoffs and compromises that go into a budget.<sup>144</sup> Indeed, one could readily say that the Constitution allocates to the most representative branch of the federal

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<sup>141</sup> U.S. CONST. amend. XIV, § 4.

<sup>142</sup> See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976).

<sup>143</sup> See, e.g., U.S. CONST. art. I, §§ 8, cl. 1-2 & 9, cl. 7; 2 J. Story, *Commentaries on the Constitution of the United States* §§ 903-908 & 1051 (1st ed. 1833). See also CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES* 226 (1948) (discussing President Lincoln’s unauthorized advancement of two million dollars of unappropriated funds to three private citizens).

<sup>144</sup> See STEPHEN E. FRANTZICH & CLAUDE BERUBE, *CONGRESS: GAMES AND STRATEGIES* 9 (4th ed. 2010); JAMES J. GOSLING, *ECONOMICS, POLITICS, AND AMERICAN PUBLIC POLICY* 64 (2008) (noting that Congress’s choices in the budgetary process “represent an amalgam of compromises and accommodations that have presidential initiatives as their starting point.”).

government the powers to tax, borrow and spend precisely because the exercise of these powers involves inherently political choices.

One might plausibly disagree with our conclusion that the President assumes more legislative policy power when he unilaterally cuts spending than when he unilaterally raises taxes. One could even disagree with our conclusion that the President assumes more legislative policy power when he unilaterally cuts spending or raises taxes than when he unilaterally issues Presidential bonds. But we hope that no one will disagree with our underlying view that, other things being equal, as between two ways of unilaterally exercising legislative power in violation of the Constitution, the President should choose the course in which he unconstitutionally exercises less legislative power.

In choosing whether to usurp the legislative power to borrow, tax, or (not) spend, the President apparently faces a choice among roughly commensurable constitutional violations. Each power is allocated to Congress, and so the President compares apples to apples in choosing whether the constitutional balance of power will be more or less upset by his unilateral exercise of one rather than another power.

Yet the actions in question are not exactly commensurate: One might think that taxing is somehow more quintessentially a legislative power than borrowing or spending,<sup>145</sup> in which case one might conclude (contrary to our own tentative conclusion in Part III), that the constitutionally worst option would be for the President to unilaterally raise taxes. Further, depending on which unilateral course the President chooses, he might violate constitutional provisions beyond separation of powers.<sup>146</sup> As we discussed in Part III, a Presidential decision unilaterally cutting spending would potentially violate Section 4 of the Fourteenth Amendment as well as separation of powers. Meanwhile, a Presidential decision to unilaterally raise taxes could be said to violate the provision of Article I requiring that bills raising revenue must originate in the House of Representatives.<sup>147</sup> There is no agreed-upon metric for aggregating and weighing these respective constitutional violations. Indeed, so far as we are aware, there does not even appear to be any awareness of the potential problem.

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<sup>145</sup> See ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 77 (2010); *THE FEDERALIST* NO. 33 (Alexander Hamilton).

<sup>146</sup> For example, the President's choice to cut spending could violate the due process clause where entitlement benefits were impacted. See also *supra* text accompanying note 134.

<sup>147</sup> See U.S. CONST. art. I, § 7, cl. 1.

The relevance of the Fourteenth Amendment to the analysis highlights an important, more general, problem: Some circumstances might require a President or other legal actor to trade off structural constitutional violations, such as separation of powers, against rights provisions, such as Section 4 of the Fourteenth Amendment. And if you think that Section 4 is not a rights provision, consider a hypothetical variation on the debt ceiling crisis that clearly does involve a rights provision.

Suppose that Congress purported to “solve” the debt ceiling impasse by raising the debt ceiling by an amount insufficient to cover the existing shortfall, but that, in violation of the Takings Clause<sup>148</sup> and (maybe) the Bill of Attainder Clause,<sup>149</sup> Congress made up the difference by including in the same bill a measure confiscating the holdings of a small number of extremely wealthy individuals named in the bill. Could the President sign the bill on the theory that violating the Takings Clause and (maybe) the Bill of Attainder Clause would be no worse than usurping legislative power, as he would have to do under the trilemma if he vetoed the legislation? Or, conversely, is it categorically worse to violate two constitutional provisions or doctrines—the Takings Clause and the Bill of Attainder Clause—than to violate just one—the separation-of-powers doctrine? Would the confiscation plan be constitutionally equivalent to unilateral Presidential action cutting spending because each action involves two distinct constitutional violations?

We would reject the notion that the key question is the *number* of constitutional provisions at stake. Perhaps if other things were equal, then one could say that it is worse to violate  $n+1$  constitutional provisions than to violate  $n$  constitutional provisions. But more broadly, we think it fairly clear that any measure of comparative constitutional harm should be qualitative, not quantitative—or at least not *merely* quantitative.

Consider an admittedly fanciful example. Suppose a criminal madman slips undetected into the Oval Office and, holding a loaded gun to the head of the President, orders him either: (1) to instruct FBI agents to perform a warrantless search of the home of the criminal’s ex-wife, and charge her with possession of obscenity when they find a copy of *Lady Chatterley’s Lover*; or (2) to unilaterally declare war on Iran and order a nuclear strike against Tehran. Assuming the President is unwilling to take a bullet for the Constitution (as the consequence of a refusal to make a choice),<sup>150</sup> we think it fairly clear that the President should choose option (1). Option (1) is not only less harmful than option (2), but also less unconstitutional, even though option (1) involves violating two constitutional provisions (the Fourth and First Amendments), whereas option (2) only involves violating one (the allocation to Congress of the power to declare war).<sup>151</sup>

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<sup>148</sup> U.S. CONST. amend. V.

<sup>149</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>150</sup> In the next sub-Part, we shall have more to say about whether the President or other government official must always choose a constitutional option, if available, even if the only constitutional options are catastrophic. For now, readers who think that the President should simply refuse to choose should imagine a variant on the hypothetical example in which the madman informs the President that if the President refuses to choose either option, the madman—



What we take to be shared intuitions about the foregoing example also undercut any suggestion that rights are trumps<sup>152</sup> in the sense that one should always prefer violating some non-rights provision to violating a rights provision. Rights may be trumps in the sense that they prevail against most utilitarian goals,<sup>153</sup> but they are not trumps in the sense that they always prevail against other (non-rights) constitutional provisions. Indeed, constitutional doctrine allows that rights can generally be overridden by a law that is narrowly tailored to serve a compelling interest,<sup>154</sup> whereas most non-rights provisions do not appear to permit such overrides. For example, the legislative veto is not permitted even if it is narrowly tailored to serve a compelling interest,<sup>155</sup> whereas a law that abridges freedom of speech or uses a suspect classification would be valid if it had those characteristics.<sup>156</sup>

That difference suggests that perhaps the opposite presumption should apply. In other words, perhaps non-derogable constitutional provisions (like the Article I, Section 7 requirements at issue in the line-item veto case) should generally prevail over derogable ones (like the rights to free speech and to equal protection). We think that there may be a limited sense in which such a presumption in fact makes sense: Complying with separation of powers, federalism or other non-derogable constitutional limits could, in principle, be the sort of compelling interest that justifies use of a race-based classification or a content-based regulation of speech.<sup>157</sup>

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who is, among his other talents, an excellent mimic—will impersonate the President and order *both* the violation of the rights of the madman’s ex-wife and the nuclear strike on Tehran. Thus, in this modified example, failure to choose itself leads to unconstitutional actions.

<sup>151</sup> See U.S. CONST. art. I, § 8, cl. 11.

<sup>152</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi-xv & 367 (1977).

<sup>153</sup> See RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* 370 (1985).

<sup>154</sup> For this reason, Professor Schauer has aptly stated that rights are better understood as shields rather than trumps. See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429-30 (1993).

<sup>155</sup> See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

<sup>156</sup> See, e.g., *Hill v. Colorado*, 530 U.S. 703, 725-26 (2000).

<sup>157</sup> Cf. *Ricci v. DeStefano*, 557 U.S. \_\_\_, 129 S.Ct. 2658, 2677, 2681 (2009) (stating that compliance with Title VII could be a compelling interest justifying presumptively impermissible race-conscious public employment measures).

But one must be careful not to run too far with this line of analysis. Although saving the President's life certainly counts as a compelling interest, we do not think it would be accurate to say that it is therefore constitutionally permissible for the President to order the FBI to charge the gun-wielding madman's ex-wife with obscenity for possessing non-obscene materials. First Amendment doctrine is not derogable on this particular: It does not utilize the compelling interest test to determine what qualifies as obscenity.<sup>158</sup> Likewise, neither is doctrine under the Fourth Amendment, the other rights provision in our hypothetical case, exactly derogable. To be sure, there are exceptions to the warrant requirement, and some of them—such as the exigent circumstances exception<sup>159</sup>—are based on compelling interests, but the doctrine does not directly ask in particular cases whether to sacrifice the right for the sake of a compelling interest.<sup>160</sup> So the possibility of using existing doctrine under a constitutional right to accommodate a structural constitutional provision will not always be available.

Moreover, even when a right can be overridden by a compelling interest, the doctrine assumes that overriding the right is necessary to achieve that compelling interest in some non-fortuitous way.<sup>161</sup> Yet the gun to the head of the President bears the wrong sort of causal relationship to any benefit that would derive from charging the madman's ex-wife with obscenity for such a charge to qualify as narrowly tailored to advancing a compelling interest. We think that in our hypothetical example it is more straightforward and more accurate to say that the madman creates a choice for the President between unconstitutional options. To characterize one option as valid in virtue of the fact that it enables the President to avoid the other option is to omit the key step in the process: deciding which option is worse. We shall return to this characterization issue in Sub-Part (C) below.

For now, we want to note the seemingly irreducible mushiness of any plausible test for degrees of unconstitutionality. It is easier to state what the test should not be than what it should be. As noted above, the test should not simply count the number of constitutional violations. Nor do we think that there can be any all-purpose hierarchy of constitutional provisions. To use an example to which we shall return below, it may be tempting to say that the First Amendment is more important than the Sixth Amendment or vice-versa, but nothing in the constitutional text or our history provides a basis for either judgment.<sup>162</sup> And one can imagine circumstances in which the values underlying one provision prevail over those underlying the other, as well as vice-versa.

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<sup>158</sup> See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. United States*, 354 U.S. 476, 489 (1957).

<sup>159</sup> See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1857-58 (2011).

<sup>160</sup> See *id.* at 1858-1860.

<sup>161</sup> See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011).

<sup>162</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (“The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”).

To make that last point concrete, suppose that the gun-wielding madman has different priorities. Suppose that he offers the President the following choice: (1) Send the FBI to the home of a potential whistleblower with instructions to seize and destroy documents exposing high-level government corruption;<sup>163</sup> or (2) approve, and then act upon, a State Department legal memorandum asserting that American support for Libyan rebels in their resistance against the Gadaffi regime can continue without notification to Congress under the War Powers Act.<sup>164</sup> Even assuming that the President believes that course (2) would usurp the war-declaring power of Congress, he could nonetheless fairly conclude that course (2) is *less unconstitutional* than course (1) because the abuse of power entailed by (1) makes the violation of the Fourth and First Amendments worse in this case. Comparing this conclusion with the conclusion we reached with respect to the first set of choices discussed above in the original gun-wielding madman scenario, we see that the question whether one unconstitutional course is more or less unconstitutional than another can yield different answers in different circumstances, even when the exact same constitutional provisions are in play.

Does that mean that the entire enterprise of comparing unconstitutional courses of action is utterly mysterious? Not necessarily. To say that one cannot devise an all-purpose formula for weighing constitutional harms against one another is not to say that the enterprise is hopelessly subjective. We think that the sorts of factors that might be invoked in particular circumstances will often garner consensus. Indeed, we are familiar with courts and political actors making the relevant sorts of judgments, even if we are unaccustomed to thinking of them in the terms described in this Article.

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<sup>163</sup> This scenario is not very different from what President Nixon ordered with respect to Daniel Ellsberg, except of course that no one was holding a gun to Nixon's head at the time.

<sup>164</sup> See Memorandum from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to Att'y Gen. Eric Holder, Auth. to Use Military Force in Libya, 2011 WL 1459998 (U.S.A.G. Apr. 1, 2011) ("We concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.").

Consider the choice courts must make in deciding whether to adopt a proposed narrowing construction of a statute in order to avoid a difficult constitutional question. On the one hand, courts try to construe statutes so that they are constitutional, because invalidating a statute is a serious affront to the democratic will as expressed through the legislature.<sup>165</sup> On the other hand, courts will not wholly re-write statutes in order to avoid a difficult constitutional question, because such re-writing is a different sort of affront to the democratic will, insofar as it usurps the legislative function.<sup>166</sup> Which affront is worse? The cases do not give a categorical answer, instead applying context-specific judgment to allow creative interpretation but not re-writing. While there is no sharp boundary line between those activities, there can be consensus about a great many cases that fall on one or the other side of the boundary.

We think the same should be true about choices among unconstitutional options. In our discussion of the debt-ceiling crisis in Part III, we gave context-specific reasons why a Presidential decision simply to ignore the debt ceiling would require the exercise of substantially less legislative-style policy judgment than the decision of what programs to cut and by how much or the decision of what taxes to raise and by how much. That judgment reasonably closely parallels the sort of judgment courts must make in deciding whether a statute can fairly bear a proposed narrowing construction. Indeed, if anything, the argument that ignoring the debt ceiling usurps less legislative power than either cutting spending or raising taxes strikes us as more decisive than common arguments for adopting or rejecting a narrowing construction of a statute challenged as unconstitutional. More broadly, here, as elsewhere, an admittedly mushy multi-factor test can still yield clear answers in cases far from the margins.

### C) Minimize Sub-Constitutional Harm

Another lesson that emerges from the debt-ceiling crisis is that decision makers ought to try to minimize sub-constitutional harm as well as constitutional harm. Here, “sub-constitutional” harm refers to real harm—economic hardship or even lost lives—but not necessarily harm that *amounts to* a constitutional violation. The difference between the two madman scenarios sheds light on what we mean. In both instances, option 2 involved the unconstitutional usurpation by the President of the power of Congress to commit the nation to war. But part of what made option 2 worse in the first scenario than in the second scenario was a judgment about consequences: It would be worse to use nuclear weapons against Iran than to provide air support for Libyan rebels because the consequences of using nuclear weapons against Iran—the deaths of millions of Iranian civilians and the possibility of nuclear retaliation against the United States or its allies—would be so much worse than the consequences of supporting Libyan rebels—at

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<sup>165</sup> See, e.g., *Crowell v. Benson*, 285 U.S. 22, 62 (1932);

<sup>166</sup> See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1591-92 (2010); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997).

best displacing a dictator with democracy and at worst a mostly-contained civil war.

But in saying that differences between the consequences of unconstitutional options matter, we do not mean to say that consequences are *all* that matters. A President's decision to ignore the debt ceiling, we have emphasized, would usurp less legislative power—and would thus be less unconstitutional—than a President's decision to decide which spending programs to cut and by how much or which taxes to raise and by how much. Ignoring the debt ceiling would continue to be less unconstitutional than either of the other unilateral Presidential actions even if it appeared that, on balance, one of these other options would lead to somewhat better consequences. Perhaps the damage to the economy from the government having to pay higher rates of interest on Presidential bonds could be expected to be greater than the damage to the economy from the expected loss of confidence that would arise from unilateral Presidential action cutting spending or raising taxes. Even so, we think that ignoring the debt ceiling would be the less unconstitutional option—unless the differences in projected consequences were reckoned in orders of magnitude. Put differently, taking the Constitution seriously—and rejecting the “all bets are off” approach—means giving priority to minimizing constitutional harm, while treating as secondary the principle that sub-constitutional harm ought to be minimized.

To be sure, giving priority to the avoidance of constitutional harm does not mean giving it *absolute* priority. If the consequences of following what would otherwise be the least unconstitutional of several unconstitutional paths would be truly catastrophic, then we think that government officials would be justified in choosing an otherwise somewhat more unconstitutional option that did not lead to catastrophe. With this caveat, our view is analogous to what moral philosophers call *threshold deontology*: one treats certain rules as impervious to arguments for being overridden by consequentialist considerations, unless the expected adverse consequences rise above a threshold of moral catastrophe.<sup>167</sup> For example, a threshold deontologist might say that torture is morally impermissible to save a life or even ten lives but that it is permissible to save a million lives.<sup>168</sup> Likewise here, a President should not choose to cut spending or raise taxes rather than ignore the debt ceiling in order to save a few million dollars in GDP, but he could make that choice to avert a substantial chance of a worldwide depression.

The principle of catastrophe-avoidance also applies—or at least, we would argue, *should* apply—even in circumstances in which the President or some other political actor has available at least one technically constitutional option. For parallelism we shall call our view of this question *threshold constitutionality*. Just as threshold deontologists are deontologists below a threshold of catastrophic harm, threshold constitutionalists favor compliance with the Constitution below a threshold of catastrophic harm.

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<sup>167</sup> See, e.g., Michael S. Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280 (1989); Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

<sup>168</sup> See Alexander, *supra* note 167, at 898-901. Compare Moore, *supra* note 167, at 314-15.

We can illustrate threshold constitutionality by reference to Professor Balkin's "jumbo coins" proposal. Recall that Balkin argued that, even if Congress had failed to raise the debt ceiling, the President could have avoided acting unconstitutionally if he had instructed the Treasury Department to mint two one-trillion-dollar platinum coins to be deposited in the government account with the Federal Reserve, thereby creating an additional two-trillion dollars for the government to spend on its obligations.<sup>169</sup>

We note two objections to the jumbo coins proposal. First, the very act of minting trillion-dollar coins looks so cartoonish and desperate that it could undermine faith in the government's ability to repay its obligations, and for that reason might be understood as a violation of Section 4 of the Fourteenth Amendment.<sup>170</sup> A public that observes the federal government resorting to exotic gimmicks like minting trillion-dollar coins has reason to worry that public debt may go unpaid. Second, even if one takes a narrower view of Section 4—so that nothing short of actual default on obligations counts as a violation—the jumbo coins proposal would likely spook the markets, leading lenders to demand a very high rate of interest.

But is that second factor a legitimate consideration absent constitutional necessity? Suppose that the jumbo coins would not actually violate Section 4 of the Fourteenth Amendment or any other constitutional provision. Even if minting the jumbo coins would have terrible consequences, would the President nonetheless be obligated to prefer the jumbo coin option to one of the unconstitutional options (such as ignoring the debt ceiling, cutting spending or raising taxes)? Is there some requirement that a President (or other government official) must exhaust his or her constitutional options, no matter how disastrous, before he or she may even consider unconstitutional options? More generally, is threshold constitutionality justified? We think it is, although we also think that most of our analysis should be relevant to those who disagree.

Disagreement with threshold constitutionality would lead to an absolutist position. No matter how high the cost of compliance, the absolutist says that government officials simply may not violate the Constitution if they have any constitutional options. In this view, a non-defeasible constitutional provision or doctrine—like the separation of powers—is just that: completely non-defeasible.<sup>171</sup>

For the absolutist, choices among truly unconstitutional options will rarely arise, because any constitutional option—no matter how outlandish or tragic—will have to be given priority. Under this view, the President must sacrifice his life to the gun-wielding madman rather than choose one of the two unconstitutional options; he must also choose the jumbo coins option (or some equally outlandish but constitutionally valid scheme) if he concludes that it is constitutional, even if doing so would bring financial ruin that could have been avoided by one of the other unconstitutional options.

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<sup>169</sup> See Balkin, *supra*, note 21.

<sup>170</sup> See *supra* note 82 and accompanying text.

<sup>171</sup> See CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 76-80 (9th ed. 2009).

We think that the absolutist position for rejecting threshold constitutionality is unjustified for the same sorts of reasons that have been advanced in favor of threshold deontology. Where a deontological purist would avoid telling a lie even at the cost of ending the world, we would not. President Lincoln most clearly expressed the constitutional equivalent of threshold deontology in explaining (through a rhetorical question) his willingness to temporarily sacrifice Congressional authority over suspension of the writ of habeas corpus<sup>172</sup> while the Union's survival hung in the balance: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>173</sup> Averting catastrophe, in Lincoln's view and ours, warrants violating the Constitution.

That is not to deny that there is something to be said for the absolutist view. One might worry that if constitutional provisions are not deemed inviolable, government officials will attach too little weight to them. The absolutist stance is sub-optimal, in this approach, but *less* sub-optimal than any approach that rejects absolute prohibitions. To continue the torture analogy, if the law purports to permit torture but only in the ticking-bomb scenario, one might worry that the government will start hearing bombs ticking everywhere.<sup>174</sup> An absolute rule deliberately overshoots the mark to avoid the worse sin of undershooting the mark.<sup>175</sup>

Notwithstanding the foregoing logic, one might conclude—as we do in the present context—that there are both principled and pragmatic problems with a deliberately over-inclusive absolute prohibition. If one thinks that catastrophes ought to be averted, then, as a matter of principle, there is something dishonest about pretending that one takes an absolutist stance. Moreover, as a practical matter, it is hardly clear that the absolutist prohibition does not lead to over-deterrence. By hypothesis, threshold constitutionality only permits resort to unconstitutional action to avert a catastrophe, and so adopting the absolutist position risks bringing about catastrophes. At a minimum, before adopting the absolutist position, one ought to consider the alternatives.

One alternative would be a version of threshold constitutionality that incorporates catastrophe avoidance into considerations of constitutionality. In this approach, catastrophe avoidance operates *within* constitutional law to treat an otherwise unconstitutional course of action as constitutional so long as it is the least unconstitutional of the possible courses of action that avoid catastrophic

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<sup>172</sup> See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

<sup>173</sup> See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

<sup>174</sup> Worse yet, the government may deliberately aggravate situations in order to justify the use of torture. See Alexander, *supra* note 167, at 902-04 (describing the possibility of intentionally increasing danger in order to reach the deontological threshold).

<sup>175</sup> In the torture context, Oren Gross has argued that an absolute prohibition is optimal because it will lead to just the right amount of torture—almost none. See Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1486-87; 1501-11 (2004).

harm.<sup>176</sup> In the context of the debt ceiling crisis one might say something like this: We all *thought* that the separation of powers was non-defeasible but we have now encountered a case that leads us to conclude otherwise. Thus, the rule that says that the President may not borrow money (or tax or cut spending) without congressional authorization should be reformulated to say that the President may not borrow money (or tax or cut spending) without congressional authorization, *unless* doing so is necessary to avert a catastrophe. Call this the *accommodationist* version of threshold constitutionality: In this approach, the Constitution accommodates the need to avoid catastrophes by authorizing what might otherwise be constitutional violations.<sup>177</sup> Slogans like “the Constitution is not a suicide pact” reflect accommodationist sentiment.<sup>178</sup>

Accommodationism has deep roots in our constitutional culture and those roots generally prevent courts and other political actors from even recognizing that constitutional duties may conflict. Consider *Nebraska Press Ass’n v. Stuart*,<sup>179</sup> which involved at least the potential for a conflict between the First Amendment right of the press to report fully on a criminal trial and the Sixth Amendment right of the defendant to a fair trial untainted by pre-trial publicity. Speaking for the Court in that case, Chief Justice Burger began by appearing to recognize a textual conflict. He wrote: “The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”<sup>180</sup> He then disavowed any judicial power to “assign[] to one [right] priority over the other.”<sup>181</sup> And yet, the Court resolved the case.

How? By construing the outer bounds of the First and Sixth Amendments so that neither infringed the other. The Court held that the First Amendment right to freedom of speech and of the press can be overridden with gag orders where doing so is essential to ensuring a fair trial<sup>182</sup>—thus favoring the Sixth Amendment over the First Amendment if push comes to shove—but the Court

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<sup>176</sup> For similar approaches and critiques, see RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 157-58 (2006); Benjamin A. Kleinerman, *9/11, the Liberty/Security Balance, and the Separation of Powers*, 26 CRIM. JUST. ETHICS 59, 62 (2007) (reviewing POSNER, *supra*).

<sup>177</sup> See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

<sup>178</sup> This sentiment manifests frequently within the national security context. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution Is A “Suicide Pact”*, 20 WM. & MARY BILL RTS. J. 287 (2011). See also David Corn, *The “Suicide Pact” Mystery*, SLATE (Jan. 4, 2002, 11:04 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2002/01/the\\_suicide\\_pact\\_mystery.html](http://www.slate.com/articles/news_and_politics/politics/2002/01/the_suicide_pact_mystery.html).

<sup>179</sup> 427 U.S. 539 (1976).

<sup>180</sup> *Id.* at 561.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 562, 570.



also held that in the particular case there had not been a sufficient showing that muzzling the press was necessary to protect the defendant's right to a fair trial.<sup>183</sup>

Although we agree with the substantive result of *Nebraska Press Ass'n*, we regard the Court's claim to have avoided prioritizing rights as highly formalistic. The Court said, in substance if not in form, that the fair trial right is more important than the free press right, at least in a case of unavoidable conflict. But the Court somehow managed to persuade itself that conflict was avoidable.

What were the alternatives? An absolutist of the sort who would insist on the Treasury minting jumbo coins at the cost of crashing the global economy might say that the conflict in *Nebraska Press Ass'n* was avoidable. The defendant in that case was accused of murdering six people, but the Constitution does not *require* that every murderer be punished. If it was impossible for the defendant to receive a fair trial and to honor the freedom of the press, an absolutist would say that the constitutionally required solution is to simply dismiss the indictment.

The dismissal solution might take as its model the exclusionary rule in criminal procedure, which bars the admission of evidence obtained in violation of the Fourth or Fifth Amendment.<sup>184</sup> If there is insufficient other evidence for a jury to find a defendant guilty beyond a reasonable doubt, then the exclusionary rule effectively requires dismissal of an indictment.<sup>185</sup> If that rule obtains for the Fourth and Fifth Amendments, the absolutist might ask, why not for the First and Sixth Amendments?

The comparison is suggestive but, we think, ultimately unpersuasive, as the Supreme Court's own exclusionary rule jurisprudence indicates. In the post-Warren Court era, the case law has substantially whittled away at the exclusionary rule, recognizing numerous exceptions where the Justices find that application of the rule is not cost-justified.<sup>186</sup> We think that these exceptions show that the exclusionary rule has not been understood in absolutist terms. Although early cases invoking a judicial integrity rationale for the exclusionary rule could be understood in absolutist terms, the modern doctrine—which rationalizes the exclusionary rule as a deterrent to illegal police investigation<sup>187</sup>—shows the Court carefully calculating costs and benefits. Put simply, we do not have a criminal procedure doctrine that instructs courts to exclude unlawfully obtained evidence

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<sup>183</sup> *Id.* at 567.

<sup>184</sup> *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 649-50 (1961); *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985).

<sup>185</sup> *See United States v. Leon*, 468 U.S. 897, 908 n. 6 (1984) (discussing studies on the effect of the exclusionary rule on the disposition of felony arrests).

<sup>186</sup> *See, e.g.*, Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 691-94 (2011); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1399-1404 (1983).

<sup>187</sup> *See Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 990-991, 997-1000, 1006-10 (2010); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 192-93; 236-238 (1983).

even when the results would be catastrophic. We have more nearly the opposite: a set of doctrines that seek to limit the damage from strict insistence on the observance of constitutional rights.

Indeed, even those jurists who have resisted the erosion of the exclusionary rule need not be understood as constitutional absolutists. Rather, it may make more sense to understand their view as one that simply strikes a different balance from the balance that their tougher-on-crime colleagues strike.<sup>188</sup> For the would-be strict enforcers of the exclusionary rule, the long-term damage that comes from admitting unlawfully obtained evidence may seem greater than the harm that comes from occasionally permitting a guilty defendant to go free.<sup>189</sup>

If a weighing of costs and benefits underlies the Justices' avoidance of absolutism by commonly rejecting the application of the exclusionary rule as a remedy for acknowledged constitutional violations, no such open weighing is visible in their efforts to deal with circumstances in which two rights conflict. The Supreme Court's discussion of the options on offer in *Nebraska Press Ass'n* was typical for American jurisprudence in its failure to engage in open balancing, and in that respect the United States is an outlier. In most other constitutional democracies, a court (or other constitutional interpreter) would view a conflict between two rights (or any two constitutional provisions) as calling for balancing.<sup>190</sup> A court (or other actor) would ask, which right should prevail in the particular circumstances? The following figure illustrates the difference between accommodation of the *Nebraska Press Ass'n* sort and European or Canadian style balancing.

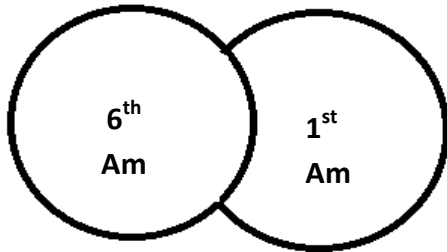
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<sup>188</sup> Cf. Stewart, *supra* note 60, at 1404 (“I have suggested that the exclusionary rule is a constitutionally mandated remedy, necessary to enforce the fourth and fourteenth amendments, and that proposals to modify the rule must preserve an effective remedy.”)

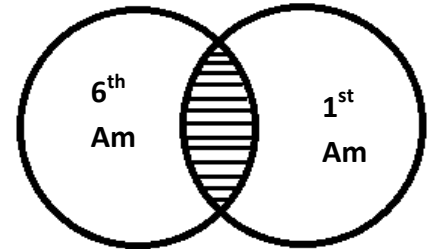
<sup>189</sup> See, e.g., John P. Gross, *Dangerous Criminals, the Search for the Truth and Effective Law Enforcement: How the Supreme Court Overestimates the Social Costs of the Exclusionary Rule*, 51 SANTA CLARA L. REV. 545, 570-71 (2011).

<sup>190</sup> See Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1291 (2011) (“many of the world's most respected constitutional courts, including the courts of Canada, Germany, Israel, India, and South Africa, in addition to the European Court of Human Rights and the European Court of Justice, incorporate balancing into forms of proportionality analysis.”). For a careful exposition of the stages of balancing as employed in modern rights jurisprudence by one of the world's most important jurists of the last quarter century, see AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012).

## Accommodation



## Balancing



In the accommodation approach, the prevailing right (here the Sixth Amendment fair trial right) eats into area that the other right (here the First Amendment free press right) would otherwise occupy. By contrast, in the balancing approach, the constitutional decision maker recognizes that the two rights overlap (as represented by the shaded area), but then decides that one rather than the other right prevails in that area of overlap. The results may often be the same. Even the processes of reaching those results may be tacitly similar. But the balancing approach has the comparative virtue of transparency: Courts (and other actors) openly admit both that there is a conflict between the constitutional provisions and that they are favoring one rather than the other approach.

We think that the choice between accommodation and balancing will often be a matter of labels, although perhaps not always. As a formal matter, American constitutional law resists balancing *and* tends to be more libertarian than the constitutional and human rights law of other jurisdictions,<sup>191</sup> but the United States is a more libertarian (and less egalitarian) country than nearly all other constitutional democracies in other respects as well.<sup>192</sup> Accordingly, it is hardly clear that U.S. constitutional law is libertarian *because* it eschews balancing rather

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<sup>191</sup> See Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 Int'l J. Const. L. 468, 469-75 (2009).

<sup>192</sup> See, e.g., JAMES W. RUSSELL, *DOUBLE STANDARD: SOCIAL POLICY IN EUROPE AND THE UNITED STATES* 50-52, 59 (2010).

than vice-versa. In any event, our interest in the choice between accommodation and open balancing has little to do with the choice between libertarianism and egalitarianism.

Even under most balancing approaches, courts typically say that after the balancing is completed, the course of action that vindicates the winning right (or other provision) *is constitutionally permissible* (or, in the case of a multinational human rights treaty such as the European Convention on Human Rights, *permitted by the treaty*).<sup>193</sup> In that sense, rights balancing is not a perfect model for the choice we seek to understand here, because we are interested in how to decide among *unconstitutional* options. Nonetheless, balancing as performed by courts and other actors in other constitutional democracies is still a better model for the choice among unconstitutional options than is accommodation because in balancing, unlike in accommodation, the element of choice is apparent.

By contrast with accommodationist approaches that suppress or deny the existence of conflict among constitutional values, balancing approaches more clearly acknowledge what Michael Walzer has termed the problem of “dirty hands.”<sup>194</sup> The core idea is that political actors and others sometimes face “tragic choices” in which any choice they make (including the choice to do nothing) will be a choice to do evil. (The William Styron novel *Sophie’s Choice*—in which Nazis force a woman to choose which of her two children to sacrifice in order that the other may be spared<sup>195</sup>—presents a dramatic example in the personal realm.) They have reason to choose the least bad option but doing so remains wrongful. In the legal academic literature, Oren Gross has built on the insights of Walzer and others to develop a set of principles for the legal system to evaluate extra-constitutional decision-making.<sup>196</sup>

We take no position here on the exact approach proposed by Walzer, Gross or anyone else. Our point in invoking their work is much more basic: Whether we like it or not, life sometimes presents tragic choices in which there are no good options; and likewise with the law. In the latter circumstances, insistence on compliance with constitutional rules will be futile (if there are truly no permissible options), catastrophic (if there are technically permissible options that will lead to a catastrophe but one insists on absolute adherence to such rules anyway) or question begging (if one uses an accommodationist strategy to suppress the conflict).

Summarizing the principles that have emerged in this sub-Part, we would emphasize three points: (1) After giving priority to minimizing constitutional harm, legal actors finding themselves with no constitutional options should attempt to minimize sub-constitutional harm; but (2) minimizing constitutional harm should not be given absolute priority, so that where sub-constitutional harm

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<sup>193</sup> See *I.A. v. Turkey*, 2005-VII Eur. Ct. H.R. 590.

<sup>194</sup> Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *WAR AND MORAL RESPONSIBILITY* 62 (Marshall Cohen et al, eds., 1974).

<sup>195</sup> WILLIAM STYRON, *SOPHIE’S CHOICE* (Modern Library 1998) (1979).

<sup>196</sup> See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1105 (2003) (invoking Walzer as well as Max Weber).

exceeds a catastrophic threshold, legal actors may sometimes even be justified in choosing an unconstitutional course over a constitutional one; and (3) in choosing among unconstitutional options, it is better to acknowledge conflict than to re-categorize constitutional violations in ways that suppress or disguise conflict.

D) Preserve, to the Extent Possible, the Ability to Undo or Remedy Constitutional Violations

Our final general principle states that government officials choosing among unconstitutional options should preserve, to the extent possible, their own ability and the ability of other actors, to undo or remedy constitutional violations. Often the choice among unconstitutional options will be controversial. Indeed, sometimes it will not even be clear that one or another proposed course of action really is unconstitutional. Accordingly, it should weigh in favor of some proposed choice that it is readily reversible.

To the extent that a choice among putatively unconstitutional options is controversial because of a contest over constitutional meaning, political actors ought to strive to ensure that their choice permits expeditious judicial review. This factor arguably cuts against our own prioritization in the debt ceiling trilemma. Recall that by our lights, the President's two worst unconstitutional options were unilaterally cutting spending and unilaterally raising taxes, while his least bad unconstitutional option was to issue Presidential bonds. Yet cutting spending or raising taxes would likely lead to justiciable cases, whereas issuing Presidential bonds might not.

A decision to cut spending would quickly lead to a lawsuit by a person or entity legally entitled to receive funding absent the cut.<sup>197</sup> Likewise, a decision to raise taxes would likely lead to a lawsuit by some party whose resulting tax liability increased. To be sure, given the Anti-Injunction Act,<sup>198</sup> a taxpayer could not seek to enjoin the assessment or collection of his increased taxes, but once he paid the tax, he could sue for a refund in the Tax Court, with review in the Article III courts, including the potential for certiorari review by the Supreme Court, to follow. But a lawsuit challenging the President's decision to issue Presidential bonds would not necessarily lead to litigation.

Would anyone suffer the sort of concrete and particularized injury needed to authorize Article III standing as a consequence of the issuance of Presidential bonds? If the government were to fail to pay interest or principal to the holder of a Presidential bond, then the bondholder would clearly suffer injury. But what if the government does not default? Perhaps holders of non-Presidential bonds might worry that by increasing the total debt, Presidential bonds make it less likely that they will receive payment—much in the way that the holder of a first mortgage on a home might worry that the homeowner's further indebtedness to new lenders puts the initial loan at greater risk. Yet as we explained above, the

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<sup>197</sup> *Clinton v. City of New York* is a straightforward precedent. The City of New York successfully challenged spending cuts that President Clinton made under the Line Item Veto Act.

<sup>198</sup> 26 U.S.C. § 7421(a) (2006).

principles of default risk applicable to private parties do not apply to a sovereign lending in its own currency.<sup>199</sup> Moreover, the whole point of the Presidential bonds would be to prevent default on existing obligations, and so it seems highly speculative to say that the Presidential bonds increase default risk. In any event, even if the Presidential bonds did increase default risk somewhat, the increased risk of a default in the indefinite future does not count as the sort of “imminent” injury that the Court’s cases require for Article III standing.<sup>200</sup> Thus, it appears that a decision to issue Presidential bonds would be substantially more difficult to challenge in court than a Presidential decision to cut spending or raise taxes.

Does that fact lead us to reassess our priority among the elements of the trilemma? In a word, no. It is true that judicial reviewability counts for something, but here the reason why there would be no judicial review of the Presidential bonds is a double-edged sword that is much sharper on its other edge. No one has standing to challenge the Presidential bonds because no one is injured by them. In the *overall* cost-benefit analysis, surely the fact that Presidential bonds cause no concrete and imminent harm counts mostly in their favor, not against them. We do not claim that Presidential bonds are necessarily harmless. Relative to spending cuts and tax increases, Presidential bonds increase the national debt, which could have adverse long-term consequences. But spending cuts and tax increases also could have adverse long-term consequences and, in addition, they cause immediate injuries in a way that the Presidential bonds do not. How one nets out the various short-term and long-term costs and benefits of each possible course of action is a very complicated question. Our point for now is simply that the absence of any concrete and imminent harm to an identifiable party probably counts in favor of Presidential bonds by an amount that may well outweigh the cost in forgone judicial review.

In any event, judicial review is no panacea. A court could decide a multi-lemma case in a way that makes clear that one course of action is preferred. For example, a court might decide that the President has the power to cut spending after all. But assuming a case in which there truly are no (non-catastrophic) constitutional options, a reviewing court does not face the same decision that a political actor does.

For concreteness, suppose that faced with the trilemma, the President chooses to cut spending and that a canceled beneficiary challenges the cuts. A reviewing court cannot simply rule that the spending cut was unconstitutional because, by hypothesis, anything the President might have done would have been unconstitutional. But as we have unpacked the President’s trilemma, selecting a course of action requires a delicate blend of constitutional and policy analysis. We can well imagine that the best course for a President in resolving the trilemma would be to issue Presidential bonds but that the courts ought to uphold the President’s selection of any of the horns of the trilemma as a reasonable exercise of his discretion. We can even sympathize with a holding that a complaint charging the President (or other political actor) with choosing the wrong

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<sup>199</sup> See *supra* text accompanying notes 70-73.

<sup>200</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-95 (2009).

unconstitutional option ought to be non-justiciable. In this view, the President does not face a naked policy choice in choosing among unconstitutional options but the relevant constitutional and policy guideposts leave him with sufficient discretion to render the matter a political question.

Whether or not a particular choice among unconstitutional options would lead to a justiciable case or controversy, political actors ought to try to take actions that can be undone by other political actors. That is especially true where—as in the debt ceiling trilemma—the core concern is separation of powers.<sup>201</sup> Because the President, no matter what he does, will end up stepping on the toes of Congress, he ought to ensure that Congress can specify which toes it wants stepped on (or conversely, which toes it most wants to avoid being stepped on).

We argued in Part III that the prior choices of Congress indicate that it placed a higher priority on having its decisions about taxing and spending respected than about having the borrowing limit respected. That conclusion was substantially based on the detailed political tradeoffs that go into taxing and spending laws, by contrast with the simple selection of a number for the debt ceiling.<sup>202</sup> The same factors lead us to conclude that a Presidential decision to spend or tax unilaterally would be more disruptive of the legal status quo than a decision to issue Presidential bonds, and thus substantially more difficult for Congress to undo. That is because the departure from Congress's choices could create a dramatically different political status quo, thus calling into play a new set of political forces. If some members of Congress do not like the choices the President makes in canceling spending or raising taxes, the new political reality may prevent them from restoring the prior status quo, even though Congress never voted for the particular set of compromises entailed by the President's unilateral action.<sup>203</sup> Just as legislation can be “sticky,”<sup>204</sup> so can acts taken by the President that usurp legislative power.

Put most simply, because a Presidential decision to cut spending or raise taxes unilaterally usurps substantially more legislative power than a decision to issue Presidential bonds, cutting spending or raising taxes will generally be stickier. If judicial review of a Presidential decision to cut spending or raise taxes is more likely to occur than judicial review of the decision to issue Presidential bonds, effective *Congressional* review of the Presidential bonds is more likely than effective Congressional review of unilateral spending cuts or tax increases.

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<sup>201</sup> See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (“Concern of encroachment and aggrandizement . . . has animated our separation-of-powers jurisprudence. . .”).

<sup>202</sup> See *supra* text accompanying notes 121-124.

<sup>203</sup> In an important article, Professors Eskridge and Ferejohn explained how judicial and administrative constructions of statutes can change the legal status quo against which the vector sum of political forces in Congress operates. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). Our point here is that a Presidential decision to cancel spending or impose taxes can be equally or more disruptive and can preclude a Congressional “fix” in much the same way.

<sup>204</sup> See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1667-69 (2002).

And where, as in the debt crisis case, the core concern is separation of powers, preserving the opportunity for effective Congressional review strikes us as more important than facilitating judicial review.

## **V. Conclusion**

The debt ceiling crisis of August, 2011 nearly presented President Obama with a trilemma of unconstitutional options. Should he or a future President ever squarely face such a trilemma, he would have no good choices and certainly no good constitutional choices. But choose the President must. He should do so in a manner that minimizes the unconstitutional assumption of power, minimizes sub-constitutional harm, and maximally preserves the ability of other actors to undo or remedy constitutional violations. In the debt ceiling context, given the balance of constitutional, practical, and prudential considerations, the least unconstitutional choice would be for the President to continue to issue debt, in the amounts authorized by the duly-enacted budget of the United States.