ADMINISTERING MONEY: COINAGE, DEBT CRISES, AND THE FUTURE OF FISCAL POLICY[*]

Abstract

The power to coin money is a fundamental constitutional power and central element of fiscal policymaking, along with spending, taxing, and borrowing. However, it remains neglected in constitutional and administrative law, despite the fact that money creation has been central to the United States' fiscal capacities and constraints since at least 1973, when it abandoned convertibility of the dollar into gold. This neglect is particularly prevalent in the context of debt ceiling crises, which emerge when Congress fails to grant the executive sufficient borrowing authority to finance spending in excess of taxes. In such instances, prominent legal and economic scholars have argued that the President should choose the "least unconstitutional option" of breaching the debt ceiling, rather than impeding on Congress's even more fundamental powers to tax and spend. However, this view fails to consider a fourth, arguably more constitutional option: minting a high value coin under an obscure provision of the Coinage Act, and using the proceeds to circumvent the debt ceiling entirely. Reintroducing coinage into our fiscal discourse raises novel and interesting questions about the broader nature of, and relationship between "money" and "debt." It also underscores how legal debates over fiscal policy implicate broader social myths about money. As we enter the era of digital currency, creative legal solutions like high value coinage have the potential to serve as imaginative catalysts that enable us to collectively develop new monetary myths that better fit our modern context and needs.

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INTRODUCTION

American fiscal policymaking has always been a dynamic and evolving practice, contingent on changes in underlying administrative legal principles and the institutional structure of the federal government. Since the founding of the Republic, however, certain basic elements have remained the same. Congress, as the legislative body entrusted with the powers of spending, taxation, and finance, establishes statutory directives regarding both the kind of spending, and the nature of how to finance that spending, which the President and Treasury are then entrusted to execute. And in the event that Congressionally mandated spending exceeds taxes and other sources of external revenue, the resulting deficit must be financed via a combination of borrowing or money creation.

At the same time, centuries of experimentation and mistakes have revealed some general principles to guide the implementation of fiscal policy that remain relevant today. First, it is preferable for Congress to grant the executive relatively broad discretion over day-to-day financing decisions, while at the same time limiting its capacity to exercise unilateral influence over spending and taxing levels. Second, Congressional spending and taxing directives both normatively and positively prevail over financing restrictions, so when the former come into tension with the latter, the latter should be (and usually is) relaxed or reformulated. Third, fiscal policy cannot be separated from broader monetary and macroeconomic management, but that does not mean that the entity responsible for administering the former must also be responsible for the latter, or that fiscal and monetary authorities should be granted coextensive powers and policy tools. Fourth, financing laws work best when they operationalize fiscal commitments, and worst when they are treated as a proxy for broader political disputes. Fifth, monetary regimes matter, and what may be technically impossible and/or undesirable in a gold standard or fixed exchange rate regime, may conversely be possible and/or desirable in a floating rate, fiat currency regime.

Notwithstanding these historical lessons, contemporary fiscal policy remains highly dysfunctional, generating recurrent crises, shutdowns, and concerns about the possibility of self-inflicted default. Perhaps no single element of the federal budget process is more symbolic of this dysfunction than the debt ceiling limit. For many, the debt ceiling is a badly designed relic that exists today primarily to be wielded as a political football for cynical partisan purposes. For others, however, it represents an important, if not the last, bulwark against irresponsible "borrowing run amok." As a result of this dual nature, simultaneously technical and deeply political, efforts to reform the debt ceiling, and with it, the administration of fiscal policy more broadly, have been difficult to achieve.

At the same time, the division of legislative and executive responsibilities between Congress and the President (and Treasury) means that Congress today directs the Executive Branch to simultaneously a) spend a certain amount; b) tax a certain amount; and c) maintain a hard limit on the amount of total debt that can be issued. In the event that the size of the deficit is greater than available borrowing authority, the President is believed to face a constitutional "trilemma," whereby they will have to either unilaterally violate the debt ceiling, raise taxes, or default on spending obligations. Because all three options require directly violating laws passed by Congress, they each represent unconstitutional action.

When faced with this trilemma, Neil Buchanan and Michael Dorf argue that the President should "choose the least unconstitutional option" of violating the debt ceiling, on the basis that taxing and spending are more fundamental Congressional powers, and the debt ceiling is largely meaningless as an operational constraint. While the core reasoning of this argument is sound, it remains unsatisfying, in that it does not address the political and economic concerns that originally motivated the enactment of the debt ceiling, or alternatively, explain why such considerations are no longer meaningful or valid. Instead, by justifying breaching the debt ceiling on the basis that the only other alternatives are even worse, it leaves the internal flaws and incoherent legal logic of the debt ceiling intact.

Perhaps most importantly, the trilemma framework omits the possibility of using a fourth constitutionally-articulated power – the money power – to resolve debt ceiling crises without actually violating the debt ceiling, or otherwise engaging in unconstitutional action. Reintroducing money creation on the ground floor of the relevant legal analysis has the potential to resolve the ostensible legal paradox at the heart of debt ceiling crises. At the very least, it introduces new considerations and values that affect how different policy options should be weighed.

In particular, this article argues that a better solution for resolving recurring debt ceiling crises is for the Treasury Secretary to issue a "trillion dollar coin" under an obscure provision of the Coinage Act, which authorizes minting platinum coins of any denomination, and use the generated funds to finance the deficit. In contrast to conventional wisdom, this solution would not be economically catastrophic, nor would it represent a significant departure from the kinds of accounting "gimmicks" that have historically been employed to avoid debt ceiling crises in the past.

Beyond its merits as a practical solution to debt ceiling crises, the trillion dollar coin proposal is theoretically interesting, and raises a number of novel statutory and administrative law questions. More broadly, taking the proposal seriously – if not necessarily *literally* – allows for consideration of the deeper constitutional implications of replacing the "trilemma" with a four-dimensional conceptual framework that includes money creation alongside spending, taxing, and borrowing. In doing so, it reveals new possibilities for fundamental monetary reform, beyond the acute legal relief the coin may or may not provide in moments of debt ceiling-induced crisis.

Exploring these possibilities, and developing new social narratives to explain their implications, is increasingly important as we enter the era of digital currency. What we collectively recognize and understand as true and important of the physical coins of today, we can more easily recognize as true and important of the digital coins of tomorrow. It also has implications for improving the administration of fiscal policy, and with it, our capacity to achieve economic prosperity and distributional justice. In that sense, moments of debt ceiling crisis are also teaching moments, and opportunities to improve our collective imagination regarding what money is, how it operates, and what it can be made to become.

The rest of the paper proceeds as follows: Part I explores the historical origins and evolution of the federal government's borrowing and spending authority, including the emergence of the contemporary debt ceiling, and various spending and financing constraints placed on the executive branch by Congress.

Part II examines the operational and institutional interplay between the Treasury and other agencies within the modern administrative state. In particular, it focuses the ways in which the Federal Reserve both influences fiscal policy dynamics, and serves as a countervailing force against the Treasury within the realm of macroeconomic policymaking.

Part III explores the rise of modern debt ceiling crises, as well as the legal and accounting maneuvers that have historically been deployed to avoid breaching the ceiling. It also introduces Buchanan and Dorf's proposed "trilemma" framework for analyzing the administrative and constitutional issues raised by debt ceiling crises, and critiques it for failing to properly consider and incorporate the constitutional power to coin money.

Part IV introduces the “trillion dollar coin” proposal, and considers its political and legal significance, before addressing various technical and substantive objections to its legality and practical viability.

Finally, Part V explores the sociological implications of recentering money creation in our collective consciousness, as well as the legal lessons and economic insights that can be gleaned from coinage, and the trillion dollar coin in particular, for the future of fiscal policy and monetary system design.

I. HISTORY OF THE FISC

A. Borrowing and Spending in the Old Republic

Article I, Section 8 of the U.S. Constitution grants Congress the power “[t]o borrow Money on the credit of the United States.”[1] From the outset, Congress exercised this power in tandem with its power to appropriate money “to pay the debts and provide for the common defence and general welfare of the United States.”[2] Bills directing the Treasury to spend money on new programs were typically accompanied by separate legislation authorizing the Treasury to issue government securities to fund those programs in the event other revenue sources, such as taxes, customs duties, and seigniorage,[3] proved insufficient.[4] When a program’s borrowing limit was exhausted, Congress would simply pass supplementary legislation to extend it, thereby ensuring every program had its own dedicated financing authority.[5]

This two-step approach to fiscal policy, whereby increases in borrowing capacity were linked to specific spending commitments,

[1] U.S. Const. Art I, § 8.

[2] U.S. Const. Art I, § 8, cl. 1; § 9, cl. 7. Typically, Congress first authorizes funding, and then subsequently passes appropriations directing such spending occurs. However, it is also able to exercise “contract authority,” whereby it authorizes agencies to enter into contracts and incur obligations payable at a later time, and then subsequently appropriates funds to meet those obligations as they come due. Note, Impoundment of Funds, 86(8) *Harv. L. Rev.* 1505 (1973).

[3] Seigniorage refers to the nominal profit generated by the difference between the face value of monetary instruments (typically coinage) and their production costs. Thus, if a one dollar coin cost ten cents to make, it would generate seigniorage to the value of ninety cents.

[4] *See, e.g.*, D. Andrew Austin & Kenneth R. Thomas, Cong. Research Serv., *Clearing the Air on the Debt Limit* (2017), https://fas.org/sgp/crs/misc/R45011.pdf. *See also* Spooner Act of June 28, 1902. Pup. L. No. 57-183, § 744, 32 Stat. 481.

[5] This process was also used to extend financing capacity to make payments on previously issued debt. *See* Gerhard Casper, Appropriations of Power, 13 *U. Ark. Little Rock L. J.* 17-20 (1990) (discussing the appropriations process in the early American republic); Gerhard Casper, Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson, 47(3) *Stan. L. Rev.* 473, 484-490 (discussing the evolution of appropriations specificity and deficiency rules in the early nineteenth century).

worked relatively smoothly throughout the eighteenth and nineteenth centuries. With few exceptions, the United States persistently ran budget deficits, and comfortably increased its stock of outstanding government securities without risk of default.[6] Moreover, Congress exercised close control over the type, duration, and interest rate of the securities issued by the Treasury, reflecting its active interest in managing not only the quantity, but the composition of outstanding government debt.[7]

B. Consolidating Debt Authority

By the early twentieth century, however, the budgeting process had become unwieldy. Faced with an increasingly complex and fragmented economy, it was no longer practically feasible to maintain distinct financing strategies for each and every spending program, or for Congress to micromanage debt issuance. In 1917, faced with the exigencies of World War I mobilization, Congress enacted the Second Liberty Bond Act, which merged various sources of unused borrowing capacity from different spending programs into a consolidated

[6] Notably, however, there was little attempt to calculate or produce a single aggregate budget during this period. Instead, that practice only emerged after the passage of the Budget and Accounting Act of 1921, and reached maturity after the publication of the *Report on the President's Commission on Budget Concepts* in 1967, which led to the creation of a single, unified budget. *See, e.g.*, Office of Management and Budget, *Fiscal Year 2017 History Tables: Budget of the U.S. Government* (2015), 1-2, https://www.govinfo.gov/content/pkg/BUDGET-2017-TAB/pdf/BUDGET-2017-TAB.pdf; Bill Heniff, Jr., Megan Suzanne Lynch, & Jessica Tollestrup, Cong. Research Serv., RL 98-721, *Introduction to the Federal Budget Process* (2012), 2-3, https://fas.org/sgp/crs/misc/98-721.pdf; James V. Saturno, Cong. Research Serv., RS0095, *The Congressional Budget Process: A Brief Overview* (2011), 1, https://fas.org/sgp/crs/misc/RS20095.pdf.

[7] For a more detailed history, *see* Donald Kennon & Rebecca Rogers, U.S. House of Representatives, *The Committee on Ways and Means: A Bicentennial History 1789-1889* (1989), https://www.govinfo.gov/content/pkg/GPO-CDOC-100hdoc244/pdf/GPO-CDOC-100hdoc244.pdf. There were certain exceptions to this general trend, however, notably in periods of war or financial crisis. For example, in 1860 and 1898, Congress granted the Treasury authority to issue short-term bills in large amounts, with the express intention of providing significantly greater leeway within those amounts than was typically granted. D. Andrew Austin, Cong. Research Serv., RL31967, *The Debt Limit: History and Recent Increases* (2015), n. 26-27, https://www.senate.gov/CRSpubs/d2c8f833-9796-4b3e-9462-6b1755ef463d.pdf. Similarly, the bonds issued after the financial panic of 1893 did not have maturity limits. *Id.*, n. 29. In addition, Congress exercised similarly close control over the types of coins and notes issued, including making numerous adjustments to the Coinage Act, and experimenting with a wide range of different forms of note issuance, including small denomination Treasury notes in 1812-1815 and 1860-1863, silver certificates, and federal bank notes. *See, e.g.*, U.S. Congress, National Monetary Commission, *Laws of the United States Concerning Money, Banking, and Loans, 1778-1909, 61st Cong., 2nd sess.* (1910), 580, 766-769, https://fraser.stlouisfed.org/scribd/?item_id=21954&filepath=/files/docs/historical/nmc/nmc_580_1910-pt1.pdf; U.S. Treasury Department, *Information Respecting United States Bonds, Paper Currency and Coin, Production of Precious Metals, Etc.* (July 1, 1915), https://fraser.stlouisfed.org/files/docs/publications/books/usbonds_currency_191507.pdf.

borrowing limit.[8] In addition, it granted the Treasury wide discretion in how the funds available under that limit could be used.[9]

Over the next decade, Congress enacted a series of procedural amendments that expanded the Treasury's discretion over fiscal financing and debt management practices. These included, for example, authorizing the Treasury Secretary to replace older, more expensive securities with cheaper, newer issues, reintroducing previously defunct financing instruments such as Treasury notes and savings certificates, and replacing limits on total note issuance with limits on total notes outstanding in order to improve the Treasury's capacity to roll over short-term debt.[10]

The success of these reforms increased the Treasury's appetite for even greater operational flexibility. In 1930, Treasury Secretary Andrew Mellon declared that "orderly and economical management of the public debt requires that the Treasury Department should have *complete freedom* in determining the character of securities to be issued and should not be confronted with any arbitrary limitation."[11] This vision was realized by the end of the decade, when on July 20, 1939, President Roosevelt signed into law a bill that replaced prior restrictions on the issuance of shorter and longer term securities with a single aggregate debt limit, totaling $45 billion.[12]

In the proceeding decades, Congress raised this limit repeatedly to accommodate growing spending obligations. Occasionally, Congress refused to pass debt limit increases that were requested by the Treasury.[13] However, such refusals were typically intended to force the Treasury to reduce the growth of new spending, rather than impede financing for existing programs.[14] Consequently, they rarely escalated to

8 Austin, *Supra* Note 7, at n.29. *See also* H.J. Cooke & M. Katzen, The Public Debt Limit, 9(3) *J. of Fin.* 300 (1954). At the same time, Congress imposed limits on the issuance of specific kinds of debt. Austin & Thomas, *Supra* Note 4, at 2.

9 Austin, *Supra* Note 7, at n.29.

10 Austin, *Supra* Note 7, at 6.

11 *Id.* (quoting Treasury Department, *Annual Report of the State of the Finances* (1930), http://fraser.stlouisfed.org/docs/publications/treasar/AR_TREASURY_1930.pdf).

12 Austin, *Supra* Note 7, at n.38 ("While a separate $4 billion limit for "National Defense" series securities was introduced in 1940, legislation in 1941 folded that borrowing authority back under an increased aggregate limit of $65 billion"). *See also* Revenue Act of June 25, 1940 (54 Stat 516; P.L. 76-656); Revenue Act of February 19, 1941 (55 Stat 7).

13 *See, e.g.*, Kenneth Garbade, The First Debt Ceiling Crisis, *Federal Reserve Bank of New York Staff Report No. 783* (2016), 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2803867.

14 For example, in 1953, opposition to expanding the debt ceiling, led by Senator Byrd and his colleagues in the senate, forced President Eisenhower to direct all agencies to reduce possible expenditures, which was undertaken primarily through a slowdown in payments and new work procured from private actors via federal contract. *Id.*, 4. Later, this practice was supplemented by recission, which allowed the President and Congress to propose *ex post* spending cuts to previously appropriate spending obligations, subject to final Con-

the point of a general financing crisis, and never resulted in government shutdown.[15]

Instead, instances of Congressional budgetary brinksmanship put pressure on the Treasury to experiment with creative methods of increasing its financing capacity. These included drawing down cash holdings, and 'monetizing' existing free gold holdings by issuing gold certificates against them (which were not subject to limit under the debt ceiling), depositing those certificates at the Fed, and using the resulting credits to repurchase maturing Treasury notes directly from the Fed.[16]

In 1979, the House of Representatives, recognizing the political hazards of allowing a significant divergence between mandated appropriations and financing authority, instituted the Gephardt Rule.[17] This Rule allowed the House to automatically raise the debt limit via passage of a budget resolution, without the need for a separate vote.[18] Overall, it was used to pass fifteen increases in the debt limit between 1979 and its repeal in 2011.[19]

In 1982, the debt limit was formally codified into law as 31 U.S.C. § 3101.[20] Previously, aggregate debt limit increases were enacted as

gressional approval, and was primarily used to reallocate fiscal space between different spending caps. Gary L. Kepplinger, U.S. Government Accountability Office, *Impoundment Control Act: Use and Impact of Recission Procedures* (1999), 4 https://www.gao.gov/archive/1999/og99056t.pdf.

15 To the contrary, modern government shutdowns emerged in 1982, as a result of an interpretative change to the Antideficiency Act of 1882, which established that ongoing appropriations not funded by temporary resolution would not be funded. Andrew Cohen, *The Odd Story of the Law That Dictates How Government Shutdowns Work*, The Atlantic (Sept. 28, 2013), https://www.theatlantic.com/politics/archive/2013/09/the-odd-story-of-the-law-that-dictates-how-government-shutdowns-work/280047.

16 Garbade, *Supra* Note 13, at 6-7.

17 Bill Heniff, Jr., Cong. Research Serv., *Debt Limit Legislation: The House "Gephardt Rule"* (2019), https://fas.org/sgp/crs/misc/RL31913.pdf. This Rule was in part inspired by an earlier dispute over raising the debt ceiling in April 1979, which produced a settlement backlog that caused a delay in payments on $122 million in Treasury bills that some have since interpreted as a technical default. Terry Zivney & Richard Marcus, The Day the United States Defaulted on Treasury Bills, 24(3) *The Fin. Rev.* 475. At the time, the Government Accountability Office also issued a report calling for reform of debt ceiling practices, in recognition that debt ceiling increases were necessary to ensure adequate financing for spending that had already been approved. Government Accountability Office, 110373, *A New Approach to the Public Debt Legislation Should Be Considered* (1979), https://www.gao.gov/assets/130/127694.pdf.

18 Heniff Jr., *Supra* Note 17.

19 31 U.S.C. § 3101(b). *See also* 31 U.S.C. § 258.

20 § 3101 defines the obligations subject to its quantitative limit as those "issued under [31 U.S.C. Subtitle III, Chapter 31]" – which consists of bonds, notes, treasury bills, certificates of indebtedness, savings bonds, savings certificates, retirement and savings bonds, and tax and loss bonds – as well as "the face amount of obligations whose *principal and interest* are guaranteed by the United States Government." 31 U.S.C. §§ 3101-3113. Notably, the latter category excludes a range of instruments that are nevertheless considered "obligations or other securit[ies] of the United States," including United States notes, Federal Reserve notes, Federal Reserve Bank notes, certificates of deposit, drafts for

amendments to the Second Liberty Bond Act, reflecting the practice's origins in the first legislative consolidation of distinct borrowing authorities. For many involved in the budgeting process, the emergence of the modern debt ceiling was a positive development. Nevertheless, as early as 1953, critics such as Marshall Robinson condemned the debt ceiling as a "disorderly defense against government spending," that was responsible for "[f]oster[ing] budgetary subterfuge" and "[h]ampering proper debt management policy."[21]

On the other hand, such criticisms were equally if not more applicable to the older borrowing practices from which the debt ceiling emerged. Moreover, it is hard to imagine even the staunchest critic of the debt ceiling arguing that the budgeting demands of the modern federal government would be better served by a return to the pre-1917 practice of requiring distinct Congressional borrowing authority for each and every spending program.

Indeed, even the enactment of the Second Liberty Bond Act itself arguably reflected the institutionalization of an earlier practice of granting Treasury additional ad hoc financing discretion in exigent periods, which had begun during the Civil War.[22] Thus, with few exceptions, the evolution of borrowing legislation and financing practices from the postbellum period through to the enactment of the modern debt ceiling in 1982 followed an almost singular trajectory towards less Congressional oversight and day-to-day management, and greater Treasury flexibility and autonomy.

Of course, this decades-long evolutionary process did not take place evenly or consistently. In particular, there was a notable surge in the rate of increase of Treasury discretion over financing operations after the United States entered World War I, and then again during the New Deal. This was primarily due to the growth in size, range, and complexity of the federal government's budget and spending programs during each of these periods.

C. Financing Freedom, Spending Constraint

Overall, the Treasury's efforts to expand its budgetary financing authority during the early and mid twentieth century were mostly successful and largely uncontroversial. This was in large part because the pow-

money, checks, stamps, or coins. 18 U.S.C. §§ 8; 685 (2012). It also excludes Zero Coupon Treasury bonds, debt held by the Federeal Financing Bank, and and other miscellanrous categories. TreasuryDirect, *Frequently Asked Questions About the Public Debt* (2019), https://www.treasurydirect.gov/govt/resources/faq/faq_publicdebt.htm#GenInfo.

21 Marshall A. Robinson, *The National Debt Ceiling: An Experiment in Fiscal Policy*, 102, Brookings Institution, (1959).

22 Austin, *Supra* Note 7, n.5.

ers Treasury sought concerned *how* to finance fiscal spending, as opposed to *what* fiscal spending to undertake. In contrast, whereas the Treasury today enjoys greater discretion over financing operations than it did a century ago, the same cannot be said with regards to the President's discretion over spending authority.

Perhaps the most significant twentieth century example of Congress rebuking the President for deviating from its fiscal directives was the Congressional Budget and Impoundment Control Act of 1974 (Impoundment Act), which was passed in direct response to President Nixon's decision in 1973 to "impound" approximately $14.7 billion of Congressionally appropriated funds and effectively terminate a number of longstanding nonmilitary programs.[23] Among other things, the Impoundment Act prohibited the President from future impoundments, and required them instead to submit spending cut proposals to Congress for approval under a budgetary process called "recission."[24]

Prior to 1920, the Presidential impoundment power had been invoked on only two occasions.[25] In 1803, Thomas Jefferson informed Congress that he had declined to spend approximately $50,000 in appropriated funds for the construction of a number of gunboats.[26] In contrast to Nixon, however, Jefferson was careful to justify his decision as a mere "delay" in spending, warranted by the "favorable and peaceful turn of affairs on the Mississippi."[27] Moreover, the following year he promptly released the funds from impoundment, and spent them in accordance with Congress's original wishes.[28]

Subsequently, in 1876, President Grant impounded approximately $2.7 million in appropriated funds for river and harbor improvements, on the grounds that the spending was "of purely private or local interest, in no sense national," and that the Treasury lacked sufficient dedicated

23 Such programs included the Rural Environmental Assistance Program (REAP), as well as subsidies for low rent public housing. Cf. Note, *Supra* Note 2, at 1512.

24 2 U.S.C. § 683(b) ("Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved"). *See also* Virginia A. McMurtry, Cong. Research Serv., RL33869, *Recission Actions Since 1974: Review and Assessment of the Record* (2008), https://fas.org/sgp/crs/misc/RL33869.pdf. For a full breakdown of the various steps involved in modern budgetary policymaking, *see* Center on Budget and Policy Priorities, *Policy Basics: Introduction to the Federal Budget Process* (July 8, 2019), https://www.cbpp.org/research/policy-basics-introduction-to-the-federal-budget-process.

25 During that period, the major concern was not executive underspending but *overspending*, which occurred when executive officers entered into contracts obligating the government to make payments in the future that were not authorized by Congress. Such concerns ultimately culminated in the Antideficiency Act of 1882. Cohen, *Supra* note 15.

26 Note, *Supra* note 2, at 1508.

27 *Id.*

28 *Id.*

revenues to cover the expenditures.[29] Notably, Grant's reasoning reflected an implicit recognition that impoundment would not have been as justifiable had the spending commitments in question been deemed in the national interest and/or financially feasible.

Beginning in 1920, impoundment became increasingly commonplace, with almost every President from Hoover through to Nixon using it to override Congressional spending directives at least once during their presidencies. With a couple of notable exceptions, however, each of these actions was justified on one or more of the following grounds:

> 1. The funds in question were "no longer necessary for or appropriate to the achievement of the ends for which they had been made available;"[30]
>
> 2. The funds in question were for defense spending and the President had determined, in their capacity as Commander in Chief of the Armed Forces, that such spending was unnecessary or would undermine national security interests; or
>
> 3. Congress had explicitly granted the President authority to "impound if necessary as a means of reducing government spending."[31]

The only two substantiated exceptions were in 1931, when President Hoover directed his administrators to "slow down the pace of program implementation" and establish an annual budget reserve, thereby cutting overall expenditures by 10 percent, and in 1966, when President Johnson impounded approximately $5.3 billion of domestic program funding in order to reduce inflation.[32] Both situations were eventually resolved by Congressional action. In 1932, Congress enacted legislation authorizing Hoover to seek additional savings by reorganizing government agencies and reducing federal employee levels and pay rates.[33] Similarly, in 1967, Congress passed legislation establishing an "expenditure ceiling,"[34] which imposed limits on the

29 *Id.* at 1510 (internal citations omitted).

30 *Id.* at 1508.

31 *Id.*

32 *Id.*

33 *Id.*

34 Notably, an expenditure ceiling, which limits the amount of spending obligations the federal government can incur in a fiscal year, is distinct from a debt ceiling, which limits the number of interest-earning government securities that can be issued to finance existing spending obligations. *Id.*, n.82, at 1520-21.

growth of fiscal obligations (outside of certain programs),[35] and permitted the President to impound funds as necessary to stay within those limits.[36]

Because neither Hoover nor Johnson were challenged in court, it is impossible to know whether their actions would have been deemed constitutional, despite falling outside of the three traditionally articulated justifications for Presidential impoundment. In any event, both were clearly distinguishable from Nixon's action in 1973, which involved denying funding to programs that Congress had explicitly exempted from the possibility of impoundment.[37]

Of the $14.7 billion that Nixon impounded, approximately $2.5 billion was in the form of contract authority granted to the Federal-aid Highway Program. However, in 1968, Congress had passed an amendment to the Federal-aid Highway Act declaring that

> It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation ….[38]

At the time, Nixon justified his decision on the grounds that the "executive power" clause of the Constitution granted the President authority over the "administration of the national budget and the preservation of the nation's fiscal integrity," which included the authority to refuse to spend appropriated funds if doing so would undermine that fiscal integrity.[39] However, this view was directly in conflict with well-established judicial precedent, beginning with *Kendall v. United States ex rel*

[35] Exempted programs included spending on the Vietnam War, veteran's benefit and Social Security benefits payments, and payment of interest on the federal debt. CQ Almanac, *1969 Supplemental Enacted With Expenditure Ceiling*, CQ Almanac (Sept. 26, 2019), https://library.cqpress.com/cqalmanac/document.php?id=cqal69-1247916.

[36] Note, *Supra* note 2, at 1510, n.16. *See also* The Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, tit. II, 82 Stat. 270 (establishing a $180.1 billion limit on spending for fiscal 1969), and the Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, tits. IV, V, 401, 501, 84 Stat. 405 (establishing a $197.9 billion spending ceiling for fiscal 1970 and a $200.8 billion spending ceiling for fiscal 1971). The 1968 Act expressly granted the executive authority to impound in order to keep spending within the expenditure ceiling. *See* Pub. L. No. 90-364, tit. II, 202(b), 203(b), 82 Stat. 272; *also* Louis Fisher, The Politics of Impounded Funds, 15 *Ad. Sci. Q.* 311, 311-12 (1970).

[37] Note, *Supra* Note 2, at 1512. Furthermore, Congress had only recently passed a law in 1972 denying Nixon's request for general impoundment authority to stay within a proposed $250 billion expenditure ceiling for the 1973 fiscal year. *See* Public Law Number 92-599, 86 Stat. 1324 (1972); *also* Note, *Supra* Note 2, n.97 at 1522.

[38] 3 U.S.C. § 101(c) (1970), cited in Note, *Supra* Note 2, at 15, fn 25.

[39] Note, *Supra* Note 2, at 1513.

Stokes in 1838, which confirmed the principle that "when Congress has expressly directed that sums be spent, the executive has no constitutional power not to spend them."[40]

Nixon also attempted to derive impoundment authority from other statutory directives, most notably his responsibility not to violate borrowing limits implied by the debt ceiling.[41] However, there was little evidence at the time that the spending in question would, in fact, have caused the Treasury to exceed its remaining borrowing authority.[42] Furthermore, Nixon had not yet fully exhausted other means of securing additional financing capacity, such as running down additional reserve cash balances and delaying contractual payments.[43] Consequently, legal experts at the time argued that there was "substantial evidence that the Administration [wa]s not in fact being forced to choose between conflicting statutory objectives," and that "as a practical matter, the statutory debt ceiling did not create the direct conflict which the Administration asserted it was seeking to resolve."[44]

Ultimately, Nixon's decision to impound appropriated funds over express statutory directives to the contrary was widely condemned by both Congress and the judiciary,[45] and led to a permanent reduction in the level of operational discretion enjoyed by the executive branch with respect to spending commitments.[46] These limits were then further reinforced in 1998, when the Supreme Court ruled as unconstitutional the Presidential line-item veto established by the Line Item Veto Act of

[40] *Kendall* arose when Congress passed a private bill directing the Postmaster General to pay petitioner for work done, and the Postmaster General refused to do so, on the basis that it was subject only to the President's directives, and thus petitioner had no basis upon which to bring suit. The Court disagreed, holding that ""[t]o contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible." Note, *Supra* Note 2, at 1515. This principle was subsequently upheld in *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

[41] Note, *Supra* Note 2, at 1520. For a discussion of secondary statutory justifications, *see Id.*, at 1516-1519.

[42] *Id.*, at 1520.

[43] *Id.*, at 1523.

[44] *Id.*, at 1521, 1523.

[45] *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% of funds allocated to the Water Pollution Control Act was a "flagrant abuse of executive discretion" and, therefore, void) (cited in Neil Buchanan & Michael Dorf, How To Choose the Least Unconstitutional Option: Lessons for the President (and Others) From the 2011 Debt Ceiling Standoff (henceforth "*How to Choose*"), 112 *Colum. L. Rev.* 1175, 1196 (2012).

[46] *See* Arthur M. Schlesinger, Jr., *The Imperial Presidency*, Houghton Mifflin Harcourt, 235-240 (1973); Thomas E. Cronin, A Resurgent Congress and the Imperial Presidency, 95 *Pol. Sci. Q.* 209, 215–16 (1980) (cited in *How to Choose*, n.93).

1996.[47] In its decision, the Court held that the line-item veto violated the Presentment Clause by impermissibly granting the President the power to unilaterally repeal or amend statutes that had been duly passed by Congress.[48]

II. THE (MACROECONOMIC) ADMINISTRATIVE STATE

A. Sharing the Money Power

The modern administrative state, which emerged in the Civil War era but truly came into maturity during the New Deal, granted greater power and autonomy to executive departments and administrative agencies across the federal government.[49] For Treasury, this meant increased fiscal financing autonomy, but also a relative decline in control over the macroeconomic affairs of the federal government.

In part, this decline was the result of the introduction of mandatory spending programs such as social security, which removed a significant fraction of overall fiscal spending from the discretionary appropriations process, over which Treasury enjoys some influence.[50] In addition, automatic stabilizer programs, such as unemployment insurance, generates new positive feedback loops between spending commitments and tax receipts, thereby reducing the Treasury's ability to accurately predict or control its day-to-day spending and revenue flows.

At the same time, independent agencies such as the Reconstruction Finance Corporation and the Tennessee Valley Authority were established with the authority to engage in substantial spending and revenue-generating activities, independent of Treasury control.[51] Many of these agencies were also authorized to issue their own government-guaranteed securities, further diminishing the hegemony of the Treasury's balance sheet and its ability to control total borrowing levels.

47 *Clinton v. City of New York*, 524 U.S. 417 (1998).

48 *Id.*

49 *See, e.g.*, David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, *113 Colum. L. Rev.* 265, 265 (2013) ("Congressional delegation of broad lawmaking power to administrative agencies has defined the modern regulatory state"). Richard B. Stewart, Beyond Delegation Doctrine, 36 *Am. U. L. Rev.* 323, 329 (1987) (noting the "massive transfer"of policymaking to federal administrative agencies); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 *Colum. L. Rev*. 452, 497 (1989) (noting that the "funneling [of] enormous power into agencies" through regulatory statutes has "radically reconfigured . . . government authority").

50 Moreover, such programs are notably not subject to recission, which applies only to annual appropriations. Kepplinger, *Supra* Note 14, at .

51 See, e.g., Arnold R. Jones, The Financing of TVA, 26(4) *L. & Contemp. Prob.* 725; Secretary of the Treasury, Final Report on the Reconstruction Finance Corporation (1959), https://fraser.stlouisfed.org/files/docs/publications/rcf/rfc_19590506_finalreport.pdf.

Perhaps the most macroeconomically transformative agency to emerge in the twentieth century was the Federal Reserve System, which was introduced in 1913 as a superior alternative to the private bank clearing unions that had operated since the late nineteenth century.[52] From the outset, the Fed was tasked by Congress with managing interest rates, prices, and liquidity conditions for financial markets, as well as stable growth and full employment. This expansive delegation of statutory authority, along with the highly technical nature of its operational activities, afforded the Fed significant freedom in both setting and implementing monetary policy on a day-to-day basis.

Since its founding, the Federal Reserve asserted its operational independence from the President and the rest of the Executive Branch with respect to its monetary policy and macroeconomic stability mandate.[53] In turn, these assertions were often contested by the Treasury and President, resulting in the Treasury-Fed Accord of 1951, which ended the practice of direct Treasury control over the Fed's interest rate setting policy.[54]

Beyond its monetary policy and macroeconomic stability mandates, the Fed is also tasked with managing the payments system. This includes administering reserve accounts to facilitate clearing and transfers between commercial banks, foreign governments, and U.S. government agencies, as well as distributing for public circulation various physical notes printed by the Bureau of Engraving and Printing. Although many different kinds of physical notes have been issued into circulation since 1913, including U.S. notes, federal bank notes, and silver and gold certificates, only Federal Reserve notes remain in active use today.[55]

Federal Reserve notes are legal tender bearer instruments, and thus can physically circulate among a wide range of private actors, without any third-party approval. In that sense, they are nearly identical to U.S. currency notes, or "Greenbacks," which were actively issued by the

52 For more on the history of pre-Fed clearing unions, *see* John James & David Weiman, *Toward a More Perfect American Payments System: The Civil War at a Political Watershed* (2005), https://www.newyorkfed.org/medialibrary/media/research/conference/2006/Econ_Payments/James_Weiman_a.pdf.

53 *See, e.g.,* Sarah Binder & Mark Spindel, *The Myth of Independence: How Congress Governs the Federal Reserve*, Princeton University Press (2017), Peter Conti-Brown, *the Power and Independence of the Federal Reserve*, Princeton University Press, 2007.

54 For a detailed account of this dispute, *see* Thorvald Grung Moe, Marriner S. Eccles and the 1951 Treasury-Federal Reserve Accord: Lessons for Central Bank Independence, *Norges Bank Working Paper 2014-6* (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446377&download=yes; Robert L. Hetzel & Ralph L. Leach, The Treasury-Fed Accord: A New Narrative Account, 87(1) *Fed. Res. Bank of Richmond Econ. Q.* 33 (2001).

55 *See* Dismal Facts: Federal Reserve Notes (Oct. 25, 2018), https://insidefraser.stlouisfed.org/2018/10/federal-reserve-notes/.

Treasury from 1817 until 1971. Despite being legally considered obligations of the U.S. government,[56] neither Federal Reserve notes or U.S. currency notes are treated as debts subject to limit under the debt ceiling.[57] Moreover, there is no statutory limit on the number of Federal Reserve notes that can be issued, whereas the total issuance of U.S. currency notes was statutorily capped at $300 million in 1862, and remains so today.[58]

From an accounting perspective, the distinction between U.S. notes and Federal Reserve notes is that the latter are issued and recorded for accounting purposes as direct liabilities of the Federal Reserve System, rather than of the Treasury. Moreover, whereas U.S. notes were often spent into circulation, Federal Reserve notes are instead purchased by member banks of the Federal Reserve System through debiting their settlement accounts for an equivalent amount of dollars (often called ‘reserves’), and are then distributed indirectly to consumers through depository withdrawals and other commercial banking operations.

For budgetary accounting purposes, the amount of Federal Reserve notes in circulation is recorded as a single aggregate liability on the Fed’s balance sheet titled “Federal Reserve Notes Outstanding.”[59] In contrast, reserve liabilities are recorded as account balances of different entities who have accounts managed by the various regional Federal Reserve Banks. In that sense, they are “trapped” within the Federal Reserve System, and can only be either written down (ie to effectuate payments to the Fed) or transferred between accounts (including to government accounts, such as the Treasury General Account).[60]

Reserves function as money, in that they can be used to settle debts and make payments to government agencies and private actors. Since the

[56] 12 U.S.C. § 411.

[57] This is also true of national bank notes, which were issued between 1863 and 1935, and like U.S. notes, still circulate as legal tender at face value today. Federal Reserve Bank of Richmond, *Currency & Coin*, (Sep. 27, 2019), https://www.richmondfed.org/faqs/currency.

[58] 31 U.S.C. § 5115(b). Although $300 million is not a significant some today, it was in 1862, when the statute was first enacted.

[59] *See, e.g.,* Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet* (Sept. 27, 2019), https://www.federalreserve.gov/monetarypolicy/bst_frliabilities.htm.

[60] Todd Keister & James McAndrews, Why Are Banks Holding So Many Excess Reserves? *Fed. Res. Bank of New York Staff Rep. No. 380* (2009), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr380.pdf (“The general idea here should be clear: while an individual bank may be able to decrease the level of reserves it holds by lending to firms and/or households, the same is not true of the banking system as a whole. No matter how many times the funds are lent out by the banks, used for purchases, etc., total reserves in the banking system do not change. The quantity of reserves is determined almost entirely by the central bank’s actions, and in no way reflect the lending behavior of banks”).

passage of the Financial Services Regulatory Relief Act of 2006, the Fed has been authorized to pay interest directly on reserves, in addition to offering other interest-earning book-entry liabilities that have positive maturities akin to government securities, most notably term deposits.[61] Despite the fact Fed term deposits are positive-maturity obligations whose principal and interest are guaranteed by the United States, they have never been classified as instruments subject to limit under the debt ceiling.

Instead, the Federal Reserve retains the discretionary authority to expand or contract the combined supply of reserves, term deposits, and Federal Reserve notes as it sees fit.[62] In the past decade, for example, the Federal Reserve expanded the amount of reserves on its balance sheet by over $4.5 trillion, reflecting the broad scope and operational flexibility afforded by its statutory mandate.[63]

B. The Fed's Balance Sheet

Despite operating for twenty years prior to the New Deal, the Fed did not gain full budgetary autonomy until the passage of the Banking Act in 1935, when domestic convertibility of the dollar into gold was suspended, and the Board of Governors assumed control over the balance sheets of the regional Federal Reserve Banks.[64] Shortly thereafter, in 1947, the Board of Governors instituted a directive requiring regional Federal Reserve banks to remit back to the Treasury all surplus profits net of operating costs, member bank dividends, and the amount necessary to equate the remaining surplus with capital paid-in.[65]

[61] Federal Reserve Bank of San Francisco, *Why Did the Federal Reserve Start Paying on Reserve Balances Held at the Fed?* (March 2013), https://www.frbsf.org/education/publications/doctor-econ/2013/march/federal-reserve-interest-balances-reserves.

[62] *See, e.g.*, Michael Ng & Dave Wessel, *The Fed's Balance Sheet*, Brookings Institution (Aug. 18, 2017), https://www.brookings.edu/blog/up-front/2017/08/18/the-hutchins-center-explains-the-feds-balance-sheet ("What makes the Fed unique is that it can expand its balance sheet at will by (electronically) printing money (technically, bank reserves) and using that money to buy Treasuries in the open market").

[63] *Id.*

[64] On the other hand, as Peter Conti-Brown argues, there is little evidence that such budgetary independence was intended by the drafters of the Federal Reserve Act. *See* Peter Conti-Brown, The Institutions of Federal Reserve Independence, 32(2) *Yale J. on Reg.* 257, 273-285 (2015).

[65] Federal Reserve Board of Governors ("BoG"), *Financial Accounting Manual for Federal Reserve Banks* (January 2019), 55, https://www.federalreserve.gov/aboutthefed/files/bstfinaccountingmanual.pdf. In the event that a regional bank does not have any net profits, after covering all necessary costs and expenses, it records its negative balance as a "deferred asset," which must be reduced to zero before remittances can resume. Otherwise, negative profits have no effect on the Fed's day-to-day operating capacity or broader balance sheet dynamics. *Id.*

In 2015, the Fixing America's Surface Transportation Act (FAST Act) was passed into law, which amended the Federal Reserve Act to require any surplus funds held by the regional Reserve Banks in excess of $10 billion be immediately transferred to the Board of Governors for further transfer to the Treasury.[66] This amendment effectively codified the Board of Governors' earlier directive in legislation, but modified it to reduce the aggregate amount of surplus funds that regional Reserve Banks could hold against capital paid-in by member banks. In 2018, this requirement was further amended to reduce the aggregate limit of surplus funds held by regional Reserve Banks from $10 billion to $6.825 billion.[67]

Regional Federal Reserve banks typically generate profits from interest payments earned on their portfolios of acquired securities, which they purchase by directly marking up the reserve account of the selling entity's bank. Prior to 2015, regional Reserve Bank remittances were reported for internal budgetary purposes as "Earnings remittances to the Treasury: Interest on Federal Reserve Notes."[68] This unusual accounting designation was due to the fact that the Board of Governors derived its authority to impose such non-discretionary remittance requirements from Section 16 of the Federal Reserve Act, which provides that:

> The Board of Governors of the Federal Reserve System shall have the right [...] to grant [...] the application of any Federal Reserve bank for Federal Reserve notes [...]
>
> [S]uch bank shall be charged with the amount of the notes issued to it and *shall pay such rate of interest as may be established by the Board of Governors of the Federal Reserve System* [...]
>
> Federal Reserve notes issued to any such bank shall [...] *become a first and paramount lien on all the assets of such bank* (emphasis added).[69]

In other words, the Board of Governors justified its imposition of remittance requirements on regional Reserve Banks on the basis of its exclusive authority to not only issue Federal Reserve notes (which it obtained, at cost, from the Treasury's Bureau of Engraving and Printing), but also to charge an interest rate on those notes of whatever amount it deemed appropriate to pursue its broader statutory objectives.

66 *Id.*
67 BoG *Supra* Note 65, at 55.
68 *Id.*
69 *Id.*

Following the enactment of the FAST Act, the 'Interest on Federal Reserve Notes' line-item was superseded by another line item, titled "Earnings remittances to the Treasury: Required By the Federal Reserve Act."[70] Beyond the obvious semantic difference, the two designations are otherwise treated identically in form and effect.

C. Treasury-Central Bank Coordination

Historically, the Fed has adjusted the size of its balance sheet primarily through buying, selling, lending, and/or borrowing government securities subject to limit under the debt ceiling, such as Treasury bills, notes, and bonds. As the monopoly issuer of reserves, the Fed purchases government-guaranteed securities by crediting the reserve accounts of its selling counterparties or their agent banks. As former Fed Chairman Bernanke explained in 2009, the Fed "simply use[s] the computer to mark up the size of the account [the bank] has with the Fed."[71]

At the same time, the overall supply of reserves capable of being generated by purchases of Treasury securities remains limited, at least in theory, by the limits on total outstanding Treasury securities implied by the debt ceiling. Furthermore, Section 14 of the Federal Reserve Act restricts the Fed to buying Treasury securities "only on the open market."[72] Consequently, the Treasury must first successfully sell securities to private actors before they can then be purchased (and resold) by the Fed.

Notwithstanding these restrictions, the Fed and Treasury communicate and coordinate regularly in order to minimize any monetary policy disruptions that may result from fiscal activities. This is partly because the Fed's daily liquidity management operations are sensitive to the transactional volatility generated by large fiscal events, including end-of-month transfer payments, quarterly tax payments, and secular changes in the size of the deficit.

One prominent example of such coordination is the Treasury Tax & Loan (TT&L) program, which was launched in 1978 with the aim of reducing large swings in aggregate reserve levels held by the commercial banking system before and after major tax collection periods.[73] The program involved the Treasury establishing a series of

70 BoG *Supra* Note 65, at 39.

71 Alessandro Del Prete, *Bernanke on Taxpayer's Money for the Bailouts*, YouTube (Sep. 29, 2015), https://www.youtube.com/watch?v=odPfHY4ekHA.

72 12 U.S. Code § 355.

73 Joan Lovett, Treasury Tax and Loan Accounts and Federal Reserve Open Market Operations, 3(2) *Fed. Reserve Bank of New York Q. Rev.* 41 (1979); Richard Lang, TTL Note Accounts and the Money Supply Process, 61(1) *Fed. Reserve Bank of St. Louis Rev.* 3

dedicated "TT&L accounts" at commercial banks, and agreeing to hold a fraction of total operating funds, including income tax receipts, as demand deposits in those accounts instead of as reserves at the Fed.[74] This allowed both taxing and spending transactions to effectively take place within the commercial banking system, instead of between banks' accounts and the Treasury General Account on the Fed's balance sheet.[75] In addition, it allowed the Treasury to earn a higher rate of interest on idle balances than if they had remained at the Fed, which at the time did not pay interest on reserves.

The TT&L program was discontinued after 2008, when the Fed increased the amount of excess reserve liquidity in the banking system by over a factor of ten, and consequently excess liquidity became the norm.[76]

Another example is the process by which the Treasury and Fed coordinate to ensure that deficit spending operations do not result in overly restrictive or overly accommodative liquidity conditions, and thereby place pressure on the Fed's target interest rate.[77] As noted above,

(1979).

74 *Ibid*. Mario Pessoa & Mike Williams, *Government Cash Management: Relationship Between the Treasury and the Central Bank*, *International Monetary Fund* (2012), https://www.imf.org/external/pubs/ft/tnm/2012/tnm1202.pdf.

75 *Ibid*.

76 Paul J. Santoro, The Evolution of Treasury Cash Management During the Financial Crisis, 18(3) *Current Issues in Econ. and Fin.* 6 (2012); The Federal Reserve Bank of New York, Domestic Open Market Operations During 2011 (2012), *A Report Prepared for the Federal Open Market Committee*, 30, http://www.newyorkfed.org/markets/omo/omo2011.pdf ("While the largest autonomous factor is Federal Reserve Notes, other factors play a larger role in determining short-run swings in reserve supply. The Treasury's cash balances held at the Federal Reserve has been one of the most volatile autonomous factors. The Treasury has kept almost all of its funds at the Federal Reserve in the TGA since late-2008, due to the very low rates of return available on alternative investments. The Treasury again made no use of the term investment option, reverse repurchase investments, or administrative direct placements in 2011, and it [] kept only a small, stable amount ($2 billion) invested in Treasury Tax & Loan (TT&L) accounts. As a result, the TGA absorbed all of the Treasury's cash flow volatility, typically swelling when auctions of Treasury securities settled and on tax payment dates, and declining when large payouts were made (typically early in a month). While the Treasury does not earn interest directly on its holdings at the Federal Reserve, funds placed in the TGA reduce the amount of reserves otherwise in the banking system and therefore lower the amount of interest the Federal Reserve pays on reserves, which increases the amount of income that is then remitted to the Treasury"). www.chicagofed.org%2F~%2Fmedia%2Fpublications%2Feconomic-perspectives%2F1977%2Fep-nov-dec1977-part3-brewer-pdf.pdf&usg=AOvVaw3BNgDiuP36wYUtg4OctvB6.

77 Scott Fullwiler, *Modern Central Bank Operations—The General Principles, in* Advances in Endogenous Money Analysis 50 (Louis-Philippe Rochon & Sergio Rossi eds., 2017); *See also* V. Sundararajan, Peter Dattels & Hans J. Blommestein (Eds.), *Coordinating Public Debt And Monetary Management*, 403, International Monetary Fund (1997) ("[t]here is a telephone conversation each business day between treasury staff and staff of the Federal Reserve Bank of New York to discuss estimates and movements of cash between the treasury account at the Federal Reserve and the TT&L accounts. A buildup of

the Fed is only authorized to purchase Treasury securities on the secondary "open market."[78] As a result, the Treasury and Fed are required to coordinate via an intermediate proxy group of private financial institutions, called Primary Dealers, who participate in Treasury auctions and buy and sell securities to other financial actors on a bid-spread basis.[79]

The steps commonly involved in this tri-party coordinating process are as follows:

> 1. The Treasury communicates to the Fed that it wishes to engage in new deficit spending, and intends to sell new Treasury securities to the Primary Dealers via auction to acquire the necessary funds in the Treasury General Account (TGA) at the Fed to do so.
>
> 2. In order to ensure in advance that the Primary Dealers (or their agent banks) will have sufficient excess reserve balances to settle the auction without exerting additional pressure on the Fed's target interest rate, the Fed initiates, as necessary, repurchase agreement operations (repos) whereby it purchases existing Treasury securities owned by the Primary Dealers with a promise to sell them back on a specific date.
>
> 3. The Treasury conducts its auction, and all sales are settled by debiting the reserve accounts and crediting the securities accounts of participating Primary Dealers (or their agent banks), and crediting the Treasury General Account by a corresponding amount.

the treasury balance at the Federal Reserve would absorb reserves from the banking system. If the Fed wanted to maintain a stable monetary policy posture, it would likely offset the reserve-absorbing effect of a temporary buildup in the treasury balance by taking action in the open market, such as transacting short-term repurchase agreements to supply reserves temporarily");

78 Notably, other countries, including Canada, have relied upon direct monetary financing by the central bank with little effect, often for decades at a time. *See, e.g.*, Josh Ryan-Collins, *Is Monetary Financing Inflationary? A Case Study of the Canadian Economy, 1935-1975*, Levy Economics Institute Working Paper No. 848 (2015), http://www.levyinstitute.org/publications/is-monetary-financing-inflationary-a-case-study-of-the-canadian-economy-1935-75.

79 In exchange for the special benefits and privileges granted to them, Primary Dealers are obligated to participate regularly in Treasury auctions and submit bids consistent with their pro rata share of overall securities auctioned. *See* Federal Reserve Bank of New York, *Primary Dealers* (Sept 27, 2019), https://www.newyorkfed.org/markets/primary-dealers.html.

> 4. The Fed effectuates the Treasury's spending requests by debiting the Treasury General Account, thereby drawing down its newly acquired reserve balances, and crediting the reserve accounts of member banks, who in turn credit the deposit accounts of the intended recipients of Treasury spending on their own balance sheets.
>
> 5. The Fed sells back to the Primary Dealers the Treasury securities that it bought at the outset via repos, thereby draining from the banking system the newly added reserves injected by the Treasury's deficit spending.

Overall, this process ensures that the stock of reserves in the banking system remain consistent with the level necessary to maintain the Fed's target interest rate at all times.

In certain instances, the Fed will determine that it is preferable for liquidity management and/or monetary policy implementation that the banking system end up with additional reserves instead of securities at the end of this process. In such instances, it simply purchases Treasury securities outright in Step 1, rather than engaging in a repo operation whereby it commits to selling the securities it buys back at a later date.

This description matches, for example, the Fed's approach in the aftermath of the global financial crisis, when it engaged in multiple rounds of "Quantitative Easing" that increased the total outstanding stock of reserves in circulation from under $50 billion to over $4 trillion.

D. The (De)Consolidated Government

From a consolidated government perspective, when the Fed purchases government securities and holds them to maturity, the effect is functionally equivalent to overt monetary financing of the deficit, as the Fed ends up remitting back to the Treasury the entire amount it receives in interest and principal payments, minus Fed operating costs, member bank dividends, and $6.825 billion in surplus capital. The only major difference between this process and direct monetary financing is that the former requires the Fed to accumulate an ever-growing stock of Treasury securities, and remit ever larger amounts of net profits back to the Treasury, whereas the latter simply involves allowing an overdraft on the Treasury's reserve account.[80] In both cases, the only instruments that

[80] Presently, the Treasury does not have the legal authority to run an overdraft on its account at the Fed. However, this was not always the case: from 1914-1935, the Federal Reserve had the authority to lend directly to the Treasury by purchasing newly created govern-

remain in private circulation by the end of the process are the Fed's newly created reserve liabilities.

Thus, from a consolidated government perspective, combining fiscal deficits with ongoing debt monetization is functionally equivalent to financing the budget deficit directly with newly created reserves, or "printing money."

From a deconsolidated government perspective, however, the fact that Fed profits are only remitted back to Treasury *after its* expenses have been first been deducted is significant, as it means the Fed can set the size of its own budget, and then remit any residual back to the Treasury, rather than vice-versa. In addition, it provides the Fed with a degree of political insulation to pursue its statutorily defined macroeconomic objectives without being required to seek approval *ex ante* from the Treasury, or preemptively justify any potential second order effects on remittance levels that may result from its day-to-day policy decisions.

In 2008, in response to the global financial crisis and collapse in the home mortgage market, the Fed significantly expanded its holdings of non-Treasury securities, including mortgage-backed securities (MBSs) issued by various Government Sponsored Entities (GSEs), such as the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Government National Mortgage Association ("Ginnie Mae"). Of these entities, only Ginnie Mae's debts are explicitly guaranteed by the United States government, and thus subject to limit under the debt ceiling.[81] In contrast, MBSs issued by Freddie Mac and Fannie Mae are not formally government-guaranteed, although there has been an implicit

ment debt under then-Section 14(b) of the Federal Reserve Act, which permitted the Federal Reserve to "buy and sell, at home or abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase not exceeding six months." This direct-purchase authority was removed in a modification to the Federal Reserve Act in 1935, but was reinstituted with a $5 billion limit on March 27, 1942 under the War Powers Act. John Paul Koning, *The Final Draft on Fed-Treasury Overdraft*, Moneyness (Dec. 27, 2012), http://jpkoning.blogspot.com/2012/12/the-final-draft-on-fed-treasury.html. According to the Government Accountability Office, this authority was extended and modified 22 times between 1942 and 1979, before finally expiring in 1981, following an amendment of the Federal Reserve Act. Government Accountability Office, GAO-06-1007, Debt Management: Backup Funding Operations Would Enhance Treasury's Resilience to a Financial Market Disruption (2006), 8, *Report to the Chairman, Committee on Ways and Means, House of Representatives*, http://www.gao.gov/new.items/d061007.pdf.

81 Ginnie Mae, *Ginnie Mae at 50*, 3, https://www.ginniemae.gov/newsroom/publications/Documents/ginnie_at_50.pdf ("As a wholly-owned, self-sustaining government corporation, Ginnie Mae fulfills its mission by providing a government guaranty, or "wrap," on MBS, which ensures the timely payment of principal and interest payments to the owner of the security").

understanding since their founding that they would receive government support if and when necessary.[82]

By purchasing non-government-guaranteed securities with government-guaranteed reserves, the Fed expanded the overall amount of outstanding government obligations beyond any limit implied by the existing stock of Treasury securities, or more generally, the debt ceiling. In effect, the Fed unilaterally expanded the supply of 'high powered money' by monetizing what had until then been legally considered private debts.

D. Implementing Monetary Policy

Around the same time, the Fed introduced a number of new programs to improve its ability to implement monetary policy in a newly reserve-abundant economy. Many of these involved paying interest directly on the Fed's own liabilities, which it previously had not done.[83] In particular, the Fed began paying a positive overnight interest rate on both required and excess reserves, as well as offering interest-bearing term deposits that functioned similar to non-marketable securities. Together, these programs increased the amount of interest-earning, positive-maturity government obligations outstanding, both directly by replacing what had previously been non-interest-earning liabilities, and indirectly by increasing net interest income injected into the banking system. In addition, they also helped establish a yield curve floor that in turn increased the interest rate burden on other government liabilities, including Treasury securities.[84]

Since 2008, the interest earned by the Fed on its stock of total assets (ie Treasury securities and MBSs) has been consistently higher than the

[82] For example, the Housing Act of August 2, 1954, which authorized Fannie Mae to issue debt directly to private investors, also directed Fannie Mae to "insert appropriate language in all of its obligations … indicating that such obligations are not guaranteed by the United States." Garbade, *Supra* Note 13, at 9. However, the Wall Street Journal noted at the time that "the purpose of issuing non-guaranteed securities, of course, is to avoid pushing the Treasury's debt toward the ceiling," and that notwithstanding any formal disclaimer to the contrary, at the time of the first offering of Fannie Mae debt, the president of Fannie Mae had "received written assurance from Treasury 'that it would lend to [Fannie Mae] any amount that may be necessary to meet its obligations.'" Garbade, *Supra* Note 13, at 9 (internal citations omitted). *See also* U.S. Congressional Budget Office, *Fannie Mae, Freddie Mac, and the Federal Role in the Secondary Mortgage Market* (2010), 43, https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/reports/12-23-fanniefreddie.pdf (noting that funding mortgage guarantees via direct sale of Treasury securities would likely entail lower interest costs than creating a new agency and having it issue its own debt, but that doing so would require a higher statutory debt ceiling).

[83] See, e.g., Scott Fullwiler, Paying Interest on Reserve Balances: It's More Significant Than You Think, 39(2) *J. of Econ. Issues* 543 (2005); Ben S. Bernanke & Donald Kohn, *The Fed's Interest Payments to Banks*, Brooking Institution (2016), https://www.brookings.edu/blog/ben-bernanke/2016/02/16/the-feds-interest-payments-to-banks.

[84] Fullwiler, *Supra* Note 83.

interest paid on its stock of total liabilities (ie reserves and term deposits). As a result, profits remitted by the Fed to Treasury have increased exponentially relative to earlier periods. In 2016, for example, total Fed remittances reached over $100 billion, making it one of the largest sources of budget financing outside of taxes and Treasury auctions.[85]

Beyond coordinating with the Treasury and managing its own balance sheet, the Fed also exerts considerable influence over the distribution and yield curve of government liabilities in private circulation. For example, the Fed has on numerous occasions engaged in debt 'swaps,' where it purchases longer term Treasury bonds and sells shorter term Treasury notes in order to compress yield differentials across the maturity spectrum.[86] More broadly, day-to-day market liquidity management operations have historically been conducted via adjusting the relative quantity of reserves and three-month Treasury bills held by private actors. When liquidity is too tight, the Fed simply buys Treasury bills with newly created reserves, and when it is too loose, it sells Treasury bills that it had previously bought.

Recently, the Fed has also begun considering reviving the practice of direct Yield Curve Control (YCC), which involves directly setting a target rate on government securities of a particular duration (i.e. the 10 year benchmark rate), and committing to buying and selling as many securities as necessary to defend that target.[87] This practice, which the Fed employed from 1945-1951, and which the Bank of Japan has been using for a number of years, effectively establishes a fixed exchange rate between reserves and government securities of particular maturities, and then lets the relative quantities of each instrument in circulation float based on private demand.

From an investor perspective, it matters little whether a particular class of government obligation is issued by the Treasury or the Fed. Instead, what matters is its safety, liquidity, duration, and yield relative to other classes of government obligations in circulation. In that sense, there is almost no functional difference between, for example, a three month Treasury bill earning two percent, and a three month Fed term

[85] Board of Governors of the Federal Reserve System, *Federal Reserve Announces Reserve Bank Income and Expense Data and Transfers to the Treasury for 2015* (Jan.11, 2016), https://www.federalreserve.gov/newsevents/pressreleases/other20160111a.htm.

[86] Titan Alon & Eric Swanson, *Operation Twist and the Effect of Large-Scale Asset Purchases*, Federal Reserve Bank of San Francisco Economic Letter (April 25, 2011), https://www.frbsf.org/economic-research/publications/economic-letter/2011/april/operation-twist-effect-large-scale-asset-purchases.

[87] Sage Belz & David Wessel, *What is Yield Curve Control?*, Brookings (Aug. 14, 2019), https://www.brookings.edu/blog/up-front/2019/08/14/what-is-yield-curve-control.

deposit that earns two percent.[88] Both are government guaranteed, both earn interest, and both can be easily swapped for cash or reserves via deep and highly liquid markets, or with the Fed directly.[89]

Today, the Fed and Treasury Office of Debt Management coordinate closely to ensure that the composition and maturity distribution of newly issued Treasury securities best serves their shared macroeconomic objectives. Even more importantly, the Fed engages in an ongoing process of defensive accommodations (or "sheepdogging") via minor adjustments and interventions in capital markets in order to respond to changing conditions and keep liquidity levels "just right."

In the event that the Treasury's debt management practices generated unintended effects in conflict with the Fed's monetary policy goals, the Fed would quickly step in and neutralize them. As a result, the Fed effectively controls the Treasury yield curve spread, as well as the maturity distribution of Treasury securities in private circulation, despite the fact that they were initially issued by the Treasury for the purpose of financing its fiscal activities.

Thus, the modern Fed exerts a significant impact on fiscal policy dynamics via at least three major channels: a) the level of remittances it returns to Treasury on a regular basis; b) the composition and maturity distribution of different classes of government obligations it decides to keep in private circulation, and c) the relative and total rates of interest it decides to maintain on different classes of government obligations. In doing so, the Fed acts as a countervailing constraint on Treasury discretion over monetary and fiscal financing affairs, notwithstanding the fact that the Fed, like the Treasury, operates on a day-to-day basis with little direct Congressional oversight.

III. DEBT CEILING CRISES

A. The Erosion of Budgetary Norms

In the decades following 1982, political standoffs over the debt ceiling became increasingly common and severe. In September 1985, faced

88 Narayana Kocherlakota, *'Helicopter Money' Won't Provide Much Extra Lift*, Bloomberg (March 24, 2016), https://www.bloomberg.com/opinion/articles/2016-03-24/-helicopter-money-won-t-provide-much-extra-lift; Stephanie Kelton & Scott Fullwiler, *The Helicopter Can Drop Money, Gather Bonds, or Just Fly Away*, Financial Times Alphaville (Dec. 12, 2013), https://ftalphaville.ft.com/2013/12/12/1721592/guest-post-the-helicopter-can-drop-money-gather-bonds-or-just-fly-away-3/).

89 Indeed, there are dozens of countries in which the central bank itself issues securities to support financial market stability and improve its interest rate maintenance operations. Simon Gray & Runchana Pongsaparn, *Issuance of Central Bank Securities: International Experiences and Guidelines*, International Monetary Fund Working Paper 15-106 (2015), https://www.imf.org/external/pubs/ft/wp/2015/wp15106.pdf.

with the imminent likelihood of breaching the ceiling, the Treasury Secretary for the first time resorted to "Extraordinary Measures;" accounting maneuvers that extended the government's capacity to continue meeting its federal obligations without breaching the debt ceiling.[90] These measures included divesting and declining to reinvest in various government accounts, such as the Federal Financing Bank, federal employee retirement funds, and the Social Security trust funds, as well as ceasing the issuance of non-marketable securities, such as State and Local Government Series Treasury securities.[91]

On November 1, 1985, the Chairman of the House Committee on Ways and Means' Subcommittee on Social Security requested an opinion from the General Accounting Office on the legality of the Treasury's use of Extraordinary Measures.[92] On December 5th, the Comptroller General issued his opinion, which concluded that "although some of the Secretary's actions appear in retrospect to have been in violation of the requirements of the Social Security Act, we cannot say that the Secretary acted unreasonably given the extraordinary situation in which he was operating."[93]

On December 12, 1985, Gramm–Rudman–Hollings Balanced Budget and Emergency Deficit Control Act was signed into law. This act increased the debt ceiling limit, but also established future deficit reduction targets that, if not achieved, would trigger automatic across-the-board spending cuts, known as "sequestration."[94] This practice, of linking debt ceiling increases to future deficit-reduction commitments, quickly became commonplace thereafter.[95]

90 Mindy Levit et al, Cong. Research Serv., *Reaching the Debt Limit: Background and Potential Effects on Government Operations* (2013), 4, https://www.tsp.gov/PDF/formspubs/CRS-Memorandum-R41633.pdf.

91 *Id.* Although securities held by government trust funds "represent a loan from one part of the government against the other, they nevertheless count against the debt ceiling." U.S. GAO, GAO/AIMD-96-130, *Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis* (Aug. 1996), https://www.gao.gov/assets/160/155577.pdf;

92 U.S. Comptroller General, *Treasury's Management of Social Security Trust Funds During the Debt Ceiling Crisis* (Dec. 5, 1985), http://archive.gao.gov/d12t3/128621.pdf.

93 *Id.*

94 Levit et al, *Supra* Note 90.

95 Other statutes that combined statutory debt ceiling increases with spending cuts or deficit reduction requirements include: The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987; Omnibus Budget Reconciliation Act of 1990; Omnibus Budget Reconciliation Act of 1993; Balanced Budget Act of 1997; Statutory PAYGO Act of 2010; and Budget Control Act of 2011. Of these, the Budget Control Act of 2011 was perhaps the most extreme, establishing hard budget caps on various discretionary spending programs in the event Congress failed to enact over $1 trillion in spending cuts by the end of the year. In 2012, after Congress failed to do make the required cuts, sequestration came into effect, with a requirement to lower the already significant spend caps each year thereafter. Instead, however, the Bipartisan Budget Acts of 2013, 2015, 2018, and 2019 all incorporating "sequester relief" provisions that raised the caps on discretionary spending above the levels otherwise required by the Budget Control Act of 2011. Nevertheless,

In 1986, the Omnibus Budget Reconciliation Act granted new authority to the Treasury Secretary to declare a "debt issuance suspension period" in the event they determined that additional Treasury securities could not be issued without exceeding the debt limit.[96] Upon declaring a debt issuance suspension period, the Treasury Secretary is authorized to suspend new investments and redeem existing investments from a range of government pension and benefit funds (although notably not the Social Security trust funds) in order to extend the government's ability to meet ongoing spending obligations.[97] Since receiving this authority, Treasury Secretaries have declared debt issuance suspension periods in 1995-1997, 2002, 2003, 2004, 2006, 2011, 2012, 2013, 2014, 2015, 2017, 2018, and 2019.[98]

In February 1996, as the debt ceiling limit once again loomed near, Treasury announced that it had exhausted most of its Extraordinary Measures, and anticipated being unable to meet Social Security benefit payments in March 1996.[99] In response, Congress passed Public Laws 104-103 and 104-115, authorizing the Treasury to issue securities that did not count toward the debt ceiling, in an amount equal to total social security benefit obligations for March 2006.[100]

In 2009, the Treasury employed another innovative measure to avoid declaring a temporary debt issuance suspension period: withdrawing all but $5 billion from the $200 billion Supplementary Financing Program (SFP), which had been established in 2008 to support the Fed's emergency assistance to the financial sector.[101] Previously, the Treasury had injected funds into the SFP by auctioning Treasury securities in excess of the amount needed to finance ongoing government operations.[102] After the debt ceiling was increased in early 2010, the Treasury replenished the SFP back to its original amount of $200 billion, but subsequently withdrew all funds again in 2011, as it approached the debt ceiling limit

the spending caps continue to remain in existence, and will revert to their 2011-specified levels in the future if additional relief legislation is not passed. House Committee on the Budget, *Understanding Sequester: An Update for 2018* (March 12, 2018), https://budget.-house.gov/publications/report/understanding-sequester-update-2018.

96 5 U.S.C. 8348(j). Notably, the statute does not specify any conditions necessary for the Treasury Secretary to declare a temporary debt suspension period. Instead, it leaves that determination entirely to the Treasury's discretion. Treasury Department, *Description of the Extraordinary Measures*, (March 5, 2019), https://home.treasury.gov/system/files/136/Description-of-Extraordinary-Measures-03_05_19.pdf.

97 *Id.*

98 Treasury Department, *Frequently Asked Questions on the Civil Service Retirement and Disability Fund*, (March 5, 2019), https://home.treasury.gov/system/files/136/CSRDF-PSRHBF-FAQs-03_05_19.pdf.

99 GAO, *Supra* Note 91.

100 *Id.*, at 5.

101 Levit et al, *Supra* Note 90, at 5.

102 *Id.*

once again.[103] The SFP was subsequently not replenished, and has been defunct ever since.[104]

On January 16, 2011, facing yet another debt ceiling crisis,[105] Treasury Secretary Geithner sent a letter to Congress stating that although "default on the legal debt obligations of the United States is unthinkable and must be avoided," in the event that Extraordinary Measures were exhausted, "no remaining legal and prudent measures would be available to create additional headroom under the debt limit, and the United States would begin to default on its obligations."[106]

On August 2, 2011, the Budget Control Act of 2011 was signed into law, immediately increasing the debt ceiling limit by $400 billion.[107] In addition, it authorized President Obama to request further increases that would automatically be granted by Congress unless both houses passed a motion of disapproval.[108] Furthermore, if Congress did attempt to pass a motion of disapproval, President Obama could exercise his veto power, which in turn would require a two-thirds majority in Congress to override.[109]

B. Suspension, Shutdown, and Default

On February 4, 2013, the No Budget, No Pay Act was passed, which temporarily suspended the statutory debt ceiling for the first time.[110] Between 2013 and March 2019, the debt ceiling was temporarily suspended six times.[111] In each instance, the debt ceiling was increased upon its reinstatement to accommodate the additional securities issued during its suspension.[112] On August 1, the President signed the Bipartisan Budget Act of 2019, which suspended the debt ceiling until July 31, 2021.[113]

Notwithstanding this temporary respite, the debt ceiling statute remains valid law. Furthermore, there is no reason to believe that the partial and/or temporary relief afforded by the various creative accounting, procedural and statutory innovations employed in the past and described above will be sufficient to avoid future debt ceiling crises.

To the contrary, as recently as 2019, a budgetary dispute between President and Congress over funding for a border wall resulted in a

[103] *Id.*
[104] *Id.*
[105] Howell E. Jackson, The 2011 Debt Ceiling Impasse Revisited, in Franklin Allen et al (Eds.), *Is U.S. Government Debt Different?*, FIC Press (2012).
[106] Erika Gudmundson, *Secretary Geithner Sends Debt Limit Letter to Congress*, Treasury Notes (Jan. 6, 2011), https://www.treasury.gov/connect/blog/Pages/letter.aspx.
[107] Austin, *Supra* Note 7.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 25.
[113] *See* H.R. 3877.

record-breaking thirty five day government shutdown, costing the U.S. economy an estimated 0.02% of annual Gross Domestic Product (GDP) in lost output.[114] It also significantly harmed the lives of hundreds of thousands of federal government employees and their families, as well as government contractors, private businesses, and individuals reliant on government services that were affected by the shutdown.[115]

Although this particular dispute was over the authorization of additional spending obligations, rather than financing of previously incurred spending obligations, the fact that it escalated to the level of a government shutdown reflects the increasing politicization and breakdown of basic budgetary processes critical to the ongoing functioning of the federal government.

Moreover, while the real costs of government shutdowns should not be understated or downplayed, there are a number of reasons why defaulting on existing obligations would likely be even more economically and socially harmful. First, the size of non-discretionary spending commitments dwarfs that of discretionary spending programs subject to ongoing appropriations. Consequently, an across-the-board default would create an economic shock orders of magnitude larger than that of a government shutdown. Second, failure to honor interest payments on outstanding Treasury securities would likely destabilize global financial markets that rely upon the unquestioned safety of U.S. government obligations as an operating benchmark for their day-to-day contract-setting activities.[116] Third, default could provoke a constitutional crisis by violating the Fourteenth Amendment, which holds that "[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions ... shall not be questioned."[117]

In addition, financing crises pose unique structural challenges relative to other kinds of fiscal or budgetary disputes. This is because it is Congress's prerogative to incur spending commitments on behalf of the United States, but the President's (and Treasury Secretary's) responsibility to honor those spending commitments under Article II, Section 3 of the Constitution, which provides that the President must "take Care that the Laws be faithfully executed."[118] In other words, Congress may create the legislative conditions that produce a financing crisis, but it is the Executive Branch that must ultimately decide on the appropriate response,

[114] Congressional Budget Office, *The Effects of the Partial Shutdown Ending in January 2019,* (2019), https://www.cbo.gov/system/files?file=2019-01/54937-PartialShutdownEffects.pdf.

[115] *Id. See also* Emily Stewart, *The Shutdown's Effect on the US Economy, Explained*, Vox (Jan. 23, 2019), https://www.vox.com/policy-and-politics/2019/1/18/18188262/government-shutdown-economy-recession-workers-gdp.

[116] GAO, *Supra* Note 17.

[117] U.S. Const. amend. 14, Section 2.

[118] U.S. Const. Section 3, Cl. 5.

implement it, and be held liable in the event its actions are deemed inadequate, illegal, or unconstitutional. Consequently, whereas a financing crisis merely poses a *political* problem for Congress, it also poses a *legal* problem for the President and Treasury Secretary.

C. The Constitutional Trilemma

According to Buchanan and Dorf, the crux of this legal problem is that in the event of a debt ceiling crisis, the President (and Treasury Secretary) face an impossible "trilemma," whereby they are legally required to honor three distinct statutory responsibilities that are in direct conflict with each other: a) to spend a particular sum of money consistent with Congressional appropriations; b) to impose taxes at levels specified by Congress; and c) to limit any 'borrowing' necessary to finance the shortfall between spending and taxes to limits implied by the public debt ceiling.[119] When presented with this trilemma, the President has no choice but to ignore one or other statutory mandate, thereby violating their constitutional responsibility to faithfully execute all laws enacted by Congress.[120] Thus, the pertinent question is how to determine which of the available unconstitutional options is the *most desirable despite being unconstitutional.*[121]

In B&D's view, the "least unconstitutional" of the three aforementioned available options is to violate the debt ceiling statute.[122] They offer a number of justifications for this, but the most central is the fact that taxing and spending authority are fundamental legislative prerogatives that Congress has historically guarded closely from executive encroachment, whereas the debt ceiling is increasingly wielded only as a "symbolic measure, or at most, a bargaining chip," instead of as a meaningful restriction on the Treasury's borrowing authority.[123] Thus, they conclude, "it is not difficult to view the debt ceiling as the least important manifestation of Congress's efforts to protect its [constitutional] prerogatives."[124]

Along the way, B&D also consider various other proposals to circumvent the spending limits ostensibly implied by the public debt ceiling, including selling public assets like national parks, issuing an 'exploding option' to purchase government property to the Federal Reserve,

[119] *How to Choose*, 18. *See also* 31 U.S.C. § 3301(a) ("[t]he Secretary of the Treasury shall – (1) receive and keep public money, (2) take receipts for money paid out by the Secretary, (3) give receipts for money deposited in the Treasury, (4) endorse warrants for receipts for money deposited in the Treasury"); 31 U.S.C. § 321(a) ([t]he Secretary of the Treasury shall . . . (2) issue warrants for money drawn on the Treasury consistent with appropriations . . . [and] (6) collect receipts").
[120] *How to Choose*, at 18.
[121] *Id.*, at 19.
[122] *Id.*, at 21.
[123] *Id.*, at 22.
[124] *Id.*, at 23.

and prioritizing certain payments over others.[125] However, they ultimately dismiss each of these as unrealistic, harmful, and/or even more unconstitutional than simply disregarding the debt ceiling.[126]

D. Scarcity and Sovereignty

As I discuss in detail below, one of the alternatives that B&D consider and dismiss – issuing high denomination platinum coins under 31 U.S.C. § 5112(k) (ie the high value coin seigniorage, or "HVCS") – is arguably more legally sound, and less socially harmful, than violating the debt ceiling statute.[127] To that extent, HVCS better satisfies B&D's own articulated selection criteria than breaching the debt ceiling.

Beyond its *practical* significance, HVCS is also *theoretically* significant, in that it reveals the limits of the "trilemma" framework as a way of understanding the constitutional issues implicated by debt ceiling crises.[128] Specifically, by focusing exclusively on the interplay *between* the three commonly discussed Congressional fiscal powers – spending, taxing, and borrowing – the trilemma neglects the ways in which *all three* powers are equally predicated on an even more fundamental Congressional prerogative: the power to create and issue money itself.[129]

In contrast, I contend that any meaningful discussion of the U.S. government's fiscal financing capacity must begin with the recognition that, as a monetarily sovereign nation, the United States is the *issuer* of the currency, and thus can never "run out of dollars" any more than a bowling alley can "run out of points."[130] Without properly understanding the economic implications of this baseline case, it is impossible to situate the legal nuances and operational wrinkles implied by specific fiscal administrative arrangements in their proper constitutional context.

In *How to Choose*, B&D consider the economic implications of the U.S. government's monetary sovereignty only once, in the context of an

125 *Id.*, at 25.

126 *Id.*, 26.

127 *See* Part IV, *infra*.

128 Although first proposed by B&D, the "trilemma" framing has since been widely adopted in the constitutional literature on debt ceiling crises. *See, e.g.*, Kelleigh I. Fagan, The Best Choice Out Of Poor Options: What The Government Should do (Or Not Do) If Congress Fails To Raise The Debt Ceiling, 46(a) *Indiana L. Rev.* 225 (2013).

129 As a matter of basic logic, it is impossible to tax or borrow money that has not already been placed into circulation. Consequently, in a nation with its own currency and unit of account, taxing and borrowing powers are subordinate to the power to coin money almost by definition. *See also* Stephanie Bell (now Kelton), Do Taxes and Bonds Finance Government Spending?, 35(4) *J. of Econ. Issues* 603 (2000).

130 As former Fed Chair Alan Greenspan once noted, "there is nothing to prevent the Federal Government from creating as much money as it wants and paying it to somebody. The question is, how do you set up a system which assures that the real assets are created which [that money is] employed to purchase? [...] [Tha]t is a question of the structure of a financial system which assures that the real resources are created for [consumption] as distinct from the cash." Testimony to House Committee on the Budget, March 2, 2005.

argument raised by "economic libertarians" that the issuance of new government debt could itself be said to violate Section 4 of the Fourteenth Amendment, by allowing the stock of outstanding government obligations to grow so large as to preclude any reasonable possibility of it being repaid in the future.[131] In their response, B&D rightly dismiss the reasoning underlying this argument as flawed, on the basis that:

> All current United States debt is denominated in dollars, which the federal government alone is empowered to create[.] 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.[132]

Notwithstanding this delightfully revealing paragraph, B&D otherwise give little thought to the fiscal significance of Congress's money power, or financing capacity generated by the executive agencies to which that power has currently been delegated. They make no mention of the hundreds of millions of dollars in seigniorage profits remitted to Treasury by the Mint on an annual basis, let alone the tens of billions of dollars remitted to the Treasury by the Fed. To the contrary, they regularly invoke the language of a currency *user* to describe the federal government, including references to "money in [its] possession" that includes "revenues collected from taxation and other sources."[133] In doing so, they conceptually alienate the public fisc from the money power entirely, reducing it instead to something akin to a "pot" of public money that is filled with tangible monetary "units" and capable of depletion if not adequately replenished.

Such language may have been appropriate in earlier eras, when the U.S. dollar was backed by or convertible into real assets such as gold and silver, and thus the funds available for spending by the Treasury were limited by external resource considerations.[134] Nevertheless, it is clearly inapplicable today, as the modern U.S. dollar is a floating, fiat currency, whose nominal value is not tied to any fixed commodity or commitment to maintain a certain amount of real purchasing power.[135] In

131 *How to Choose*, at 29.
132 *How to Choose*, at 31.
133 *How to Choose*, at 18, 15, 33.
134 Even before 1971, however, the U.S. regularly issued liabilities that did not promise fixed convertibility, but nevertheless had a high degree of "moneyness," most notably during Civil War era when it issued U.S. Notes, a.k.a. "Greenbacks." *See, e.g.*, Bruce Carruthers & Sarah Babb, The Color of Money and the Nature of Value: Greenbacks and Gold in Postbellum America, 101(6) *Am. J. of Soc.* 1556, 1561.
135 This process ended when Nixon suspended the discount window, but had begun much earlier, when Roosevelt took the country off the gold standard.

place of stacks of gold bars in a vault deep underground at Fort Knox, the modern symbolic manifestation of America's monetary power is a computer at the Federal Reserve, where, in Chairman Bernanke's words, bank accounts are simply "mark[ed] up" as necessary in a manner tantamount to printing money.

In this sense, the law and economics of seigniorage – nominal spending capacity generated via money creation – are arguably even more central to the modern economy than they were to the early American republic. Once all of its complex layers of loans, swaps, and derivatives are stripped away, the engine of the modern American financial system runs on fiat money, and little else. To ignore this crucial fact when considering the merits and drawbacks of different administrative responses to a debt ceiling crisis is to ignore the very constitutional context that gives such a crisis legal meaning in the first place.

IV. MINTING THE COIN

A. A Trillion Dollar "Gimmick"

Seigniorage has been a valid and legal method of increasing the Treasury's fiscal capacity for centuries.[136] It was not until 2011, however, that it was seriously considered as an option for circumventing the debt ceiling.[137] At that time, an attorney named Carlos Mucha observed that the Treasury appeared to have the legal power to issue coins with extremely high face value under the plain language of 31 U.S.C. § 5112(k), which provides that the Treasury Secretary "may mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary's discretion, may prescribe from time to time."[138]

Moreover, although profits from coin sales are typically retained by the Mint, the Treasury Secretary had the authority under 31 U.S.C. § 5136 to direct the Mint to 'sweep' its surplus profits into the Treasury General Account at any time, where they are recorded as miscellaneous receipts.[139] Thus, according to Mucha, § 5112(k) allowed the Treasury Secretary to circumvent the debt ceiling crisis entirely by simply directing the U.S. Mint to a) mint a high-denomination proof platinum coin and ship the coin to the Federal Reserve, who would deposit the

136 *See, e.g.,* Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism*, Oxford University Press (2014); David Fox & Wolfgang Ernst, *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, Oxford University Press (2015).

137 Austin & Thomas, *Supra* Note 4, at 5.

138 31 U.S.C. § 5112(k).

139 31 U.S.C. § 5136.

coin and credit the Mint's reserve account;[140] and then b) sweeping the Mint's profits into the Treasury General Account, where they would then become available for use by the Treasury.[141]

§ 5112(k) was enacted in 1996 as part of the Omnibus Consolidated Appropriations Act of 1997.[142] The original author of the provision was Rep. Michael Castle (R-De), who in 1995 was the head of the House Financial Services subcommittee on domestic and international policy, whose jurisdiction also included matters relating to coinage.[143]

In an interview with Dylan Matthews at the Washington Post in 2013, Castle indicated that he originally drafted the provision in order to give the Treasury Secretary flexibility to issue platinum coins of smaller sizes, as coin collectors had complained that the existing platinum coin denominations on offer were too large and thus too expensive.[144] He further noted that he and his fellow members of the subcommittee viewed the seigniorage income that would be generated from the sale of platinum coins as an "opportunity to make money for the Mint and the Treasury," and in doing so help reduce the deficit without raising taxes or cutting spending.[145]

When asked about the possibility of using § 5112(k) to avoid breaching the debt ceiling, Castle responded that it would constitute a "stretch beyond anything we were trying to do."[146] Similarly, Philip Diehl, the former Mint Director and Treasury chief of staff who helped draft § 5112(k),[147] acknowledged that minting a trillion dollar coin would constitute an "unintended consequence" of the bill.[148] Nevertheless, Diehl concluded that "[a]ny court challenge [wa]s likely to be quickly dismissed," as § 5112(k) was established by an act of Congress under power "expressly granted to Congress in the Constitution," and clearly

140 The question of whether the Federal Reserve System has discretion in whether or not to accept the deposit is discussed more *infra*.

141 Carlos Mucha (aka Beowulf), *Coin Seigniorage and the Irrelevance of the Debt Limit*, Fire Dog Lake (Jan. 3, 2011), http://my.firedoglake.com/beowulf/2011/01/03/coin-seigniorage-and-the-irrelevance-of-the-debt-limit/. *See also*, Carlos Mucha, *Proposing the Unprecedented to Avoid Default: The Coin*, New York Times (Jan. 13, 2013), http://www.nytimes.com/roomfordebate/2013/01/13/proposing-the-unprecedented-to-avoid-default/platinum-coin-would-create-a-trillion-dollar-in-funds.

142 Public Law 104-208.

143 Dylan Matthews, *Michael Castle: Unsuspecting Godfather of the $1 Trillion Coin Solution*, Washington Post (Jan. 4, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/04/michael-castle-unsuspecting-godfather-of-the-1-trillion-coin-solution.

144 *Id.*

145 *Id.*

146 *Id*.

147 Cullen Roche, *Philip Diehl, Former Head of the US Mint Addresses Confusion Over the Platinum Coin Idea*, Pragmatic Capitalism (Jan. 8, 2013) https://www.pragcap.com/philip-diehl-former-head-of-the-us-mint-addresses-confusion-over-the-platinum-coin-idea.

148 *Id.*

granted the Treasury Secretary "complete discretion regarding all specifications of the coin, including denominations."[149] In addition, the accounting treatment of the coin would be "identical to the treatment of all other coins,"[150], and "[i]n minting the $1 trillion platinum coin, the Treasury Secretary would be exercising authority which Congress has granted routinely for more than 220 years."[151]

On one hand, using § 5112(k) to circumvent the debt ceiling via HVCS is clearly a) an accounting "gimmick" that b) stretches the statute beyond the original intent that motivated its passage into law. On the other, neither of these observations are reasons to dismiss it from consideration out of hand. Plenty of statutes have been reinterpreted over time, particularly in moments of crisis. In 2008, for example, the Fed justified its unprecedented expansion of emergency lending facilities, including selective liquidity provisioning and purchases of assets with limited market value, under the auspices of Section 13(3) of the Federal Reserve Act, despite little evidence that that provision was enacted with such use in mind.[152]

Similarly, the fact that § 5112(k) represents an accounting gimmick is a source of its strength, rather than a weakness. Accounting workarounds are used regularly in financial and business contexts to overcome otherwise incoherent or suboptimal operating requirements that do not implicate a deeper economic or solvency issue. Indeed, the debt ceiling itself can be viewed as one big, poorly designed accounting gimmick, in that it is not intrinsically tied to any underlying real economic constraint, and does not impose any spending limitations not already inherent to the appropriations process. In that respect, the idea of "fighting an accounting problem with an accounting solution" is entirely coherent, and perfectly describes the various "Extraordinary Measures" employed by Treasury Secretaries during prior debt ceiling crises.

Indeed, one could easily imagine the Treasury Secretary deciding to mint and deposit a $1 trillion platinum coin at the Fed on a rainy Friday afternoon after the markets had already closed, with no prior announcement, and then conducting a public education and PR blitz over the weekend until the issue had been discussed to exhaustion by Monday

149 *Id. See also* Chad DeVaux, The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoff Through the Prism of Youngstown Steel, 47(2) *Conn. L. Rev.* 1, 14 (2014) (noting that under the legal test established by Justice Jackson in *[Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring)], the President's power is "at its maximum" when the President acts "pursuant to […] express or implied constitutional authorization").

150 Roche, *Supra* Note 147.

151 *Id*.

152 Alexander Mehra, Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis, 13(1) *U. of Penn. J. of Bus. Law* 221 (2010).

morning. Such an approach would allow the President and Treasury Secretary to declare victory in terms of averting the debt ceiling crisis before anyone even had a chance to complain about the particular methods employed to achieve that victory. Moreover, to the extent such an approach would undoubtedly provoke legal criticism, it is unclear who, if anyone, would have grounds to bring suit against the Treasury or President.

Thus, while such a strategy would undoubtedly produce immediate *political* backlash, from a *constitutional* perspective it is a scalpel compared to the sledgehammer of having the President and Treasury Secretary explicitly violate the constitution by breaching the debt ceiling. Indeed, Treasury Secretaries have historically employed similar accounting gimmicks *precisely in order to avoid breaching the debt ceiling* in moments of crisis.[153] In that respect, HVCS can be seen as merely the latest iteration in a long and noble history of relying upon accounting gimmicks to extend fiscal financing capacity in moments of debt ceiling-induced budgetary crises, whereas a direct breach of the debt ceiling represents an unprecedented departure from that practice, and a direct refutation of Congress's expressed desire to keep the debt ceiling in effect *in some sense or other*.

At the same time, there is no reason to believe that relying on HVCS in a moment of constitutional crisis would lead to it becoming the primary or default way of conducting all future fiscal financing operations. Indeed, it is highly likely that a one-time deployment of HVCS would inspire a rapid Congressional response, even as the deployment itself would be irreversible. At the same time, the second order effects on both fiscal financing law and broader budgetary discourse would likely be massive. In that sense, the long-term value of HVCS lies in its potential to "let the genie out of the bottle," and thereby improve prospects for deeper structural reform of the administrative law of fiscal policy, rather than in its capacity to resolve debt ceiling crises on an ongoing basis.

B. Minor Technical Objections

When HVCS first gained notoriety and press attention, various commentators were quick to raise a range of technical objections. Most of these objections were unpersuasive and reflected either a limited

[153] This includes not only the "Extraordinary Measures" first adopted in 1985, but also, for example, the transformation of free gold into monetized gold in 1953, and the draining of the Supplementary Financing Program's operating balance in 2011. *See also* Cheryl D. Block, Budget Gimmicks, in Elizabeth Garrett, Elizabeth Graddy, & Howell Jackson (Eds.), *Fiscal Challenges, an Interdisciplinary Approach to Budget Policy*, Ch. 2, Cambridge University Press (2008).

understanding of the specific details of § 5112(k), or of administrative law and macroeconomic dynamics, or both. Of these, the four most significant critiques, which will now be addressed in turn, were: 1) the “bullion” critique; 2) the “circulation” critique; 3) the “acceptance” critique; and 4) the “central bank independence” critique.

i. The “Bullion” Critique

First, critics contended that since the U.S. Mint defined bullion coins as “a coin that is valued by its weight in a specific precious metal,”[154] the U.S. Mint would be required to obtain a prohibitively expensive volume of platinum in order to mint a coin of sufficient face value to meet federal spending obligations.[155]

On closer inspection, however, this definition of “bullion coin” is overly restrictive, as a number of the Mint's bullion coin price schedules are based on the market cost of metal used in their production.[156] For example, 31 U.S.C. § 5112(q)(5), which concerns the sale of $50 denominated gold bullion coins, provides that “[e]ach gold bullion coin issued under this subsection shall be sold for *an amount the Secretary determines to be appropriate, but not less than the sum of* — (A) the market value of the bullion at the time of sale; *and* (B) the cost of designing and issuing the coins, including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping” (emphasis added).

Similarly, 31 U.S.C. § 5112(o)(4)(A), which governs the sale of $10 denominated commemorative gold coins under the First Spouse Bullion Coin Program,[157] provides that “[e]ach bullion coin issued under this subsection shall be sold by the Secretary at a price that is *equal to or greater than the sum of* — (A) the face value of the coins; and (B) the

154 “A bullion coin is a coin that is valued by its weight in a specific precious metal. Unlike commemorative or numismatic coins valued by limited mintage, rarity, condition and age, bullion coins are purchased by investors seeking a simple and tangible means to own and invest in the gold, silver, and platinum markets.” U.S. Mint, *American Eagle Bullion Coin For Investors*, (2013), http://www.usmint.gov/mint_programs/american_eagles/index.cfm?action=american_eagle_bullion.

155 *See, e.g.*, Edmond C. Moy, *Former U.S. Mint Director: The $1 Trillion Platinum Coin Ain't Worth A Plugged Nickel*, CNBC NetNet (Jan. 8, 2013), http://www.cnbc.com/id/100364183; Kevin Drum, *Can the Treasury Department Create a Platinum T-Bill?*, Mother Jones (Jan. 9, 2013), http://www.motherjones.com/kevin-drum/2013/01/can-treasury-department-create-platinum-t-bill; Heidi Moore, *'Mint The Coin': Why The Platinum Coin Campaign Doesn't Even Work As Satire*, The Guardian (Jan. 4, 2013), http://www.guardian.co.uk/business/2013/jan/04/minting-platinum-coin-option-treasury; Tom Maguire, *And Yet, Laurence Tribe Is Wrong On The Trillion Dollar Coin*, JustOneMinute (Jan. 10, 2013), http://justoneminute.typepad.com/main/2013/01/and-yet-laurence-tribe-is-wrong-on-the-trillion-dollar-coin.html.

156 *See* 31 U.S.C. §§ 5112(o)(4)(A), (q)(5)(A), and (v)(3)(A).

157 *See* 31 U.S.C. §§ 5112(n) and (o).

cost of designing and issuing the coins (including labor, materials, dies, use of machinery, overhead expenses, marketing, and shipping)" (emphasis added). Both provisions support a broader legal definition of bullion coins than that provided by the U.S Mint glossary, as the former treats the bullion's market value as a floor but not a ceiling in price determination, and the latter is not constrained by it whatsoever.[158]

Furthermore, § 5112(k) clearly authorizes the Treasury Secretary to create "proof" platinum coins.[159] In contrast to bullion coins, which are defined by metallic content, "proof" coins are identified by their high production quality.[160] Under 31 CFR 92.3, proof coins are "sold at a price sufficient to cover their face value plus the additional expense of their manufacture and sale." Hence, notwithstanding the meaning of "bullion" coins, the metallic content criticism would be inapplicable to coins minted under § 5112(k)' proof platinum clause.

In response, critics contended that since the "proof" designation refers merely to a higher standard of production quality,[161] it is intended only to authorize the minting of high quality versions of existing bullion, circulating or numismatic platinum coin series.[162] However, this

[158] In both examples, the pre-production cost of acquiring bullion is included the final sale price of the coin, but does not place a cap on its potential face value. This is analogous to § 5112(k), which does not specify limits on bullion percentage or weight. Hence, it is possible to strike a platinum bullion coin with only a very small and inexpensive amount of platinum, but a very high sale cost based on face value. *Contra* 31 U.S.C. § 5112(f)(1) ("the Secretary shall sell the [1 Oz. Silver American Eagle bullion] coins minted under subsection (e) to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses)"); 31 U.S.C. §§ 5112(i)(2)(A) ("The Secretary shall sell the coins minted under this subsection to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses)").

[159] Numerous coinage provisions refer to "bullion and proof" coins, suggesting a categorical distinction between the two. *See, e.g.*, § 5112(i)(4)(C).

[160] According to the U.S. Mint glossary, "proof" coins are "specially produced coin[s] made from highly polished planchets and dies and often struck more than once to accent the design. Proof coins receive the highest quality strike possible and can be distinguished by their sharpness of detail and brilliant, mirror-like surface." U.S. Mint, *Coin Term Glossary: 'Proof'*, (2013), http://www.usmint.gov/about_the_mint/collectors_corner/index.cfm?action=glossary. Since "proof" status refers to production quality rather than metallic content, it can apply to both bullion and non-circulating numismatic coins. *See, e.g.*, § 5112(o)(6), (s)(5)(A), (v)(7).

[161] 31 CFR 92.3 (Proof coins are coins "prepared from blanks specially polished and struck").

[162] *See, e.g.*, Maguire, *Supra* Note 155 ("There are examples of conventional coins being struck without accompanying proof versions for collectors, but there are **no** examples of proof coins being struck for which there is no conventional circulating, commemorative or bullion counterpart" (emphasis included)). *See also* Tom Maguire, *Before Cashing Out My Coins*, JustOneMinute (Jan. 11, 2013), http://justoneminute.typepad.com/main/2013/01/before-cashing-out-my-coins.html.

argument is also unpersuasive, for two reasons. First the explicit distinction in § 5112(k) between "platinum bullion coins" and "proof platinum coins" implies that the scope of the latter extends beyond proof quality bullion coins.[163] Second, an interpretation of § 5112(k) that restricts the scope of the "and proof platinum coins" clause to high quality versions of platinum coins already in circulation would undermine the discretion afforded to the Treasury Secretary to determine the "specifications, designs, varieties, quantities, denominations, and inscriptions" of any coin created under the provision.[164]

Consequently, in the absence of any authority explicitly requiring proof quality coins to be preceded by non-proof quality coins of the same denomination, the more reasonable interpretation of § 5112(k) is that it authorizes the minting of platinum bullion coins of both proof and uncirculated qualities, *as well as* proof versions of other platinum coin denominations determined at the discretion of the Treasury Secretary.

ii. The "Circulation" Critique

Next, critics contended that even if § 5112(k) granted the Treasury Secretary the authority to mint high value denomination proof platinum coins, the Treasury would nevertheless encounter difficulty generating funds from the sale of the coin, since § 5136 authorizes retention of Federal Reserve receipts only from the sale of "circulating coins," as opposed to bullion or proof coins.[165] Upon closer inspection, however, the Mint's practice of distinguishing between circulating and proof coins appears to be merely customary, rather than legally significant. Indeed, in 1836, President Andrew Jackson resumed the minting of gold and silver coins after a 32 year hiatus by ordering a series of "circulating proof" gold coins called "Gobrecht Dollars."[166] Furthermore, under existing operational practice, the Mint realizes its seigniorage profits "as soon as it transfers coins to the Federal Reserve for initial distribution, even if the coins do not enter active circulation."[167]

163 *Cf.* 5112(o)(6) ("The bullion coins minted under this Act shall be issued in both proof and uncirculated qualities").

164 § 5112(k).

165 *See, e.g.*, Edmund Moy, *Former U.S. Mint Director: The $1 Trillion Platinum Coin Ain't Worth A Plugged Nickel*, CNBC (Jan. 8, 2013), https://www.cnbc.com/id/100364183; Anonymous (a.k.a. "Vjk"), Comment at January 24th, 2011 at 9:39 am, on Warren Mosler, *Joe Firestone Post On Sidestepping The Debt Ceiling Issue With Coin Seigniorage*, Center of the Universe (Jan. 20, 2011), http://moslereconomics.com/2011/01/20/joe-firestone-post-on-sidestepping-the-debt-ceiling-issue-with-coin-seigniorage.

166 James L. Halperin (Ed.), *Heritage ANA Platinum Night U.S. Coin Auction #1114*, 232, Heritage Auctions, Inc. (2008).

167 Lorelei St. James, GAO-13-164T, Benefits and Considerations for Replacing the $1 Note with a $1 Coin, *Testimony Before the Subcommittee on Domestic Monetary Policy and Technology, Committee on Financial Services, House of Representatives,* 27, http://

iii. The "Acceptance" Critique

On January 12, 2013, Treasury spokesman Anthony Coley issued an official statement indicating that the Obama administration would not pursue HVCS, on the grounds that "[n]either the Treasury Department nor the Federal Reserve believes that the law can or should be used to facilitate the production of platinum coins for the purpose of avoiding an increase in the debt limit."[168] Following this announcement, New York Times columnist Paul Krugman reported that, according to White House officials he had spoken to, the Administration's rejection of the coin option was "a gesture of strength[,] a way to put the onus for avoiding default entirely on the [Republican Party]."[169] In contrast, Zeke Miller from *Buzzfeed* reported that, according to a senior administration official, the Fed was responsible for vetoing the proposal, and had conveyed to the Obama Administration that it "would not have credited the Treasury's accounts . . . for depositing the coin."[170]

Upon first glance, it appears as if the Fed would have no choice but to accept the coin, as all circulating and non-circulating coins minted under § 5112(k) are clearly legal tender.[171] However, it is well established that a newly created coin must be purchased from the Mint in order for it to be "monetized" and become legal tender.[172] Thus, *in theory*, the Fed could refuse to credit a coin deposited by Mint on the grounds that it had not yet been sold, and hence did not have legal tender status that would necessitate the Fed's acceptance. *In practice*, however, it is highly unlikely that the Fed would pursue such a contentious and confrontational route, notwithstanding its apparent public pronouncements to the contrary. To do so would be in direct conflict with its broad fiscal agent responsibilities with respect to the federal

www.gao.gov/assets/660/650373.pdf.

168 Ezra Klein, *Treasury: We Won't Mint A Platinum Coin To Sidestep The Debt Ceiling*, Washington Post (Jan. 12, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/12/treasury-we-wont-mint-a-platinum-coin-to-sidestep-the-debt-ceiling/.

169 Paul Krugman, *By George*, New York Times (Jan. 13 2013), http://krugman.blogs.nytimes.com/2013/01/13/by-george.

170 Zeke Miller, *The Fed Killed The Trillion-Dollar Coin*, BuzzFeed (Jan. 13, 2013), http://www.buzzfeed.com/zekejmiller/the-trillion-dollar-coin-was-killed-by-the-fed.

171 31 § 5103 ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues").

172 For example, during the auction of a rare 1933 Double Eagle commemorative coin, the winning bidder was required to pay the face value of $20 in addition to the approximately $7.6 million he had bid in order to "monetize" the coin and convert it into legal tender. Susan Berfield, *Gold Coins: The Mystery Of The Double Eagle*, Bloomberg Businessweek (Aug. 25, 2011), http://www.businessweek.com/magazine/gold-coins-the-mystery-of-the-double-eagle-08252011.html.

government,[173] as well as its duty to maintain the integrity of the payments system.[174]

Indeed, if the Fed did for some reason attempt to refuse acceptance, it would immediately open itself to legal challenge by the Treasury Secretary, who under § 5112(k) has the clear authority to "mint *and issue*" (emphasis added) platinum coins according to their discretion.[175] Moreover, at that point the legal presumption would be strongly in the Secretary's favor, as 12 U.S.C. § 246 of the Federal Reserve Act provides that:

> Nothing in this chapter contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this chapter in the Board of Governors of the Federal Reserve System or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, *such powers shall be exercised subject to the supervision and control of the Secretary.*[176]

iv. The 'Central Bank Independence' Critique

Finally, critics argued that because HVCS is tantamount to "monetizing debt," it constitutes monetary policy, and thereby it

173 For a detailed account of the accounting and payment operations undertaken by the Federal Reserve System on behalf of the Treasury Department, *see* Paula V. Hillery & Sephen E. Thompson, The Federal Reserve Banks as Fiscal Agents and Depositories of the United States, *Federal Reserve Bulletin* (April 2000), http://www.federalreserve.gov/pubs/bulletin/2000/0400lead.pdf; Donna A. DeCorleto & Theresa A. Trimble, Federal Reserve Banks as Fiscal Agents and Depositories of the United States in a Changing Financial Environment, *Federal Reserve Bulletin* (Autumn 2004), http://www.federalreserve.gov/pubs/bulletin/2004/autumn04_fiscal.pdf.

174 *See, e.g.*, The Federal Reserve System, *The Federal Reserve System: Purposes and Functions (9th ed.)*, Ch. 7, (2005), http://www.federalreserve.gov/pf/pdf/pf_7.pdf.

175 *See* Carlos Mucha (a.k.a. "Beowulf"), *Did the Fed Have A Legal Basis For Rejecting The Coin? (Updated)*, Monetary Realism (Jan. 15, 2013), http://monetaryrealism.com/did-the-fed-have-a-legal-basis-for-rejecting-the-coin/. Moreover, Sec. 103(a) of the United States Commemorative Coin Act of 1996 clearly intends to confer legal tender status on all authorized coins, including platinum proof and bullion coins. Public Law 104-329 (Oct. 20, 1996), http://www.gpo.gov/fdsys/pkg/PLAW-104publ329/pdf/PLAW-104publ329.pdf.

176 12 U.S.C. § 246. *See also* Joe Firestone, *Can the Federal Reserve Really Refuse to Accept and Credit a Platinum Coin Deposited By the U.S. Mint?*, New Economic Perspectives (Jan. 26, 2013), http://neweconomicperspectives.org/2013/01/can-the-federal-reserve-really-refuse-to-accept-and-to-credit-a-platinum-coin-deposited-by-the-us-mint.html.

effectively undermines the independence of the Federal Reserve.[177] However, this argument is also unpersuasive, as it relies upon a mistaken understanding of the nature of the Fed's "independence," and how HCVS would specifically affect the Fed's practical capacity to implement monetary policy.

At the outset, it is important to distinguish between the *legal independence* of the Fed, which relates to its leadership and executive decision-making discretion, from its *policy independence*, which relates to its ability to effectuate particular policy outcomes in accordance with its legally articulated mandate. From a legal perspective, the Fed is established by the Federal Reserve Act, and led by the Board of Governors, an independent decision-making body whose seven members are appointed by the President and confirmed by the Senate for 14-year terms in a manner similar to other government agencies.[178] Outside of the nomination process, Board members, along with their colleagues on the Federal Open Mark Committee, enjoy wide legal latitude to use the range of policy tools at their disposal in such a manner as they deem necessary to "promote effectively" the Board's statutorily defined goals of "maximum employment, stable prices, and moderate long-term interest rates," as well as maintenance of the payment system.[179]

Such legal independence is distinct, however, from the *policy independence* over interest-rate targeting operations that is often viewed as the core of "central bank independence" in the economic sense of the term.[180] Such policy independence, in contrast, was the result of an inter-administrative agency dispute between the Fed, Treasury, and White House that culminated in an informal victory for the Fed in 1951, and

[177] *See, e.g.*, Greg Ip, *Platinomics*, The Economist (Jan. 9, 2013), http://www.economist.-com/blogs/freeexchange/2013/01/economics-platinum-coin-option ("Buying a coin solely to finance the deficit is monetizing the debt, precisely the sort of thing central bank independence was meant to prevent. How could any Federal Reserve chairman justify co-operating in such a scheme, in particular since the Fed would be taking the White House's side in a fight with Congress over a matter of dubious legality?").

[178] *See Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 132 F.3d 985, 989 (4th Cir. 1997) (The Board of Governors of the Federal Reserve System is a non-appropriated fund instrumentality of the United States).

[179] 12 U.S.C. 225(a). For a discussion of the unitary executive considerations surrounding this and similar delegations of agency authority, *see* Peter L. Strauss, (2007), Overseer, or 'The Decider'? The President in Administrative Law, 75(4) *Geo. Wash. L. Rev. 696*.

[180] *See* Peter Conti-Brown, Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve, 24 *Geo. Mason L. Rev.* 617, 624 ("the law has generally played a limited role in central bank operations"); *See also* Rosa Maria Lastra, *International Financial and Monetary Law (2d ed.)*, 30, Oxford University Press (2015); Scott Fullwiler & L. Randall Wray, It's Time to Rein In the Fed, *Levy Economics Institute of Bard College Public Policy Brief* (2011), www.levyinstitute.org/publications/?docid=1371.

the signing of the Treasury-Fed Accord.[181] The Fed's victory in this dispute led to the era of modern central bank independence in the economic sense, and with it, the modern division of labor between the Treasury and Fed with respect to interest rate policy. Under this division of labor, the Treasury is free to establish and innovate policy with respect to debt management and Treasury auction policies, on the understanding that such actions do not ultimately undermine the Fed's capacity to set interest rates in the broader financial markets, including rates paid on different classes of Treasury securities.

Even during the contentious depths of the political dispute that led to the Treasury-Fed Accord, the Treasury and Fed nevertheless continued to cooperate closely on a day-to-day basis to ensure smooth liquidity conditions within the broader financial system. Furthermore, in the aftermath of the global financial crisis this already high degree of institutional entanglement was expanded further, when both entities introduced programs that significantly overlapped with the other's historical policy domain.

For example, as discussed above, the creation of the Fed's Term Deposit Loan Facility effectively gave it the capacity to issue positive-maturity, interest-bearing liabilities similar to Treasury securities. Conversely, the 2008 Supplementary Financing Program (SFP), discussed above, established a Treasury-led mechanism for absorbing excess reserves that resembled almost identically the Fed's traditional open market operations. As Hamilton explains: "In a traditional open market sale, the Fed would sell a [Treasury] bill out of its own portfolio, whereas with the SFP, the Fed is asking the Treasury to create a new T-bill expressly for the purpose. But in either case, the sale of the T-bill by the Fed or by the Treasury through the SFP results in reabsorbing previously created reserve deposits."

In 2011, the Treasury drained the SFP of its entire balance of $200 billion as part of extraordinary financing measures intended to avoid hitting the debt ceiling, despite the program being established with the explicit intent to support the Fed's monetary policy objectives. Nevertheless, the Fed's operational independence over interest rate-targeting remained intact, and endures to this day.

In this respect, it is perhaps more accurate to understand the Fed's policy "independence" as a second-order emergent property of its first-order institutional interdependence.[182] In other words, the policy freedom

[181] Notably, this is not a binding legal statute. *See* Moe, *Supra* Note 54; Hetzel & Leach, *Supra* Note 54.

[182] *See, e.g.*, John Goodman, The Politics of Central Bank Independence, 23 *Comp. Pol.* 329, 330 (1991) ("Independence is a continuous, not dichotomous, variable. In other words, there are degrees of central bank independence"). *See also* Richard Sylla, The Autonomy

the Fed enjoys with respect to interest rate setting (and more broadly, portfolio management of overall outstanding government securities) does not derive from a bright-line legal or operational separation from the Treasury, but rather (at least partly) from an ongoing commitment by the Treasury to respect and accommodate the Fed's policy goals within areas traditionally considered to be within its policymaking jurisdiction.[183]

Moreover, if the Treasury truly wished to interfere with the Fed's interest rate management practices, it could easily do so without relying upon HVCS, simply by changing the maturity structure of government debt it chose to issue into circulation. This is because the Fed relies on adjustments to yield rate differentials on different maturities of Treasury debt in order to affect interest rates in credit markets more broadly. Thus, if the Treasury ceased to issue any security with a maturity greater than three months, for example, it would have a significantly disruptive effect on the functioning of capital markets, and force the Fed to seek new ways of effectuating its monetary policy objectives.

Even then, however, such disruption would likely not ultimately undermine the Fed's operational independence, as the Fed would still

of Monetary Authorities: The Case of the U.S. Federal Reserve System, in Gianni Toniolo (Ed.), *Central Banks' Independence in Historical Perspective*, Ch. 2, 25, Walter de Gruyter (1998), ("[A]lthough the Fed cannot achieve all of its *objectives* independently of what others in economic policy and economic life are doing, it can implement policy *measures* of which others – the President, members of Congress, and so forth – disapprove").

183 Conti-Brown, *Supra* Note 180, at 625-26 ("[I]ndependence is ... a sleight of hand that reveals only a narrow slice of Fed policymaking at the expense of a broader, more explanatory context where Fed insiders and interested outsiders form relationships using law and other tools to implement a wide variety of specific policies … central bankers … are deeply embedded in their legal, historical, social, ideological, and political contexts. Pure separation from the political process was never a possibility, whatever the law said or says"); s*ee also* Marvin Goodfriend, Central Banking in the Credit Turmoil: An Assessment of Federal Reserve Practice, *Carnegie Mellon University and National Bureau of Economic Research* (2010), 2, http://www.carnegie-rochester.rochester.edu/april10-pdfs/goodfriend.pdf ("[M]onetary policy, credit policy, and interest on reserves policy all involve fiscal policy in important but different ways . . . Clearly, to be sustainable, independent central banking must be regarded as legitimate by the fiscal authorities and the public. The problem is how to identify the limits of independence on monetary policy, credit policy, and interest on reserves policy in terms of their fiscal policy features so as to preserve a workable, sustainable division of responsibilities between the independent central bank and the fiscal authorities. . . . [the] lack of clarity in the boundary of fiscal support for the financial system between the Fed and fiscal authorities contributed importantly to the financial panic and the deterioration of macroeconomic conditions in the fall of 2008"); Marvin Goodfriend,, We Need An 'Accord' For Federal Reserve Credit Policy, 5-7, *The Cato Institute* (2008), http://www.cmc.edu/somc/marvin_goodfriend_042009.pdf; ("Credit policy executed by the Fed is really debt financed fiscal policy. Fed credit policy "works" by exploiting the creditworthiness of the government to acquire funds at a riskless rate of interest in order to make those funds available to financial institutions that otherwise would have to pay a much higher risk premium to borrow, if they can borrow at all under current circumstances").

retain other policy tools that it could use to maintain influence over both long and short term market interest rates.[184] These include paying interest on excess reserves (as it has done since 2008), issuing term deposits, or even issuing its own securities directly into circulation.[185]

Thus, to the extent that preserving the Fed's policy independence over interest-rate targeting operations is an important legal consideration, it has little bearing on whether or not the Treasury can use coin seigniorage to finance its deficit, or indeed may be obligated to do so in the context of a debt ceiling crisis. To the contrary, the Fed's policy independence has always and everywhere depended on the ongoing consent and cooperation of the Treasury, and there is every reason to believe such cooperation and support would persist in the event high value coin seigniorage was implemented.

C. Major Substantive Objections

Beyond these technical concerns, critics also raised a number of deeper statutory, constitutional, and consequential objections. These are broadly summarized as 1) the "nondelegation" critique; 2) the "narrow interpretation" critique; and 3) the "catastrophic impact" critique. Each is addressed below.

i. The "Nondelegation" Critique

The nondelegation doctrine derives from Article I of the Constitution, which vests all legislative powers in Congress. Under this doctrine, Congress must supply an "intelligible principle" to inform the lawmaking decisions of the executive agent to whom lawmaking power has been delegated for that delegation to be constitutional. This intelligible principle serves as both a constraint on the agent's discretion,

[184] In particular, Garbade notes that the act of "monetizing" gold into gold certificates, and using the resulting funds to pay down existing government debt, did not have a material effect on monetary policy, as it "merely replaced one asset (the Treasury notes) with another (the gold certificates) on the Fed's books." Garbade, *Supra* Note 13, at 6-7.

[185] Morton L. Bech & Spence Hilton, *Drain, Baby, Drain: Term Deposits, Reserves and Interbank Rates* (2012), 1, http://www.chicagofed.org/digital_assets/others/events/2012/day_ahead/bech_paper.pdf ("A term deposit is a money deposit with a banking institution that cannot be withdrawn for a certain period of time unless penalties are paid"). Some financial experts even describe the process of purchasing a security with digital reserves as equivalent to transferring funds from a non-interest checking account to an interest-bearing savings account. *See, e.g.*, Frank Newman, *Freedom From National Debt*, 11, Two Harbors Press (2013), ("Treasuries today are much like time-deposits directly with the U.S. Treasury but better than similar deposits in commercial banks, since Treasuries are fully backed by the U.S. Government and tradeable"); Warren Mosler, *MMT to Washington: There is No Long-Term Deficit Problem!*, Huffington Post (March 11, 2013), http://www.huffingtonpost.com/warren-mosler/mmt-to-washington-there_b_2822714.html.

and as a standard against which courts can review the agent's decisionmaking.

In the context of high value coin seigniorage, critics like John Carney argued that the wording of § 5112(k) is overly broad, and thus represents an impermissible delegation of Congress's Article I Section 8 power to coin money. This is incorrect. § 5112(k) clearly has an overriding intelligible principle that limits the Treasury's ability to create money: the Congressionally determined appropriations process itself.[186] Since Congress determines both the level of spending and tax receipts, as well as the programs on which funds can be spent, the Treasury Secretary does not have the power to effectuate its money creation powers except in the manners prescribed by Congress. Instead, the Treasury's fiscal discretion is limited to operational questions of how best to manage budget financing demands given the instruments and options available to it.[187]

Furthermore, as discussed above, the trajectory of legislative and operational developments with respect to fiscal operations over the past century has been overwhelmingly in favor of granting the Treasury ever greater latitude to make intra-budgetary financing decisions, while at the same time restricting executive discretion more broadly with respect to actual spending decisions. There is little reason to view § 5112(k) as out of line with this historical trend.

To the contrary, granting the Treasury Secretary significant financing autonomy may be the best way to ensure that it fully honors its Congressionally mandated spending commitments, without being forced to contend with ambiguous or conflicting statutory directives that require them (or the President) to assume additional lawmaking power in order to resolve. In other words, if faced with the choice between granting the Treasury the financing freedom to avoid debt ceiling crises, or allowing debt crises to emerge and force the executive to assume additional lawmaking authority over fiscal policy, the former is clearly preferable as a matter of preservation of separation of powers.

[186] *See* Art. I, S. 9, U.S. Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); Michael W. McConnell, Origins Of The Fiscal Constitution, in Franklin Allen et al (Eds.), *Is U.S. Government Debt Different?*, 9, FIC Press (2013), http://finance.wharton.upenn.edu/FIC/FICPress/usdebt.pdf ("The general theme of the United States fiscal constitution is thus easily summarized: The President is powerless to tax, to spend, or to borrow without advance Congressional authorization").

[187] 31 U.S.C. § 321, which sets out the general authority of the Treasury Secretary, provides that the "Secretary shall ... (2) carry out services related to finances that the Secretary is required to perform; (3) issue warrants for money drawn on the Treasury consistent with appropriations; (4) mint coins, engrave and print currency and security documents, and refine and assay bullion, and may strike medals; ... (6) collect receipts."

In addition, there is little reason to believe that minting high value coins under 5112(k) would have a material impact on broader macroeconomic or liquidity conditions. This is because, as explained above, the Fed intervenes on a daily basis to manage the composition and distribution of government liabilities in private circulation, including engaging in defensive activities intended to neutralize any undesired effects of the Treasury's fiscal activity.[188] Thus, to the extent HVCS produced any unintended second-order macroeconomic effects, the Fed would retain the macroeconomic tools necessary to respond and neutralize those effects to the extent it already does.

ii. The "Narrow Interpretation" Critique

Another criticism, raised by Dorf among others, is that § 5112(k) fails *Chevron's* "reasonable interpretation" test[189] when viewed in light of the overall context of the Secretary's budgetary authority, which includes "(1) a limit on the face amount of paper currency the government can print; (2) limits on the Secretary's discretion to mint coins made of other metals; and (3) the debt ceiling.[190] In contrast to Lawrence Tribe's argument that such restrictions imply, under the *expressio unius* canon, that there is no limit on the executive's authority under the plain language of § 5112(k),[191] Dorf argues that "[n]o reasonable person would legislate so as to constrain the executive's

[188] 12 U.S.C. § 225(a). Indeed, if Carney is correct and the Treasury's authority to mint platinum coins under the Coinage Act violates the non-delegation doctrine, then one could that the same must therefore be true of the Fed's authority to create reserves and Federal Reserve notes under the Federal Reserve Act.

[189] The relevant section of this test holds that "[i]f Congress has explicitly left a gap [in statutory interpretation] for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, *a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency*" (emphasis added). *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

[190] Mike Dorf, *Post Mortem Part 2: Zombie Big Coins, Chevron and the Quadrilemma*, Dorf on Law (Jan. 14, 2013), http://www.dorfonlaw.org/2013/01/post-mortem-part-2-zombie-big-coins.html.

[191] Ryan Cooper, *Harvard Law School Professor Laurence Tribe on the Legality of #Mintthecoin* (Jan. 8, 2013), Ten Miles Square, http://www.washingtonmonthly.com/ten-miles-square/2013/01/harvard_law_school_professor_l042276.php. *See also* Abbe Gluck, *The Grant in King – Obamacare Subsidies as Textualism's Big Test*, SCOTUSBlog (Nov. 7, 2014), https://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test ("Textualists have spent three decades convincing judges of all political stripes to come along for the ride, and have had enormous success in establishing "text-first" interpretation as the general norm. In so doing, textualists have repeatedly emphasized that textual interpretation is to be sophisticated, 'holistic' and 'contextual,' not 'wooden' or 'literal,' to use Justice Scalia's words").

discretion to borrow or to create money, unless the executive mints super-high-value platinum coins, in which case all bets are off."[192]

Dorf acknowledges that this view invites judicial discretion regarding the limits of a "reasonable" interpretation, as there is no discernible bright line between the minting of a $100 coin ("reasonable"), and a $1 trillion-dollar coin ("unreasonable").[193] He concludes, however, that in the case of the $1 trillion coin the answer is "straightforward: [r]easonable people can differ about whether Treasury can mint a $100,000 coin (which is the highest value U.S. currency ever printed), but no reasonable person would put a trillion-dollar coin on the permissible side of the line."[194] Additionally, he argues that this reasonability test would apply equally to instances where the Treasury attempted to mint 20 million $100,000 coins, or 200 million $10,000 coins, since such actions would also be intended to "evade the statutes that limit money creation and borrowing," and hence would constitute an unreasonable interpretation of § 5112(k).[195]

This argument is unpersuasive, for three reasons. First, although Dorf is correct that U.S. currency notes are presently statutorily capped at $300 million, in practice this is because they have been effectively replaced by Federal Reserve notes, which enjoy no similar legislatively imposed limit. Indeed, the Federal Reserve Bank of Richmond notes that U.S. currency notes were discontinued in 1971 precisely because they "serve[d] no function that [wa]s not already served by Federal Reserve notes."[196]

Furthermore, as discussed *supra*, the expansion of Federal Reserve balance sheet liabilities, including Federal Reserve notes, reduces the Fed's surplus profits that are ultimately remitted back to Treasury. Consequently, not only are Federal Reserve notes not capped whatsoever in practice, but decisions made by the Fed to vary its stock of liabilities outstanding impose a direct impact on the Treasury's budget position.

Second, while the Coinage Act imposes various restrictions on other forms of coins that the Treasury Secretary may issue, these restrictions

192 Dorf, *Supra* Note 190.
193 *Id.*
194 *Id*.
195 *Id.*
196 *See* G. Thomas Woodward, Money and the Federal Reserve System: Myth and Reality, *Cong. Research Serv. Report for Congress No. 96-672 E* (1996), http://hiwaay.net/~becraft/FRS-myth.htm ("[U.S. Notes and Federal Reserve Notes] cost the same to produce. They have identical propensity to generate inflation if issued in excessive amounts. To the extent that they are issued, they generate savings to the government in the same amount: in the case of U.S. Notes, the Treasury is able to borrow less because it can spend the notes instead, thereby saving interest expense; in the case of Federal Reserve Notes, the Fed is able to buy back from the public more of the Treasury's outstanding debt, and then turn the interest from the securities back to the Treasury's general fund").

concern only relevant denominations, as opposed to hard quantitative caps.[197] There is little historical evidence to suggest that Congress ever intended to limit the quantity of coins issued[198] or the amount of seigniorage profits generated,[199] or to proscribe Treasury from using seigniorage profits to fund the budget deficit in lieu of issuing new Treasury securities.[200]

Moreover, apart from the logistical difficulties associated with minting higher volumes of lower denomination coins, there is no practical difference between seigniorage generated via issuing platinum proof coins under § 5112(k), and seigniorage generated via any other

[197] §§ 5112 (e) ("Notwithstanding any other provision of law, the Secretary shall mint and issue, in qualities and quantities that the Secretary determines are sufficient to meet public demand . . ."); (i)(1) ("Notwithstanding section 5111(a)(1) of this title, the Secretary shall mint and issue the gold coins described in paragraphs (7), (8), (9) and (10) of subsection (a) of this section, in qualities and quantities that the Secretary determines are sufficient to meet public demand . . ."); (l)(6)(a) ("The Secretary may mint and issue such number of quarter dollars . . . in uncirculated and proof qualities as the Secretary determines to be appropriate"); (n)(7) ("The Secretary may mint and issue such number of $1 coins . . . in uncirculated and proof qualities as the Secretary determines to be appropriate"); (q)(1) (". . . the Secretary shall commence striking and issuing for sale such number of $50 gold bullion and proof coins as the Secretary may determine to be appropriate, in such quantiaties, as the Secretary, in the Secretary's discretion, may prescribe"); (r)(4) ("The Secretary may mint and issue such number of $1 coins of each design selected under this subsection in uncirculated and proof qualities as the Secretary determines to be appropriate"); (s)(5)(A) ("The Secretary may mint and issue such number of quarter dollars of each design selected under paragraph (3) in uncirculated and proof qualities as the Secretary determines to be appropriate"); (t)(6)(A) ("The Secretary may mint and issue such number of quarter dollars of each design selected under paragraph (3) in uncirculated and proof qualities as the Secretary determines to be appropriate"); (t)(6)(B) ("Notwithstanding subsection (b), the Secretary may mint and issue such number of quarter dollars . . . as the Secretary determines to be appropriate"); § 5112(v)(1) (". . . the Secretary shall mint and issue the palladium coins described in paragraph (12) of subsection (a) in such quantities as the Secretary may determine to be appropriate to meet demand"). § 5112(m)(2)(A) does impose quantitative restrictions on a small number of commemorative coin programs in order to preserve scarcity and improve collector value, however even those limits can be waived by the Treasury Secretary based on a determination that current mintage levels are not adequate to meet public demand. § 5112(m)(2)(B).

[198] Generally speaking, the quantity of coins has historically been influenced by a combination of private demand and the government's decision to introduce special coin programs in accordance with broader monetary and public policy objectives. *See, e.g.*, *Denver Mint Honored for Record Coin Production,* U.S. Mint News (Feb. 2, 1970), http://www.usmint.gov/education/historianscorner/?action=DocDL&doc=pr415.pdf ("The Director of the United States Mint … today highly praised Denver Mint employees … [in light of their] 'special achievement' … in surpassing all previous coin production records in the Mint's 177-year history. ... This outstanding coin production record contributed greatly in making it possible for the Bureau of the Mint to meet the ever increasing demand for coins for our continually growing economy"); §.1, Ch. 4, Statute I, Acts of the Third Congress of the United States, (1795), *An Act in Alteration of the Act Establishing a Mint and Regulating the Coins of the United States* ("[I]t shall be the duty of the treasurer of the mint to receive and give receipts for all metals which may lawfully be brought to the mint to be coined ... [a]nd the said treasurer shall from time to time deliver the said metals to the chief coiner to be coined in such quantities as the director of the mint may prescribe"); § 3, *Act of April 2, 1792. Establishing a Mint and Regulating the Coins of the*

provision of the Coinage Act. Consequently, as Dylan Matthews at the Washington Post has argued, in the event § 5112(k) was deemed impermissible, the Treasury Secretary could just as easily choose to exercise their authority under the American Eagle Palladium Bullion Coin Act of 2010 to mint unlimited numbers of $25 palladium coins "in such quantities as the Secretary may determine to be appropriate to meet demand."[201]

Third, although the debt ceiling imposes a meaningful quantitative cap on outstanding government securities *when in effect*, in recent years the debt ceiling has been suspended for increasingly sustained periods of time in between contentious negotiations over its increase. Indeed, presently, the debt ceiling cap is suspended until July 31, 2021, thereby granting the Treasury significant autonomy to issue additional securities as it deems necessary to satisfy spending requirements.

In light of these various dynamics, and the significant discretion afforded to the Treasury and Fed with respect to the quantity of coins, paper money, and government securities in general, it is inaccurate to claim that § 5112(k) represents a unique outlier in Congress's broader delegation of money creation powers to the executive branch under Article I, Section 8.

Moreover, as a matter of operational design, it stands to reason that there should exist at least one "catch-all" financing provision to allow the Treasury to meet its spending commitments in the event its standard financing options, such as issuing Treasury securities subject to limit under the debt ceiling, are no longer available. Zero maturity, non-

United States ("The chief coiner shall cause to be coined all metals which shall be received by him for that purpose, according to such regulations as shall be prescribed by this or any future law").

199 *See* Sec. 27, Ch. 131, Session III, Acts of the Forty-Second Congress of the United States, (1873), *An Act Revising and Amending the Laws Relative to the Mints, Assay-Offices, and Coinage of the United States*, ("The gain arising from the coinage of such silver bullion into coin of a nominal value exceeding the cost thereof shall be credited to a special fund denominated the silver-profit fund. ... The balance to the credit of this fund shall be from time to time ... paid into the treasury of the United States").

200 *See, e.g.,* Ch. I, Session I, Public Acts of the Forty-First Congress of the United States, *An Act to Strengthen the Public Credit* ("[I]n order to remove any doubt as to the purpose of the government to discharge all just obligations to the public creditors, and to settle conflicting questions and interpretations of the laws by virtue of which such obligations have been contracted, it is hereby provided and declared that the faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver. ... And the United States also solemnly pledges its faith to make provision at the earliest practicable period for the redemption of the United States notes in coin").

201 Matthews, *Supra* Note 143. *See also* 31 U.S.C. § 5112(v)(1).

interest bearing, high value coins serve that purpose well, and are arguably preferable to other instruments, such as Treasury securities, which incur additional interest expenses and implicate third-party private actors in their issuance. Moreover, the financing capacity afforded by such a "catch-all" provision is in no way greater than that afforded by the Coinage Act more broadly, which as noted above contains no inherent quantitative limit on the number of coins that can be issued, or the amount of seigniorage that can earned from their issuance. Rather, granting the Treasury to issue a single coin, rather than thousands of individual coins, merely simplifies logistically the process of collecting seigniorage that the Treasury had already been legislatively authorized to collect. Thus, there is little if any reason to believe that interpreting § 5112(k) as authorizing high value coin seigniorage would run afoul of the longstanding "absurdity doctrine," which precludes reading the plain language of statutory texts in ways that produce "absurd" results.[202]

Indeed, one way to interpret the debt ceiling statute that restores to it some semblance of rational legislative purpose is as functioning to provide a limiting principle on the Treasury's otherwise broad discretion to pursue different fiscal financing strategies according to its own self-determined criteria. When outstanding debt is below the debt ceiling, the Treasury Secretary is free to choose how to finance the deficit, including via either additional interest-bearing securities, or via other methods, or some combination of both. When the debt ceiling is reached, however, they cannot rely upon debt issuance, and thus must instead restrict themselves exclusively to other financing options available to them.

Thus, if viewed together with § 5112(k), the debt ceiling statute establishes a clear two-tier hierarchy with respect to fiscal financing discretion: outside of debt ceiling crises, the Treasury Secretary may decide to finance deficits exclusively via debt issuance, but when the debt ceiling limit is reached, debt issuance is no longer allowed and other fiscal financing tools such as coinage must be used instead.

[202] Laura R. Dove, (2019), Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine, 19 *Nev. L. J.* 741, 744 (2019) ("Modern judges typically eschew all but the most narrow versions of the absurdity doctrine, requiring a statute's plain meaning to be patently illogical or insensible to justify applying the doctrine. Otherwise, they contend, the judiciary risks overstepping its constitutional limitations by ignoring plain meaning where it entails an outcome seemingly contrary to the overall statutory purpose or policy"); Veronica M. Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 *Am. U. L. Rev.* 127 (1994); John F. Manning, The Absurdity Doctrine, 116 *Harv. L. Rev.* 2387 (2003). *See also* Linda D. Jellum, But That is Absurd! Why Specific Absurdity Undermines Textualism, 76(3) *Brooklyn L. Rev.* 917 (arguing that the absurdity doctrine should not apply in situations where the plain language of a statute is not absurd when applied generally, even if it produces unexpected or anticipated outcomes when applied in specific circumstances).

This interpretation has the advantage of being consistent with the statutory language pertaining to both the Treasury Secretary's borrowing and coinage authority. In particular, 31 U.S.C. § 3104(a) provides that the Treasury Secretary "*may* borrow on the credit of the United States Government amounts necessary for expenditures authorized by law," (emphasis added). In contrast, § 5111(a)(1) provides that the Secretary "*shall* mint and issue coins described in section 5112 of this title in amounts the Secretary decides are necessary to meet the needs of the United States . . . " (emphasis added).

In addition, there is a longstanding judicial principle of prioritizing constitutional over unconstitutional statutory interpretations.[203] Thus, since the Treasury Secretary cannot raise funds via issuing securities without admittedly violating the expressed language of the debt ceiling statute, and with it the Take Care clause of the Constitution, but could do so via HVCS if they interpreted § 5112(k) in the manner described above, it follows that the Treasury Secretary may legally be required to adopt such an interpretation.

Moreover, since *Chevron* is invoked only in instances where a statute is ambiguous, and thus invites agency discretion in determining how it should be read, if a situation were to arise in which the Secretary were legally required to interpret § 5112(k) as permitting HVCS under § 5111(a)(1), "it would follow *a fortiori* that the Secretary is permitted to [do so]."[204] Clearly, avoiding an explicitly unconstitutional outcome in the event of a debt-ceiling crises is precisely an instance where such a necessity can and would arise.[205]

iii. The "Catastrophic Impact" Critique

In fact, Buchanan & Dorf consider this exact situation, but reach the exact opposite conclusion on consequentialist grounds. In particular, they acknowledge HVCS could be a "plausibly constitutional" response

203 *Nat. Fed. of Independent Bus. v. Sebelius,* 567 U. S. 519 (2012) ("The text of a statute can sometimes have more than one possible meaning. . . . And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so"); *How to Choose*, at 1228-1229 ("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. On the other hand, courts will not wholly rewrite statutes in order to avoid difficult constitutional questions, because such rewriting is a different sort of affront to the democratic will, insofar as it usurps the legislative function. Which affront is worse? The cases do not give a categorical answer, instead applying context-specific judgment to allow creative interpretation but not rewriting") (internal citations omitted).

204 Dorf, *Supra* Note 190, Comment 6:49pm.

205 *Cf.* Dove, *Supra* Note 202, at 767 (arguing that modern courts regularly read ambiguity into otherwise clear statutory texts in order to justify engaging in purposive analysis without falling short of the widely accepted textualist principle of strong deference to plain language reading).

to a debt-ceiling showdown,[206] but argue that the President should nevertheless favor the explicitly unconstitutional approach of ignoring the debt-ceiling instead, due to the likely "catastrophic" implications of employing HVCS.[207]

Drawing an analogy to the concept of threshold deontology in moral philosophy, they propose a "threshold constitutionality" principle, whereby "[i]f the consequences of following what would otherwise be the least unconstitutional of several unconstitutional paths would be truly catastrophic...government officials would be justified in choosing a somewhat more unconstitutional option that did not lead to catastrophe."[208] They then extend this logic even further, arguing that "[t]he principle of catastrophe avoidance should also apply even in circumstances in which the president or some other political actor has available at least one *technically constitutional option.*"[209]

Notwithstanding the general merits of the concept of threshold constitutionality, it is a highly problematic approach to the resolution of legal issues concerning macroeconomic policy-making. This is because predictions regarding the impact of present behavior on the future conditions of the entire macroeconomy, particularly those that also depend on secondary assumptions about mass social psychology, involve a high degree of speculation and uncertainty. Even if it were possible to accurately predict the societal response to budgetary innovations like HVCS, policymakers would have little way of comparing the likelihood of contingent counterfactuals and/or distinguishing accurate predictions from false predictions until after the fact.[210] Hence, there is a risk that, in the context of political-crises-masquerading-as-economic-crises, such as a debt-ceiling standoff, a threshold constitutionality approach could be easily misapplied, or worse, provide legal cover for politicians to avoid unpopular but constitutional decisions in favor of explicitly unconstitutional policies that suit their political agenda.

Ironically, this latter risk is demonstrated by B&D's own assessment of the economic risks of coin seigniorage. In *How to Choose the Least Unconstitutional Option*, they argue that

206 *How to Choose*, 1197; n.94.
207 *Id.*, at 1231.
208 *Id.*
209 *Id.*, at 1232.
210 This problem is exemplified by the overwhelming failure of the economics profession to predict the Global Financial Crisis. *See, e.g.*, Paul Krugman, *How Did Economists Get It So Wrong?*, New York Times Magazine (Sept. 2, 2009), https://www.nytimes.com/2009/09/06/magazine/06Economic-t.html; James K. Galbraith, *Who Are These Economists, Anyway?*, Thought & Action (Fall 2009), http://www.nea.org/assets/docs/HE/TA09EconomistGalbraith.pdf.

> 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 it might be understood as a violation of Section 4 of the Fourteenth Amendment. 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.[211]

This argument is entirely backwards. The entire purpose of HVCS is to provide the government with operating funds to honor is spending obligations. From the perspective of a creditor, it is irrelevant whether the funds received at the point of redemption come from seigniorage or from tax receipts, provided that the face value of their obligations are satisfied with acceptable tender. Or, to put it another way, "cash registers don't discriminate."[212]

This is why, as policymakers and macroeconomists have recently come to appreciate in the context of the European sovereign bond crisis, a nation's ability to generate its own currency is critically important in determining the default risk of sovereign debt. Indeed, even HVCS generated a non-trivial degree of economic disruption and inflation, it would not necessarily rise to the level of a violation of the Fourteenth Amendment, since bills, notes and bonds promise only to be redeemable at nominal face value plus interest.[213]

B&D further argue that, even if HVCS were technically constitutional, its use would "likely spook the markets, leading lenders to demand a very high rate of interest."[214] In a later piece, however, Buchanan appears less worried abut undermining the ability of the Treasury to issue government securities on the bond markets, suggesting a possible change of opinion.[215] Regardless, absent a clear articulation of

[211] *How to Choose*, at 1231.

[212] As economist Stephanie Kelton notes, "cash registers don't discriminate." Harry Shearer, *Interview Transcript Between Stephanie Kelton and Harry Shearer* (Oct. 30, 2012), http://harryshearer.com/transcript-stephanie-kelton-interview.

[213] *See* David Fox, (2011), The Case of Mixt Moneys: Confirming Nominalism in the Common Law of Monetary Obligations", 70(1) *Cambridge Law Journal* 144, 144-145 ("To a modern observer, the principle established by the [Gilbert v. Brett, 1605, a.k.a. *The Case of the Mixt Moneys*] may seem obvious to the point of being trite. If a creditor is owed £100, then the debtor can make a valid tender by proffering banknotes with a face value of £100. Putting the same point differently, banknotes with a face value of £100 are worth £100 in the estimation of the law. [...] The effect of [*the Case of the Mixt Moneys*] was that the creditor had to bear the risk of fluctuations in the purchasing power of the currency arising from any one of these reasons"). *Cf.* Francis A. Mann, *The Legal Aspect of Money* (5th Ed.), Oxford University Press, 271, (2010).

[214] *How to Choose*, at 1231.

[215] Neil Buchanan, *If You're Explaining, Everyone's Losing (Platinum Coin Edition)*, *Dorf on Law* (Jan. 11, 2013), http://www.dorfonlaw.org/2013/01/if-youre-explaining-every-

the causal steps that could produce such an outcome, there is little reason to take this assertion seriously in light of the extensive evidence that governments and central banks in floating fiat currency regimes can control yield levels even during periods of significant economic disruption.[216]

IV. MODERNIZING FISCAL POLICY

A. Money, Debt, and Debt-Money

In a convertible or fixed exchange rate currency regime, there is a meaningful economic difference between financing a budget deficit via issuing currency, which can be readily converted into gold, and via term-maturity Treasury securities, which only promise to be redeemable into gold-convertible currency upon maturity. This is because the former imposes a real economic liability, in the form of immediate pressure on accumulated gold reserves, whereas the latter defers that liability until a future date, when the outstanding Treasury securities come due for redemption (if they are not rolled over).

By contrast, un a floating, fiat currency regime, Treasury securities, as well as other government-guaranteed debts, derive their nominal value, liquidity, and general acceptability from the same full faith and credit of the federal government that underscores legal tender such as coins and Federal Reserve notes, as well as government-backed private monies like bank deposits.[217] This observation is not new – Thomas Edison made the same point in 1921:

ones-losing.html (noting that "Krugman's mockery of "the monetary gods" was based on his rejecting, quite rightly, the "bond vigilantes"-based argument about government debt").

216 *See, e.g.*, Paul McCulley, *Our Currency, But Your Problem*, Pimco: Global Central Bank Focus (Oct. 8, 2003), http://www.pimco.com/EN/Insights/Pages/FF_10_2003.aspx ("there is a limit to how steep the yield curve can get, if the Fed just says no - again and again! - to the implied tightening path implicit in a steep yield curve"). *See also* Edward Harrison, *Credible Lenders Of Last Resort Use Price, Not Quantity Signals*, Credit Writedowns (Nov. 6, 2011), http://www.creditwritedowns.com/2011/11/credible-lenders-of-last-resort-use-price-not-quantity-signals.html; Antoine Martin & Jamie McAndrews, Why Are There No Intraday Money Markets?, *Federal Reserve Bank of New York* (Oct. 2007), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.173.2885 ("we note that the costs of reserves, both intraday and overnight, are policy variables. Consequently, a market for reserves does not play the traditional role of information aggregation and price discovery. I[n] fact, as we discuss, many demand management features determined by central bank policy are intended to dampen price variability in the market for reserves"); Perry Mehrling, *The New Lombard Street: How the Fed Became The Dealer of Last Resort*, Princeton University Press (2010).

217 *See* Robert Hockett & Saule Omarova, The Finance Franchise, 102 *Cornell. L. Rev.* 1143 (2017).

> If our nation can issue a dollar bond, it can issue a dollar bill. The element that makes the bond good makes the bill good also […]
>
> It is absurd to say that our country can issue $30,000,000 in bonds and not $30,000,000 in currency. Both are promises to pay […] If the currency issued by the Government were no good, then the bonds issued would be no good either […]
>
> If the Government issues bonds, the brokers will sell them. The bonds will be negotiable: they will be considered as gilt-edged paper. Why? Because the Government is behind them, but who is behind the Government? The people.
>
> Therefore it is the people who constitute the basis of Government credit.[218]

In light of this fact, many monetary scholars have argued that for monetarily sovereign nations like the United States, the act of issuing government-backed securities, denominated in the domestic unit of account, which can be redeemed only for other government obligations also denominated in that unit of account, is functionally closer to "money creation" than it is to "borrowing." This view is further supported by the fact that the Fed regularly adjusts the relative stock of circulating government securities vis-a-vis its own reserve liabilities as it deems appropriate for the conduct of monetary policy, without concern for one being "money" and the other being "debt."[219]

If modern Treasury securities are indeed better thought of as a special form of money, rather than a "loan" in the colloquial sense, then perhaps it is more appropriate to consider their issuance – in spirit if not black letter law – as an exercise of Congress's power to coin money, rather than its power to borrow money. After all, most people don't get a

218 New York Times, *Ford Sees Wealth In Muscle Shoals,* (Dec. 6, 1921), http://query.nytimes.com/mem/archive-free/pdf?_r=3&res=9C04E0D7103EEE3ABC4E53DF-B467838A639EDE.

219 *See, e.g.*, John Maynard Keynes, *The General Theory of Employment, Interest and Money*, Ch. 14, fn. 1., Palgrave (1936) ("we can draw the line between 'money' and 'debts' at whatever point is most convenient for handling a particular problem. For example, we can treat as money any command over general purchasing power which the owner has not parted with for a period in excess of three months, and as debt what cannot be recovered for a longer period than this; or we can substitute for "three months" one month or three days or three hours or any other period; or we can exclude from money whatever is not legal tender on the spot. It is often convenient in practice to include in money time-deposits with banks and, occasionally, even such instruments as (e.g.) treasury bills").

loan from a bank by walking in and handing them a bag of cash so that the bank can lend it right back to them.

Under this analytical framework, "true" government "borrowing" would be understood to refer only to instances where the government incurred debts redeemable in a convertible currency, or debts directly payable in a resource other than its own floating, fiat currency, such in-kind debts payable in goods and services, or debts denominated in foreign-denominated currency. Indeed, this definition of "borrowing" as involving the acquisition of resources that one did not possess prior to effectuating the loan more closely describes the economics of government debt auctions between 1790 and 1973, when the United States promised convertibility of the dollar into gold or foreign exchange.

Today, in contrast, the Treasury and Fed coordinate closely to ensure that the private sector has sufficient reserves to purchase any and all Treasury securities offered at auction. The economics of this "borrowing," whereby the Fed provides the necessary funds to private creditors in advance so that they can then be made available to pay or lend to the Treasury, bear little resemblance to the economics of "borrowing" prior to 1973.

To their credit, B&D recognize the transformative implications of monetary sovereignty on the nature and function of government debt, noting that "financial markets have [historically] treated United States debt securities as the equivalent of cash," due to the fact that "there [is] no risk of default" when a security "denominated in dollars is backed by the full faith and credit of the United States."[220] However, from this insight they against reach the opposite legal conclusion, arguing that because U.S. currency instruments such as coins, U.S notes, or tax-anticipation "scrip," are legally government obligations akin to government securities, they should similarly be subject to limit under the debt ceiling.[221] Consequently, any attempt to finance the budget deficit with direct currency creation must violate the trilemma in a manner identical to breaching the debt ceiling.[222]

This argument is unpersuasive for at least four reasons. First, as a matter of statutory interpretation, the plain language of 31 U.S.C. § 3101 clearly states that the only obligations subject to limit under the debt ceiling apart from those explicitly specified in U.S.C. Title 31, Chapter 31 are those whose "principal *and interest*" are guaranteed by the United States government.[223] Given that coins, U.S. Notes, and tax-anticipation

[220] *How to Choose*, at 18.

[221] Michael Dorf, *Even After the Coin is Gone, the Legal Analysis is Constructive*, *Dorf on Law* (Jan. 13, 2013), http://www.dorfonlaw.org/2013/01/even-after-coin-is-gone-legal-analysis.html.

[222] *Id.*

[223] 31 U.S.C. § 3101.

notes do not mature at a specific date or pay interest, there is a strong plain language presumption that they should not be subject to this limit, which is otherwise restricted to defined-maturity, positive-interest bearing obligations.

Second, as a matter of positive law, there are many categories of government-guaranteed obligations presently not counted as debt subject to limit under the debt ceiling. These include not only coins and U.S. Notes, but also Federal Reserve notes, gold certificates, and stamps.[224] To include each and every one of these instrument categories under the debt ceiling would require a radical reinterpretation of the boundaries of 31 U.S.C. § 3101, well beyond any intent implied or articulated by Congress. Moreover, it would necessitate the conclusion that the Treasury had been in violation of the debt ceiling for a considerable fraction of the ceiling's existence, including for multiple periods immediately after Congress passed limit increases.

Third, treating any and all government obligations, including legal tender currency instruments, as debts subject to limit under the debt ceiling negates the economically meaningful and constitutionally recognized distinction between Congress's power to coin money, and its power to borrow on the credit of the United States. Furthermore, if combined with the view that the debt ceiling statute itself was itself an expression of borrowing power, the effect would be to completely subsume Congress's power to create money within its borrowing power.

There is no historical or doctrinal justification for such an extreme and expansive interpretation of 31 U.S.C. § 3101. To the contrary, as argued above, if anything it is more economically coherent to treat *nominal* government debts, which promise redemption only in the form of other government obligations of an equivalent or similar nominal value, as an expression of Congress's money creation power, rather than its borrowing power. Thus, while modern Treasury securities subject to limit under the debt ceiling may technically constitute a form of "borrowing," they arguably more closely adhere to the spirit of "coined money" than the original meaning of "borrowing" implied by the Borrowing clause.

Understanding modern Treasury debt issuance as a form of money creation makes it easier to draw functional parallels between the quantitative cap on government securities imposed by 31 U.S.C. § 3101, and the $300 million cap on U.S. currency notes imposed by 31 U.S.C.

[224] 18 USC § 8 ("The term "obligation or other security of the United States" includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps").

§ 5115, as well as to a lesser degree, the qualitative denominational caps on coins imposed by the Coinage Act. In the case of Treasury securities and U.S. currency notes, the Treasury Secretary is granted wide latitude in determining the denominations of instruments to issue, but is capped with respect to the total value of instruments capable of being issued into circulation.

With coins, by contrast, the Treasury Secretary is granted limited latitude in determining the denominations to issue,[225] but faces no cap regarding the total value of coins capable of being issued into circulation.[226] In each case, the quantitative (or qualitative) caps establish the boundaries of specific Congressional delegations of money creation power. Taken together, however, they grant the Treasury Secretary broad operational discretion in how they choose to finance Congressionally-mandated spending priorities via a combination of "money creation" and "borrowing."

Fourth, even if issuing new currency instruments was deemed subject to limit under the debt ceiling, it would nevertheless remain legally distinct from issuing Treasury securities, implicate different institutional actors and operational procedures, and produce different economic and political effects. Moreover, there is a meaningful constitutional difference between breaching the debt ceiling by coining money, and breaching the debt ceiling by borrowing money. Thus, simply determining that both would constitute a violation of the debt ceiling statute is not, in itself, a reason to prefer issuing Treasury securities over HVCS. Rather, such a conclusion requires further analysis as to why it is inherently worse for the executive to violate the separation of powers by usurping the power to coin money than by usurping the power to borrow.

B. Monetary Mythmaking

By downplaying the centrality of money creation to modern fiscal dynamics, and dismissing proposals to circumvent the debt ceiling limits through HVCS on the grounds that they are mere "accounting gimmicks," B&D implicitly reinforce the notion that administratively imposed constraints on money creation are tantamount to material or legally hardwired limits to the government's fiscal capacity. Or, at the

225 With the exception of 5112(k), as discussed further *infra*.

226 Conversely, the Treasury Secretary enjoys considerable discretion over when *not* to issue coins. For example, in December 2011, Secretary Geithner suspended the $1 Presidential Coin Program, despite an explicit statutory requirement that he continue issuing four new Presidential coins on an annual and ongoing basis, citing his authority under § 5111(a) to mint and issue coins "in amounts the Secretary Treasury decides are necessary to meet the needs of the United States." Neal S. Wolin, Reducing The Surplus Dollar Coin Inventory, Saving Taxpayer Dollars, *U.S. Treasury Website* (Dec. 13, 2013), http://www.treasury.gov/connect/blog/Pages/Reducing-the-Surplus-Dollar-Coin-Inventory-Saving-Taxpayer-Dollars.aspx.

very least, that they should be viewed and discussed as such in public policy discourse, even by those who know better.

Of course, B&D are not alone in their defense of the social utility of noble lies in the realm of monetary and macroeconomic affairs. Famed economist Paul Samuelson, for example, expressed a similar sentiment with respect to increasingly lax social attitudes towards budget deficits:

> I think there is an element of truth in the view that the superstition that the budget must be balanced at all times [is necessary]. Once it is debunked [that] takes away one of the bulwarks that every society must have against expenditure out of control.
>
> There must be discipline in the allocation of resources or we will have anarchistic chaos and inefficiency. And one of the functions of old fashioned religion was to scare people by sometimes referring to what might be regarded as myths into behaving in a way that, in the long-run, civilized life requires.
>
> We have taken away a belief in the intrinsic necessity of balancing the budget if not in every year, [then] in every short period of time. If Prime Minister Gladstone came back to life he would say "uh oh, what you have done" and James Buchanan argues in those terms. I have to say that I see merit in that view.[227]

Unlike Samuelson, B&D see little social merit in preserving balanced budget fictions.[228] Nor, indeed, do they share the concern of less economically sophisticated critics of HVCS that it would be intrinsically inflationary.[229] This is because, as Paul Krugman notes, when interest rates on short-term debt and money are identical,[230] "issuing short-term

[227] L. Randall Wray, *Paul Samuelson on Deficit Myths*, New Economic Perspectives (April 30, 2010), https://neweconomicperspectives.org/2015/01/public-understood-money-works.html.

[228] *See, e.g.*, Neil Buchanan, Why We Should Never Pay Down the National Debt, 50 *U. of Louisville L. Rev.* 683 (2012).

[229] Buchanan, *Supra* Note 215 ("I completely agree that the problem with Big Coins has nothing to do with creating inflation. The problem, in other words, is surely not a matter of how this would affect the Fed's balance sheet, the monetary base, or anything like that").

[230] Historically, this equivalency between the inflationary potential of money-financed and bond-financed deficits was understood to apply only when interest rates were at the "Zero Lower Bound," such that both reserves and government debt paid zero interest. However, since the Fed began paying interest on excess reserves in 2008, both government debt and reserves have offered similarly positive yields. As a result, the equivalency between bond-financing and money-financing of deficits now applies even when interest rates are above zero. *See also* Fullwiler, *Supra* Note 83; Kocherlakota, *Supra* Note 88;

debt and just 'printing money' […] are completely equivalent in their effect, so even huge increases in the monetary base […] aren't inflationary at all."[231]

Instead, B&D's resistance to the "#mintthecoin" phenomenon[232] is motivated by sociological considerations. In a tellingly named blog post titled "If You're Explaining, Everyone's Losing (Platinum Coin Edition)," Buchanan argues that employing HVCS to circumvent the debt ceiling limit would "pull[] back the curtain on the entirely ephemeral nature of money and finance itself."[233] Thus, he concludes, "what the Big Coin people dismiss as mere concern about looking 'undignified' is, by contrast, a question of the utmost importance."[234]

It is this desire to avoid "pulling back the curtain" on the nature of money, more than any of the constitutional and statutory objections discussed above, that lies at the heart of B&D's opposition to HVCS. Indeed, Buchanan goes on to argue that:

> A monetary system simply cannot work if people do not collectively take a leap of faith. We accept currency or precious metals – which have no inherent use value for everyday purposes – because we think that other people will accept them in turn. This group delusion allows us to say that money is money. If the delusion starts to fall apart, then there are very real, very negative effects.[235]

This concern is also the most charitable explanation for the Obama administration's decision not to give serious consideration to HVCS, despite prominent legal scholars like Lawrence Tribe, as well as prominent economists like Paul Krugman, imploring it to do so. From the administration's vantage point, it was easier to frame the debt ceiling crisis as a product of Republican intransigence and partisan brinkmanship, than to interpret it as an invitation or even mandate to reconfigure the administration of fiscal policy, and in the process, challenge society's collective understanding of money. Moreover, they predicted a political windfall in the event they were able to force their Republican opponents to blink before they reached default; a prediction that ultimately proved correct.

On one hand, the Obama administration's gamble paid off, in the narrow sense that they successfully broke the Republican party's logjam

Kelton & Fullwiler, *Supra* Note 88.

231 Paul Krugman, *Rage Against the Coin*, New York Times (Jan. 8, 2013), https://krugman.blogs.nytimes.com/2013/01/08/rage-against-the-coin.

232 See, e.g., Ryan Tate, *Meet the Genius Behind the Trillion-Dollar Coin and the Plot to Breach the Debt Ceiling*, Wired (Jan. 10, 2013), https://www.wired.com/2013/01/trillion-dollar-coin-inventor/.

233 Buchanan, *Supra* Note 215.

234 *Id.*

235 *Id.*

without defaulting, albeit at great economic and social cost to the American public. On the other hand, its decision to sidestep the deeper constitutional questions raised by the debt ceiling crisis rather than confront them head on, while politically understandable, was not inevitable. To the contrary, U.S. history is replete with "constitutional monetary moments" where partisan disagreements over proper exercise of the "money power' pushed monetary issues to the forefront of the popular and legal imagination.[236] Indeed, it is impossible to separate monetary issues from the broader politics of the New Deal era, the populist era, the Civil War era, the Jacksonian era, or indeed, the Revolutionary era itself.[237]

Rather than pursuing that path, however, the Obama administration punted, and what could have been a defining moment in American monetary history was instead reduced to yet another play in a decades-long game of partisan budgetary football. And therein lies the rub. Upon closer inspection, what at first blush appeared to be a constitutional crisis, driven by an ostensible legal paradox in the administrative law of fiscal policy, was ultimately revealed instead to be a manufactured crisis, driven by a political desire to preserve a particular set of social myths about money, even when doing so carried the risk of economic catastrophe or explicitly unconstitutional outcomes.

In this sense, the response "breach the debt ceiling" was never really an answer to the question of "how to choose the least unconstitutional option in the event of a debt ceiling crisis." Rather, it was an answer to the much narrower question of "how to choose the least unconstitutional option in the event of a debt ceiling crisis *while also preserving existing monetary myths*." Indeed, B&D at one point even concede that HVCS may not merely be less unconstitutional than breaching the debt ceiling,

236 Perhaps the most famous of these is populist William Jennings Bryan's famous "cross of gold" speech at the Democratic National Convention on July 9, 1896, in which he criticized the evils of the gold standard for its deflationary, "hard money" bias, and advocated instead the adoption of bimetallism. Roy Kreitner, Money in the 1890s: The Circulation of Politics, Economics, and Law, 1(3) *UC Irvine L. Rev.* 975 (2012). *See also* Gerard N. Magliocca, The *Gold Clause Cases* and Constitutional Necessity, 64(5) *Fl. L. Rev.* 1243 (2012); Roy Kreitner, Kenneth W. Dam, From the Gold Clause to the Gold Commission: A Half Century of American Monetary Law, 50 *U. Chi. L. Rev.* 504 (1983); Kenneth W. Dam, The Legal Tender Cases, 1981 *The Sup. Ct. Rev.* 367 (1981); *generally* James Willard Hurst, *A Legal History of Money: 1774-1970*, University of Nebraska Press (1973).

237 See, e.g., David Freund, State Building for a Free Market: The Great Depression and the Rise of Monetary Orthodoxy, in Brent Cebul, Lily Geismer, and Mason B. Williams (Eds.), *Shaped by the State: Toward a New Political History of the Twentieth Century*, University of Chicago Press (2019)*;* Desan, *Supra* Note 136; K-Sue Park, Money, Mortgages, and the Conquest of America, 41(4) *L. & Soc. Inq.* 1006 (2016); Roy Kreitner, *Supra* Note 236; Woody Holton, *Unruly Americans and the Origins of the Constitution*, Hill and Wang (2008); John A. James & David Weiman, The Political Economy of the U.S. Monetary Union: The Civil War Era as a Watershed, 97(2) *Am. Econ. Rev.* 271 (2007).

but may in fact be a *potentially constitutional* option. Nevertheless, they still recommend breaching the debt ceiling in that instance, underscoring the fact that of the two concerns – avoiding unconstitutional behavior, and preserving existing monetary myths – the latter ultimately takes primacy over the former.

In contrast to this view, I argue that in "constitutional monetary moments" like those generated by debt ceiling crisis, it is important – not only positively but also *normatively* – to recognize that contemporary operational constraints on money creation are self-imposed, institutionally contingent, and ultimately *legal* rather than *material* in nature. It is important to do so because in such instances it may be not only appropriate, but socially optimal, to subject existing legal constraints to creative interpretation, or even ignore them outright, in order to challenge and disrupt the social myths they uphold, as well as the political dynamics that they produce.[238] As noted legal realist Thurman Arnold argued:

> You judge the symbols [upon which society is built and depends] as good or bad on the basis of whether they lead to the type of society you like. You do not cling to them on general principles when they are leading in the wrong direction.[239]

By denying from the outset the possibility that debt ceiling crises are, in fact, constitutional monetary moments in which it may make sense to abandon outdated monetary symbols, we close off the full range of political possibilities and legal options available to us to improve fiscal policy administration, and with it, our economy more broadly. In other words, it was not sufficient then, and it is not sufficient now, to merely assert as a positive matter that our current social myths about the nature of money preclude exotic or even 'radical' legal solutions such as HVCS from serious consideration. Rather, it is incumbent on us to question whether the social myths in question are in fact worthy of preservation, or at the very least, how sure we are that the alternatives that would likely emerge to take their place would lead to socially inferior outcomes.

Moreover, while there may be valid reasons to value caution and restraint when considering actions that challenge core social myths, these reasons are not absolute or dispositive. In certain situations, an abundance of caution and/or fear of abandoning groupthink despite overwhelming evidence to the contrary can prove far more costly than the alternative.[240] Thus, as with common law jurisprudence, adherence to precedent and maintenance of continuity may be an important considera-

[238] Desan, *Supra* Note 136.

[239] Warren Samuels, Legal Realism and the Burden of Symbolism: The Correspondence of Thurman Arnold, 13(4) *L. & Soc. Rev.* 997, 1006 (internal citations omitted).

tion, but their benefits should always be considered in context, and weighed against the risks and benefits of other available options.

In this instance, for example, the main alternative solution to HVCS – explicitly breaching the debt ceiling – is not without its own legal, political, and economic risks. Most notably, it requires the President to intentionally refuse to honor Congress's statutory directives, and in doing so possibly provoke a constitutional separation of powers crisis. Furthermore, whereas breaching the debt ceiling *necessarily* involves the President engaging in unconstitutional behavior, it is only a *possibility* that HVCS will produce the cataclysmic outcome Buchanan and others fear.

Indeed, there are at least four reasons to be highly skeptical that such an outcome will actually occur. First, the claim that the social value of money is anchored in nothing other than shared belief is not supported by legal or anthropological evidence.[241] To the contrary, this "infinite regress" theory of monetary value has been thoroughly refuted by legal historical research demonstrating that the value of money has historically been anchored in its capacity to be tendered to satisfy taxes and other non-reciprocal obligations payable in cash.[242] These obligations, in turn, are coercively imposed through hierarchical institutions such as religious authorities, warlords, imperial powers, monarchs, and the modern nation state.[243]

In other words, the historical value of public money has, at its core, not been derived from a "leap of faith" but on the cold, hard, material recognition that money is, at its core, a tax credit. Or, more accurately, a "legal liability settlement" credit. If it is indeed true that, as the saying goes, the only two things certain in life are death and taxes, there is little cause to worry that U.S. currency will cease to enjoy wide acceptability overnight in the event that the Treasury chooses to engage in creative fiscal financing via issuance of high value platinum coins. Such an outcome would instead require a loss of faith in the functioning and coercive capacity of not only the I.R.S., but the entire system of courts, police, and military upon which the I.R.S. relies.

Moreover, the commercial world is increasingly defined not only by the inevitability of taxes, but also by the complex web of accounting, in-

[240] See, e.g., William Mitchell, *Eurozone Dystopia: Groupthink and Denial on a Grand Scale,* Macmillan (2015) (exploring how groupthink contributed to monetary and financial system crisis in Eurozone).

[241] See, e.g., Philip Pilkington, *What is Debt? An Interview With Economic Anthropologist David Graeber*, Naked Capitalism (Aug. 26, 2011), https://www.nakedcapitalism.com/2011/08/what-is-debt-%E2%80%93-an-interview-with-economic-anthropologist-david-graeber.html; Christine Desan, Creation Stories: Myths About the Origins of Money, *Social Science Research Network* (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252074.

[242] *See, e.g.*, Desan, *Supra* Note 136; Fox & Ernst, *Supra* Note 136.

[243] *Id.*

surance, compliance, and jurisdictional regulations in which legal subjects are embedded. In addition, as Katharina Pistor has argued, part of the reason why the U.S. dollar enjoys such high demand globally is because the modern global financial system is highly dependent on the private law and judicial system of New York State, as well as the United States more broadly.[244] Together, these factors increase the value of possessing (or having access to) liquid U.S. currency as a means of day-to-day liability risk mitigation for both Americans and non-Americans alike.

Indeed, the United States has enjoyed relatively stable high demand for its currency and debt since its emergence after World War II as a dominant military and economic actor, despite engaging in a wide range of unorthodox macroeconomic policy responses over the past years, including monetization of trillions of dollars of outstanding government debt via the Federal Reserve in the aftermath of the global financial crisis. Moreover, even non-hegemonic countries have enjoyed stable demand for their currencies despite engaging in unorthodox monetary policies, as evidenced by the fact that the Japanese Yen remains stable and in in high demand, and interest rates on Japanese government bonds are presently negative, despite the fact that the Bank of Japan presently owns nearly half of all outstanding Japanese government securities in circulation, and 'monetizes' more debt on a monthly basis than the size of the monthly budget deficit.

Second, there is every reason to believe that resolving the threat of future debt ceiling crises without resorting to explicitly unconstitutional action would increase public faith in the stability of the U.S. government and its monetary system, relative to the recent trend of increasingly common and severe budgetary crises and government shutdowns. Even if that is not the case, however, there is little reason to believe any fiscally-inspired political instability will have a material effect on public confidence in the dollar. Indeed, to the extent that most creditors are concerned about prospects of payment rather than the source of funds used by the debtor to make that repayment, eliminating the possibility of future default is likely to increase confidence in the safety of U.S. debt, rather than undermine it. This is, in fact, exactly what occurred in the aftermath of the 2011 debt ceiling crisis, when global appetite for Treasury securities increased, and bond yields were driven even lower despite the fact that Standard & Poors downgraded the U.S. debt rating from AAA to AA+ out of concern for the increased politicization of the budget process.

[244] Katharina Pistor, *Coding Private Money*, Institute for New Economic Thinking (June 3, 2019), https://www.ineteconomics.org/perspectives/blog/coding-private-money.

Third, while Buchanan may be correct that the smooth functioning of society requires a shared belief in common legal fictions,[245]there is no reason to presume that the "sound money" myths he defends are either necessary or sufficient to meet the evolving economic demands of the twenty-first century economy. As early as 1945, former New York Federal Reserve Chair Beardsley Ruml argued in a speech delivered to the American Bar Association that

> [T]he United States is a national state which has a central banking system, the Federal Reserve System, and whose currency, for domestic purposes, is not convertible into any commodity. It follows that our Federal Government has final freedom from the money market in meeting its financial requirements.
>
> Accordingly, the inevitable social and economic consequences of any and all taxes have now become the prime consideration in the imposition of taxes. [...]
>
> The public purpose which is served should never be obscured in a tax program under the mask of raising revenue.[246]

Notwithstanding Ruml's exhortations, the legal concept of "taxpayer citizenship," predicated on the fiction that the government budget is funded by "taxpayer money," was ultimately successfully weaponized by white supremacists during the second half of the twentieth century in order to block federal efforts to promote school integration and enforce equal protection laws on behalf of racial minorities.[247]

Furthermore, as Sandy Hager has argued, the fiction that government bondholders act as creditors to the United States has obscured the historical flow of resources *fro*m the government *to* the bondholder class, for centuries and is responsible for significantly increasing the concentration of wealth and power among a tiny financial elite.[248] More

245 *See also* Samuels, *Supra* Note 239, at 1004-05 ("Arnold felt that the professions of law and economics did not contain truth but were laden with symbolic thinking which conditioned behavior; economics guarded vested interests, and the law lent them permanence []. Law was largely primitive ritual [] and all economic theory was so much folklore [...] Although Arnold revealed symbols to be substantially empty and often utterly meaningless, he emphasized (as did Pareto and J.H. Robinson) their essential social role. Belief in metaphysical entities and concepts functioned to sustain civilization and institutions, condition behavior, and cement society. What was substantively empty was nevertheless emotionally and thus socially *and* scientifically important").

246 Beardsley Ruml, Taxes for Revenue Are Obsolete, VII(1) *American Affairs 5, (1945).*

247 Camille Walsh, *Racial Taxation: Schools, Segregation, and Taxpayer Citizenship, 1869-1973*, University of North Carolina Press, (2018).

248 Sandy Brian Hager, *Public Debt, Inequality, and Power*, University of California Press, (2016).

broadly, the fiction that "governments are budget-constrained like a business or household" has played a major facilitating role in the adoption and perpetuation of austerity policies across the world over the past decade, including cuts to many core public services.[249]

Consequently, Buchanan may indeed be correct in his observation that using HVCS to circumvent the debt ceiling would expose and undermine the myth that monetarily sovereign governments like the United States must – and, in fact, do – seek external sources of funds in order to finance their spending. However, his implicit rejection of that outcome on the grounds that society, like Tom Cruise's character in A Few Good Men, simply "can't handle the truth," obviates the possibility and potential for a new and superior monetary myth to emerge and take its place.[250]

For many legal realists, like Thurman Arnold, the task of recognizing when existing myths have decayed and no longer serve their social function, and devising better myths to replace them, was a core function and responsibility of both the political and legal classes:

> My own feeling is that man was born to be harnessed by priests and that this is one of the crosses which he must bear. However a realistic appreciation of this fact is like the physician's appreciation of the fact that he has certain physical limitations and a social diagnosis would require that his need in this direction be ministered to.
>
> Therefore I will make a distinction between useful and useless priests from the standpoint of humanitarian values.[251]

Moreover, in moments of deep social crisis, where institutional and political arrangements previously considered necessary to the day-to-day

[249] *See, e.g.*, Jacke Calmes, *Obama's Budget Revives Benefits as Divisive Issue*, New York Times (April 13, 2013) https://www.nytimes.com/2013/04/14/us/politics/president-obamas-budget-revives-benefits-as-divisive-issue.html.

[250] It arguably already is. *See, e.g.*, Steve Matthews, Economists Worry That MMT Is Winning the Argument in Washington, *Bloomberg* (Oct. 7, 2019), https://www.bloomberg.com/news/articles/2019-10-07/economists-worry-that-mmt-is-winning-the-argument-in-washington*;* Matthew Klein, Everything You Need To Know About Modern Monetary Theory, *Barrons* (June 7, 2019), https://www.barrons.com/articles/modern-monetary-theory-51559956914; Dylan Matthews, Modern Monetary Theory, Explained, *Vox* (April 16, 2019); Patricia Cohen, Modern Monetary Theory Finds an Embrace in an Unexpected Place: Wall Street, *New York Times* (April 5, 2019), https://www.nytimes.com/2019/04/05/business/economy/mmt-wall-street.html; Katia Dimitrieva, For Overspending Governments, an Alternative View on Borrowing Versus Raising Taxes, *Washington Post* (March 13, 2019), https://www.washingtonpost.com/business/for-overspending-governments-an-alternative-view-on-borrowing-versus-raising-taxes/2019/03/12/13945b5a-44dc-11e9-94ab-d2dda3c0df52_story.html.

[251] Samuels, *Supra* Note 239, at 1005-6.

legal functioning of the government are revealed to be deficient, the process of evaluating and choosing which myths to support or reject becomes in itself a *political* act. This point was perhaps most eloquently articulated by President Lincoln, who in the depths of the Civil War noted in his Second Annual Message to Congress that

> The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves, and then we shall save our country.

Indeed, it was out of a similar deep concern that Thurman Arnold in 1936 wrote to Harold Laski indicating that he was

> [L]ooking for symbols to put a different class of politicians in power. Not a set of brighter or more intellectual politicians, because I doubt the efficacy of reason in political action, but a set of people with a different kind of objective.[252]

Recently, the global impact of the 'Green New Deal' resolution introduced by freshman congresswoman Alexandria Ocasio-Cortez, as well as the viral popularity of the previously obscure heterodox school of macroeconomic thought known as Modern Monetary Theory (MMT),[253] has underscored the public's growing appetite for bold, new macroeconomic narratives on a scale similar to that of the Civil War and the original New Deal.

Concurrently, the rise of new financial technologies, such as mobile money, blockchain, and virtual coins, have already begun to inspire renewed public interest in the process of money creation, in the process giving new meaning to Hyman Minsky's observation that "everyone can create money; the problem is to get it accepted."[254] However ridiculous or unfathomable it may have seemed to suggest the government could simply "mint" money out of thin air in 2012, it is undeniably less so in

[252] *Id*.

[253] *See, e.g.*, Atossa Araxia Abrahamian, *The Rock-Star Appeal of Modern Monetary Theory*, The Nation (May 8, 2017), https://www.thenation.com/article/the-rock-star-appeal-of-modern-monetary-theory; *See also* The Modern Money Network (Oct. 18, 2019), https://modernmoneynetwork.org.

[254] Hyman Minsky, *Stabilizing an Unstable Economy*, 228, Yale University Press (1986). *See also* Rohan Grey, Banking in a Digital Fiat Currency Regime, in Phillipp Hacker, Ioannis Lianis, Georgios Dimitropoulos, & Stefan Eich (Eds.), *Regulating Blockchain: Techno-Social and Legal Challenges*, Ch. 8, Oxford University Press (2019); Rohan Grey, Mobile Finance in Developing Countries: Policy Implications and Potential, *Global Institute for Sustainable Prosperity Working Paper No. 116* (2017), http://www.binzagr-institute.org/wp-content/uploads/2017/06/WP-116.pdf.

2019, when the "fintech" sector is one of the fastest growing in the entire economy, and every other venture or new product is (or at least seems to be) pitched as "something-coin" or "this-or-whatever-blockchain."[255]

Most recently, Facebook's announcement that it plans to create a new digital currency to serve its 2+ billion user base has presented both an opportunity and an urgent need to develop new social narratives and symbols to educate the public about the nature of money creation and the future of public finance.[256] As Benoît Cœuré, Chair of the Bank of International Settlements' Committee on Payments and Market Infrastructures and head of the G-7 Working Group on Stablecoins, recently observed,

> [G]lobal "stablecoin" initiatives, such as Libra, will prove disruptive in one way or another. They are the natural result of rapid technological progress, globalisation and shifting consumer preferences.
>
> But how we respond to these challenges is up to us. We can focus our efforts on ensuring that private payment systems will thrive […]
>
> Or we can accelerate our own efforts to overcome the remaining weaknesses in global payment systems, safe in the belief that only public money can ultimately, and collectively, ensure a safe store of value, a credible unit of account and a stable means of payment.[257]

[255] *See, e.g.,* Jonathan Dharmapalan & Rohan Grey, The Case for Digital Legal Tender: The Macroeconomic Policy Implications of Digital Fiat Currency, *eCurrency Mint Ltd.* (2017), https://www.ecurrency.net/static/resources/201802/TheMacroeconomicImplicationsOfDigitalFiatCurrencyEVersion.pdf; Saule Omarova, New Tech vs. New Deal: Fintech As A Systemic Phenomenon, 36 *Y. J. on Reg.* 735 (2019); Robert Hockett, Money's Past is Fintech's Future: Wildcat Crypto, the Digital Dollar, and Citizen Central Banking, 2 *Stanford J. of Blockchain L. & Policy* __ (2019); Douglas Arner, Janos Barberis, & Ross Buckley, The Evolution of Fintech: A New Post-Crisis Paradigm?, University *of Hong Kong Faculty of Law Research Paper No. 2015/047* (Sept. 7 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676553.

[256] Rohan Grey, *Facebook Wants Its Own Currency. That Should Scare Us All*, The Nation (July 22, 2019), https://www.thenation.com/article/facebook-libra-currency-digital; *see also* Robert Hockett, *Facebook's Proposed Currency: More Pisces Than Libra For Now*, Forbes (June 20, 2019), https://www.forbes.com/sites/rhockett/2019/06/20/facebooks-proposed-crypto-currency-more-pisces-than-libra-for-now/#6c7d35ee2be2; *Katharina Pistor, Facebook's Libra Must Be Stopped,* Project Syndicate (June 20, 2019), https://www.project-syndicate.org/commentary/facebook-libra-must-be-stopped-by-katharina-pistor-2019-06.

[257] Benoît Cœuré, *Digital Challenges to the International Monetary and Financial System*, European Central Bank (Sept. 17, 2019), https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190917~9b63e0ea23.en.html.

C. Symbolic Seigniorage

Against this backdrop, coin seigniorage can be understood more broadly than as a mere accounting gimmick or exotic budgetary financing tool. Instead, it is a doorway through which we can glimpse a fundamentally different mode of monetary politics; one in which the process of money creation is made visible, and the mechanics of finance are simplified and abstracted to such an extent that the money required to fund the government entire operating budget could literally be held in one's hand, with plenty left over for change.

Of course, even a trillion dollar coin is still ultimately a physical token, and to that extent could be seen as implicitly reinforcing an essentially commodity-like understanding of the nature of modern money. On the other hand, Jon Stewart's quip that "if we're just gonna make sh*t up, I say go big or go home. How about a $20 trillion dollar coin?"[258] is revealing, in that it demonstrates how the sheer size of a number as large as $1 trillion can be so psychologically disruptive as to break any residual subconscious linkage between the nominal face value of coins and their underlying metallic content.

Instead, the prospect of minting a "trillion dollar coin" confronts the public directly with the reality of the "big monetary infinity sign in the sky,"[259] and in doing so, forces us to collectively grapple with the economic and cultural implications of the state's money creation power. For professional clowns like Stewart, that confrontation may, as Buchanan observes, represent little more than an opportunity to "expose the fundamentally unreal nature of money to public ridicule."[260] But for other, more thoughtful, segments of the population, it represents an opportunity to imaginatively reclaim the public fisc from the austere clutches of red ink, overburdened grandchildren, bond vigilantes, and empty coffers.

Moreover, the social implications of reimagining money go well beyond merely increased federal spending capacity. Instead, they cut to the heart of the very processes by which modern money is created. If the Fed is the institutional embodiment of our contemporary monetary politics, replete with its jargon-speaking technocrats, complex financial products, and Wall St. clientele, the institutional embodiment of the monetary politics of seigniorage is the Mint; a small, humble Treasury

[258] Buchanan, *Supra* Note 213 (quoting Jon Stewart).

[259] *See* Scott Ferguson, *Money's Laws of Motion*, Arcade (May 9, 2017), https://arcade.stanford.edu/blogs/moneys-laws-motion ("Drawing on G. W. F. Hegel's terminology, [David Harvey] brands money's endless unraveling a "bad infinity," an infinite regress that leads nowhere but into further crisis. […] Seen through the eyes of [Modern Monetary Theory], however, the future hardly looks foreclosed. Private debt can become a "bad infinity." But public money is the best kind of infinity and it constitutes the center around which this forsaken system turns").

[260] Buchanan, *Supra* Note 213.

bureau that elementary school children visit with their family or on school field trips. At the Fed, money is "loaned out" as accounting entries on a computer screen via complicated financial market interventions; at the Mint, money is "created" via stamping lumps of inert metal with the seal of the sovereign. At the Fed, money is discussed only in terms of mindbogglingly large sums that are beyond the practical comprehension of the average person; at the Mint, the same process is responsible for creating pennies as would be responsible for creating a trillion dollar coin.

Furthermore, the visual imagery and physical composition of coins – small, uniform, held in a "wallet," and adorned with U.S. government insignia – serves as a useful metaphorical complement to that of the "bank account" that dominates policy discussions of new public digital currency infrastructure.[261] Additionally, coins are the universal symbol of anonymous money, even more than banknotes, which historically have included barcodes that can be used to trace illegal or unusual transactions.[262] Thus, as concerns for surveillance, traceability, and censorship gain greater salience in public debates over digital fiat currency system design and regulation, as they are beginning to do,[263] it is useful to recenter coinage at the heart of the public monetary imagination.

In the broadest sense, HVCS represents not only a possible solution to debt ceiling crises, but a public teaching moment, and an opportunity to rejuvenate our collective monetary identity. By making the inherently social nature of money impossible to ignore, HVCS serves as weapon against what sociologist Jakob Feinig calls "monetary silencing," whereby average people are

> [E]xclud[ed] [...] from knowledge of monetary institutions and turn[ed] [...] into mere money users and consumers–people whose knowledge doesn't go beyond using a credit card, depositing a check, or knowing where to get money from a pay-day lender. […] [A]nything that comes close to a structural vision [is silenced.][264]

261 *See, e.g.*, Morgan Ricks, John Crawford & Lev Menand, A Public Option for Bank Accounts (Or Central Banking for All), *Vanderbilt Law Research Paper 18-33* (Jan. 26, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192162; Hockett, *Supra* Note 255.

262 John Paul Koning, *How Anonymous is Cash?*, Moneyness (Oct. 27, 2016), http://jpkoning.blogspot.com/2016/10/how-anonymous-is-cash.html.

263 *See, e.g.*, David Beckworth, *The Future of Digital Currency*, The Bridge (Feb. 11, 2019), https://www.mercatus.org/bridge/podcasts/02112019/future-digital-fiat-currency.

264 Maxximilian Seijo, Scott Ferguson, & William Saas, *Money Politics Before the New Deal With Jakob Feinig*, Monthly Review (Sep. 13, 2019), https://mronline.org/2019/09/13/money-politics-before-the-new-deal-with-jakob-feinig.

CONCLUSION

Fiscal policy is not administered in a monetary vacuum. To the contrary, the historical evolution of the federal budget is intertwined with the evolution of money. In particular, the Treasury's discretion over budget financing practices expanded during the twentieth century in large part due to legal developments that dissolved functional distinctions between different forms of government-guaranteed financial instruments, including, ultimately, between "public debt" and "public money" itself.

Against this backdrop, the persistence of recurring debt ceiling crises can be seen not only as a failure of fiscal policy administration, but also of monetary system design. Moreover, framing the legal dynamics driving debt ceiling crises as a "trilemma" that implicates only the constitution powers to spend, tax, and borrow obscures the centrality of a fourth constitution power: the power to coin money. Bringing money creation to the analytical forefront reveals that debt ceiling crises ultimately have less to do with inherent jurisprudential or operational contradictions in the budget process than with political concerns about maintaining prevailing social myths about money.

In contrast, HVCS – symbolized by the "trillion dollar coin" – represents a distinct break with existing monetary myths. It offers a plausibly constitutional way to avoid the ostensible legal "trilemma" of debt ceiling crises, at the potential cost of provoking a permanent structural transformation in the administration of fiscal policy. At the very least, taking HVCS seriously, if not literally, generates new economic insights and raises interesting new legal questions. As we enter the era of digital currency, creative and unconventional legal 'gimmicks' like HVCS should be embraced as imaginative catalysts that invite and challenge us to collectively develop new monetary myths and budgetary practices better suited to our modern context and needs.