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*BYPASSING CONGRESS ON FEDERAL DEBT:
EXECUTIVE BRANCH OPTIONS TO AVOID DEFAULT*

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In *Rollover Risk: Ideating a U.S. Debt Default*,² I examined how a U.S. debt default might occur and analyzed its potential consequences. Even a mere “technical” default, such as temporarily missing an interest or principal payment, “almost certainly

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² 55 B.C. L. REV. 1 (2014) (hereinafter, *Rollover Risk*).

[would] have large systemic effects with long-term adverse consequences for Treasury finances and the U.S. economy.”³ The most plausible U.S. debt default would in fact be a technical default—a temporary default due to Congress’s failure to raise the federal debt ceiling.⁴ The U.S. Department of the Treasury (the “Treasury Department”) recently cautioned that such a default, which became a near-reality in October 2013, could be disastrous: “In the event that a debt limit impasse were to lead to a default, it could have a catastrophic effect on not just financial markets but also on job creation, consumer spending and economic growth”⁵

This article focuses on that potential cause of a U.S. debt default—a technical default resulting from Congress’s failure to raise the federal debt ceiling—and analyzes how the executive branch of the federal government (hereinafter, “Executive Branch”) might be able to avoid such a default. To that end, Part I of this article provides historical context, explaining the debt ceiling as a means of delegating certain congressional borrowing authority to the Executive Branch and discussing the ongoing potential for debt-ceiling showdowns. Part II examines the publicly discussed options for avoiding a U.S. debt default, including the argument that the President has implicit borrowing authority under the Fourteenth Amendment and that the Executive Branch could prioritize its payment obligations. Part II also explains why these options are not generally considered viable.

Part III of the article proposes alternative options for avoiding default, applying structured finance modeling to federal debt. In the first of these options, a special-purpose

³ Terry Belton et al., *The Domino Effect of a US Treasury Technical Default*, J.P. MORGAN 1 (Apr. 19, 2011), <http://perma.cc/0ZNnoaut2AB> (explaining the possible effects of a technical default on U.S. debt caused by the failure to raise the debt ceiling). That report also concludes that a technical default would, at a minimum, cause the United States to “likely” suffer “a one percent reduction in gross domestic product (GDP) due to higher interest rates and a likely equity selloff,” and that such a default also “could leave lasting damage in its wake due to a permanent decline in foreign demand” for Treasury securities, which would “likely lead to higher borrowing costs and larger deficits.”

⁴ *Rollover Risk*, *supra* note 2.

⁵ U.S. DEP’T OF TREAS., THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKSMANSHIP 6 (2013).

entity would issue debt that is not full faith and credit to the U.S. government per se and would use the proceeds to make a back-to-back loan to an Executive Branch agency or entity on a non-recourse but secured basis. In the second of these options, the special-purpose entity would use the proceeds to purchase income-generating financial assets, such as rights to the future payment of specified tax revenues. Part III also provides a detailed legal analysis of these alternative options.

Finally, Part IV of the article explains how credit rating agencies (“rating agencies”) and investors would likely view these alternative options. Part IV also discusses how these options should be constrained to prevent their potential abuse.

I. INTRODUCTION

Under the U.S. Constitution, Congress has exclusive authority to issue debt “on the credit of the United States.”⁶ Congress has long delegated some of that power to the Treasury Department.⁷ To avoid having to micromanage the Treasury Department’s debt issuances, Congress created the public debt limit⁸—colloquially known as the “debt ceiling”—within which the Treasury Department has virtually unfettered debt-issuance authority.⁹

As government costs increase, the debt ceiling may need to be raised to finance those costs.¹⁰ A substantial component of annual U.S. government expenditures is the

⁶ U.S. CONST. art. I, § 8, cl. 2 (providing that “The Congress shall have Power . . . To borrow Money on the credit of the United States”).

⁷ 1 Cong. Ch. 12 (Sep. 2, 1789), 1 Stat. 65 (available at <http://www.treasury.gov/about/history/Pages/act-congress.aspx>).

⁸ 31 U.S.C. § 3101.

⁹ *Rollover Risk*, *supra* note 2.

¹⁰ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE BUDGET FOR FISCAL YEAR 2014 – Historical Tables, Table 1.1 (2014) (indicating that the U.S. government is projected to operate at a deficit, albeit shrinking, through fiscal year 2018; if the government collects less in total than it spends, it must increase its level of debt overall).

payment of debt service—principal and interest—on maturing Treasury securities.¹¹ Congress thus can threaten a default by refusing to raise the debt ceiling,¹² creating the potential for a debt-ceiling showdown between Congress and the Executive Branch. Such a showdown will loom large, for example, if Congress and the President are at loggerheads on spending and Congress uses the debt ceiling as leverage to try to extract spending cuts—a scenario that has occurred many times over the years, including during the Clinton Administration¹³ and more recently during the Obama Administration.¹⁴ This type of showdown can occur frequently because the federal government, like most governments worldwide, routinely depends on borrowing new money—often above the debt limit¹⁵—to repay (i.e., refinance) its maturing debt.¹⁶

In October 2013, the Obama Administration thus warned that if the debt limit were not raised, the United States would shortly default on its debt.¹⁷ Congress agreed to

¹¹ *Cf. id.* at Table 3.1 (observing that “Net Interest” as a percentage of total “U.S. Government Outlays,” or spending, has historically been 9% on average from 1940-2012, and is expected to fall to around 6% in fiscal years 2013 and 2014 before gradually rising to over 10% in fiscal year 2018). For an explanation of Treasury securities, *see infra* note 121 and accompanying text.

¹² *See supra* notes 4-5 and accompanying text.

¹³ *See infra* note 25 and accompanying text. *See also Rollover Risk, supra* note 2 (discussing other debt-ceiling showdowns).

¹⁴ *See infra* notes 17-18 and accompanying text.

¹⁵ *See infra* note 20 and accompanying text (explaining that the rising federal government debt load inevitably makes future debt-ceiling increases necessary).

¹⁶ *See Rollover Risk, supra* note 2. One might ask why governments routinely depend on borrowings to repay maturing debt. The answer is cost: using short-term debt to fund long-term projects is attractive because, if managed to avoid a default, it tends to lower the cost of borrowing. The interest rate on short-term debt is usually lower than that on long-term debt because, other things being equal, it is easier to assess a borrower’s ability to repay in the short term than in the long term, and long-term debt carries greater interest-rate risk. *Id.*

¹⁷ The Treasury Department estimated that if the debt ceiling were not raised by October 17, 2013, it would have only \$30 billion in cash, which would be used up in days. *See THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKSMANSHIP, supra* note 5.

a temporary increase, but the issue will arise again in February 2014.¹⁸ The problem, though, is not limited to that date. As mentioned, the risk that a debt-ceiling showdown could trigger a debt default has been historically significant.¹⁹ And it will continue to be significant, even if Congress and the President manage to agree in February on an appropriate debt ceiling, because the rising federal government debt load will inevitably make future debt-ceiling increases necessary.²⁰

My analysis assumes that Congress fails, due to political paralysis, political gamesmanship, procedural voting impediments, or any other reason *other than* a clear desire to force the nation to default on its debt, to raise the debt ceiling; that more U.S. debt is coming due than can be refinanced under the applicable debt limit; and that the Executive Branch is searching for ways to avoid a debt default. The article first examines and critiques the extant options for avoiding default, showing that each such option has serious legal or practical impediments, or both.²¹ Thereafter, the article proposes and analyzes alternative options for avoiding default.²²

II. EXTANT OPTIONS FOR AVOIDING DEFAULT

Principally, two options have been discussed for avoiding a U.S. debt default: (A) that the President has implicit authority under the Fourteenth Amendment to the

¹⁸ The increase, which was implemented by temporarily suspending the debt ceiling, expires on February 7, 2014. Continuing Appropriations Act of 2014, PL 113-46, 127 Stat 558 (Oct. 17, 2013).

¹⁹ See *supra* note 13 and accompanying text.

²⁰ Cf. Joe Nocera, *Why the Debt Ceiling Matters*, N.Y. TIMES, Oct. 8, 2013, at A27 (reporting that “U.S. finances are on a troubling long-term trajectory [in part because the] government has promised more to future retirees than taxpayers seem willing to pay”). Congress constitutionally cannot raise the debt ceiling for an unlimited amount, even in the unlikely event it were politically willing to do so. *Rollover Risk*, *supra* note 2.

²¹ See *infra* Part II. This list of options takes into account, among other sources, Nelson D. Schwartz & Charlie Savage, *Wall St. Fears Go Beyond Shutdown*, N.Y. TIMES, Oct. 2, 2013, at B1 (discussing that “economists and investors have quietly begun to explore the options the White House might have in the event Congress fails to act” on raising the federal debt limit).

²² See *infra* Part III.

Constitution to borrow in order to avoid such a default; and (B) that the Executive Branch could prioritize payments, paying its maturing debt first, in order to avoid default. Consider these options in turn, along with other less-discussed options.

A. The Fourteenth Amendment Option

According to this option, the President may “invoke authority under the [Fourteenth] Amendment” to the U.S. Constitution and order the “government to keep borrowing.”²³ The rationale for this implicit authority is that the Fourteenth Amendment prohibits the government from questioning the “validity” of its public debt.²⁴ This option is reported to have been “endorsed by former President Bill Clinton during an earlier debt standoff in 2011.”²⁵ Two legal scholars have argued that it is one of the “least unconstitutional” options.²⁶

The problem, however, is that this option may not be constitutional at all and, even if it is, the resulting uncertainty will be costly. The Fourteenth Amendment does not explicitly authorize the Executive Branch to borrow in order to avoid default. Nor does it appear to provide any implicit authorization: its provision prohibiting the government from questioning the “validity” of its public debt was historically included solely to prevent a southern Democratic majority from repudiating Civil War debts.²⁷

²³ Schwartz & Savage, *supra* note 21.

²⁴ U.S. CONST. amend. XIV, § 4.

²⁵ Schwartz & Savage, *supra* note 21.

²⁶ Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1194 (2012). Scholars have criticized this article’s framing of options as “least unconstitutional,” arguing that it is conceptually nonsensical to talk about the best (or least worst) way to violate the Constitution. *See, e.g.*, Adam Liptak, *Experts See Potential Ways Out for Obama in Debt Ceiling Maze*, N.Y. TIMES (Oct. 3, 2012), <http://www.nytimes.com/2013/10/04/us/politics/experts-see-potential-ways-out-for-obama-in-debt-ceiling-maze.html>. Professor Laurence Tribe of Harvard Law School also rejected Dorf and Buchanan’s idea, saying “it was proposed by ‘otherwise very sensible law scholars’ who in this case had concocted ‘a prescription for a free-for-all that abandons the rule of law.’ ‘We have no metric for comparative lawlessness.’” *Id.*

²⁷ Michael W. McConnell, *Origins of the Fiscal Constitution*, in IS U.S. GOVERNMENT DEBT DIFFERENT? 45, 49-50 (Franklin Allen et al. eds., 2012); Stuart McCommas, Note,

Although that provision has been held to apply generally, not just to Civil War debts,²⁸ it is doubtful that “question[ing]” the “validity” of U.S. debt includes defaulting on such debt.²⁹ One leading scholar has lucidly explained the distinction as follows: “Default is not the same as repudiation. If Congress repudiated the debt, it would be declaring that the debt is not owed. If Congress defaulted on the debt, the [debt] would still be owed; it would simply go (in part) unpaid.”³⁰ The Obama Administration itself has announced that it does “not believe that the Fourteenth Amendment gives the President the power to ignore the debt ceiling — period.”³¹

Debt borrowed by the federal government in violation of the debt ceiling would therefore be, at best, of uncertain constitutional validity. Any such borrowing could therefore have adverse consequences. For example, it “might provoke a threat of impeachment” from members of Congress opposed to such borrowing, such as House Republicans.³² Almost certainly, any such borrowing would be litigated up to the Supreme Court.³³ Furthermore, and of greater practical importance, investors in debt

Forgotten but Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment, 99 VA. L. REV. 1291, 1325 (2013) (“Under the original public meaning of [Section 4 of the Fourteenth Amendment], only legal action directly repudiating the federal debt is unconstitutional.”).

²⁸ See, e.g., *Perry v. United States*, 294 U.S. 330, 354 (1935).

²⁹ I discuss this at length in *Rollover Risk*, *supra* note 2.

³⁰ McConnell, *supra* note 27, at 50.

³¹ Statement of Jay Carney, White House Press Secretary, Oct. 3, 2013.

³² Schwartz & Savage, *supra* note 21.

³³ There is a chance, however, that any dispute between the Executive Branch and Congress over unauthorized borrowing would be deemed a nonjusticiable political question. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (enumerating the factors relevant to the question whether a particular suit should be dismissed as a political question); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 78 (2002) (“Courts will resolve separation of powers issues; however, they will not mediate ‘political questions’ or disputes that are strictly between the executive and legislative branches.” (citations omitted)). *But see Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (“The Judicial Branch appropriately exercises [its substantive] authority, including in a case such as this, where the question is whether Congress or the Executive is ‘aggrandizing its power at the expense of another branch.’” (citations omitted)); Curtis A. Bradley & Trevor W. Morrison, *Presidential*

securities evidencing the borrowing would likely demand a significant discount to compensate for the risk that the securities would be unenforceable.³⁴

B. The Prioritization-of-Payments Option

Under this option, the Executive Branch would try to prioritize its payments, paying the maturing debt first in order to avoid default.³⁵ It is uncertain, though, whether the Executive Branch has legal authority to pick and choose which creditors to pay.³⁶ The authority to pay all debts of the United States is constitutionally vested in Congress.³⁷ Congress has delegated the execution of that authority to the Secretary of the Treasury Department (“Secretary of the Treasury”), who is required by law to make all payments on government obligations as they come due.³⁸ An attempt by the House of Representatives to enable the Secretary of the Treasury to prioritize which obligations to pay failed in the Senate.³⁹

Even if the Executive Branch does have the authority to choose which creditors to pay first, prioritizing payments would be “logistically forbidding” because the government uses “an ancient [payment] system that wasn’t designed for debt-ceiling damage control.”⁴⁰ The Treasury Department would have to choose which among

Power, Historical Practice, and Legal Constraint, 112 COLUM. L. REV. 1097, 1131 n.122 (2013) (“The Supreme Court has recently signaled a narrow view of the political question doctrine, even in the area of foreign affairs.”) (citing *Zivotofsky*, 132 S. Ct. at 1427).

³⁴ Cf. Schwartz & Savage, *supra* note 21 (reporting that “specialists on Wall Street said questions about the legality of [such debt securities] might cause potential buyers to eschew them”).

³⁵ *Id.* This option, called the paid prioritization effort, was included in the House of Representatives’ Fall 2013 Continuing Resolution.

³⁶ Nocera, *supra* note 20 (reporting that “the Treasury Department says it does not have the authority to pick and choose which creditors to pay”). See also *Rollover Risk*, *supra* note 2.

³⁷ U.S. CONST. art. I, § 8, cl. 1 (providing that “The Congress shall have Power . . . to pay the Debts . . .”).

³⁸ 31 U.S.C. § 321(a)(3).

³⁹ The Full Faith and Credit Act, H.R. 807, 113th Cong. (2013), was passed by the House of Representatives but died in the Senate.

⁴⁰ *Congress’s Blueprint for Global Catastrophe*, BLOOMBERG BUS. WK., Oct. 10, 2013, available at <http://www.businessweek.com/articles/2013-10-10/bloomberg-view->

“approximately 80 million separate payments per month” to pay.⁴¹ Moreover, it is doubtful that prioritizing payments, if otherwise feasible, would be sufficient. In the recent debt-ceiling showdown, for example, prioritizing payments would have been unlikely to buy more than two weeks of time.⁴²

C. Other Extant Options

Other options discussed for avoiding a U.S. debt default have been more fanciful. The most plausible, perhaps, is the \$1 trillion platinum coin proposal. Congress has authorized the Secretary of the Treasury to mint platinum coins in any size, shape, and most importantly, denomination.⁴³ The Secretary of the Treasury therefore could mint \$1 trillion platinum coins, deposit them into the Treasury Department’s account at the Federal Reserve Bank, and possibly issue warrants and checks on the newly available funds without violating the debt limit.⁴⁴

congress-blueprint-for-global-catastrophe. *See also* Schwartz & Savage, *supra* note 21 (questioning the government’s ability to prioritize its payments).

⁴¹ Letter from Timothy F. Geithner, Sec’y, U.S. Dept. of the Treasury to John A. Boehner, Speaker, U.S. House of Representatives (Jan. 14, 2013) (on file with author) (stating in part, “The U.S. government makes approximately 80 million separate payments per month. These include payments for Social Security; Supplemental Security Income; Medicare; Medicaid; national security needs, including military salaries, military retirement, veterans’ benefits, and defense contractors; income tax refunds; federal employee salaries and retirement; law enforcement and operation of the justice system; unemployment insurance; disaster relief; goods and services sold to the government under contracts with small and large businesses; and many others.”).

⁴² *Cf.* Nocera, *supra* note 20 (reporting that on November 1, 2013, “nearly \$70 billion has to be paid for Social Security, Medicare, military paychecks and other obligations”). I reached that same conclusion during a September 25, 2013 conference call with approximately a dozen Congressional staffers, who sought my advice on the then-impending debt-ceiling showdown.

⁴³ 31 U.S.C. 5112(k) (providing that “The 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.”).

⁴⁴ *Cf.* Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN (July 28, 2011, 10:48 AM), <http://www.cnn.com/2011/OPINION/07/28/balkin.obama.options/> (although Balkin seems to take a neutral stance on the merits of this mint-and-then-deposit approach).

A leading economist strongly supports this idea, declaring it to be “economically harmless” (because it would be inflation neutral⁴⁵) and proclaiming that “no matter how offbeat or silly it may sound . . . , Mint that coin!”⁴⁶ Some legal scholars have observed, however, that the \$1 trillion platinum coin proposal fails as a pragmatically viable solution because it is so “cartoonish and desperate that it could undermine faith in the government’s ability to repay its obligations” and would create market uncertainty.⁴⁷ Commentators are also worried about the proposal’s political consequences.⁴⁸

III. ALTERNATIVE OPTIONS FOR AVOIDING DEFAULT

Because of the legal and practical impediments of the foregoing options, I next propose and analyze possible alternative options for avoiding default.⁴⁹ These options attempt to bypass traditional borrowing limitations by applying structured finance modeling to federal debt. Structured finance is an essential basis of corporate finance, and an increasingly important basis of state and municipal finance.⁵⁰ Its use in federal public finance has heretofore been minimal, however, probably because Treasury securities already bear extremely low interest rates.⁵¹

Each of the structured finance options proposed would use an existing or newly created special-purpose entity, or “SPE,” to issue debt that is not full faith and credit to

⁴⁵ Paul Krugman, *Rage Against the Coin*, N.Y. TIMES (Jan. 8, 2013), <http://krugman.blogs.nytimes.com/2013/01/08/rage-against-the-coin/>.

⁴⁶ Paul Krugman, Op. Ed., *Coins Against Crazyies*, N.Y. TIMES, January 11, 2013, at A23.

⁴⁷ Buchanan & Dorf, *supra* note 26, at 1231.

⁴⁸ *Platinomics: The Economics of the Platinum Coin Option*, ECONOMIST (Jan. 9, 2013), available at <http://www.economist.com/blogs/freeexchange/2013/01/economics-platinum-coin-option>.

⁴⁹ I first posited these options in an October 2013 lecture at Stanford Law School on “Legal and Economic Causes and Consequences of a US Debt Default.”

⁵⁰ Steven L. Schwarcz, *The Use and Abuse of Special-Purpose Entities in Public Finance*, 97 MINN. L. REV. 369 (2012) (hereinafter, “SPEs in Public Finance”).

⁵¹ *Cf.* confidential e-mail from senior U.S. House of Representatives staffer to the author (Oct. 9, 2013) (observing that the SPE-borrowing option “wouldn’t look terribly attractive [from an interest-rate standpoint] next to the large, highly liquid, and low cost Treasury market”).

the U.S. government per se. By analogy, many states raise the majority of their funding through SPEs, as opposed to directly issuing general obligation bonds.⁵² One of the reasons they do so is to borrow without violating archaic state-constitution-mandated debt ceilings.⁵³ This article’s structured finance options have a similar goal: to enable the federal government to borrow without violating the archaic—or, at least, politically dysfunctional—borrowing constraints under the U.S. Constitution.

The analysis below begins by examining two structured finance options—a back-to-back borrowing option,⁵⁴ and an asset-sale option⁵⁵—that the Executive Branch could utilize, absent congressional authorization, to raise funding to repay maturing federal debt (thereby avoiding default). It also provides a detailed legal analysis of these options. Thereafter, the analysis examines how rating agencies and investors would likely view the SPE debt issued to raise that funding.⁵⁶ Finally, the analysis examines how the options could potentially be abused, and how to protect against such abuse.⁵⁷

A. The Back-to-Back Borrowing Option

Under this option, an SPE would issue debt securities in amounts needed to repay maturing federal debt. The SPE would then lend the proceeds to an Executive Branch agency or entity on a back-to-back maturity basis.⁵⁸ As a somewhat parallel precedent to this structure, the U.S. Federal Reserve very successfully created and used SPEs and back-to-back lending on an emergency basis, in 2008, to surmount statutory lender-of-last-resort restrictions under the Federal Reserve Act.⁵⁹

⁵² *SPEs in Public Finance*, *supra* note 50, at 370.

⁵³ *Id.* at 375-76.

⁵⁴ *See infra* Part III.A.

⁵⁵ *See infra* Part III.B.

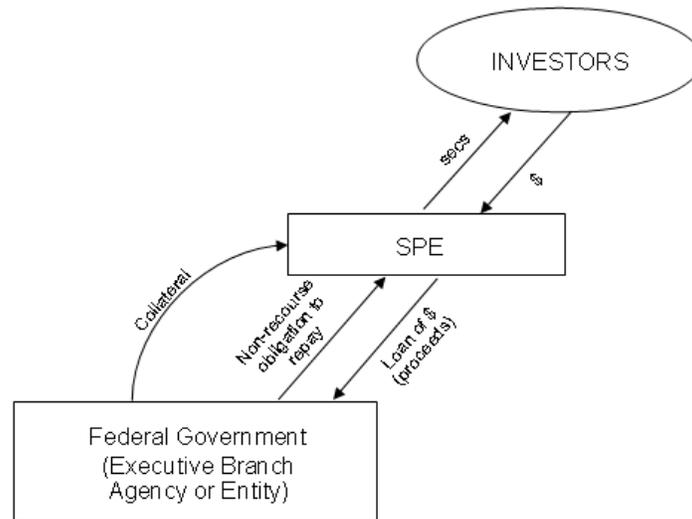
⁵⁶ *See infra* Part IV.A.

⁵⁷ *See infra* Part IV.B.

⁵⁸ A senior Senate staffer with whom I shared the idea underlying these options observed, “That’s a very interesting idea. It’s really scary that we’re this close to thinking about it.” E-mail from confidential senior U.S. Senate source, Oct. 9, 2013 (on file with author).

⁵⁹ *SPEs in Public Finance*, *supra* note 50, at 373 n. 17.

Back-to-Back Borrowing Structure



This structure is roughly analogous to a synthetic collateralized loan obligation (CLO) structure, in which an SPE issues securities to investors and then uses the proceeds to generate or acquire income-producing loans that serve to support ultimate repayment to the investors.⁶⁰ The CLO market is increasingly important and robust.⁶¹

I next examine this structure from a legal standpoint, focusing first on creating an SPE to issue debt securities⁶² and thereafter on the SPE's back-to-back on-lending of the proceeds of the debt issuance.⁶³ I later examine this structure from the standpoint of rating agencies and investors.⁶⁴

⁶⁰ See, e.g., 1 SECURITIZATION OF FINANCIAL ASSETS § 7.02[G][4] (Jason H.P. Kravitt, ed., 2d ed., 2007).

⁶¹ See, e.g., Kristen Haunss, *Wall Street Props CLO Boom as Rules Lift Costs: Credit Markets*, BLOOMBERG NEWS, Nov. 26, 2013, at <http://www.bloomberg.com/news/2013-11-26/wall-street-props-clo-boom-as-rules-lift-costs-credit-markets.html>.

⁶² See *infra* Part III.A.1.

⁶³ See *infra* Part III.A.2.

⁶⁴ See *infra* Part IV.A.

1. Creating an SPE to Issue Debt Securities. A threshold question for this structure—and also for the asset-sale structure⁶⁵—is whether the Executive Branch has the power and authority, absent explicit congressional delegation,⁶⁶ to create an SPE that could issue debt securities. Although the stand-alone power of the Executive Branch to create corporate entities has never been directly tested in the courts,⁶⁷ history (and logic) suggests that it has discretion to create such entities for the purpose of executing legislation passed by Congress. In our case, I argue that the Executive Branch’s authority, acting through the Treasury Department, to finance federal government operations and to pay the government’s financial obligations should provide sufficient power to create a debt-issuing SPE that is not itself, and that does not act as, an agency of the federal government. The mere failure of Congress to raise the debt ceiling should not undermine that authority.⁶⁸

Thus, I argue that, through the issuance of a presidential Executive Order, the Executive Branch should have the power and authority to create a non-governmental SPE

⁶⁵ See *infra* Part III.B.1.

⁶⁶ Congress itself clearly has the power to create SPEs that are in furtherance of legitimate governmental goals. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819) (upholding the constitutionality of the Second Bank of the United States, under the authority of the Constitution’s Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18 (providing Congress with the power “To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States . . .”)).

⁶⁷ In the early 1940s, an Executive Branch agency, the Farm Security Administration, created several corporations in order to circumvent its own lack of statutory authority to purchase land. The inquiry into the legality of that agency’s actions was split along political lines with the Attorney General approving, and the Comptroller General disapproving. 15 GAO-RB pt. B, s. 3 (G.A.O.), 2008 WL 6969355, at *5.

⁶⁸ See *infra* notes 91-99 and accompanying text (observing that Congress’s failure, due to failed political gamesmanship or procedural voting impediments, to raise the debt limit would not express a clear congressional desire to force the nation to default on its debt; and also observing that congressional refusal to act has generally been insufficient to put the President and Congress directly at odds with one another under *Youngstown*). See also *infra* note 88 (the Supreme Court’s holding that a presidential executive agreement was clearly valid, despite evidence that Congress informally opposed it, because the executive agreement was consistent with the general tenor of the statutory regime at issue).

that could issue debt securities. First, I contend that such power and authority are implicitly delegated by Congress to the Secretary of the Treasury, who is responsible to pay principal and interest on federal debt. Thereafter, I contend that the creation of such a debt-issuing SPE would not violate Congress’s restrictions on Executive Branch creation of corporations under the Government Corporation Control Act.

The power to create a debt-issuing SPE is implicit in Congress’ delegation of responsibility to pay federal debt. The Secretary of the Treasury is statutorily tasked with redeeming, reissuing,⁶⁹ and paying both principal and interest on Treasury securities.⁷⁰ U.S. presidents have the power to issue presidential executive orders (“Executive Orders”) to help members of the Executive Branch fulfill their responsibilities.⁷¹ The President therefore could issue an Executive Order directing the Secretary of the Treasury to create an SPE to issue debt and to use the proceeds to help pay maturing Treasury securities. The Executive Order would represent a resolution of ostensibly inconsistent congressional directives—on the one hand, to pay outstanding federal debt and, on the other hand, not to raise the debt ceiling—and would have the force of law, at least until Congress specifically says otherwise. The Executive Branch generally has substantial

⁶⁹ 31 U.S.C. § 3111.

⁷⁰ 31 U.S.C. § 3123(b).

⁷¹ *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (recognizing the President’s authority to issue Executive Orders); *Legal Aid Soc. of Alameda Cnty. v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974) (“[E]xecutive orders clearly carry the force and effect of law if they are issued pursuant to constitutional or statutory authority.”); *see also* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 841 (1981) (“The President’s power to issue executive orders derives from the Constitution or from federal statute.”) (citations omitted); Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 276–87 (2001) (discussing the sources of presidential authority for Executive Orders and providing a brief history of Executive Orders). *See generally* John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333 (2010) (supplying a detailed account of the legal, historical, and philosophical underpinnings of Executive Orders).

discretion in interpreting its obligations as defined by Congress, and its interpretation of legislation is usually afforded substantial deference.⁷²

Congress theoretically could repeal an Executive Order creating a debt-issuing SPE for the purpose of avoiding default, but that would require a veto-bypassing supermajority,⁷³ which is unlikely to occur. Executive Orders are also subject to legal challenges, but those challenges are almost never successful. Of the thousands⁷⁴ of Executive Orders, only two appear to have been successfully challenged in court.⁷⁵

⁷² See, e.g., *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer (citations omitted)); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”). See also Eric Posner, *The President Has the Power to Raise the Debt Ceiling on His Own*, SLATE (Jan. 4, 2013), available at http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/01/debt_ceiling_president_obama_has_the_power_to_raise_the_debt_limit_without.html (arguing that in raising the debt ceiling the President could rely on his “emergency powers” or his administrative power to resolve conflicting congressional directives).

⁷³ See, e.g., Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 71 (2002) (observing that “overturning a presidential directive requires more than enactment of legislation according to the normal legislative processes. It is not enough for Congress to have enough votes to simply pass a statute overturning the presidential order. It must also have enough votes to overcome the probable presidential veto.”). In other words, repealing a law—and an Executive Order is treated as law (*see infra* note 111 and accompanying text)—requires the same process as enacting a law, so if the repeal is vetoed by the President it would require a supermajority vote to override. U.S. CONST. art. I, § 7, cl. 2. Cf. Noyes, *supra* note 71, at 846 & 846 n. 38 (indicating that when “Congress . . . has acted[] to invalidate or repeal ‘incorrect’ executive branch interpretations of its statutes,” it has done so by passing legislation).

⁷⁴ As of January 20, 2014, U.S. presidents had issued 15,220 Executive Orders (of which 168 were issued by President Obama). Gerhard Peters, *Executive Orders, in The American Presidency Project* (John T. Woolley & Gerhard Peters, eds., 1999-2014), available at: <http://www.presidency.ucsb.edu/data/orders.php> (last visited Jan. 20, 2014).

⁷⁵ The successful challenges are in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

The first successful challenge occurred in *Youngstown Sheet & Tube Co. v. Sawyer*,⁷⁶ in which the steel industry persuaded the Supreme Court to overturn President Truman’s seizure through Executive Order of the entire U.S. steel industry. Justice Jackson’s concurrence in *Youngstown* established the principles for analyzing the validity of Executive Orders, articulating three classifications of presidential power.⁷⁷ The Supreme Court has since adopted Justice Jackson’s opinion, and his tripartite analytical framework, as controlling precedent.⁷⁸

Under Justice Jackson’s analysis in *Youngstown*, the scope of presidential authority varies directly with the degree of congressional authorization for the action in question. The closer the President is to the will of Congress, the stronger the presumption that the presidential action is constitutionally valid. As it becomes less clear whether the President is acting consistent with congressional will, the more likely it is that the President lacks the constitutional authority to act. Justice Jackson identified three zones of presidential power.

In the first category, “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁷⁹ An action “executed by the President pursuant to an Act of Congress would be supported by the strongest of

⁷⁶ See *supra* note 75.

⁷⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (Jackson, J., concurring). Even though *Youngstown* primarily concerned the President’s authority to act in the area of foreign affairs, “[a]ll agree, broadly, that Justice Jackson’s account of the distribution of executive and congressional powers in *Youngstown Steel* applies equally in foreign and domestic affairs.” Detlev Vagts & Anne-Marie Burley, *Book Review*, 86 AM. J. INT’L L. 415, 416 (1992).

⁷⁸ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981) (relying on Justice Jackson’s analysis in evaluating the validity of unilateral presidential action); *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action . . .”).

⁷⁹ *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

presumptions . . . and the burden of persuasion would rest heavily upon any who might attack it.”⁸⁰ In the second category,

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁸¹

In the third category, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁸² Justice Jackson deemed President Truman’s seizure of the steel industry to be in the third category⁸³ and ultimately voted with the majority in striking down the Executive Order.⁸⁴

An Executive Order directing the Treasury Department to create an SPE for purposes of avoiding a debt default—provided the SPE does not violate the Government Corporation Control Act⁸⁵—might arguably fall within the first zone of the *Youngstown* framework. Because Congress has delegated debt payment responsibility to the Secretary of the Treasury,⁸⁶ the President would be acting pursuant to an implied authorization of Congress, so his authority should be at its maximum. Moreover, by helping to avoid the

⁸⁰ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁸¹ 343 U.S. at 637.

⁸² 343 U.S. at 637-38.

⁸³ See *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring) (“This leaves the [steel] seizure to be justified only by the severe tests under the third grouping, where . . . we can sustain the President only by holding that [the seizure] is within his domain and beyond control by Congress.”).

⁸⁴ *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

⁸⁵ See *infra* notes 99-109 and accompanying text.

⁸⁶ See *supra* note 70 and accompanying text.

serious adverse economic consequences (probably including a severe recession) of such a default,⁸⁷ that Executive Order should also be consistent with the “general tenor” of the statutory regime under which the Executive Branch manages the economy. That consistency provides an independent basis for concluding that the Executive Order might fall within the first zone of the *Youngstown* framework.⁸⁸

An Executive Order directing the Treasury Department to create an SPE for purposes of avoiding a debt default at least should fall within the second zone of the *Youngstown* framework, where the President acts upon his own independent powers in the absence of either a congressional grant or denial of authority.⁸⁹ The argument,

⁸⁷ See *supra* note 5 & accompanying text (concluding that a “debt limit impasse [that] lead to a default . . . could have a catastrophic effect on not just financial markets but also on job creation, consumer spending and economic growth”).

⁸⁸ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding a presidential executive agreement to fall within zone one of the *Youngstown* framework despite evidence that Congress informally opposed the agreement; the Court reasoned that the executive agreement was consistent with the general tenor of the statutory regime allowing unilateral presidential action in times of national emergency to respond to hostile acts of foreign states).

⁸⁹ Even if such an Executive Order would fall within the third zone of the *Youngstown* framework, Congress might not be able to persuade the judiciary to declare the Order unconstitutional—in which case, as a practical matter, the Executive Order would stand. As discussed above, this issue of Executive power may be deemed a non-justiciable political question. See *supra* note 33. In addition, Congress (or members of Congress suing individually) may lack Article III standing to challenge unilateral Executive Branch action taken to avoid a default, at least until it takes an affirmative stance against the President. See, e.g., *Chenoweth v. Clinton*, 181 F.3d 112, 114 (D.C. Cir. 1999) (holding that a group of congressmen lacked standing to challenge an Executive Order, and noting “that courts should refrain from interfering in disputes arising out of the legislative process when a political remedy is available from within that process”); *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (holding that a group of congressmen lacked standing where political remedies, such as passing new legislation, were available). Only when political remedies have been exhausted, or congressional votes effectively nullified by Executive Branch action, will courts recognize legislative standing. See Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL’Y 209, 268 (2001) (“For a legislator to have standing, the [D.C. Circuit] in *Campbell [v. Clinton]* explained, there must be . . . no other legislative remedies available to rectify the action by the [President]. This means that whatever had been done by the [President] cannot be undone by legislative action.”).

explained below in more detail,⁹⁰ would be that Congress’s failure to raise the debt ceiling represents “congressional inertia, indifference or quiescence” that, “as a practical matter, enable[s] . . . measures on independent presidential responsibility [that] depend on the imperatives of events”⁹¹—i.e., preventing a government default and its disastrous consequences.⁹² Congressional refusal to act is generally insufficient to put the President and Congress directly at odds with one another under *Youngstown*.⁹³

The argument that Congress’s failure to raise the debt ceiling represents “congressional inertia, indifference or quiescence” presumes that such failure does not express a clear desire to force the nation to default on its debt (in which case the President’s power would fall within the third zone of the *Youngstown* framework, creating a strong presumption of unconstitutionality⁹⁴).⁹⁵ That presumption is supported by the facts. For example, the Majority Leader, Majority Whip, and two additional senior senators have demanded, in a private letter to the President, that he “take any lawful steps” to avoid default, including “without Congressional approval, if necessary.”⁹⁶ The Full Faith and Credit Act, which was passed by the House of Representatives (although

⁹⁰ See *infra* notes 95-99 and accompanying text.

⁹¹ 343 U.S. at 637.

⁹² See *supra* note 5 and accompanying text.

⁹³ See, e.g., Patricia L. Bellia, *Executive Power in Youngstown’s Shadow*, 19 CONST. COMMENT 87, 93 (2002) (“[C]ourts tend to avoid exploring the President’s constitutional foreign affairs powers—express or implied—instead finding congressional authorization in questionable circumstances or simply assuming that presidential action should stand as long as Congress is silent.”); *id.* at 144 (“The Dames & Moore Court [relying on *Youngstown*] interpreted Congress’s silence not as its understanding of the scope of the Executive’s constitutional powers, but rather as a legislative authorization or approval of the Executive’s conduct.”).

⁹⁴ See *supra* notes 82-84 and accompanying text.

⁹⁵ This article assumes that Congress’s failure to raise the debt limit results from political paralysis, political gamesmanship, procedural voting impediments, or any other reason other than a clear desire to force the nation to default on its debt. See *supra* notes 20-21 and accompanying text.

⁹⁶ Letter from Harry Reid, Majority Leader, U.S. Senate, together with Senators Durbin, Murray, and Schumer, to Barak Obama, President of the United States of America (Jan. 11, 2013) (copy on file with author).

dying in the Senate),⁹⁷ provided that “In carrying out the statutory responsibilities to ‘support of the public credit’ and ‘managing the public debt’ the Secretary [of the Treasury] shall take all necessary actions to ensure all obligations of the United States Government with regard to debt held by the public are fully discharged when due.”⁹⁸ Even members of Congress who have opposed raising the debt ceiling in the past have argued that the Executive Branch would still be able to take certain steps to avoid a default.⁹⁹ Most parties agree, for example, that failure to raise the debt ceiling would not restrict the Treasury Department’s authority to attempt to prioritize payments in order to avoid a default.¹⁰⁰ Congress’s failure to raise the debt ceiling, in other words, does not limit all possible methods of paying existing debt, nor does it require a default.

The power to create a debt-issuing SPE would not violate Congress’s restrictions on Executive Branch creation of corporations. Under the Government Corporation Control Act (“GCCA”), Congress has restricted Executive Branch power to create corporations. The GCCA provides in relevant part that “An agency may establish . . . a

⁹⁷ See *supra* note 39.

⁹⁸ Full Faith and Credit Act, *supra* note 39.

⁹⁹ See, e.g., Nick Wing & Shadee Ashtari, *GOP Debt Ceiling Truthers Want You To Listen To Them, Not The Experts. What Could Go Wrong?*, HUFFINGTON POST (Oct. 16, 2013) http://www.huffingtonpost.com/2013/10/16/gop-debt-ceiling_n_4101364.html (quoting Rep. Steve King [R-Iowa], appearing on the Tyler Cralle radio show on Oct. 7, 2013, as stating in part, “The money masterminds decided we would hit that date (the debt ceiling) sometime in about July. . . . Well, [default] didn’t come, because the Treasury was using what they call extraordinary measures Which means they tapped into every account they possibly could, they delayed the payments that they could in other areas. . . . We can go indefinitely without hitting default. So . . . it troubles me a little bit that I see our House leadership use the language of default on the debt ceiling.”). See also *id.* (quoting Sen. Pat Toomey [R-Pa.], appearing on MSNBC on Oct. 9, 2013, as stating in part that “there’s zero chance the U.S. government is going to default on its debt. It’s unfortunate that people have conflated this idea of not raising the debt ceiling immediately on Oct. 17 as somehow defaulting on our debt. . . . There’s no way that any Treasury secretary or administration would willfully choose to have the catastrophic results that would occur if we actually defaulted on our debt when it’s not necessary.”).

¹⁰⁰ See *supra* note 99 (quoting Republican congressmen arguing that the debt ceiling does not affect the Executive Branch’s power to prioritize some financial obligations over others). Cf. *supra* note 35 and accompanying text (observing that the House of Representatives passed a Continuing Resolution in Fall 2013, authorizing a paid prioritization effort to attempt to avoid default).

corporation to act as an agency only by or under a law of the United States specifically authorizing the action.”¹⁰¹ If the Executive Order creating the debt-issuing SPE violates the GCCA, that Order—and hence the SPE created thereunder—would be presumed unconstitutional under the *Youngstown* framework.¹⁰²

It should be feasible, however, to craft that Executive Order in a way that does not violate the GCCA.¹⁰³ At the outset, the debt-issuing SPE should be organized as an entity that is not a “corporation.” Additionally, it should not be allowed to “act as an agency.” Consider these in turn.

In the financial world, debt-issuing SPEs are routinely organized as entities that are not corporations, the goal being to avoid an entity-level corporate tax.¹⁰⁴ Typical debt-issuing SPEs are thus organized as limited liability companies (LLCs), partnerships, and even commercial trusts.¹⁰⁵ If the Executive Order were to specify that the debt-issuing SPE should be organized in one of those forms, that alone might be sufficient to avoid the GCCA’s application.

A party attempting to challenge that exemption might argue, however, that the GCCA’s use of the term “corporation” should be broadly construed to mean any generic “corporate” (i.e., separately existing) entity.¹⁰⁶ Even given that broader interpretation,

¹⁰¹ 31 U.S.C. § 9102.

¹⁰² *See supra* note 82 and accompanying text (describing the third zone as one in which the Executive Branch takes “measures incompatible with the expressed or implied will of Congress”).

¹⁰³ Depending on politics, Congress could also retroactively approve the creation of the debt-issuing SPE. That could allow Congress to have its cake (by not raising the debt limit) and eat it too (by sanctioning the measures taken to avoid default). Of course, some members of Congress might later regret that approval if they want to again create a debt-ceiling showdown.

¹⁰⁴ STEVEN L. SCHWARCZ, BRUCE MARKELL, & LISSA L. BROOME, *SECURITIZATION, STRUCTURED FINANCE AND CAPITAL MARKETS* § 5.02 (4th ed. 2004).

¹⁰⁵ *Id.* § 5.02, at 117-127.

¹⁰⁶ *Cf.* U.S. General Accounting Office, Office of the General Counsel, III *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 15-71 (SEP. 2008) (suggesting that entities subject to the GCCA “may or may not be in actual corporate form”).

however, the debt-issuing SPE would still not be subject to the GCCA unless it “act[s] as an agency.” The SPE should not be acting “as an agency” if it is either a private entity that acts pursuant to specific contractual directions¹⁰⁷ or a government-owned or controlled entity that does not engage in the implementation of government policy.¹⁰⁸ I will propose debt-issuing SPEs that fall into those exempted categories.¹⁰⁹

In closing the discussion of the GCCA, I should note a possible, though I believe flawed, argument that the GCCA itself might more explicitly delegate power to the Executive Branch to create a debt-issuing SPE. Recall that the GCCA provides that “An agency may establish . . . a corporation to act as an agency only by or under a law of the United States specifically authorizing the action.”¹¹⁰ An Executive Order itself, however, is “law.” It is well established that a President’s Executive Order, when necessary to enforce a federal statute, effectively becomes federal law and a part of the laws to which the statute relates.¹¹¹ Under this reasoning, an Executive Order creating a debt-paying SPE would be within the first zone of the *Youngstown* framework because the President would be acting pursuant to an express authorization of Congress.¹¹² The problem with

¹⁰⁷ See, e.g., *Varicon Int’l v. Office of Pers. Mgmt.*, 934 F. Supp. 440, 446–47 (D.D.C. 1996) (concluding that the U.S. Investigations Service was not established to “act as an agency” under § 9102 of the GCCA because it “appear[ed] to be a private corporation which was awarded a government contract”).

¹⁰⁸ Cf. *Lebron v. Nat’l Railroad Passenger Corp.*, 513 U.S. 374, 396 (1995) (stating that the GCCA phrase, “acting as an agency” of the United States, “was evidently intended to restrict the creation of *all* Government-controlled policy-implementing corporations, and not just some of them”) (emphasis in original).

¹⁰⁹ See Part IV.A, *infra*.

¹¹⁰ See *supra* note 101 and accompanying text.

¹¹¹ *U.S. v. Borja*, 191 F. Supp. 563 (D. Guam 1961); *U.S. v. Angcog*, 190 F. Supp. 696 (D. Guam 1961). Both of these cases cite to and rely on *U.S. v. J. D. Streett & Co.*, 151 F. Supp. 469 (E.D. Mo. 1957). That case was modified sub nom., *J. D. Streett & Co. v. U. S.*, 256 F.2d 557 (8th Cir. 1958), but the modification did not impact that case’s conclusions regarding Executive Orders.

¹¹² See *supra* note 79 and accompanying text. That argument could be further reinforced if the Secretary of the Treasury determines all material aspects of the debt securities issued by the SPE, including “(1) the form, denomination, maturity, interest rate, and conditions to which the obligations [under those debt securities] will be subject; (2) the way and time the obligations are issued; and (3) the price for which the obligations will be sold.” 31 U.S.C. § 9108(a). That determination would follow the GCCA’s prescription

this argument, however, is that it would be inconsistent with the House Report accompanying the legislation that became the GCCA, which indicates that the phrase “a law of the United States specifically authorizing the action” refers to further specific congressional authorization.¹¹³ Therefore, I am not suggesting that parties rely on an “express authorization” argument under the GCCA.

Summary. In summary, by issuing an Executive Order, the Executive Branch should have at least implicit power and authority under *Youngstown* to create an SPE that could issue debt securities. If organized skillfully, that SPE would not violate Congress’ restrictions on Executive Branch establishment of corporations under the Government Corporation Control Act.

2. *Lending the Proceeds on a Back-to-Back Basis.* The second step of the back-to-back borrowing structure would be for the SPE to on-lend the proceeds of its issued debt to an Executive Branch agency or entity on a back-to-back maturity basis.¹¹⁴ For discussion purposes, this article will refer to that as the “on-lending.” The on-lending must be structured in a way that does not itself create debt that violates the federal debt limit. This creates a conundrum: How can the on-lending constitutionally avoid the need for congressional authorization, yet make investors in the SPE’s debt securities comfortable that there will be a reliable and adequate basis of repayment?

that the Secretary of the Treasury make that determination “[b]efore a Government corporation issues obligations and offers obligations to the public.” *Id.*

¹¹³ That House Report states in relevant part as follows: “The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress . . . to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action.” H.R. Rep. No. 79-856, at 11 (1945).

¹¹⁴ *Cf. supra* note 58 and accompanying text (describing the back-to-back lending). This related question would be irrelevant to the asset-sale structure because the SPE in that structure uses the proceeds to purchase financial assets, not to make a loan.

The structured finance concept of non-recourse debt can help to resolve this conundrum. The term non-recourse (sometimes spelled nonrecourse) debt is a misnomer; it means debt that has recourse to collateral consisting of specific assets, not debt that lacks all recourse.¹¹⁵ As explained below, non-recourse on-lending should be both constitutionally valid and acceptable to investors.

Non-recourse on-lending should be constitutionally valid because it would create neither general recourse debt nor full-faith-and-credit debt of the U.S. government—and thus the debt created by the on-lending should not be “on the credit of the United States.”¹¹⁶ The distinction between general recourse debt of the U.S. government and full-faith-and-credit debt of the U.S. government is unclear, and the terms might be synonymous. The phrase “full-faith-and-credit” is not explicitly statutorily defined in the context of U.S. government debt.¹¹⁷ Nonetheless, it appears to mean that holders of that debt have recourse generally to the United States government, and not merely to a particular government agency, for payment. That interpretation follows from the fact that federal statutes sometime state that the debt of specific governmental bodies is guaranteed by the full faith and credit of the United States¹¹⁸ and sometime state that such debt is not so guaranteed.¹¹⁹ Furthermore, general-obligation debt instruments

¹¹⁵ See, e.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “nonrecourse” debt as “an obligation that can be satisfied only out of the collateral securing the obligation and not out of the debtor’s other assets”).

¹¹⁶ See *supra* note 6 and accompanying text (discussing Congress’s exclusive authority to issue that debt).

¹¹⁷ When used to describe Treasury securities and other U.S. government debt, the phrase “full faith and credit” should not be confused with the “Full Faith and Credit Clause” of art. IV, § 1 of the U.S. Constitution. The latter addresses the duties of U.S. states to respect the “public acts, records, and judicial proceedings of every other state.”

¹¹⁸ See, e.g., 12 U.S.C. § 1721(g) (in the context of the Government National Mortgage Association (Ginnie Mae), providing that “The full faith and credit of the United States is pledged to the payment of all amounts which may be required to be paid under any guaranty [of Ginnie Mae debt] under this subsection.”)

¹¹⁹ See, e.g., 16 U.S.C. § 5808(a) (in the context of the National Natural Resources Conservation Foundation, providing that “The full faith and credit of the United States shall not extend to the Foundation.”). The phrase “full faith and credit” might have originated in part from the statutory language of 31 U.S.C. § 3123(a), which states “The

issued by the Treasury Department,¹²⁰ including long-term bonds and short-term notes and bills (collectively, “Treasury securities” or colloquially, “Treasuries”), are generally understood to be backed by the “full faith and credit of the United States.”¹²¹

Non-recourse on-lending would not create general recourse debt, and thus would not create full-faith-and-credit debt, if the SPE has recourse only to collateral consisting of specific assets for repayment. Arguably, that should avoid the need for congressional authorization of the debt created by the on-lending. I recognize the absence of explicit precedent finding that non-recourse debt is not “on the credit of the United States.” That finding, however, would be logically compelling. Because non-recourse debt is payable solely from a finite source—the specified collateral—it exposes creditors to a real risk of loss.¹²² Those creditors are therefore not making their credit decision based on the ability of the U.S. government to repay them, nor would the U.S. government be liable to pay them.

That begs the question of why investors would be prepared to purchase the SPE’s debt securities if they are payable solely from specified collateral. In answer, the collateral must provide a sufficiently reliable and adequate basis of repayment to make the investors comfortable. The customary way to accomplish that is for the collateral to consist of specific high quality financial assets—i.e., assets that are expected to convert to cash.¹²³

faith of the United States Government is pledged to pay . . . principal and interest on the obligations . . . issued under this chapter.”

¹²⁰ 31 U.S.C. §§ 3102-3105.

¹²¹ Treasurydirect.gov, Why You Should Consider Treasury Securities for Your Portfolio, http://www.treasurydirect.gov/indiv/research/articles/res_invest_articles_portfolio_0604.htm (last visited Dec. 24, 2013) (on file with author).

¹²² See text accompanying note 162, *infra* (discussing investor risk of loss).

¹²³ See Part IV.A, *infra* (discussing investor and rating agency perspectives).

The most plentiful high quality financial assets that could be pledged as collateral would be rights to the future payment of specified tax revenues.¹²⁴ Thus, the SPE could on-lend the proceeds of its debt issuance to the Treasury Department on a non-recourse basis. The Treasury Department would secure repayment of that loan with collateral consisting of rights to the future payment of specified tax revenues. (The Treasury Department has statutory authority to receive tax revenues, pursuant to which it created and oversees the U.S. Internal Revenue Service.¹²⁵) The SPE would only have recourse to those specified revenues,¹²⁶ if and when they are collected; it would not have recourse to other tax revenues, nor would it have general recourse to the Treasury Department or any other part of the U.S. government.¹²⁷

B. The Asset-Sale Option

¹²⁴ The power of the Executive Branch to give a security interest in assets, such as rights to the future payment of tax revenues, may well be subject to Congress's broader power to "dispose of" assets. *Cf. Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) ("Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey *any interest* in these lands must be traced to Congressional delegation of its authority.") (emphasis added). The analysis of that Executive Branch power would therefore be subsumed in this article's analysis of the Executive Branch's power to sell those assets. *See infra* notes 136-152 and accompanying text.

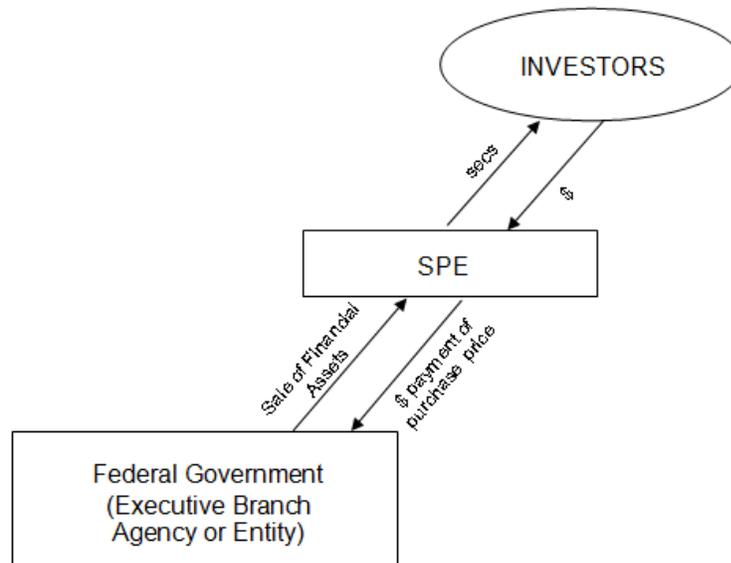
¹²⁵ 26 U.S.C. § 7801.

¹²⁶ I want to make it absolutely clear that the options I propose do not involve a first call on all tax revenues or a call on tax revenues for an indefinite period. The tax revenues serving as collateral in the first option, or being purchased in the second option, are in each case a finite set whose value would not so greatly exceed the amount of the financing that someone could call into question whether the first option is truly non-recourse or the second option is truly a sale.

¹²⁷ If the federal government can constitutionally borrow solely through Executive Branch power in a way that makes investors in the SPE's debt comfortable that there will be a reliable and adequate basis of repayment, one might ask what the SPE adds, and whether it would be simpler to omit the SPE step and have the federal government directly issue non-recourse debt to investors. At least part of the answer is that the market is more likely to understand that SPE-issued debt, as opposed to Treasury Department-issued debt, is not full recourse to the government. That would reduce the chance of the debt being viewed as "potentially illegitimate," which "could reduce investor confidence in the federal government's commitment to meet its obligations." Buchanan & Dorf, *supra* note 26, at 1210 n.135.

Under this option, an SPE would, as before, issue debt securities in amounts needed to repay maturing federal debt. The SPE would then pay the proceeds to an Executive Branch agency or entity, most likely the Treasury Department, to purchase income-generating financial assets such as rights to the future payment of specified tax revenues.¹²⁸ The SPE's securities would be repayable from collections on the purchased financial assets. Because only the SPE, and not the federal government, is borrowing or legally liable for repayment, this structure would not create debt that could violate the federal debt limit.

Asset-Sale Structure



This structure is analogous to a standard securitization structure, in which an SPE issues securities to investors and then uses the proceeds to purchase income-producing financial assets that serve to support ultimate repayment to the investors.¹²⁹ Securitization is a major source of financing both domestically and worldwide.¹³⁰

¹²⁸ See *supra* notes 124-125 (discussing the Treasury Department's right to receive future tax revenues).

¹²⁹ SCHWARCZ, MARKELL, & BROOME, *supra* note 104, § 1.03.

¹³⁰ Cf. Huw Jones, *Bank of England to Take Fresh Look at Securitization Market*, REUTERS, Nov. 28, 2013, available at <http://www.reuters.com/article/2013/11/28/us-boe-regulation-idUSBRE9AROLD20131128> (reporting that the Bank of England "may step in

I next examine this structure from a legal standpoint, focusing first on creating an SPE to issue debt securities¹³¹ and thereafter on the SPE's using the proceeds of the debt issuance to purchase financial assets.¹³² I later examine this structure from the standpoint of rating agencies and investors.¹³³

1. *Creating an SPE to Issue Debt Securities.* A threshold question for this structure—as it was for the back-to-back borrowing structure—is whether the Executive Branch has the power and authority to create an SPE that could issue debt securities. The same analysis and conclusions would apply: that through the issuance of an Executive Order, the Executive Branch should have that power and authority, and that the creation of such a debt-issuing SPE would not violate Congress's restrictions on Executive Branch creation of corporations under the Government Corporation Control Act.¹³⁴

2. *Using the Proceeds to Purchase Financial Assets.* In the second step of the asset-sale structure, the SPE would use the proceeds of its issued debt to purchase income-generating financial assets from an Executive Branch agency or entity. As before, the most significant type of Executive Branch financial assets would appear to be rights to payment of future tax revenues.¹³⁵

That raises the question whether the Executive Branch has the power to sell financial assets. Regarding power to sell assets generally, the Constitution provides that “Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”¹³⁶ The term

to kickstart the securitisation market, which was discredited by the U.S. subprime crisis but is now seen as a valuable option for financing business growth”).

¹³¹ See *infra* Part III.B.1.

¹³² See *infra* Part III.B.2.

¹³³ See *infra* Part IV.A.

¹³⁴ See Part III.A.1, *supra*.

¹³⁵ See *supra* note 124 and accompanying text. [What other types of financial assets might the Executive Branch have to sell? cite]

¹³⁶ U.S. CONST. art. IV, § 3, cl. 2.

“other property” is not limited to real property (i.e., land); it also has been interpreted to include personalty—which would include financial assets.¹³⁷ Nonetheless, as explained below, Congress already appears to have delegated sufficient power to the Executive Branch to sell financial assets in order avoid default by paying maturing Treasury securities.

The Secretary of the Treasury has statutory authority to administer and enforce the Internal Revenue Code.¹³⁸ Thus, the Secretary of the Treasury has statutory authority to collect taxes.¹³⁹ The Secretary of the Treasury also has the statutory authority and duty to pay Treasury securities.¹⁴⁰ Implicit in those authorities and duties, the Secretary of the Treasury should have the power to monetize (i.e., effectively accelerate the timing of collection of) future taxes and avoid default, by selling rights to the payment of future tax revenues.¹⁴¹

¹³⁷ See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 331 (1936).

¹³⁸ 26 U.S.C. § 7801. The Internal Revenue Code is Title 26 of the United States Code.

¹³⁹ 31 U.S.C. § 321(a)(6) (providing that the “Secretary of the Treasury shall collect receipts”).

¹⁴⁰ See *supra* note 70 and accompanying text. See also 31 U.S.C. § 3327 (providing that the “Secretary of the Treasury may issue a check or other draft on public money in the Treasury to pay an obligation of the United States Government”). Because the power to tax is constitutionally given to Congress (U.S. CONST. art. I, § 8, cl. 1 (providing that “The Congress shall have Power To lay and collect Taxes”)), Congress at least theoretically would have the power to change the tax delegation to the IRS, thereby undermining this structure to the extent it is based on tax revenues as the financial assets. The IRS is just a bureau of the Treasury Department so Congress could abolish the Treasury Department and establish a new agency; but the new agency would once again be under the control of the Executive Branch. The separation of powers doctrine prevents Congress from *enforcing* the law; that power is vested in the Executive Branch.

¹⁴¹ The Secretary of the Treasury, through the IRS, has even more explicit authority to settle and otherwise work with rights to payment of delinquent tax revenues and to collect those revenues by any means, including compromises for a reduced tax liability. See 14A MERTENS LAW OF FED. INCOME TAXATION § 54:141. See also generally 26 U.S.C. § 7122. The Secretary of the Treasury should therefore have even clearer authority to securitize rights to delinquent tax revenues. That, in turn, could also help to shift risk from the government to the SPE’s investors on those revenues.

This interpretation is supported by *United States v. Midwest Oil Co.*,¹⁴² in which the Supreme Court held that a presidential executive order was sufficient to enable the President to dispose of property in connection with the management of public lands.¹⁴³ The Court observed that “[e]mergencies may occur, or conditions may so change as to require that the agent in charge should [act] in the public interest” regarding disposition of federal government property.¹⁴⁴ Although Congress has not granted “express authority . . . , there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions.”¹⁴⁵ The Court emphasized that the President’s implied authority “all the more readily operated . . . in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.”¹⁴⁶

In our case, if the President issues an Executive Order directing the Secretary of the Treasury to avoid default by selling rights to the payment of future tax revenues, he would (as before¹⁴⁷) be acting pursuant to an implied authorization of Congress¹⁴⁸ so his

¹⁴² 236 U.S. 459 (1915).

¹⁴³ *Id.* at 474.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 475. Although the facts of *United States v. Midwest Oil Co.* indicated a separate basis for the implied authority—that the President’s action represented a “long-continued practice, known to and acquiesced in by Congress,” *id.* at 474—the Court did not limit its opinion to that rationale.

¹⁴⁷ See Part III.A.1, *supra*.

¹⁴⁸ One reviewer of this article suggested that the Anti-deficiency Act (of which the most relevant provision is 31 U.S.C. § 1341) might restrict the authority of the Secretary of the Treasury to sell or otherwise transfer (e.g., grant as collateral) rights to the payment of future tax revenues. I do not believe it does. In relevant part, that Act prohibits Executive Branch officials from committing the federal government to contracts or other obligations for the payment of money before Congress has made an appropriation for that money (or otherwise authorized the contract or obligation). A contract to sell or grant a security interest in rights to the payment of future tax revenues is not a contract that obligates the federal government to pay money. To the contrary, it is merely a contract to sell or pledge an asset. (Even if it were a contract that obligates the federal government to pay money, there is some precedent that the contract would be exempt from the Anti-deficiency Act because the contract effectuates the Secretary of the Treasury’s congressional mandate to pay government debts. 6 Op. Atty. Gen. 27 (1853)). Furthermore, in the case of

authority should be at its maximum.¹⁴⁹ Furthermore, under the reasoning of *United States v. Midwest Oil Co.*, that sale would be made in emergency conditions (to avoid a government debt default), thereby “requir[ing] that the [President and Secretary of the Treasury] should [act] in the public interest” regarding disposition of federal government property.¹⁵⁰ Also consistent with that case, the sale would be “useful to the public”¹⁵¹ by avoiding the disastrous economic consequences of a debt default.¹⁵²

C. Comparing the Alternative Options

For both alternative options, the structures begin the same: creating an SPE to issue debt securities in amounts needed to repay maturing federal debt. To that extent, they are identical. The differences between the structures are in their second step.

In the second step of the back-to-back borrowing structure, the SPE on-lends the proceeds of its issued debt to an Executive Branch agency or entity on a back-to-back maturity basis. In order to avoid the need for congressional authorization, yet make investors in the SPE’s debt securities comfortable that there will be a reliable and adequate basis of repayment, the on-lending is made on a non-recourse-debt basis

collateral, subsection (a)(2) of the Anti-deficiency Act provides that it “does not apply to a corporation getting amounts to make loans . . . without legal liability of the United States Government,” and a non-recourse loan by definition is a loan that is made without legal liability for repayment.

¹⁴⁹ It is also worth noting that the *Ashwander* Court, *supra* note 137, seemed to interpret Art. IV, Sec. 3, Cl. 2 as a federalism provision, not a separation of powers provision. See *Ashwander*, 297 U.S. at 331 (noting that the power of the United States to sell assets was “a matter of grave concern because of the fear that ‘the sale and disposal’ might become ‘a source of such immense revenue to the national government as to make it independent of and formidable to the people.’”). To that extent, one might argue that the Constitution does not much care which branch of the federal government is doing the selling so long as it’s respecting the structural limitations placed on the federal government as a whole, e.g., that the Treasury department shouldn’t securitize assets simply to make a profit but may securitize assets in an emergency situation to pay maturing debts.

¹⁵⁰ See text accompanying note 144, *supra*.

¹⁵¹ See text accompanying note 146, *supra*.

¹⁵² See *supra* note 5 and accompanying text. Nor would the sale “interfere with any vested right of [any] citizen.” See text accompanying note 146, *supra*.

secured by collateral consisting of specific high quality financial assets. The most plentiful high quality financial assets that could be pledged as collateral would be rights to the future payment of specified tax revenues. The Executive Branch borrower of the on-lent proceeds should therefore be the Treasury Department, which has the right to receive tax revenues (through its Internal Revenue Service) and also the right to use the on-lent proceeds to pay maturing Treasury securities, thereby also satisfying its obligation to pay those securities.

In the second step of the asset-sale structure, the SPE uses the proceeds of its issued debt to purchase income-generating financial assets from an Executive Branch agency or entity. As in the back-to-back borrowing structure, the most plentiful high quality financial assets that could be purchased would be rights to the future payment of specified tax revenues. Congress has already delegated sufficient power to the Executive Branch to sell financial assets in order to pay maturing Treasury securities. The Executive Branch seller of the tax revenues should therefore be the Treasury Department (which has the right to receive those revenues). The Treasury Department also has the right to use the proceeds of the sale to pay maturing Treasury securities, thereby (again) also satisfying its obligation to pay those securities.

As explained in this article, both of these structures should be legally valid and constitutional. However, the asset-sale structure may be cleaner for several reasons. It is closer to traditional securitization transactions, which are widely used not only in domestic financing but also in financing worldwide.¹⁵³ That would not only be easier to explain in the United States but also should be more accessible and understandable to foreign investors, who—as explained below¹⁵⁴—may well dominate the purchase of the SPE’s securities. Additionally, rating agencies and investors will probably better

¹⁵³ See *supra* notes 129-130 and accompanying text.

¹⁵⁴ See *infra* notes 172-175 and accompanying text (explaining why foreign investors may have greater rights, under international treaties, than domestic investors to enforce the SPE’s debt securities).

understand the default risk of the asset-sale structure.¹⁵⁵ Finally, the asset-sale structure has less legal “baggage” because it does not involve any federal government borrowing.¹⁵⁶

IV. EXTRALEGAL CONSIDERATIONS

In the discussion below, I first examine how rating agencies and investors would likely view these alternative options as a business matter. Thereafter, I discuss how these options should be constrained to prevent their potential abuse.

A. Rating Agency and Investor Perspectives

Investors in the SPE’s debt securities will have a single goal: to be repaid principal and interest on those securities on a timely basis. In assessing the likelihood of timely repayment of any debt securities (including Treasury securities and other sovereign debt securities), investors customarily rely in part on ratings assigned to those securities by rating agencies, such as Standard and Poor’s (“S&P”) and Moody’s.¹⁵⁷

Ratings. The highest rating on long-term debt securities is AAA, with ratings descending to AA, then to A, and then to BBB and below.¹⁵⁸ The higher the rating, the lower the credit risk associated with the securities in question as determined by the rating agency. The rating agencies follow explicit methodologies in deriving their ratings. For example, S&P’s framework for rating structured finance securities considers five key

¹⁵⁵ See *infra* notes 204-205 and accompanying text.

¹⁵⁶ Cf. *supra* notes 121-122 (observing the lack of explicit clarifying precedent for the back-to-back borrowing structure).

¹⁵⁷ For background on rating agencies and the rating process, see Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILLINOIS L. REV. 1 (2002).

¹⁵⁸ *Id.* Technically, the use of all capital letters, such as AAA, represents Standard & Poor’s credit ratings designations; Moody’s uses equivalent ratings except that only the first letter is capitalized, such as Aaa (being the Moody’s equivalent of S&P’s AAA rating).

factors: the credit quality of the underlying financial assets, legal and regulatory risks, payment structure and cash flow mechanics, operational and administrative risks, and counterparty risk.¹⁵⁹

Consider how those factors would apply to the SPE's debt securities. If (as this article proposes) the underlying financial assets are rights to the future payment of specified tax revenues, their credit quality should be good because taxpayers who fail to pay their taxes are subject to interest charges¹⁶⁰ and civil and potentially criminal government penalties.¹⁶¹ Those rights, however, should be quantified as legally enforceable rights before they serve as the underlying financial assets.

Overcollateralization. Even if those rights are so quantified and legally enforceable, some taxpayers may fail to pay their taxes. Individuals, for example, may die and their estates may be insufficient to pay the taxes. Companies may liquidate. Even though the Internal Revenue Service's claim for payment of taxes has priority over most other claims,¹⁶² some taxpayers may ultimately default on paying their taxes. To the extent the financial assets underlying payment of the SPE's debt securities include tax claims that ultimately default, the SPE's debt securities may similarly default.

To reduce the chance of that (similar) default on an SPE's debt securities, investors in those securities normally expect, and rating agencies rating those securities

¹⁵⁹ S&P's "Principles-Based Rating Methodology for Global Structured Finance Securities," May 29, 2007.

¹⁶⁰ Interest accrues on all taxes not paid when due as well as on all civil and criminal penalties imposed. *See generally* 26 U.S.C. §§ 6601, 6611, 6621-22 and 2 WEST'S FED. ADMIN. PRAC. § 1639.

¹⁶¹ Failure to pay taxes is subject to an initial 5% or 15% civil penalty, followed by another 5% or 15% penalty for each month that passes, up to a maximum of 25% or 75% depending on whether the failure was as a result of negligence or fraud, respectively. *See generally* 26 U.S.C. §§ 6651-65 and 2 WEST'S FED. ADMIN. PRAC. § 1640. Willful tax evasion is considered a felony, subjecting tax evaders to up to \$100,000 in fines (\$500,000 if the tax evader is a corporation) and five years imprisonment. *See generally* 26 U.S.C. §§ 7201-32 and 2 WEST'S FED. ADMIN. PRAC. § 1641.

¹⁶² *See, e.g.*, 11 U.S.C. § 1129(a)(9).

customarily require, the anticipated collections on the underlying financial assets to exceed by some margin (e.g., 10%) the amounts needed to pay the SPE's debt securities in full. This is referred to as "overcollateralization," and it is typically achieved by adjusting downward the purchase price (in the case of an asset-sale structure) or collateral value (in the case of a back-to-back borrowing structure) of the financial assets for anticipated defaults and delayed collections.¹⁶³ Overcollateralization also can be—and often is—effectively achieved by owners of the SPE or other parties contributing some capital at the outset to the SPE¹⁶⁴; that gives the SPE additional value to pay its debt securities if collections on the underlying financial assets turn out to be insufficient.¹⁶⁵

Because the party transferring the financial assets is governmental (i.e., the Treasury Department) and governmental entities are not subject to bankruptcy, there should also be considerably more flexibility than in a private structured finance transaction for the transferor of the financial assets to make warranties as to their quality. In private transactions, investors and rating agencies are concerned that strong warranties might undermine the validity in bankruptcy of the transfer of the financial assets.¹⁶⁶ In our transaction, however, the transferor of the financial assets—whether the transfer is structured as a secured loan or a sale—will be the Treasury Department. Therefore, the warranties on the quality of the transferred assets can be made as strong as the parties are willing to negotiate.¹⁶⁷

¹⁶³ SECURITIZATION OF FINANCIAL ASSETS, , *supra* note 60, § 7.02[F].

¹⁶⁴ SECURITIZATION OF FINANCIAL ASSETS, , *supra* note 60, § 3.05[A][3].

¹⁶⁵ SECURITIZATION OF FINANCIAL ASSETS, , *supra* note 60, § 7.02[F]. Owners who contribute capital customarily expect any unused capital to be returned to them after the SPE's debt securities are paid in full. *Id.*

¹⁶⁶ SCHWARCZ, MARKELL, & BROOME, *supra* note 104, § 3.03, at 69-86.

¹⁶⁷ Any such warranties on the quality of the transferred assets should be within the range of reasonableness, of course. A warranty stating that the Treasury Department would pay if a transferred asset did not collect on a timely basis would not be a reasonable warranty of quality but a full guarantee, effectively making the loan full recourse. Furthermore, warranties exposing the Treasury Department to indefinite damages for breach might violate the Anti-deficiency Act. *Cf.* *Lublin Corp. v. United States*, 98 Fed. Cl. 53 (2011) (the Anti-deficiency Act does not prevent contracts requiring the United States to pay damages for breach or from indemnifying for fixed or readily ascertainable amounts).

Thus, with sufficient overcollateralization and warranties, and assuming the underlying financial assets are legally enforceable rights to the future payment of specified tax revenues, the credit quality of those financial assets should be sufficient to support a highly rated debt issuance by the SPE.

Another factor that rating agencies regard as key is legal and regulatory risk.¹⁶⁸ This article has focused extensively on that risk. Because part of that risk turns on the nature of the SPE itself, it is useful to make several observations regarding the SPE. Before doing that, however, it should be cautioned that most of this article’s legal analysis turns on relatively thin precedent and issues of first impression. It therefore would be invaluable to investors, and rating agencies, to find a legal safe harbor.

“Reasonableness” safe harbor. In a commercial context, the concept of “apparent authority” creates a partial safe harbor, enabling parties to conclusively rely on the due authorization and execution of contracts that appear to be executed by properly authorized officers.¹⁶⁹ In contrast, however, investors in the debt securities of an SPE created pursuant to an Executive Order that appears to be properly authorized cannot conclusively rely on the validity of that Executive Order (and thus cannot conclusively rely on the validity of the SPE thereby created).¹⁷⁰ Nonetheless, as discussed below, foreign investors in those debt securities may well be able to conclusively rely on that validity.

If it is reasonable for foreign investors to rely upon the assertions of the Executive Branch that the Executive Order validly created the SPE on behalf of the U.S.

¹⁶⁸ See *supra* note 159 and accompanying text.

¹⁶⁹ See 2A C.J.S. AGENCY § 418.

¹⁷⁰ See, e.g., *Thomas v. INS*, 35 F.3d 1332, 1338 (9th Cir. 1994) (“Estoppel and apparent authority normally will not substitute for actual authority to bind the United States government” (citations omitted)); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 420–27 (1990) (explaining that estoppel will apply rarely, if ever, against the federal government).

government,¹⁷¹ such investors should be able, under the international law requirements for attribution of liability to a sovereign state, to enforce the SPE's debt.¹⁷² International law explicitly recognizes that apparent authority binds state action.¹⁷³ This is important because the "foreign investor community [already] holds nearly half of all [U.S.] Treasury securities"¹⁷⁴ Therefore, foreign investor demand should be sufficient to purchase enough SPE debt to enable the U.S. government to repay its then-maturing Treasury securities.¹⁷⁵

¹⁷¹ I would thus argue, although some readers might disagree, that it would be reasonable for foreign investors to rely upon an Executive Order that this article analyzes as being authorized. In contrast, I would not regard such reliance to be reasonable if it is based solely on the Fourteenth Amendment argument, discussed *supra* Part II.A.

¹⁷² See UNITED NATIONS INTERNATIONAL LAW COMMISSION, RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001). Under Article 1, an "internationally wrongful act of a State entails the international responsibility of that State." Article 4 provides that executive action "shall be considered an act of that State under international law." Article 7 provides that the "conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions." Commentary 2 to Article 7 explains that "The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has . . . manifestly exceeded its competence." Article 12 states that "a breach of an international obligation by a State [occurs] when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." Article 31 provides that the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Thus, if the SPE's debt purported to be authorized by the Executive Branch and foreign investors could show, under usual principles of agency law, that they reasonably relied on that authorization, that debt would be deemed to be enforceable under international law even if U.S. courts eventually concluded that the Executive Branch lacked that authority.

¹⁷³ Comment 8 to Article 7 of RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, *supra* note 172, clarifies that "the question is whether [the relevant persons or entities] were acting with apparent authority." Comment 4 to that Article adds (citations omitted) that this "modern rule is now firmly established . . . by international jurisprudence, State practice and the writings of jurists."

¹⁷⁴ Terry Belton et al., *The Domino Effect of a US Treasury Technical Default*, J.P. MORGAN 1 (Apr. 19, 2011), <http://perma.cc/0ZNnoaut2AB>.

¹⁷⁵ Whether foreign investor demand is in fact sufficient to purchase enough SPE debt to enable the U.S. government to repay its then-maturing Treasury securities will depend, of

In order to enable foreign investors to enforce their claims, the SPE debt (and in the case of the back-to-back borrowing structure, the debt created by the on-lending) should ideally include waivers of sovereign immunity from suit. Even absent such waivers, however, the United States has, under certain international treaties, waived sovereign immunity defenses and agreed to arbitration stemming from debt disputes with foreign creditors.¹⁷⁶ To the extent the United States has assets outside its jurisdictional boundaries, foreign creditors might even be able to legally seize those assets to pay certain international arbitration awards.¹⁷⁷ Foreign investors therefore should have greater

course, on market conditions at the time. *Compare U.S. Treasury Issuance and Outstanding*, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION (SIFMA), <http://sifma.org/research/statistics.aspx> (last visited Feb. 3, 2014) (indicating that between January 2011 and December 2013, the Treasury Department redeemed, on a monthly basis, an average of \$565.0 billion of Treasury securities and issued \$646.9 billion of Treasury securities, resulting in a net issuance of \$81.9 billion) *with Major Foreign Holders of U.S. Treasury Securities (monthly)*, U.S. DEPT. OF THE TREASURY, <http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/ticsec2.aspx> (last visited Feb. 3, 2014) (stating that major foreign holders of Treasury securities increased their aggregate position by \$36.6 billion each month, on average, accounting for nearly half of the net issuance).

¹⁷⁶ See Kevin Gallagher, *The New Vulture Culture: Sovereign Debt Restructuring and Trade and Investment Treaties 2* (The IDEAs, Working Paper No. 2/2011, 2011) (explaining that sovereign debt is often an “investment” covered under international investment agreements and arguing that this gives foreign holders of sovereign debt the right to file arbitration claims in accordance with the procedures laid out in such agreements). The U.S. government has effectively provided its consent to be sued under forty-one bilateral investment treaties and several regional treaties, including the North American Free Trade Agreement and the Dominican Republic-Central America Free Trade Agreement. E-mail from Julie Maupin, Lecturing Fellow, Ctr. for Int’l and Comparative Law, Duke Law School, to author (Aug. 22, 2013) (on file with the author) (explaining that in these treaties, the United States has consented to arbitrate with foreign investors; that these treaties define “investment” quite broadly to include “bonds”; and that international arbitral tribunals have held that sovereign debt is indeed covered by an investment treaty under this type of broad language). See also *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, ¶ 384 (Feb. 8, 2013) (explaining that bonds are considered investments under the ICSID definition).

¹⁷⁷ See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter “ICSID Convention”]; Convention on the Recognition and

incentives than domestic investors to purchase the debt securities contemplated by this article.

The SPE. As discussed, the debt-issuing SPE should be organized as an entity that is not a “corporation.”¹⁷⁸ Additionally, it should not act “as an agency.”¹⁷⁹ Within these parameters, there is considerable flexibility. First consider organizational choice.

Because the organizational choice may be politically influenced, this article does not purport to dictate the outcome. It should be observed, however, that if the SPE is organized as an LLC, it can be managed like a corporation.¹⁸⁰ Furthermore, a commercial trust, other than a business trust, is not generally legally recognized as separately existing.¹⁸¹ Thus, it is least likely to be viewed as a “corporation” under the GCCA.¹⁸²

It is also critical to ensure that the SPE does not act “as an agency.” There appear to be two ways to accomplish that: by creating the SPE as a private entity that acts pursuant to specific contractual directions,¹⁸³ or creating the SPE as a government-owned

Enforcement of Foreign Arbitral Awards, art. 4, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter “New York Convention”]. If those foreign creditors are nationals of states that are party to the International Centre for Settlement of Investment Disputes (“ICSID”) Convention, which has over 140 member states, including the United States, Article 53 of the ICSID Convention might allow arbitral awards to be enforced against member-state assets. E-mail from Maupin, *supra* note 142. Additionally, Article V of the New York Convention, which has 146 signatory states, including the United States, allows the holder of a valid arbitration award to request enforcement of the award from the courts of any signatory state. *Id.* Those courts must enforce the award, including by attachment of assets of a contracting state, unless one of a handful of narrow exceptions is met. *Id.*

¹⁷⁸ See Part III.A.1, *supra*.

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 1:11 (3d ed., Nov. 2013).

¹⁸¹ Steven L. Schwarcz, Commercial Trusts as Business Organizations: Unraveling the Mystery, 58 BUS. LAW. 559, 574 (2003).

¹⁸² See *supra* note 106 and accompanying text.

¹⁸³ See *supra* note 107 and accompanying text.

or controlled entity that does not engage in the implementation of government policy.¹⁸⁴ I therefore propose that the SPE be created as a private entity that acts pursuant to specific contractual directions and does not engage in the implementation of government policy. That should be feasible. There is ample precedent for finding and motivating private owners of SPEs.¹⁸⁵ Furthermore, the functions of the SPE contemplated by this article, and thus the tasks of its managers (who should be hired from the private sector), should be ministerial: to issue debt securities and, depending on the structure chosen, to either on-lend the proceeds on a non-recourse basis, secured by specific financial assets, or use the proceeds to purchase financial assets.

Even though an SPE that acts ministerially does not make government policy, it must avoid “implementing” government policy to comply with the GCCA.¹⁸⁶ Some might argue that a government-controlled SPE used to avoid a federal debt default could be seen as implementing government policy. The impact of any such argument could be countered, however, by making the SPE both privately owned and privately controlled—in which case, the GCCA’s policy-implementing restriction would not apply.¹⁸⁷

¹⁸⁴ See *supra* note 108 and accompanying text.

¹⁸⁵ See, e.g., FITCH INVESTORS SERVICE, INC., STRUCTURED FINANCE NEW ISSUE: CORPORATE ASSET FUNDING CO., INC. 2 (June 15, 1992) (observing that “Stone Street Contract Partners owns 100% of CAFCO’s common stock”). Corporate Asset Funding Co., or CAFCO, is an SPE with capacity to issue \$7 billion of debt securities. *Id.* at 1. Stone Street Contract Partners is a partnership formed by members of Goldman Sachs and compensated, in the author’s experience, by a percentage of each deal entered into by CAFCO. Another way to compensate private owners of SPEs is to allow them to share in any surplus overcollateralization. *Cf. supra* note 165 and accompanying text (discussing overcollateralization).

¹⁸⁶ *Cf. supra* note 108 (discussing *Lebron v. Nat’l Railroad Passenger Corp.*, in which the Supreme Court said that the GCCA phrase, “acting as an agency” of the United States, was intended to restrict the creation of government-controlled policy-implementing corporations).

¹⁸⁷ The precedent for that SPE’s validity would be two-fold: under *Lebron v. Nat’l Railroad Passenger Corp.*, that although policy-implementing, the SPE is not government-controlled; and under *Varicon Int’l v. Office of Pers. Mgmt.*, that the SPE is a private entity that acts pursuant to specific contractual directions.

However the debt-issuing SPE is organized, it should be created and staffed—and its operating structure, including the back-to-back borrowing or asset-sale structure, should be finalized—well in advance of a debt-ceiling dispute. That is critical to enable the SPE to be prepared to issue debt securities as and when needed to avert default.¹⁸⁸ The most time-consuming process, for example, might involve obtaining rating-agency ratings of the SPE’s debt securities.¹⁸⁹

Other factors that rating agencies regard as key are payment structure and cash flow mechanics, and operational and administrative risks.¹⁹⁰ Those factors should not be at issue in the context of the debt-issuing SPE contemplated by this article. The final factor that rating agencies regard as key is counterparty risk.¹⁹¹ I see no need for counterparties, however, in the context of this article’s contemplated SPE.¹⁹²

Implicit de facto government guarantee. Another factor that rating agencies and investors might view as relevant in the context of this article’s contemplated SPE is the possibility of an implicit de facto government guarantee of the SPE’s debt.¹⁹³ In public finance, a state will often have strong economic motivations to backstop the debt of its

¹⁸⁸ This article does not purport to address strategic political considerations, such as whether the President might want the threat of a default to be real—and thus might prefer not to implement any means to avert default—in order to exert maximum pressure on Congress.

¹⁸⁹ See *supra* notes 157-159 and accompanying text.

¹⁹⁰ See *supra* note 159 and accompanying text.

¹⁹¹ *Id.*

¹⁹² In many commercial transactions, the SPE debt is dependent on payments from one or more counterparties, such as providers of currency swaps. Rating agencies then evaluate the counterparties’ financial stability, because they could constitute a “weak link”: if, for example, they fail to perform their swap obligations, the SPE may have insufficient funds in the relevant currency to pay its debt securities. SECURITIZATION OF FINANCIAL ASSETS, *supra* note 60, § 7.03[F].

¹⁹³ See *SPEs in Public Finance*, *supra* note 50, at 381-83 (observing that, in the state context, rating agencies give top investment-grade ratings to SPE-issued public debt, partly based on the SPE’s expected cash flows and partly based on the reality that the state will not allow its SPE-debt to default because that would jeopardize the state’s own credit rating). Also see Steven L. Schwarcz, “Special-Purpose Entities in National Finance” (work-in-progress on file with author).

SPEs. A default on such debt could signal uncertainty as to whether the state will pay its debts generally, thereby jeopardizing the state's credit rating.¹⁹⁴ For example, in 1984 the State of Ohio stood behind its water development authority's revenue debt in order to reduce rating-agency scrutiny of a technical default on that debt.¹⁹⁵ Markets and investors likewise believe that the economic compulsion to avoid increased borrowing costs resulting from a default on state-SPE debt provides incentive for the state to pay that debt to avoid an SPE default.¹⁹⁶

Additionally, a state may support payment of an SPE's debt merely to protect the state's reputation more generally. In a corporate context, for example, at the outset of the 2008 financial crisis many banks backstopped their affiliated structured investment vehicles (SIVs) solely to protect their own reputations.¹⁹⁷ In the case of Citigroup, this occurred notwithstanding that it reduced the capital ratio that regulators monitor to gauge

¹⁹⁴ Cf. Standard & Poor's, *Moral Obligation Bonds* 3 (June 27, 2006) (observing that if "a properly structured moral obligation defaulted, despite clear original legislative support, the state's willingness to pay on its other debt would need to be examined"); NY State Office of the State Comptroller, *Frequently Asked Questions About State Debt*, <http://www.osc.state.ny.us/press/debtfqa.htm> (last visited July 16, 2011) ("Although the State is not obligated to pay [non-State-funded] debt, a default may affect other State debt by making it more costly for public authorities to borrow. As such, it might be financially advantageous for the State to make payments in the case of a default by a public authority.").

¹⁹⁵ E-mail from W. Bartley Hildreth, Professor of Public Management and Policy, Georgia State University Andrew Young School of Policy Studies, to the author (Apr. 25, 2011).

¹⁹⁶ See, e.g., e-mail from Scott Fein, partner, Whiteman Osterman & Hanna LLP and Chair, Public Authority Project of the Government Law Center, Albany Law School, to the author (Aug. 31, 2011): "Your observation about credit issues associated with default is in this State [New York] absolutely correct. Moral obligation bonds[] are, as you know, referred to on Wall Street as 'feel good bonds' . . . they allow the State to feel good that it's not really increasing the State's aggregate debt and Wall Street to feel good that moral obligation debt is really GO debt in different clothing. Both know that although it may only be a moral commitment . . . a default would . . . run the risk of curtailing the capital markets to the State."

¹⁹⁷ Shannon D. Harrington and Elizabeth Hester, *Citigroup to Consolidate Seven SIVs on Balance Sheet (Update3)*, BLOOMBERG NEWS (Dec. 13, 2007), available at <http://www.bloomberg.com/apps/news?pid=21070001&sid=aT0Ix2iDnZRk> (reporting that Citigroup Inc. did this in the amount of \$49 billion, following similar decisions by HSBC Holdings Plc and WestLB AG to backstop their SIVs).

that bank’s ability to withstand losses on bad loans¹⁹⁸ and caused Moody’s to lower the bank’s long-term credit rating.¹⁹⁹ The reputational harm of not supporting payment of an SPE’s debt may be even greater in a state than a corporate context because “investor perception of an implicit . . . government guarantee is hard to break,”²⁰⁰ even by “statutory disclaimers and [prospectus] disclosures” that the SPE debt is not backed by the government.²⁰¹

Thus, for these reasons—to avoid jeopardizing its credit rating and to generally protect its reputation—a state may well backstop the debt of its SPEs notwithstanding the absence of a legal obligation to do so.²⁰² These reasons would appear to be less compelling, however, in the context of a privately owned and controlled debt-issuing SPE, even if the SPE was originally created by the Treasury Department. A default by that SPE on its debt securities would be highly unlikely to jeopardize credit ratings on full-faith-and-credit backed Treasury securities. Nor should such a default impair the U.S. government’s reputation if investors receive proper disclosure about the risks inherent in the SPE’s debt securities. That disclosure should prominently warn of the risk that collections on the underlying financial assets might be insufficient, notwithstanding any applicable overcollateralization, to pay those debt securities in full and on a timely basis.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (reporting a lowering from Aa2 to Aa3).

²⁰⁰ Cheryl D. Block, *Congress and the Accounting Scandals: Is the Pot Calling the Kettle Black?*, 82 NEB. L. REV. 365, 437 (2003) (referencing investor perception of an implicit U.S. government backing of Fannie Mae’s debt).

²⁰¹ *Id.* (referencing statutory disclaimers and prospectus disclosures that Fannie Mae’s debt is not backed by the U.S. government). In 1963, for example, the City of Chicago paid eighty percent of the back interest on bonds issued by the Calumet Skyway Authority due to a “feeling that a bond default by the Authority might damage the city’s overall bond rating.” JERRY MITCHELL, *THE AMERICAN EXPERIMENT WITH GOVERNMENT CORPORATIONS* 97 (1999) (citations omitted).

²⁰² A state may also decide to support payment of SPE debt, even though the state is not legally obligated to do so, if the SPE operates as an integral part of government—essentially a “too important to fail” variant of the corporate notion of too-big-to-fail. In a federal context, for example, this is exemplified by the U.S. government’s support of Fannie Mae and Freddie Mac’s debt in order to promote stability and liquidity in the housing markets. *SPEs in Public Finance*, *supra* note 50, at 382.

Rating agencies and investors should understand that risk, especially if the SPE utilizes the asset-sale structure. Recall that that structure is similar to the structure of a traditional securitization transaction, and investors in those types of transactions have experience taking the risk of the underlying financial assets.²⁰³ It might be less certain, however, that rating agencies and investors will understand the default risk if the SPE utilizes the back-to-back borrowing structure. That's because investors do not always fully understand the significance of non-recourse debt. Indeed, arguably partly as a result of that lack of understanding, Congress included a provision in the Bankruptcy Code that sometimes gives creditors full recourse against non-recourse borrowers.²⁰⁴ Because the obligor on the non-recourse debt is the Treasury Department, some investors might mistakenly think that the credit of the Treasury Department stands behind the SPE's debt securities. If the SPE ever defaults on its debt securities and investors claim they were misled—and especially if the media, including the foreign media given the likely dominance of foreign investors,²⁰⁵ makes a big enough outcry—it is not inconceivable that the Treasury Department might decide to backstop the SPE's debt securities.²⁰⁶

B. Curbing Potential Abuses

The alternative options for avoiding default should be distinguished from the current widespread abuse of SPE borrowing by states. As mentioned, one of the reasons states engage in SPE borrowing is to avoid violating archaic state-constitution-mandated debt ceilings.²⁰⁷ That use, which would be similar to the federal government's use of SPE borrowing to avoid default, is arguably legitimate because, “[w]ithout the ability to get

²⁰³ See, e.g., Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 217 (2009).

²⁰⁴ See 11 U.S.C. § 1111(b)(1)(A). That provision would not apply, of course, against the Treasury Department, which is not subject to the Bankruptcy Code.

²⁰⁵ See *supra* notes 172-175 and accompanying text.

²⁰⁶ Indeed, the reality is that sponsors have often stood behind their defaulting SPEs, creating the perception of a de facto guarantee. See *supra* note 197-199 and accompanying text. The fact that the U.S. government's supported Fannie Mae and Freddie Mac's debt, even though that was done because these entities operated as an integral part of government (see *supra* note 202), adds to that perception.

²⁰⁷ See *supra* note 53 and accompanying text.

around these [debt limits], many states ‘would barely be able to function.’”²⁰⁸ Admittedly in each case there may be a “more democratic way of addressing the [debt] limits”²⁰⁹—in the case of states, to amend their “constitutions to increase or remove” the debt limits²¹⁰; and in the case of the federal government, for Congress to vote to increase the federal debt limit. But faced with the reality and consequences of default, SPE borrowing is a practical necessity.

Nonetheless, SPE borrowing has increasingly become subject to abuse in state public finance. The most prevalent reason that states currently engage in SPE borrowing is to reduce financial transparency and avoid public scrutiny. Even though states de facto guarantee their SPE debt,²¹¹ such debt “is rarely shown as debt on state balance sheets and, even when shown . . . , may not be easily discernible.”²¹² This “lack of transparency can undermine public finance and also make it even more likely that states will continue to manage their financial affairs with insufficient regard to their ability to repay their debts.”²¹³ Sadly, the monitoring insufficiency of states, absent appropriate media attention (which has been lacking²¹⁴), makes states even more likely than corporations to use SPEs to hide their debt.²¹⁵

Any federal use of SPE borrowing to avoid default should pay great care to counteract this potential illegitimacy, including through clear and transparent disclosure—not only to investors, but also to the public generally—of that debt and the

²⁰⁸ *SPEs in Public Finance*, *supra* note 50, at 378 (quoting from a telephone interview with a leading public finance lawyer).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See supra* note 197-199 and accompanying text.

²¹² *SPEs in Public Finance*, *supra* note 50, at 380. That article gives the example of New York State showing \$48.5 billion of debt in its 2006 financial statements but failing to show another \$80 billion of New York State SPE debt. *Id.*

²¹³ *Id.* at 383.

²¹⁴ In April 2012, the New York Times accepted for publication an op-ed I wrote on this topic. To date they have failed to publish it, although they maintain their intention to do so.

²¹⁵ *SPEs in Public Finance*, *supra* note 50, at 388.

federal government's de facto obligations, if any, as well as any legal obligations with respect to that debt.²¹⁶

V. CONCLUSIONS

Even a “technical” default by the United States on its debt, such as a delay in paying principal or interest due to Congress’s failure to raise the federal debt ceiling, could have serious systemic consequences, destroying financial markets and undermining job creation, consumer spending, and economic growth. The ongoing political gamesmanship between Congress and the Executive Branch has been threatening—and even if temporarily resolved, almost certainly will continue to threaten—such a default. The various options discussed in the media for averting a default have not been legally and pragmatically viable.

This article proposes new options for avoiding default, arguing that although the Executive Branch lacks authority to directly issue Treasury securities above the debt ceiling, it should have the power to raise financing by monetizing future tax revenues. In each of the proposed options, a non-governmental special-purpose entity (SPE) would issue securities in amounts needed to repay maturing federal debt. Depending on the option, the SPE would either on-lend the proceeds of its issued securities to the Treasury Department on a non-recourse basis, secured by specified future tax revenues; or the SPE would use the proceeds of its issued securities to purchase rights to future tax revenues from the Treasury Department. In each case, therefore, a finite set of future tax revenues²¹⁷ would form the basis of repayment to investors.

These options should be legally valid and constitutional, notwithstanding the debt ceiling: neither involves the issuance of general-obligation or full-faith-and-credit

²¹⁶ The only legal obligations should be on warranties as to the quality of transferred financial assets. *See supra* notes 165-167 and accompanying text.

²¹⁷ In finance, a finite set of future revenues is typically referred to as a finite “pool” of those revenues.

government debt, and indeed the second option doesn't involve the issuance of any government debt. Furthermore, based on the similarities of these options to successful financing transactions that are widely used in the United States and abroad, the securities issued thereunder should receive high credit ratings and also be attractive to investors. Because of provisions in foreign treaties, those securities should be especially attractive to foreign investors—who already purchase half of all Treasury securities.

These options are not intended to be standard financing structures. Being riskier than full-faith-and-credit Treasury securities, the securities issued under these options would almost certainly have to pay a higher interest rate than Treasury securities.²¹⁸ The options should therefore be viewed, and this article presents them, as viable emergency measures, if needed, to avoid a U.S. debt default.

²¹⁸ *See supra* note 51 and accompanying text.