2014

The Article III Fiscal Power

Adam Rosenzweig

THE ARTICLE III FISCAL POWER

*Adam Rosenzweig**

Imagine that the United States faces an unprecedented Constitutional crisis. Earlier in the year, Congress authorized the President to spend $3 trillion, comprised of $1 trillion in defense spending to fund a war duly authorized by Congress, another $1 trillion of interest on debt incurred by the United States also duly authorized by Congress, and another $1 trillion of Medicare expenses (which are mandatory under existing law duly enacted by a previous Congress). As the end of the year approaches, the President realizes that the United States will not have enough money to pay all these bills, leading to a choice: should the President (1) decline to prosecute a duly authorized military conflict, (2) fail to pay interest on duly authorized and issued national debt, (3) fail to make duly authorized and mandatory Medicare payments, or (4) borrow an additional $1 trillion to cover the shortfall? The President chooses option (4), and thus requests the authority from Congress to issue $1 trillion of debt. But this time Congress refuses, denying the President the power to issue the debt. What options remain?

This hypothetical represents a simplified version of the so-called "debt ceiling" standoff between Congress and President Obama in 2011. The resolution at the time was a compromise (of sorts) to raise the statutory debt limit in exchange for certain promises to cut spending in the future. But what if Congress had stood its ground? Either the President could violate the Constitutional obligation to faithfully execute the laws by failing to spend duly authorized funds or violate the separation of powers by issuing debt without Congressional authorization. A real Constitutional crisis seems to emerge,[1] with no way out. Or is there?

* Professor of Law, Washington University in Saint Louis. The author would like to thank Neil Buchanan, John Drobak, Bruce LaPierre, Ronald Levin, Greg Magarian, and the participants at the 2013 Annual Critical Tax Conference and the UNLV Faculty Speaker Series for the extremely valuable and insightful comments on earlier versions of this essay. Any errors are solely those of the author.

1. *See, e.g.,* Sanford Levinson and Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009) (referring to this as a Type II Constitutional Crisis).

As most American schoolchildren learn in civics class, the United States government is comprised of three branches: the legislative, the executive, and the judicial. So if the legislative and executive cannot—or will not—comply with their Constitutional obligations, what about the judiciary? Could a federal court itself, under its own authority, satisfy the Constitution if the other branches won't? Typically, when the Executive violates the Constitution the solution is for the Supreme Court to order the Executive to fulfill its Constitutional obligations. But in the hypothetical above this would not be sufficient; even if it wanted to, the Supreme Court couldn't order the President to spend money the country didn't have, nor could it order Congress to pass a new statute to authorize debt or withdraw appropriations.[2]

The thesis of this Essay is that, under certain limited circumstances, the Supreme Court can, under its own, independent, power under Article III of the Constitution, impose taxes and borrow money, wholly separate from the powers of Congress to do so under Article I or any potential powers of the President to do so under Article II.[3]

While at first glance this may seem like an odd, or even outrageous, contention, in fact the Supreme Court has recognized the inherent power of federal courts to do something strikingly similar over twenty years ago in the case of *Missouri v. Jenkins*.[4] In that case, the school district of Kansas City, Missouri, was ordered to undertake certain spending to comply with *Brown v. Board of Education ("Brown I")*.[5] The school district passed a new property tax to do so, but the state of Missouri passed a law withdrawing the taxing power from the school district, making the tax increase null and void. The district court found the state's actions unconstitutional, and ordered the school district to collect the tax and spend the money. In other words, the court itself ordered the imposition and collection of a

2. *See, e.g.,* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

3. This is distinct from the claim that the courts take fiscal matters into account in making their decisions. *See* NANCY STAUDT, THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS (2011).

4. 495 U.S. 33 (1990). Due to the procedural history of the case, this opinion is often referred to as Jenkins II. Jenkins I involved a review of attorney's fees, Missouri v. Jenkins, 491 U.S. 274 (1989), and Jenkins III involved the review of desegregation orders across districts, Missouri v. Jenkins, 515 U.S. 70 (1995). For simplicity, this Essay will refer to Jenkins II as Jenkins as it only focuses on the question of the judicial taxation decree at issue in that case.

5. 347 U.S. 483 (1954) [hereinafter *Brown I*].

tax that was not authorized by state law. On appeal, the Supreme Court effectively held that this was within the inherent power of the district court to remedy Constitutional violations.[6]

Jenkins understandably caused quite an uproar at the time, although much of the commentary focused on the aspect of the case related to the power of federal courts over states and localities,[7] while others on the more limited issue of enforcement of school desegregation.[8] But on the face of the opinion, neither is necessarily correct. Rather, in *Jenkins* the Supreme Court held that when a law-making body authorizes spending, then refuses to allocate the resources to meet this spending, and, crucially, the failure to do so violates the Constitution, the courts have the independent power to raise the money directly to remedy the Constitutional violation, irrespective of legislative authority to do so.[9]

This fact pattern seems almost identical to the hypothetical at the beginning of this Essay. Congress authorizes spending by statute, the President—Constitutionally obligated to execute that law—tries to undertake the spending, but then Congress effectively withdraws the ability from the President to do so. If failure to spend the money would violate the Constitution,[10] *Jenkins* would seem to stand for the proposition that the Court could order the President to raise and spend the money. Taken to an even further extreme, the Court could itself raise the money and provide it to the President to spend, either through taxing or borrowing, to avoid the Constitutional violation.

Not only would recognition of such a power fundamentally alter any future debates over taxing and spending, it could potentially offer a way out of the policy and political stalemate facing the country. After all, if both Congress and the President

6. As discussed in more detail below, the Supreme Court held that the district court should have given the school district an opportunity to enact its own tax before doing so itself under principles of comity. *See generally* D. Bruce LaPierre, *Enforcement of Judgments Against State and Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299 (1992).

7. *Id.* note 6.

8. *See, e.g.,* Jose Felipe Anderson, *Perspectives on Missouri v. Jenkins: Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed"*, 39 HOW. L.J. 693 (1996); The Honorable David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071 (2004).

9. This is in contrast to the ruling in *Jenkins III*, which held that specifying the type and location of schools across districts was inappropriate. 515 U.S. at 133.

10. *See, e.g.,* Perry v. United States, 294 U.S. 330 (1935); *see generally* Gerard N. Magliocca, *The* Gold Clause Cases *and Constitutional Necessity*, 64 FLA. L. REV. 1243 (2012).

knew that doing nothing would lead to five justices of the Supreme Court choosing how to fund the government, the odds of a stalemate would be reduced dramatically. Perhaps the recognition of the existence of such a power could itself force the government out of its rut and return a real balance of power to the coordinate branches of government.

To this end, Part I of this Essay will summarize and describe the facts and holding of *Missouri v. Jenkins*, demonstrating the already recognized Article III power to tax. Part II will then describe why and how the logic and reasoning of *Jenkins* can and should apply with equal, if not stronger, force to the federal government as opposed to state legislatures.

I. *MISSOURI V. JENKINS*: RECOGNIZING THE JUDICIAL POWER TO TAX

Prior to the landmark decision of *Brown I,* the schools of the State of Missouri ("Missouri") were legally segregated by race.[11] The decision in *Brown* effectively struck down the *de jure* segregation of schools, but as with many school districts across the country this did not mean the end to *de facto* school segregation. In response, the Supreme Court ordered, in *Brown II*,[12] that the district courts enforce the mandate of *Brown I* by using their broad equitable powers to undo the vestiges of *de jure* segregation in schools.

In 1977, certain parents and students sued Missouri and the Kansas City Missouri School District ("KCMSD") for failing to comply with the mandates of *Brown* and undertake the efforts necessary to ameliorate the effects of the previous *de jure* segregation.[13] Pursuant to *Brown II*, in 1984 the district court agreed and ordered KCMSD to undertake a number of efforts to remediate the existing *de facto* segregation in the district, including remedial education programs in underserved schools and capital improvements in facilities.[14]

The problem faced by KCMSD was that it did not have enough money to comply with the district court's order. Of course, this is a problem that is conceptually easy to remedy—KCMSD could simply raise taxes. The problem with this remedy is that Missouri, in the interim, had adopted rules effectively

11. *See* LaPierre, *supra* note 6.
12. Brown v. Bd. of Educ., 349 U.S. 294 (1955) [hereinafter *Brown II*].
13. *See* LaPierre, *supra* note 6.
14. Jenkins v. Missouri, 672 F.Supp. 400 (W.D. Mo. 1987).

prohibiting KCMSD from doing so.[15] The intention of this was clear. Missouri, having already lost one school desegregation case in Saint Louis and clearly sensing that it would lose in Kansas City, took away the taxing power from KCMSD so that, even if it lost, it would not be able to comply with any district court orders requiring new funding.[16]

This put the district court in a difficult position. The Supreme Court had clearly mandated that the court use its broad equitable powers to enforce *Brown*, and the court had found that KCMSD was not in compliance with *Brown*, but it could not order KCMSD to impose new taxes because KCMSD was prohibited by state law from doing so. The solution adopted by the district court, relying in part on the Saint Louis case, was to strike down the state law limiting the KCMSD taxing power as a violation of *Brown*.[17] In the Saint Louis case, this alone was sufficient because the Saint Louis school district had already increased its taxes, which therefore became effective as soon as the state law had been found unconstitutional. Thus, striking down the state cap effectively raised sufficient taxes to comply with the court's order. The difficulty in the KCMSD situation was that the state cap had been put in place before the KCMSD tax increase had been approved. Thus, merely striking down the cap was not sufficient.

The district court once again found itself in a bind. This time, however, the court had no precedent upon which to draw. Instead, the court fashioned its own remedy, taking up the call in *Brown II* to use its equitable powers as necessary. The district court ordered KCMSD to adopt a new property tax and, in the interim, ordered that a new income and property tax be imposed under its own inherent power, and in addition, that $150 million of new bonds be issued, all in direct contravention to the Missouri Constitution.[18]

As has been widely noted, states and localities are particularly sensitive to federal courts telling them how to tax their own citizens.[19] But the order in the KCMSD case went even

15. *See* LaPierre, *supra* note 6.

16. *See* LaPierre, *supra* note 6. *See also* Kevin Little, Missouri v. Jenkins*: Exploring the Judicial Limits of the Supremacy Clause*, 8 HARV. BLACKLETTER J. 137 (1991).

17. *Jenkins*, 672 F. Supp. at 403.

18. *Id.* at 412.

19. *See* LaPierre, *supra* note 6; *see also* Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper?*, 46 WM. & MARY L. REV. 1437 (2005).

beyond that. Missouri was concerned that if the order in KCMSD was upheld, federal courts would be able to impose their own taxes directly on the citizens of states without the approval, or even the input, of the state governments themselves. On this basis, Missouri appealed to the Eighth Circuit, claiming that the order in KCMSD exceeded the district court's authority.

The Eighth Circuit upheld the district court order in large part.[20] The primary issues on which it did not agree with the district court were: (1) the Circuit court struck down the income tax surcharge adopted by the district court, and (2) the Circuit court held that KCMSD should be permitted, as an initial matter, to set the rate of property tax to further federal/state comity.[21] Under the doctrine of federal/state comity, the federal government should avoid intruding on matters traditionally within the jurisdiction of the states, even if there is a legitimate federal interest, to avoid potentially undermining the state sovereignty implicit in a federal system.[22] Thus, the Eighth Circuit found that directly choosing the rate was the line which, if crossed, would violate comity by introducing the federal court into state and local matters, regardless of if the court had the power to do so.

On appeal to the Supreme Court, the majority substantially upheld the Eighth Circuit, agreeing that the district court should not have ordered the income tax surcharge and also agreeing that the district court should not have directly imposed a tax on KCMSD.[23] Importantly, however, the majority opinion agreed with the Eighth Circuit that ordering KCMSD to impose a property tax and following procedures permitting the district to determine the appropriate rate would be within the power of the district court. Thus, the order that KCMSD implement a property tax increase and bond issuance was upheld.[24]

A concurring opinion, signed by four Justices, disagreed with the majority on this last point. In particular, the concurring opinion noted that, in effect, there was no difference between a court directly ordering a tax increase and a court ordering that a locality enact a tax increase.[25] Either way, the court was ordering

20. Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).
21. *Id.*
22. *See, e.g.,* Shepard, *supra* note 19.
23. Missouri v. Jenkins, 495 U.S. 33, 37 (1990).
24. *Id.* at 51.
25. *Id.* at 62 (Kennedy, J., concurring).

a tax under its own inherent authority. The Justices concurred in the judgment, however, even though they believed the tax to be outside the court's authority, because they found the tax issue to be outside the scope of the case on appeal.[26]

Importantly, however, the concurring opinion did agree with the majority opinion on one key issue: that the issue in the case ultimately came down to a question of federal/state comity. In other words, both the majority and the concurrence ruled that the district court should not have exercised its existing and broad inherent powers in deference to the state sovereignty inherent in state and local taxation. Thus, in effect, the Court unanimously agreed that federal courts could have the power to impose taxes or issue bonds, the only question in the *Jenkins* case being whether doing so had intruded into traditional areas of state and local sovereignty.[27]

This core holding of *Jenkins* has been underappreciated for over two decades. Rather than being an odd outlier limited to the unique facts of the post-*Brown* school desegregation cases, *Jenkins* represents the clear and unanimous recognition by the Supreme Court of a vibrant, robust Article III power to tax and spend to remedy Constitutional violations under specific and particular circumstances. The next section will consider these circumstances in more detail.

II. THE JUDICIAL FISCAL POWER: EXTENDING *JENKINS* TO THE FEDERAL CO-ORDINATE BRANCHES

Return to the hypothetical at the beginning of this Article. Congress has authorized spending but not the means to raise the money to undertake this spending. Clearly a fiscal crisis, and potentially a Constitutional crisis, has arisen. But what does *Jenkins* have to do with this?

In fact, when looked at closely, *Jenkins* is directly on point. This can be seen more clearly by specifically delineating the holding in *Jenkins* and distinguishing it from the *dicta.* In so doing, a clear path to application to the federal co-ordinate branches emerges.

26. *Id.* at 80 (Kennedy, J., concurring).

27. *See* John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1134 (1996) ("[*Jenkins*] did not invalidate the order on the grounds that it was inconsistent with Article III, the Tenth Amendment, or principles of federalism. Instead, the Court held that the district court had gone too far because, rather than impose the tax increase itself, it should have ordered the school district to do so instead").

The following represents the logical steps necessary to the holding of *Jenkins*:

1. A Constitutional violation has occurred;

2. Federal courts have the power to order a remedy to the Constitutional violation;

3. Another branch effectively undermines the ability of the federal courts to implement the remedy;

4. If so, the courts have the inherent power under Article III of the Constitution to impose the remedy directly.

From this perspective, the holding in *Jenkins* makes perfect sense. In fact, every Justice considering *Jenkins* agreed to these logical steps. First, Missouri and KCMSD violated the Constitution by legally segregating the schools. Second, the Supreme Court recognized in *Brown II* that the federal courts have the power to remedy this violation through affirmative actions such as ordering busing and ordering facility upgrades. Third, Missouri attempted to undermine this power by revoking the ability of KCMSD to raise taxes to pay for these actions. Fourth, the federal courts have the inherent power to strike down the undermining law as unconstitutional and order that the taxes be adopted to implement the remedy.

There is no reason this cannot be extrapolated to more current debates.[28] With respect to the Constitutional questions, the bulk of the literature considering the debt ceiling showdowns has already focused on precisely these issues, and thus this section can serve mostly as a review of that literature as a predicate to engaging in the broader judicial taxation point. First, a Constitutional violation has occurred. In this case, it is one of the following: (1) Congress prevented the President from faithfully executing the law under Article II, (2) Congress questioned the validity of the public debt under Section 4 of the Fourteenth Amendment. Second, the Supreme Court has ruled that the federal courts have the power to remedy such Constitutional violations. Third, any remedy to be adopted by the federal courts would require either taxing or spending, each of which Congress has prohibited. Fourth, the federal courts

28. *See* James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57 (2012).

must have the inherent power to force Congress to adopt some fiscal provision to prevent the Constitutional violation.

The remainder of this Section will discuss each of these logical steps in order.

A. THE CONSTITUTIONAL VIOLATION

1. Article II

Section 3 of Article II of the Constitution provides that the President of the United States "shall take Care that the Laws be faithfully executed."[29] This has been interpreted to mean that the President is obligated to enforce the laws adopted by Congress.[30] But what happens when the President cannot comply with all of the laws enacted by Congress at the same time? In such a situation, the President simply cannot comply with the Constitutional mandate to faithfully execute the law without violating another provision of the Constitution, specifically that only Congress has the power to impose taxes or authorize spending.[31]

More specifically, the President faces three duly enacted and valid federal laws: (1) mandated spending such as interest due on public debt, entitlement programs like Social Security and Medicare, and discretionary spending such as military and Health and Human Services, (2) insufficient revenue raised from duly enacted taxes, and (3) a prohibition on issuing new debt. Thus, the President has only three choices: (1) fail to undertake duly authorized spending, (2) raise revenue not authorized by Congress, or (3) issue new debt in excess of the limit on public debt. All three are unconstitutional.[32]

Thus, Congress has duly enacted valid laws that, when taken together, force the President to violate the Constitutional obligation of faithfully executing the laws.

This can be seen even more starkly through a simpler example. Assume Congress in 2004 authorized the federal government to pay for insulin for all American citizens with

29. U.S. CONST. art. II, § 3, cl. 4.

30. *See* Parker Rider-Longmaid, Comment, *Take Care That the Laws Be Faithfully Executed*, 161 U. PA. L. REV. 291 (2012).

31. *See* 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 (2012).

32. *See id.* at 1196–97 (referring to this as the "trilemma").

diabetes. They expect this will cost $100 million per year each year and thus Congress appropriates $100 million to pay for insulin under this program. At the same time, Congress forbids any tax revenue from being used to pay for the insulin. Now the President must either fail to comply with the spending mandate or violate the funding restriction. Or, if one prefers, in 2004 Congress authorizes the President to fight a war with Iraq and adopts a sufficient appropriation to pay for the war, but then adopts a law mandating that the war not add to the federal debt. The idea is the same.

Some may contend this is, in fact, not a Constitutional violation. Rather, all that is required from the President is that the law be faithfully executed, not perfectly executed. Thus, the President could pay the bills as they come in and then stop paying the bills once the money runs out. Since this would be within the discretion of the Executive in how to manage the budget of the federal government, there would be no Constitutional violation.[33]

This argument requires assuming that spending mandated by federal law is only permitted but not required and that the President could have the unilateral authority not to spend money authorized by Congress. Unfortunately, the little law there is on this subject contradicts this argument. First, the Supreme Court has held that the President does not have, and cannot have even with Congressional approval, the right to veto individual items of spending in a larger spending bill.[34] Permitting the President to pick and choose among approved items of spending effectively would grant the President a line-item veto, thus making it unconstitutional. So this does not solve the Constitutional problem.

Second, Congress itself could order the President to prioritize certain spending over others without a statute.[35] For example, the President could ask Congress which spending should be prioritized rather than make this decision unilaterally.

33. *See, e.g.,* Kelleigh Irwin Fagan, Note, *The Best Choice Out of Poor Options: What the Government Should Do (Or Not Do) if Congress Fails to Raise the Debt Ceiling*, 46 IND. L. REV. 205, 233–238 (2013).

34. *See* Clinton v. City of New York, 524 U.S. 417 (1998). The dissent in *Clinton* noted that it might be possible for Congress to enact discretionary expenditures without running afoul of this doctrine. *See id*. at 466 (Scalia, J., dissenting). Even if this was the law, which is not clear, it would not apply to mandatory spending such as Medicare or interest on national debt.

35. *See* Full Faith and Credit Act, H.R. 807, 113th Cong. (2013), http://www.gpo.gov/fdsys/pkg/BILLS-113hr807rh/pdf/BILLS-113hr807rh.pdf.

Unfortunately this does not solve the problem either. The Supreme Court has held that Congress cannot direct the President through resolution as to how to execute the law, even if it does so pursuant to duly enacted legislation permitting it.[36] If the President and Congress agreed which spending should be prioritized over other spending, they could jointly pass a new statute changing the prior spending, even retroactively. In such a situation, however, there would not be a problem in the first place. The problem only arises when Congress and the President disagree. In fact, in the context of the debt ceiling, it is precisely because Congress and the President cannot agree that the conflict arose in the first place.

Taken together, this means that neither the President alone nor Congress alone can resolve the Constitutional "trilemma" (*i.e.*, three unconstitutional choices) facing the President.[37] Thus, a violation of Section 3 of Article II of the Constitution.

2. Section 4 of the Fourteenth Amendment

Section 4 of the Fourteenth Amendment provides that "[t]he validity of the public debt of the United States, authorized by law . . . shall not be questioned." Thus, some have argued that the debt ceiling showdown itself violated Section 4.[38]

The argument goes something along the following: (1) Congress duly authorized public debt and other spending; (2) once public debt is so authorized Congress cannot do anything that threatens the debt being paid; (3) Congress has not authorized enough revenue to pay the interest on the debt and all the other authorized spending and has prohibited the President form borrowing to do so; (4) taken together, Congress has questioned the validity of the debt by making default possible.

This is not as radical an idea as it first may seem. In fact, the Supreme Court has held that

> [t]he Fourteenth Amendment, in its fourth section, explicitly declares: "The validity of the public debt of the United States, authorized by law, . . . shall not be questioned," [This is] confirmatory of a fundamental principle which applies as well to the government bonds [issued after], as to those issued

36. *See* INS v. Chadha, 462 U.S. 919 (1983).

37. *See* Buchanan & Dorf *supra* note 31.

38. *See* Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227 (2013).

> before the amendment was adopted [and] the expression "validity of the public debt" embrace[s] whatever concerns the integrity of the public obligations.[39]

Pursuant to this reasoning, the Court held that ordering non-payment or payment not pursuant to the terms of the debt was outside of the power of Congress. Thus, it seems clear that Congress cannot directly enact a statute calling for the default or disavowal of the public debt of the United States.[40]

The question then becomes whether Congress may indirectly do what it cannot do directly. In this case, Congress clearly authorized public debt but did not authorize the means for the President to satisfy the public debt. Commentators have claimed that this itself in fact would violate Section 4 and thus is unconstitutional.[41]

Others have countered that failure to authorize sufficient funds to engage both in statutory spending and servicing valid public debt is not problematic because the President can simply prioritize the public debt over other spending and avoid violating Section 4. The argument on its face is appealing; Section 4 mandates servicing the public debt, the President has plenty of money to do so, and if the President runs out of money afterwards that does not violate any specific Constitutional provision.[42]

There are two problems with such an argument, however. First, it runs into the same Article II problem as discussed above. If the President chooses to service the public debt at the expense of paying military contractors (for example), the President has still failed to execute the laws of the land. Even if this could be overcome, for example by claiming that choosing the least unconstitutional option still complies with Article II,[43] such an approach faces another potential issue: the impoundment problem.

In 1972, President Nixon invoked the inherent power of the Presidency to impound, or refuse to spend, funds authorized by Congress on certain environmental programs. Earlier that year, President Nixon had vetoed the legislation authorizing such funds but Congress overrode the veto. The issue made its way to the Supreme Court, which held in *Train v. City of New York*[44]

39. Perry v. United States, 294 U.S. 330, 354 (1935).
40. *See also* Fagan, *supra* note 33.
41. *See* Buchanan & Dorf, *supra* note 31.
42. *See* Fagan, *supra* note 33.
43. *See* Buchanan & Dorf, *supra* note 31.
44. 420 U.S. 35, 44–46 (1975).

that the President could not use impoundment to avoid the Constitutional override of his veto with respect to the authorized funds. In other words, the President cannot do indirectly what the President cannot do directly.

It is possible that *Train* is limited to the situation where Congress overrode the veto of a President, and that absent such an override the President retains the inherent power to impound authorized funds. For example, President Jefferson claimed such a power over two hundred years ago.[45] Alternatively it is possible that *Train* is limited to the situation where the President has the legally authorized funds available and simply chooses not to spend them. Either way, there is no doubt that the Supreme Court believes that the issue is one subject to judicial review, and any attempt by the President to impound funds necessary to satisfy Section 4 would itself simply end up in court.[46]

Further, in 1974 Congress enacted the Congressional Budget and Impoundment Control Act, which forbade Presidents from impounding funds absent approval by Congress within 45 days.[47] Presumably this would itself prevent the President from unilaterally choosing to service the public debt and default on other authorized spending without approval from Congress.[48] But, of course, if Congress could agree to this the President would not be in the position in the first place. So it would seem the Impoundment Act would present another insurmountable hurdle to using impoundment to resolve the Section 4 problem.

Taken together, it appears Section 4 presents an alternative Constitutional violation sufficient to satisfy the first prong of *Jenkins*.

B. FEDERAL COURTS HAVE POWER TO RESOLVE

The second step of *Jenkins* requires inquiring into whether the federal courts even have the power to resolve the Constitutional violation at hand. The Court has made clear that

45. *See* Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 30–33 (2001) ("President Jefferson seems to have been the first President to have actually impounded funds in a manner inconsistent with the will of Congress. In 1801, in his first message to Congress, Jefferson announced that he was refusing to spend the money Congress had appropriated for the construction of several navy yards").

46. *See id.*

47. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 602–692).

48. *See also* Buchanan & Dorf, *supra* note 31.

the inability of a governmental entity to afford to pay for a remedy is not a defense to the actual underlying Constitutional violation.[49] Thus, the issue of whether the courts are able to provide a remedy cannot be limited to the question of whether Congress has sufficient resources to pay for any such ordered remedy. Rather, there are three steps necessary to such an analysis: (1) does any plaintiff have standing to bring the claim, (2) does the court have an available remedy within its powers, and (3) is the issue justiciable (or conversely, is the issue subject to the Political Question doctrine). As discussed in more detail below, the answer to all three is yes.

1. Standing

The standing doctrine requires that a plaintiff with a real and identifiable harm bring a case before the federal courts. Standing is jurisdictional; absent standing the federal courts do not have the power to hear a case. The standing doctrine is tied to the Case or Controversy requirement of Article III, which prevents federal courts from issuing advisory opinions.

At first glance, standing seems problematic for a *Jenkins* type claim. Unlike in *Jenkins* where there were clearly students being harmed (the students entitled to the additional spending under the court order who were not receiving it), the issue is not so clear in other cases.[50] The Supreme Court has clearly held that a taxpayer does not have standing to challenge a particular fiscal policy of the United States simply in their capacity as a taxpayer.[51] Further, the Supreme Court has recently held that even plaintiffs suffering specific harms do not have standing under the Establishment Clause to challenge the *failure* to tax.[52] Thus, it also seems at first glance as if no taxpayer would have a specific claim sufficient to establish standing under these circumstances.[53]

49. *See* Watson v. City of Memphis, 373 U.S. 526 (1963).

50. In actuality, KCMSD brought the initial lawsuit in *Jenkins* but eventually the courts restructured the suit so that it was between students and parents, as the plaintiffs, and KCMSD and Missouri, as the defendants.

51. *See, e.g.,* Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).

52. *See* Ariz. Christian Sch. Tuition Org. v. Winn (ACS), 131 S. Ct. 1436 (2011). *See generally* Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777 (2013).

53. *See* Petrella v. Brownback, 2011 WL 884455 (D. Kan 2011) (holding that taxpayers do not have standing to challenge a state cap on local jurisdiction taxing power solely to require the locality to hold an election on the tax question).

The standing problem turns out not to be as troubling as it may initially appear, however. This harkens once again to the so-called *Gold Clause* cases decided by the Supreme Court.[54] As noted above, in the *Gold Clause* cases Congress changed the type of currency with which the President could satisfy the public debts from gold-backed notes to non-gold-backed notes.[55] The Supreme Court held that this violated Section 4 of the Fourteenth Amendment, but that the remedy sought (payment in gold-backed notes) was not available to the plaintiff. Crucially, although not discussed, the Supreme Court must have determined that the plaintiff in that case—a bondholder—had standing to bring the challenge to the potential non-payment in violation of Section 4. This must be the case, precisely because standing is jurisdictional—the Supreme Court could not hear the case at all if the plaintiff did not have standing.

But standing doctrine has developed considerably since the *Gold Clause* cases. How does this affect the finding that the plaintiffs in those cases must have had standing sufficient to bring the claims in the first place? It turns out, most likely not at all. Recent standing doctrine has focused on the presence of an actual harm and whether a particular plaintiff has suffered that particular harm. This was most starkly demonstrated in the recent case of *Hollingsworth v. Perry*.[56] In that case, opponents of California's Proposition 8, which defined marriage as only between a man and a woman under the California Constitution, brought suit challenging the constitutionality of the proposition in federal court. They did so by suing the governor and attorney general of the State of California. The district court ruled in favor of the plaintiffs and found Proposition 8 unconstitutional. The governor and attorney general declined to appeal the ruling. Instead, a third party group supporting the proposition brought the appeal. The Ninth Circuit heard the case, finding that the appellants had standing after certifying the question to the California Supreme Court, and upheld the decision of the district court.[57] But on certiorari, the Supreme Court held that the third party group did not have proper standing to bring the appeal on behalf of the state when the governor and attorney general declined to do so.

54. *See* Perry v. United States, 294 U.S. 330, 358 (1935); Nortz v. United States, 294 U.S. 317, 329–30 (1935); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 316 (1935).

55. *See* Magliocca, *supra* note 10.

56. 133 S.Ct. 2652 (2013).

57. Perry v. Brown, 671 F. 3d 1052, 1070–71 (2012).

The Court in *Hollingsworth* held that being intensely interested in an issue is not the same as bearing an injury in fact sufficient for judicial redress.[58] The Court made clear that the reason for this standing doctrine was not to ensure that sufficient damages could be awarded or that adverse parties would bring out all the facts, but rather to ensure that courts act as judges and not as legislators.[59] In doing so, it reiterated that the standing doctrine looks to the harm of the particular party before the court and the ability of the court to redress the harm, to wit:

> Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." [*Diamond v. Charles*, 476 U.S. 54, 62 (1986)].[60]

Under this standard, bondholders would face the risk of nonpayment by the government on government issued bonds, and a judgment ordering payment would fully redress this injury. So it seems clear that bondholders would have standing to bring a claim that a statute violates Section 4 of the Fourteenth Amendment.[61] Contrast this with interest groups wanting to issue more public debt to fund authorized unemployment insurance benefits. In that case, while the

58. "For there to be such a case or controversy, it is not enough that the party invoking the power of the court have a keen interest in the issue. That party must also have 'standing,' which requires, among other things, that it have suffered a concrete and particularized injury." 133 S. Ct at 2659.

59. *Id*. ("This is an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives.") (emphasis not included).

60. *Id.* at 2661.

61. *See* John McGuire, Comment, *The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity?*, 7 LOY. J. PUB. INT. L. 203 (2006). *See also* Fagan, *supra* note 33.

interest group would clearly be interested, under the reasoning of *Hollingsworth* (which invokes the reasoning of a long line of standing precedent[62]), the interest group would not have standing for purposes of Article III.

But that bondholders may have standing does not alone necessarily mean that bondholders would bring suit. Rather, it would seem investors who hold U.S. Treasury bonds as an investment could simply sell the bonds if they were concerned about repayment. This would lead to a drop in price, but more importantly the new purchasers would have priced this risk into the bond and thus presumably would have little incentive to bring a lawsuit either.

But that too is also not the end of the story, since the largest holder of Treasury debt is not the public or foreign governments, but rather the Social Security Trust Fund. The problem is that the bulk of the debt held by the Social Security Trust Fund is not in fact federal Treasury bonds but rather a special type of debt only available to the Fund that is privileged over public debt. With respect to this special debt, the Fund has a right to be paid by statute, but the statute explicitly permits this obligation to be abrogated by statute as well. Thus, even if the Trust Fund wanted to sue for payment, doing so would not implicate the same types of Constitutional claims that a lawsuit brought by ordinary public debt holders would.[63] This is not the end of the analysis, however. In addition to the special Trust Fund debt certificates, the Fund also owns regular public debt, payment on which could potentially be threatened by a debt ceiling standoff.[64] There is no reason to believe that solely because the Fund holds both types of debt that its injury in fact and redress of the federal courts would be any less with respect to its ordinary Treasury debt than any other holder of Treasury debt.

Thus, taken together, presumably the Trustees of the Fund could bring a *Gold Clause* type of claim as plaintiff on the basis that failure to pay the bonds would violate their duty to maintain the

62. *Hollingsworth* cites, among others, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992); Raines v. Byrd, 521 U.S. 811, 820 (1997); Allen v. Wright, 468 U.S. 737, 754 (1984); Massachusetts v. Mellon, 262 U.S. 447, 488 (1923).

63. *See* McGuire, *supra* note 61.

64. *See* Kenneth T. Cuccinelli, II, et al., *Judicial Compulsion and the Public Fisc – A Historical Overview*, 35 HARV. J.L. & PUB. POL'Y 525 (2012) (distinguishing standing claims between those with only general claims on government benefits and government bondholders during periods of austerity).

solvency of the Fund.[65] Under the modern standing doctrine, as reflected in *Hollingsworth*, this would resolve the standing issue.[66]

Similarly, since even a potential default could result in an immediate and current loss in value to the bonds held by the Fund needed to service Social Security obligations, the Fund would suffer an actual harm prior to actual default and thus under this analysis could well bring a claim before an actual default. Further, if the Fund could establish likelihood of success on the merits, it would seem that the potential irrevocable loss of billions of dollars of value in the Fund's primary asset (for example, if the markets permanently downgraded U.S. debt) would be precisely the type of situation in which courts should be willing to issue immediate temporary relief pending resolution of the trial.[67]

2. Remedy

While the *Gold Clause* cases and the more recent line of cases provide an avenue for standing, at least for the Social Security Trust Fund, they present another obstacle: that of remedy. The Court held in the *Gold Clause* cases that the plaintiff had standing and that Congress had violated Section 4 of the Fourteenth Amendment, but that the Court had no remedy to provide to the plaintiff. This was because the Court could not order Congress to print gold-backed dollars to pay off the bond, and no other remedy would make the plaintiff whole.

At first glance this seems prohibitive to finding a remedy in a *Jenkins*-type case between Congress and the President. Looked at

65. *See* Lior Jacob Strahilevitz, *The Balanced Budget Amendment and Social Security: An Alternative Means of Judicial Enforcement*, 22 SETON HALL LEGIS. J. 513, 523–24 (1998) (analyzing standing of Social Security Fund trustees to enforce a hypothetical Balanced Budget Amendment).

66. There should also be no sovereign immunity concern under the *Gold Clause* cases and other precedent, as well as statutory considerations, as well. *See* Fagan *supra* note 33; McGuire, *supra* note 61; Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 606–08 (1998).

67. *See* Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 WASH. L. REV. 257, 286 (1992) ("[i]f . . . the most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act . . . then the case in favor of preliminary injunctions to enjoin the dissipation of assets is compelling indeed.") (internal citations omitted). *See also* Johnson v. Couturier, 572 F.3d 1067 (9th Cir. 2009) (holding the Supreme Court's restriction on issuing preliminary injunctions in debt cases does not apply to suits seeking equitable relief); Bethany M. Bates, Note, *Reconciliation After Winter: The Standard for Preliminary Injunctions*, 111 COLUM. L. REV. 1522 (2011).

more closely, however, the differences become apparent. In the *Gold Clause* cases the Court held that it could not order Congress to issue a specific type of currency and only that specific type of currency would suffice to redress the harm at issue. By contrast, in most cases the issue will not be what type of currency but how much currency is necessary to satisfy the Constitution. Thus, in situations where the question comes down to how much money is at issue rather than the type of money at issue the conclusion on remedy of the *Gold Clause* cases proves inapt.

This distinction can be seen in the history of the *Jenkins* case itself. In *Jenkins* the district court ordered that a property tax and an income tax be imposed to fund the necessary capital improvements.[68] The Eighth Circuit affirmed the order with respect to the property tax but reversed on the income tax on the theory that district courts cannot impose a tax unless there is no other alternative.[69] This theory is based on the case of *Lidell v. Missouri*,[70] an Eighth Circuit case which explicitly recognized the power of district courts to impose taxes directly when there are no less intrusive means of remedying the Constitutional violation.

What to make of *Lidell* as applied in *Jenkins*? A brief review of the background leading up to *Jenkins* may prove helpful. First, the Supreme Court held in *Griffin v. County School Board*[71] that district courts have the power to enjoin the payment of scholarships and grants if the effect was to violate *Brown*, a traditional negative remedy. Next, the Supreme Court held in *Swann v. Charlotte-Mecklenberg Board of Education (Swann II)*[72] that district courts had the power to order specific actions to remedy a Constitutional violation if the defendant refused to do so. This was the introduction of the affirmative remedy. Following that, the Supreme Court held in *Milliken v. Bradley*[73] that any remedies adopted by the district court needed to be narrowly tailored to remedy the underlying Constitutional violation and were limited by the constraints of comity (in the case of state and local school districts).

Separately, in cases not related to school desegregation, the Supreme Court has been inconsistent in what level of fiscal authority a federal court may have to remedy a Constitutional

68. Jenkins v. Missouri, 672 F.Supp. 400 (W.D. Mo. 1987).
69. Jenkins v. Missouri, 855 F.2d 1295 (8th Cir. 1988).
70. 731 F.2d 1294 (8th Cir. 1984).
71. 377 U.S. 218 (1964).
72. 402 U.S. 1, 6 (1971).
73. 418 U.S. 717 (1974).

violation. Thus, the Supreme Court has held in a string of cases that when a locality issues bonds a State may not subsequently pass a law prohibiting the locality from imposing taxes to repay the bond.[74] These cases stood primarily for the proposition that States could not undermine the validity of a debt issued by a locality by removing the locality's taxing power under the Contracts Clause of the Constitution. Crucially, however, the Supreme Court assumed that the locality had the appropriate power to tax at the time the bonds were issued. Thus, the negative remedy of striking down the prohibition was sufficient to satisfy the debts. In a separate line of cases, however, the Supreme Court held that federal courts could not affirmatively grant the power to tax to localities for which the State had never granted that power in the first place.[75]

So *Jenkins* arose within the context of these disparate lines of cases. District courts clearly had the power to forbid discriminatory spending but did not have the power to order taxes by localities for which they never had the authority. The Court in *Jenkins* applied this line, holding that the district court had properly ordered the imposition of a property tax to fund the desegregation order—a power KCMSD had prior to its being revoked by Missouri—but inappropriately ordered the imposition of an income tax—a power that it was unclear whether KCMSD had and clearly had not been exercised by KCMSD in the past.

Where does this leave the Court with regard to a remedy for a Constitutional violation undertaken by the coordinate federal branches? At a minimum, it is clear that the federal courts would have the power to strike down the debt ceiling statute if the statute itself violated the Constitution. Striking down the debt ceiling is different than authorizing new debt, however, which authorization would be required to permit the President to issue new debt to satisfy statutory spending obligations. In fact, technically the debt ceiling is an authorization to issue federal debt, up to a certain level, and not really a ceiling at all.[76]

This leaves the federal courts looking to more affirmative remedies. For example, it is clear that the courts could order the

74. *See, e.g.,* Louisiana ex rel. Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909) (striking down statute preventing repayment of bonds); Graham v. Folsom, 200 U.S. 248 (1906) (striking down statute revoking locality's charter to prevent repayment of bonds).

75. *See, e.g.,* Meriwether v. Garrett, 102 U.S. 472 (1880); United States v. County of Macon, 99 U.S. 582 (1878).

76. *But see* Buchanan & Dorf, *supra* note 31.

President to undertake spending to avoid a Constitutional violation. Per *Jenkins*, therefore, it would seem that the courts should equally have the power to order such spending and to authorize a means to engage in the spending which would be available absent the legislative prohibition against such spending. In other words, the Court could order the President to issue debt or collect taxes sufficient to engage in the spending necessary to avoid the Constitutional violation. Following the limitations in *Jenkins*, presumably this would mean ordering the issuance of new federal debt rather than ordering a new tax increase since issuing debt is the typical way the President undertakes spending not covered by tax revenue.

Taken together, then, the Court has the power to order the President to issue new debt in excess of the debt ceiling to avoid a Constitutional violation. But what if the President does not want to do so or cannot do so in a timely manner? Would the remedies rejected by the Court in *Jenkins* now become available?

The Court in *Jenkins* held that the federal courts had the power to order the imposition of taxes directly on residents of KCMSD but that it should not have done so on the basis of comity. Comity is a doctrine that emerges from the federalist structure of the Constitution claiming that federal courts must respect the sovereignty of the states within the purview of their jurisdiction.[77] Based on the doctrine of comity, the Supreme Court held that directly imposing taxes would violate the sovereignty of Missouri and was thus inappropriate.[78] Since there was a remedy available that did not violate comity, this lesser remedy was upheld by the Court.[79]

But a comity doctrine meant to respect the sovereignty of the states does not, and cannot, apply to the federal government. So how should the ruling in *Jenkins* be interpreted in light of this? One possible reading would be that the Court held that direct taxing power is outside of the scope of the power of the federal courts under Article III. While this may have intuitive appeal, the logic of *Jenkins* does not seem to support it. Article III is jurisdictional. If something is outside the scope of Article

77. *See, e.g.,* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994).

78. *See* Jenkins, *supra* note 4.

79. *But see* Douglas J. Brocker, Note, *Taxation Without Representation: The Judicial Usurpation of the Power to Tax in* Missouri v. Jenkins, 69 N.C. L. REV. 741 (1990).

III, the courts cannot engage in that activity regardless of any other limitations on the power of the courts.

In other words, the Supreme Court would not have needed to resort to comity—a non-jurisdictional rule—unless the courts theoretically had jurisdiction over the case, and thus implicitly the power to impose taxes directly under Article III in the first place.[80] Consequently, rather than reading *Jenkins* as a narrowing of the inherent power of the federal courts, *Jenkins* recognized a vast and significant increase in the power of the courts, albeit subject to other limiting doctrines such as comity.

Taking this as true, could any other doctrine apply to limit the ability of the federal courts to impose taxes or issue federal debt directly? The most obvious one on its face is the doctrine of separation of powers. Under the doctrine of separation of powers, a power delegated to one branch of the federal government cannot be exercised by another branch of the federal government. The policy behind this is to prevent any one branch from obtaining the ability to act unilaterally so as to minimize the potential abuse of power in the government.

For example, as discussed above, the Supreme Court has held that the so-called Line-Item Veto was unconstitutional under the separation of powers doctrine.[81] In that case, Congress had passed a law granting the power to the President to strike down specific items of spending in an appropriation bill while signing the larger bill itself. This would permit Congress to pass large appropriations bills with so-called "pork barrel" or "log rolling" items to garner the votes necessary to pass, but the President could sign the bill into law while doing away with these wasteful expenditures.[82] The Court held that such a system violated the separation of powers in that it granted the President a quasi-legislative power reserved for Congress under the Constitution.[83]

Article I, Section 8 of the Constitution grants the power to impose Taxes, Imposts, Duties and Tariffs to Congress.

80. *See, e.g,,* Peter D. Enrich, *Federal Courts and State Taxes: Some Jurisdictional Issues, with Special Attention to the Tax Injunction Act*, 65 TAX LAW. 731 (2012).

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

82. *See, e.g.,* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003).

83. For support, the Court also noted that the Act could violate the Presentment Clause, which requires the President to sign or veto any bill presented to the President by Congress. *See Clinton*, 524 U.S. at 421.

This would seem to make clear that only Congress may impose any such taxes, meaning that under the doctrine of separation of powers no other branch could do so. But, as usual, the issue is more complicated than it would appear at first glance.

At a minimum, it seems clear that a majority of the Court has never held that the federal courts are forbidden from engaging in remedies of Constitutional violations solely because the remedy would involve entering an area traditionally reserved for another branch.[84] In fact, the Supreme Court has recognized a number of situations in which the federal courts can exercise powers that look surprisingly similar to legislative or executive powers, notwithstanding that those are clearly delegated to other branches.[85] For example, the Supreme Court has upheld the power of the federal courts to impose their own Congressional districts[86] and to decide how to manage and operate prisons, including which to close, what staff to hire, and how to fund them.[87] This point was made explicit by the Supreme Court in *Brown v. Plata*, which stated "Courts nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons . . . Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."[88] In a different context, the Supreme Court has actually said that the federal courts taking on the "essentially legislative task"[89] of crafting a remedy to a Constitutional violation is crucial to the bedrock of the separation of powers doctrine.[90]

Taken together, according to at least one recent article, "[i]t may, in fact, be fair to say that the role of the constitutional judge as policymaker and potential administrator of public institutions has now become a permanent feature of American

84. *Cf.* Brown v. Plata, 131 S.Ct. 1910, 1953 (2011) (Scalia, J., dissenting) ("Structural injunctions . . . [turn] judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today's decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it may produce constitutional violations.").

85. *See* Ridgway, *supra* note 28 at 103–11.

86. *See* Branch v. Smith, 538 U.S. 254 (2003).

87. *See* Hutto v. Finney, 437 U.S. 678 (1978).

88. *Brown*, 131 S.Ct. at 1928–29.

89. Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring).

90. *Cf.* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001) (affirming the availability of a *Bivens* claim if no alternative legislative remedy exists).

constitutional law."[91] Thus, the question is not whether federal courts may encroach on essentially legislative functions, but rather whether doing so in a particular case is entrusted to the federal courts pursuant to the Article III mandate that the judicial power be exercised by the federal courts.[92]

So, is remedying the failure to make Constitutionally mandated payments within the judicial power? Given the history of the *Gold Clause* cases and the *Jenkins* cases, especially in light of recent exercises of judicial power in cases such as *Brown v. Plata*, it would seem the answer to this question is clearly yes. If anything, the concerns expressed in most cases about doing so tend to involve respect for the sovereignty of the states in their traditional realms,[93] which does not apply as between Congress and the President. Thus, the question comes down to whether the Court *should* choose to exercise that power in the politically fraught situation of a Constitutional showdown between Congress and the President leading to such a Constitutional violation.[94] The next section will consider that question.

3. The Political Question Doctrine

In general, the Court has held that it should not exercise even its proper jurisdiction over an issue that is a question better suited to the political process. This has led to the development of the so-called "political question" doctrine. The political question doctrine has proven both somewhat elusive and remarkably resilient. At times, the doctrine has been described as a form of extension of the standing doctrine, that is, that the federal courts should choose not to exercise jurisdiction when doing so would implicate similar concerns as those raised under the standing

91. Laurence P. Claus & Richard S. Kay, *Constitutional Courts as "Positive Legislators" in the United States*, 58 AM. J. COMP. L. 479, 504 (2010).

92. *See* Yoo, *supra* note 27.

93. *See Brown*, 131 S.Ct. at 1946-47 ("Proper respect for the State and for its governmental processes require that the three-judge court exercise its jurisdiction to accord the State considerable latitude to find mechanisms and make plans to correct the violations in a prompt and effective way consistent with public safety . . . . At the same time, both the three-judge court and state officials must bear in mind the need for a timely and efficacious remedy for the ongoing violation of prisoners' constitutional rights").

94. *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

doctrine.[95] At other times, the political question doctrine has been described as a separate doctrine, unrelated to standing, providing a pragmatic way for the courts to avoid conflicts with the political branches over cases that might raise justiciable issues but over which the courts should not interfere.[96]

Rather than take a position in this debate, this Section will apply the classic political question doctrine, as interpreted by scholars,[97] as a doctrinal matter. To begin, the classic statement of the political question doctrine can be found in the case *Baker v. Carr*[98] as follows:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[99]

To this end, the court in *Baker* held that a challenge to state voting laws as violating the equal protection clause of the Fourteenth Amendment was not a nonjusticiable political question. Crucially, the Court stated expressly, "the mere fact that the suit seeks protection of a political right does not mean it

95. *See* Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (providing a summary and overview of the differing theories behind standing as compared to political question doctrine).

96. *See id.*

97. *See, e.g.,* Jesse H Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L. J. 1457 (2005); Oona Hathaway, et. al., *The Treaty Power: Its History, Scope, and Limits,* 98 CORNELL L. REV. 239 (2013); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA L. REV. 541 (2004).

98. 369 U.S. 186 (1962).

99. *Id*. at 217.

presents a political question. Such an objection is little more than a play upon words."[100]

Similarly, the mere fact that a suit challenging nonpayment of a bond implicates a political showdown does not mean that the issue is a nonjusticiable political question; in fact, according to the command of *Baker* that should be irrelevant to the question.[101] Rather, any analysis should focus on the factors delineated by the Court in *Baker* instead.

To this end, recent scholarship has strenuously argued that the treaty power is not a political question under this rubric, notwithstanding that the decision to enter into a treaty is a deeply political one clearly committed to the political branches.[102] Hathaway, et al., apply a *Baker* taxonomy to determine whether the treaty power is a political question.[103] This Essay will apply the same taxonomy.

Pursuant to this taxonomy, the first factor does not apply because it rarely applies.[104] Per the article, "[t]he fact that these powers are entrusted to other branches does not mean that oversight of their lawful exercise is outside the responsibility of the judiciary."[105] Rather, the issue is whether the power has been expressly or impliedly committed to the political branches. Given the history of the *Gold Clause* cases, *Jenkins v. Missouri*, and even more recent cases such as *Busse v. City of Golden*, it would be difficult to contend that such issues are unambiguously committed to the political branches. Thus, factor one would not preclude review of the issue.

Under the taxonomy, the second and third factors question whether judicial criteria, as opposed to purely political criteria, are available to resolve the question at issue.[106] This tends to come down to the question of whether fixed, clear, and articulable standards can be used to determine the outcome of the case. Again, given the history of the court in addressing issues relating to the issuance of federal bonds and the need for inherent remedial powers, there is no reason to doubt that the

100. *Id.* at 209 (internal quotations omitted).

101. *Cf.* Busse v. City of Golden, 73 P.3d 660, 664 (Colo. 2003) (holding that question of whether city spent bond proceeds on inappropriate expenditures is not a political question under the Colorado constitution, citing *Baker v. Carr*).

102. *See* Oona Hathaway et al., *supra* note 97.

103. *See id.* at 280–85.

104. *Id.* at 280.

105. *Id.* at 281.

106. *Id.*

issue of whether the federal government has violated the Constitution in failing to authorize sufficient revenue to pay its debts is justiciable, especially since the Court has already done so in the past.

For example, a single bondholder may have a single payment of a fixed amount due on a fixed date. If the federal government cannot pay on the fixed due date and defaults, the question of nonpayment clearly seems subject to justiciable standards, i.e., whether the government failed to make a fixed payment on a fixed due date. As these are clear and specific legal and factual questions, if anything these factors would seem to weigh strongly in favor of judicial review.

Per the taxonomy, "[t]he fourth, fifth, and sixth prongs of the *Baker* test all address the prudential consideration that there are times when it is imperative for the government to speak with one voice."[107] It is under this rubric that the need for judicial action in fact becomes most stark. In fact, as opposed to the scenario in which which the political branches have spoken with a unitary voice, in the circumstances described in this Essay the political branches have failed to work at all. To wit: both Congress and the President authorized duly issued federal debt and annual spending plans, both Congress and the President authorized the tax law that generated insufficient funds to meet these obligations, and both Congress and the President enacted a debt ceiling (and failed to raise it) preventing the President from borrowing to meet this shortfall. While this may present a Constitutional Crisis,[108] it is precisely the opposite situation envisioned by *Baker* in establishing the prudential considerations underlying the political question doctrine.

Taken together, if anything the *Baker* factors would seem to lean in favor of judicial resolution of this issue rather than nonjusticiabilty as a political question. This may strike some as odd, or perhaps even discomforting. After all, what could be more inherently political than a political showdown between the two democratically elected branches of government over fiscal policy? This is true, to an extent. If the matter was one of first impression, i.e., it was a political debate over whether to engage in a new spending program, such an argument could well be persuasive. But this is not such a case. The political branches have painted themselves into a proverbial corner. By issuing

107. *Id.* at 282.
108. *See* Levinson and Balkin, *supra* note 1.

debt and authorizing spending, the political branches implicated Constitutional protections they need not have. But once implicated, the fact that a political fight leads to the violation of these protections does not cloak the Constitutional violation in the protection of the political question doctrine.[109]

This ultimately may be the true lesson of *Jenkins v. Missouri*, at least as seen through the lens of *Baker v. Carr*. In *Jenkins* the Court held that if the KCMSD had never had the power to impose taxes the remedy adopted by the district court might well have been inappropriate. But once granted, the power to raise property taxes cannot be rescinded solely as a means to violate Constitutional protections, and federal courts must have the inherent remedial authority to address such violations. If this was true in *Jenkins*, it would seem only more true in a dispute among the coordinate federal branches.

C. ATTEMPT TO UNDERMINE THE CONSTITUTIONAL REMEDY

At this point, undertake a thought experiment. Assume the President has been authorized to issue sufficient to debt to meet the country's obligations. The President then attempts to issue debt to raise money to pay off debts owed to the Social Security Trust Fund. Congress then passes a new statute (say, by overriding a veto) forbidding the President from issuing debt to satisfy debt obligations to the trust fund (for example, as an indirect way to try to force Social Security reform). The Supreme Court ultimately hears the case and strikes down the statute as unconstitutional. By striking down the statute, the debt issued once again proves valid under the President's initial authorization and the President may settle the obligations to the trust fund.

What if, instead, Congress initially adopts a law that both mandates payment of the Social Security Trust Fund debt obligations and also forbids the issuance of new debt obligations at the same time? At this point, striking down the statute is not sufficient. The President would still be under the obligation to settle the trust fund obligations but would not be authorized to issue the debt even if the provision forbidding new debt was struck down. This is because, at least under current law, the

109. A similar argument was cited by the district court in the challenge against California's Proposition 8, i.e., that granting and then removing a privilege invokes different Constitutional considerations than never granting it in the first place. *See* Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010).

President must have affirmative authority to issue U.S. debt in order to do so.

What would be the result in such a case? The answer is a roadmap to the political branches to avoid judicial oversight of potentially unconstitutional behavior simply by choosing option 2 instead of option 1. The issue, then, is whether Congress or the President can, by choosing one procedural approach over another, effectively remove the power of the federal courts to hear and resolve Constitutional questions.

This thought experiment is simply a federal version of what occurred in *Jenkins*. KCMSD had the authority to raise property taxes to comply with the district court's desegregation order, and in fact attempted to do so. The State of Missouri acted to remove this taxing power from KCMSD, causing KCMSD to be in default of the order. Merely striking down the Missouri statute as unconstitutional, however, might not be sufficient without also enacting a new state law authorizing KCMSD to raise taxes or issue new debt. Rather, the district court ordered the taxes directly to fund the desegregation order. The Supreme Court agreed with the remedial power of the district court but found the facts looked more like the first situation than the second, and ordered the district court to give KCMSD the option to raise taxes before doing so directly.

Thus, the issue in *Jenkins* was not whether the district court had the power to impose taxes to comply with the desegregation order, but rather a factual question, informed by principles of comity, as to whether KCMSD had the authority to do so simply as a result of the district court striking down the Missouri cap on KCMSD's taxing power.

In the federal context, however, this is not the case. The so-called "debt ceiling" is itself a creature of the statute authorizing the issuance of federal debt.[110] This, in turn, raises the so-called severability doctrine. In other words, would striking down the debt ceiling also strike down the statute authorizing the issuance of federal debt in the first place?

The severability doctrine recently received an extensive review by the Supreme Court in the case of *NFIB v. Sebelius*.[111] In that case, the Court was considering the Constitutionality of the Affordable Care Act, also known as ObamaCare. One of the

110. 31 U.S.C. §§3101–3111 (2011).
111. 132 S. Ct. 2566 (2012)

key questions at issue was the Constitutionality of the so-called individual mandate to purchase health insurance. While there was significant disparity over that question, a second question proved almost as crucial: if the mandate was unconstitutional, would that invalidate the entire statute or just the mandate?

Four justices found the entire Act Constitutional under the Commerce Clause power and thus did not address this issue.[112] One justice found the individual mandate unconstitutional under the Commerce Clause but Constitutional under the Taxing Power and thus did not address the issue.[113] Four justices, however, found the mandate unconstitutional and found that it was not severable and thus invalidated the entire act.[114] While not a majority, there were some indications that the lone justice might have agreed with the severability analysis of this group, in which case it would have garnered a majority.

Under this analysis of severability, the question is whether a provision can be struck down in such a way that the core purpose of the entire statute is not undermined. In other words, if the unconstitutional portion of a statute is crucial to the working of the statute as a whole, the entire statute must fall as unconstitutional as well.[115] Pursuant to this reasoning, the four justice opinion in *Sebelius* held that the entire Affordable Care Act must fall if the individual mandate was unconstitutional.

Assuming this analysis is correct, there is no doubt that the debt ceiling provision is core to the debt authorization statute as a whole. The entire point of enacting a limit on the authorization to issue debt on behalf of the United States is to prevent an executive from having unlimited discretion in funding the government with debt as opposed to other sources of funding. If true, there is no way to sever the ability to issue debt with the limit on the amount of debt that can be issued. Thus, if the debt limit is unconstitutional, so must be the debt authorization as well.[116]

If correct, the Supreme Court finds itself in an impossible situation. If it finds the failure to raise taxes or issue debt violates the Constitution, it may strike down the debt limit as

112. *Id.* at 2609.
113. *Id.* at 2600.
114. *Id.* at 2668-70.
115. *Id.* at 2668.
116. *Id.* at 2669 ("the Court must determine if Congress would have enacted [the provisions] standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated").

unconstitutional, but doing so would effectively prevent the President from issuing new debt, thereby only exacerbating the Constitutional violation. Unlike in *Jenkins*, there is no lesser remedy available to the Court, whether under principles of comity or separation of powers, to remedy the Constitutional violation. Thus, the Court would have to resort to its inherent remedial powers to do so.

This is not to say that the severability analysis is clear or obvious, or even that all reasonable people would necessarily agree. For example, Buchanan and Dorf have analyzed the debt ceiling statute and concluded that the ceiling, 26 U.S.C. § 3101, can be unconstitutional independent of the authorization to borrow, 26 U.S.C. § 3102.[117] Buchanan and Dorf point to a number of factors, including that they are separately codified, that they have been amended separately, and that the authorization can act independently of the limit.[118]

This is true, insofar as it goes. Buchanan and Dorf undertake this analysis in an attempt to establish that the President has the authority to disregard the debt limit in certain circumstances.[119] But they concede it is not entirely clear how a court would deal with the same question in a case properly before it, citing precisely the four justice opinion in *Sebelius*.[120] Thus, the question is not whether the debt ceiling statute could properly be severed from the debt authorization statute but whether the Court could, in adopting a remedial measure to enforce a Constitutional violation, strike down the debt ceiling in such a way that would authorize the President to borrow against the will of Congress.

As Buchanan and Dorf appear to concede, authorizing the President to issue debt in contravention of the debt ceiling would itself be unconstitutional, albeit in their opinion the least unconstitutional option.[121] To the extent this is true, this Essay is in complete agreement.[122] The issue is not whether the choices faced by the President are unconstitutional, but whether the

117. *See* Neil H. Buchanan & Michael C. Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating Over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, 113 COLUM. L. REV. Sidebar 32, 38 (March 5, 2013).

118. *See id.*

119. *See id*.

120. *See id.* ("there may be some doubt about whether the courts will presume that sub-parts of a single statute are severable").

121. *See* Buchanan & Dorf, *supra* note 31.

122. *See supra* p. 136.

Court, in the face of this unconstitutional choice, may (or potentially must) use its inherent remedial power to fashion a Constitutional remedy when Congress attempts to preclude it from doing so. Under the doctrine of *Missouri v. Jenkins*, the answer is yes.

In many ways, this is reminiscent of other disputes between Congress and the Court over the proper jurisdiction of the Court in potentially politically sensitive questions. While there is no recent case law involving such politically contentious issues in the fiscal arena, there have been cases in other areas that might help shed light on the issue. Perhaps most famously this occurred in the cases of *Hamdan v. Rumsfeld*[123] and *Boumediene v. Bush*[124]—the Guantanamo Bay cases. In those cases, Congress attempted to forbid the federal courts from hearing challenges to detention by prisoners in Guantanamo Bay by stripping the courts of jurisdiction over such claims. The problem was that there were potential Constitutional violations occurring as a result (in this case, the suspension of habeas corpus). The issue came down to whether Congress could, pursuant to its clear Constitutional authority to establish the jurisdiction of the federal courts, strip the courts of jurisdiction in one politically sensitive area. The Court held it could not, finding that at some point a federal court must have access to hear such a case to enforce the Constitutional protections afforded such prisoners, striking down the statute as unconstitutional.[125] If not, the Court held, Congress could effectively abrogate these protections from the Constitution.[126] In other words, Congress could not attempt to avoid the Constitutional issue simply by enacting a law purportedly taking away some of the inherent "judicial power" of the Court.[127]

While the Guantanamo Bay cases literally dealt with issues of life and death and legal considerations as important as the

123. 548 U.S. 557 (2006).

124. 553 U.S. 723 (2008).

125. *See* Alex Glashausser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225 (2012).

126. *See* Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377 (2009).

127. *See* Glashausser, *supra* note 125 at 1302 ("As is widely recognized, the drafters of the Constitution envisioned an independent judiciary that could operate without fear of legislative reprisal. What is often overlooked is that the judiciary necessarily consists of not only the judges themselves but also the abstract judicial power—including jurisdiction—that they wield. Together, Sections 1 and 2 of Article III declare for the Supreme Court a robust jurisprudential and jurisdictional independence.").

writ of habeas corpus, perhaps some lessons could be drawn out of these cases to the fiscal arena. At its core, the Court held that the political branches could not completely abrogate specific and enforceable Constitutional protections solely by limiting the jurisdiction of the courts. Similarly, permitting Congress to avoid any review to enforce the Constitutional protections afforded bondholders of the United States would be an attempt by one branch to interfere in the operations of another.

Just as the Supreme Court held that Congress could not do so in the case of Guantanamo Bay prisoners, it follows that Congress could not do so in the case of bondholders.[128] The only way to argue to the contrary would be to somehow contend that the Constitutional protections afforded by Section 4 of the Fourteenth Amendment or other similar provisions are entitled to less judicial protection than those embodying the right to habeas corpus or other criminal procedural rights. It is difficult to think of a way to differentiate between the relative costs and benefits of explicit Constitutional protections based solely on their subject matter without placing the courts in the position of picking and choosing which provisions they like and which they do not. Since this runs directly contrary to the judicial power, at least as described by the Supreme Court, this would be a difficult argument to make. Accordingly, under this line of reasoning, the third prong of the *Jenkins* analysis would be satisfied as well.

D. TAXING AND BORROWING AS AN INHERENT REMEDIAL POWER

Assuming the foregoing is correct, the *Jenkins* test establishes that the Court must utilize its inherent remedial authority to craft a remedy to the case before it. To this end, the Court seems faced with only two choices: (1) raise money through imposing taxes, or (2) raise money through issuing federal debt. The immediate question that must be addressed, however, is, why not simply order the President to do one of these?

The answer derives, in part, from the seminal case of *Marbury v. Madison*.[129] In *Marbury*, the Supreme Court held that Marbury was entitled to a judicial commission, that failure to deliver the commission violated Marbury's rights, and that a writ of mandamus to compel the President to deliver the commission was the appropriate remedy. However, the Court declined to

128. *See id.*
129. 5 U.S. 137 (1803).

enter an order requiring the President to deliver the commission to Marbury on the theory that to do so would violate the Constitution. More specifically, the Court held that the statute granting jurisdiction to the Supreme Court to issue the writ itself violated the Constitution.

For first-year law students, the take-away of *Marbury* is that the Supreme Court has the power of judicial review, that is, to declare that a statute of Congress violates the Constitution and therefore is null and void. A second take-away often cited of *Marbury* is that every legal violation is entitled to a remedy.[130] The first is obviously correct, at least insofar as *Marbury* in fact held a statute unconstitutional. The second has proven more difficult to apply in the real world.[131]

For purposes of this Essay, therefore, the ultimate take-away of *Marbury* is the proposition that the ultimate job of the federal courts is to adjudicate cases properly before them and to craft appropriate remedies for those cases.[132] In *Marbury* the case was not properly before the Supreme Court. But in this situation, having undergone the first three steps of the *Jenkins* analysis, the case is properly before the federal courts. Thus, once having decided that the provision at issue violates the Constitution, the *Jenkins* test, consistent with *Swann* and *Milliken*, not only permits but requires the Court to fashion an appropriate remedy. If not, the Article III command that the judicial power be vested in the federal courts would prove illusory.[133]

In some ways, this bears a remarkable resemblance to other areas of law where the courts have invoked their inherent powers to mandate spending. For example, courts have the inherent power to impose and collect fines from people held in

130. *Id.* at 163.

131. *See, e.g.,* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338 (1993) ("*Marbury's* promise of a remedy for every rights violation is better viewed as a flexible normative principle than as an unbending rule of constitutional law. Nevertheless, the Constitution in general and the Due Process Clause in particular do sometimes require individually effective remediation for constitutional violations."); *see also* Derek Ludwin, Note, *Can Courts Confer Citizenship? Plenary Power and Equal Protection*, 74 N.Y.U. L. REV. 1376 (1999) (describing *Miller v. Albright* in which the Supreme Court held it could not provide a remedy for an unconstitutional naturalization statute).

132. *See* Mary M. Cheh, *When Congress Commands a Thing to be Done: An Essay on* Marbury v. Madison*, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253 (2003).

133. Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37 (2008).

contempt.[134] But nothing in Article III of the Constitution, which vests the judicial power of the United States in the Supreme Court and the other federal courts created by Congress, says anything about a contempt power or a power to impose and collect fines. Yet it is well accepted that such a power must exist or else the courts would not be able to fully exercise the judicial power.[135]

Similarly, courts have held that they may order spending by the government absent Congressional authorization in the interests of justice. For example, in the case of *Jacksonville Port Authority v. Adams*[136] the plaintiffs sued the FAA for failing to distribute appropriated funds to them as required by the authorizing statute. The FAA contended that since the authorizing statute had not been fully funded and the appropriations period had closed the court could not order relief for the plaintiff. The D.C. Circuit held that not only could it do so but that it must order payment notwithstanding the lack of a Congressional appropriation in the interest of justice.[137]

Perhaps the most striking example occurs in the case of so-called *Bivens* actions. Under a *Bivens* claim, an individual can bring suit against federal officials for a violation of a Constitutional provision absent any federal statute establishing a private cause of action.[138] What was quickly recognized in the literature is that providing a private cause of action against the federal government for money damages is effectively the same as the court itself directly engaging in spending federal resources as a remedy to a Constitutional violation.[139] This is especially true in light of *Watson v. City of Memphis*,[140] which rejected the inability of the government to afford to comply as a defense.[141]

In other words, if a Constitutional cause of action must have a remedy, finding a cause is the same as finding that the courts have the remedial power to resolve the cause. In a contempt

134. *See, e.g.,* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 768-71 (2001).

135. *Id.* at 770-71.

136. 556 F.2d 52 (D.C. Cir. 1977).

137. *Id.* at 56-57.

138. *Bivens v. Six Unknown Named Defendants of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Technically a Bivens action creates a right to recover from federal officers, although in most cases the federal government indemnifies federal employees with respect to such claims. *See, e.g.,* F.D.I.C. v. Meyer, 510 U.S. 471 (1994).

139. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

140. 373 U.S. 526 (1963).

141. *See* Ridgway, *supra* note 28 at 97.

hearing the courts can offer federal officers to pay fines to the court regardless if such amounts have been appropriated by Congress. In a *Jacksonville Port Authority* type case the court can order funds specifically not appropriated by Congress. In a *Bivens* action, the court can order the federal government to spend money (in the form of damages) irrespective of the existence of a federal statute authorizing such spending. These examples look remarkably similar to a federal court ordering spending, and the necessary revenue raising, not otherwise authorized by Congress.

It may be that granting money damages for the violation of a non-monetary Constitutional right is a good idea or a bad idea.[142] But what if the Constitutional violation itself involves a failure to spend money, such as in the debt ceiling case? In that case, the only possible remedy can be spending the money. Then what relevance does *Marbury* have? The relevance is that the Supreme Court cannot craft a remedy that would itself independently violate the Constitution. The Court in *Marbury* held that something as simple as physical delivery of a judicial commission was outside of the scope of judicial remedy because the authorizing statute itself was unconstitutional.

Similarly, the Court cannot order the President to raise the money needed to remedy the violation when the President faces a Constitutional trilemma, since such a decision would force the President to violate an independent Constitutional provision such as the Article II clause that the President faithfully execute the laws of the United States.[143] Presumably, therefore, the Court cannot order the President to issue debt that the President is not permitted to issue by statute, nor can it order Congress to enact a statute either increasing taxes or authorizing additional debt.[144]

This returns the analysis to the two options facing the Court above: (1) impose taxes, or (2) issue debt.[145] As between these

142. *See* Jeffries, *supra* note 2; Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

143. *See* Strahilevitz, *supra* note 65.

144. *See* Jeffries, *supra* note 2. In some ways, this is conceptually related to the so-called "anti-commandeering" doctrine. *See* NFIB v. Sebelius, 132 S.Ct 2566 (2012). *See also* South Dakota v. Dole, 483 U.S. 203 (1987).

145. A third option, reducing spending, is not considered because it is presumed that the Constitutional violation itself involves some failure to spend in violation of Article II, Section 4 of the Fourteenth Amendment, or otherwise. *See supra* p. 136. In other words,

two, does one independently implicate the Constitution? Again, the answer is yes. The Constitution requires that all measures relating to revenues must originate in the House of Representatives.[146] While this provision has often been seen mostly as a formality, recent scholarship has begun to argue that it in fact does, and should, have substantive force.[147] If this is true, the Court directly raising revenue through the direct imposition of taxes under its inherent Article III power could be troubling from a Constitutional standpoint.

What then of option (2)? As Professors Buchanan and Dorf argue, of all the options this appears to raise the least number of Constitutional concerns.[148] Assuming there is a Constitutional violation, the federal courts have the power to hear the case, and if a coordinate branch attempts to prevent that from occurring, the courts are obligated to directly impose a remedy—in this case, to directly order the Department of Treasury to issue debt obligations in the amount and type determined by the Court to be sufficient to remedy the violation.

This is precisely what the district court did in *Jenkins*. Although most famously the district court ordered the imposition and collection of property taxes, it also ordered the issuance of bonds. Again, the only infirmity of this remedy held by the Supreme Court was that the district court should have provided KCMSD an opportunity to do so of its own design before directly imposing such remedies under principles of comity. As discussed above, comity simply cannot apply in this case. Of the two remedies adopted by the district court in *Jenkins*, the one that makes the most sense in this context is for the Court to directly issue bonds.

That does not mean that this inherent Article III remedial power is necessarily limited to issuing debt, however. In circumstances where the Constitutional violation would require directly imposing taxes it is possible to think of a situation in which the Court could do so.[149]

while Congress might have avoided the Constitutional issue in the first place by reducing spending, once the Constitutional violation arises due to lack of spending an order reducing spending would not remedy the violation.

146. U.S. CONST. art. I, § 7, cl. 1.

147. *See, e.g.,* Erik M. Jensen, THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2005) at 170–71; Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1 (2012).

148. *See* Buchanan & Dorf, *supra* note 31.

149. *Cf.* Ludwin, *supra* note 131.

For example, assume a situation where the Congress and the President enact a hypothetical tax law called the Marriage Equality Tax Act. Under the META, married couples who receive a "marriage bonus" are obligated to pay a special tax to offset this bonus while married couples who receive a "marriage penalty" will receive a subsidy to offset the penalty.[150] Crucially, in addition META requires that the penalties and bonuses be revenue-neutral, that is, that no tax revenue be raised or lost through these payments. It turns out that this is not possible, since whether taxpayers face a marriage penalty or marriage bonus depends on, among other factors, whether the married couple has a sole primary earner or dual earners. This means that in some years there could be significantly greater marriage bonuses while in others there could be greater marriage penalties.

The President, facing a situation in which there is no way to comply with the bonus, penalty, and revenue-neutrality provisions all at the same time, chooses to comply with the bonus and revenue-neutrality provisions. This results in some couples who face the marriage penalty receiving a check to offset the penalty while others do not. Married couples not receiving the offset check sue claiming a violation of the Equal Protection Clause of the Fourteenth Amendment. The courts agree, yet they cannot order the President to issue offset checks to the plaintiffs without ordering the President to violate Article II of the Constitution by directly violating the revenue-neutrality clause of META.[151] Striking down the revenue-neutrality clause alone is not an option since, based on the assumptions above, it was integral to the entire statute. Under a severability analysis the entire statute would have to be struck down if a core part is unconstitutional. But there is nothing necessarily unconstitutional about the entire statute on its face, so there is little justification to strike down the entire statute. Instead, the

150. *See, e.g.,* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997). In reality, Congress adopted marriage-penalty relief provisions but permitted the marriage bonus to continue, effectively choosing to reduce revenue to move towards marriage neutrality rather than adopt a budget neutrality approach.

151. This differs from similar cases where Congress in subsequent years chose not to fully fund certain programs found in earlier authorizing statutes. In such cases, the courts ordered *pro rata* division of the shortfall as a way to avoid a conflict between the mandates of an earlier authorizing statute and the funding of a subsequent appropriations bill. *See* City of Los Angeles v. Adams, 556 F.2d 40 (D.C. Cir. 1977). In the hypothetical the conflicting mandates are in a single statute and thus the *City of Los Angeles* approach does not apply.

Court orders that the marriage bonus tax be increased in an amount sufficient to raise the revenue necessary to pay the offset checks, mitigating the Constitutional violation without striking down the entire statute.

While this is obviously a vastly over-simplified example, it demonstrates just how powerful the remedial power of the Court to tax and borrow can be. Whenever a statute, for political reasons or otherwise, puts the President in a position where a Constitutional violation must arise, the Court would have the power to resolve the Constitutional violation on its own accord. In situations where an order to Congress or the President to resolve the violation would itself violate the Constitution, this leads to the conclusion that the Court must directly adopt the appropriate remedy to effectuate its Article III power.

III. CONCLUSION

What should happen when Congress and the President find themselves in a fiscal policy showdown resulting in a Constitutional violation? This question has risen to the fore in light of the recent showdowns over the so-called "debt ceiling" and whether the United States might default on its debt. But the question is one that reaches far beyond just the debt ceiling debate. Rather, it implicates the broader issue of the proper role of the coordinate branches of government to function properly within the Constitutional framework.

To this end, this Essay analyzes the proper role of the federal courts, and the Supreme Court in particular, in remedying Constitutional violations arising from fiscal policy showdowns between Congress and the President. In such circumstances, this Essay demonstrates, the courts can, and should, have an independent fiscal power under Article III of the Constitution. While this may seem radical at first glance, it is merely an extension of the well-established powers of the federal courts to remedy Constitutional violations in other settings. Looked at from this perspective the Article III fiscal power makes sense, both from a doctrinal and theoretical point of view. Through a robust, but limited and well-demarcated Article III fiscal power, the country can avoid continuing Constitutional Crises arising over the use of the fiscal power, whether it be in the context of the debt ceiling, the tax laws, or otherwise. Only in this manner can the full extent of the Constitution's fiscal power be realized.