February 29, 2012

Protecting the Government's Obligations: The Public Debt Clause and the President's Duty To Disregard the Statutory Debt Limit

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PROTECTING THE GOVERNMENT'S OBLIGATIONS: THE PUBLIC DEBT CLAUSE AND THE PRESIDENT'S DUTY TO DISREGARD THE STATUTORY DEBT LIMIT

JACOB D. CHARLES†

ABSTRACT

The statutory debt limit restricts the amount of funds that can be borrowed to meet the government’s obligations. The Fourteenth Amendment’s Public Debt Clause mandates that all the government’s legally authorized obligations be met. This Article argues that the Clause protects these obligations from actions that create “substantial doubt” about their validity, including actions short of default or repudiation. The Article proposes a test to determine substantial doubt that analyzes (1) the political and economic environment at the time of the government’s actions, and (2) the subjective apprehension exhibited by debtholders. Applying this test, the Article argues that Congress’s actions in the 1995–96 and 2011 debt limit debates violated the Public Debt Clause. It argues, moreover, that the president must disregard the debt limit under circumstances, such as these, when the government’s actions have placed the validity of the debt in substantial doubt. This presidential duty arises from the Constitution and the Impoundment Control Act, both of which require the president to spend appropriated funds and ignore the debt limit in these situations.

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INTRODUCTION

The statutory debt limit\(^1\) has been increased under every president since it was first codified in 1939.\(^2\) Though bitterly contested, legislation authorizing such increases is therefore inexorably entrenched in American fiscal policy. This Article is the first to demonstrate the relevance of Section Four of the Fourteenth Amendment (“the Public Debt Clause”) to the debate over the statutory debt limit. While there have been two previous attempts to decipher the contours of the Clause,\(^3\) no scholar has connected the Clause’s commands to the president’s executive power over the statutory debt limit. This Article begins to fill that void in the literature. It argues that any governmental action that places the debt in substantial doubt is unconstitutional under the Public Debt Clause of the Fourteenth Amendment.\(^4\) When such unconstitutional conduct occurs, the president has a duty, grounded in both the Constitution and the Impoundment Control Act,\(^5\) to disregard the statutory debt limit.

The statutory debt limit creates an overall ceiling on the amount of government indebtedness.\(^6\) The debt that is subject to the statutory limit\(^7\) contains two components: debt held by the public (“public debt”) and debt

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\(^3\) See generally, Michael Abramowicz, Beyond Balanced Budgets, Fourteenth Amendment Style, 33 Tulsa L.J. 561 (1997); P.J. Eder, A Forgotten Section of the Fourteenth Amendment, 19 Cornell L.Q. 1 (1933).

\(^4\) U.S. Const. amend. XIV, § 4 (“The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”).


\(^7\) This Article refers to this sum as the “national debt,” even though technically there are other parts of the total federal debt that are not subject to the statutory limit. See D. Andrew Austin & Mindy R. Levit, Cong. Research Serv., RL31967, The Debt Limit: History and Recent Increases 1 n.1 (2011) (remarking that the debt not subject to limit represents less than half a percent of the total federal debt).
held by other federal government accounts ("intragovernmental debt"). The amount of public debt fluctuates directly with the balance of the federal budget. If the government runs a deficit, the public debt necessarily increases; a surplus likewise decreases the public debt. On the other hand, intragovernmental debt is not directly affected by budget surpluses or deficits. The amount of intragovernmental debt is, rather, contingent upon the surplus in tax receipts generated by certain trust accounts, such as Social Security and Medicare. Social Security, for instance, has been an increasing source of government indebtedness ever since the recommendations of the Greenspan Commission were implemented in 1983. Any amount that these trust funds receive in tax receipts over what they pay out in benefits is invested in Treasury securities, which are held by the trust fund. Under the debt limit statute then, if the government runs a budget deficit or programs required to invest in Treasury securities run a surplus, the debt subject to limit increases. When this happens, if Congress does not increase the debt ceiling, the government defaults on its obligations. Political posturing notwithstanding, a "failure to approve an increase would not be an act of fiscal responsibility, unless it can be said that deadbeats are fiscally responsible because they refuse to pay their bills." Nonetheless, votes on the debt limit have been used as a political weapon for decades. In 1979, Congressman John Ashbrook (R-OH) summarized the reasons many politicians felt the debt limit was an effective tool to combat excessive national debt:

In the consideration of the debt limit bills, our attention is focused solely on the amount of debt this country has accumulated. We need

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10 AUSTIN & LEVIT, supra note 7, at 22.
11 Id. at 22–23.
12 The latter scenario assumes the government does not run a budget surplus that is large enough to cover the investment by other intragovernmental entities.
to do this from time to time. In budget resolutions, the debt limit tends to disappear in a morass of other figures. At least every once in a while we should stop and realize what we are doing to this country by burdening it with an ever escalating national debt.\footnote{Cong. Rec. H23669 (daily ed. Sept. 26, 1979) (statement of Rep. John Ashbrook).}

Notwithstanding the possible political virtues of a debt limit, it raises serious constitutional issues. Professor Neil Buchanan poignantly articulates the problem: “The point of the debt-limit statute—if it were ever applied—is to guarantee a default on some government obligations.”\footnote{Neil H. Buchanan, The Debt Ceiling Law is Unconstitutional: A Reply to Professor Tribe, JUSTIA.COM (July 11, 2011), http://verdict.justia.com/2011/07/11/the-debt-ceiling-law-is-unconstitutional (emphasis added).} He goes on to argue that it is precisely this characteristic of the statute that renders it unconstitutional; that is, “[t]he debt limit is not unconstitutional because it increases the risk of default, but because it would actually require one” if it were ever applied.\footnote{Id.} The Public Debt Clause in Section Four of the Fourteenth Amendment was designed to take the national debt out of the fray of partisan politics. The threat of default is such a powerful political weapon that the Constitution prohibits its employment to damage the credit of the United States. “Section Four was placed in the Constitution,” argues Professor Jack Balkin, “to remove this weapon from ordinary politics.”\footnote{Jack Balkin, The Legislative History of Section Four of the Fourteenth Amendment, BALKINIZATION (June 30, 2011), http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html.} Because of the Public Debt Clause’s sweeping injunction, when the actions of the federal government create substantial doubt about the validity of the national debt, these actions violate the Constitution.\footnote{See infra Part II.B. for a formulation and justification of the Substantial Doubt Test.}

This Article outlines a theory of executive power under which the president could alter or ignore the statutory debt limit set by Congress. Part I analyzes the text and history of Section Four of the Fourteenth Amendment—the Public Debt Clause—and concludes that it extends more broadly than its Reconstruction-era references initially suggest. This Part makes two conclusions about the Clause: (1) action short of direct repudiation or actual default can constitute an unconstitutional questioning of the debt, and (2) the phrase “public debt” should be read broadly to
include all legally authorized government obligations, not just Treasury securities. But establishing this meaning is only part of the task. Perhaps the most intractable problem with regard to the Public Debt Clause is creating an implementable legal standard to govern it. Part II does just that, proposing and elaborating a Substantial Doubt Test to determine the kinds of government action that qualify as unconstitutional questioning. Two factors are relevant for determining the existence of substantial doubt: (1) the political and economic context in which the actions occur, and (2) the subjective debtholder apprehension caused by the government’s actions. Part II applies the test to several recent debates surrounding debt limit increases and concludes that the Public Debt Clause renders unconstitutional the “brinksmanship” created by congressional refusals to increase the debt limit on the verge of government default, which occurred in both 1995–96 and 2011. Part III argues that, under some circumstances, the president retains the constitutional power to “take care that the laws be faithfully executed” by setting aside the debt limit and ordering the Treasury Secretary to borrow the funds necessary to meet the government’s obligations. This argument is buttressed by two independent sources of executive power—or, more properly, limits on power. Under the Constitution, the president has a duty to refuse enforcement of unconstitutional laws. This duty is magnified when the president has to choose between two competing statutes—the appropriations bill or the debt limit—and one of them (the debt limit) can only be enforced unconstitutionally. Under the Impoundment Control Act, the president has a duty to spend the funds that Congress appropriates. He cannot unilaterally defer or rescind budget authority when the appropriations bills conflict with the debt limit. Therefore, when government actions create substantial doubt about the validity of the national debt, the president has a duty to disregard the debt limit statute. If history is any indication, the probability of unconstitutional congressional conduct vis-à-vis the debt limit means that future presidential action will likely be warranted.

I. THE MEANING OF THE PUBLIC DEBT CLAUSE

The Public Debt Clause solemnly declares, “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.” Two aspects of the Public Debt Clause shed light on the permissible scope of executive power.

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20 To simplify matters, when this Article speaks of Section Four simpliciter it refers only to the first sentence.
over the debt limit: (1) the meaning of textual provisions and (2) how they

This Part takes up the exegetical task by arguing that the

Public Debt Clause’s language and history support a broad reading of its
terms. In particular, it first argues that the “questioning” forbidden extends
to government actions that create substantial doubt about the debt’s
validity—actions that fall short of outright repudiation or actual default; and
second, it argues that the phrase “public debt” should be read broadly to
include all legally authorized government obligations. This Part begins by
analyzing the history of Section Four.

A. Drafting and Legislative History

The Fourteenth Amendment has a long, complex, and controversial
history.\(^{21}\) It is clear, however, that a central goal of the Amendment was to
ensure that if—and when—Southerners were readmitted to the Union, and
to elected office, they could not undo the results of the Civil War.\(^{22}\) This
protection was necessary because an unfortunate result of emancipation—
and the passage of the Thirteenth Amendment—was that the South would
receive increased representation in Congress, a fact that did not sit well with
many loyal Unionists.\(^{23}\)

The fourth section of the Amendment in particular has a unique and
interesting history. Before now, this section has been largely unexamined.
Most of the floor debate about the proposed Amendment focused, as one
would expect, on more pressing matters, such as the contours of equal

\(\text{\textsuperscript{21}}\) See generally William E. Nelson, The Fourteenth Amendment 1–12
(1988) (tracing the Fourteenth Amendment’s convoluted history).

\(\text{\textsuperscript{22}}\) Id. at 44 (“The task confronting the Thirty-ninth Congress was to devise a
formula, in which the South would acquiesce, ‘to secure in a more
permanent form the dear bought victories achieved in the mighty
calism.’”); Charles E. Chadsey, The Fourteenth Amendment, 1 U. Colo.
Studies 197, 198 (1902) (“As the Constitution then stood, there would be
nothing to prevent these states [i.e. the South] from legally reversing all
their actions . . . Therefore good politics demanded that the Constitution be
amended so as to prevent the most serious of the dangers which they
believed threatened them.”).

\(\text{\textsuperscript{23}}\) See William Archibald Dunning, Reconstruction: Political and
Economic 1865-1877 53–54 (reprinted 1962) (“That the result of the war
should be an accession of influence in Congress to the South, was a
proposition which few northerners could contemplate with entire
equanimity.”).
protection and the nature of the citizenship guarantee. In fact, early versions of the Amendment did not include a public debt clause at all, and surprisingly little was said about the language in Congress when a debt clause was introduced. The meager discussions that did take place, however, are best understood in the context of Section Four’s evolution. This Section of the Article first traces the evolution of the language and then analyzes floor debate concerning the Clause.

On April 30, 1866, the proposal adopted by the Joint Committee on Reconstruction was reported to the House and Senate. In the fourth section, the Committee’s proposal read:

Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for the loss of involuntary service or labor.

After the House passed this version of Section Four on May 10th, the Senate began debate. On May 23rd, Senator Benjamin Wade offered a revision to the debt section that read:

The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for

24 Eder, supra note 3, at 4 (“The strenuous debates in Congress turned on the other more controverted sections of the Amendment which were a fiercely burning issue in those critical and rather disgraceful days of our Reconstruction history.”)
25 NELSON, supra note 21, at 49 (noting that the first proposal for a constitutional amendment did not include the current Section Four).
26 Abramowicz, supra note 3, at 582 (“The Public Debt Clause emerged not from a congressional debate about the dynamics of the Fiscal Constitution, but from a Thirty-Ninth Congress focused on reconstructing a war-ravaged nation. It is not surprising then that no member of the House or Senate commented for the record on the Clause’s consequences for posterity.”).
27 The Joint Committee on Reconstruction was tasked with determining the conditions under which the rebel states could be readmitted to the Union (and whether current representatives from these states would be recognized as full members of Congress). See DUNNING, supra note 23, at 51–52. Importantly, it also took on the responsibility for drafting the Fourteenth Amendment. Id.
29 CONG. GLOBE, 39th Cong., 2nd Sess. 2542 (1866).
payment of bounties or pensions incident to such war and provided for by the law, shall be inviolable. But debts or obligations which have been or may hereafter be incurred in aid of insurrection or of war against the United States, and claims of compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States.\textsuperscript{31}

Senator Wade withdrew his proposed revision\textsuperscript{32} after an alternative version agreed to in the Senate Republican Caucus was introduced on May 29th.\textsuperscript{33} The new version\textsuperscript{34} read:

[Section four:] The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate.

[Moved to a new section five:] Neither the United States nor any State shall assume or pay any debt or obligation incurred, in aid of insurrection [or] rebellion against the United States, or any claim for compensation for\textsuperscript{35} the loss or emancipation of any slave; but all such debts, obligations, and claims shall be forever held illegal and void.\textsuperscript{36}

On June 8th, the day on which the Senate passed the Fourteenth Amendment, Senator Daniel Clark offered an amendment to (re)combine sections four and five into the now-familiar Section Four:\textsuperscript{37}

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.\textsuperscript{38}

\textsuperscript{31} CONG. GLOBE, 39th Cong., 2nd Sess. 2768 (1866).
\textsuperscript{32} Id. at 2869 (recording the withdrawal of the amendment).
\textsuperscript{33} JAMES, supra note 28, at 140–42.
\textsuperscript{34} The original proposal was to split the section and call the first sentence section four and the second sentence section five. CONG. GLOBE, 39th Cong., 2nd Sess. 2869 (1866).
\textsuperscript{35} Later, “any claim for compensation for” was changed to “any claim on account of.” Id. at 2941.
\textsuperscript{36} Id. at 2869. This language was reconstructed from the Globe’s record of revisions suggested by Sen. Howard (his proposals were to modify the text: e.g. “strike out the word ‘already’ in line thirty-four,” etc.).
\textsuperscript{37} Id. at 3040.
\textsuperscript{38} Id.
Senator Clark’s amendment was approved\(^{39}\) and the House concurred in the Senate’s revisions to the Amendment.\(^{40}\)

In less than six weeks, Section Four went from simply repudiating the debt of the Southern states to protecting the debt of the United States as well. Though important and consequential, these changes were little discussed. There was near-unanimous agreement on the original language presented to the House by the Joint Committee. The last three versions, however, are important because they each explicitly protect the national debt. The first effort to protect the Union debt as well as to repudiate the Confederacy’s debt—the May 23rd Wade amendment—was also uncontroversial. Though ultimately withdrawn before it came to a vote, the Wade amendment is significant for a number of reasons. First, it was the initial suggestion that the debt of the United States should be protected in the Constitution. Second, its language was so similar to the final version that it can shed light on the latter’s meaning. Third, it created the most discussion about the need for a provision protecting the national debt. Finally, given the importance of Senator Wade in the 39th Congress, his views were not only paramount to the party, but also represented what the majority of congressional Republicans likely believed.\(^{41}\)

When he proposed the amendment to Section Four, Senator Wade spoke at length about the necessity of protecting the Union debt.\(^ {42}\) His proposal, he argued, went “to another branch of this business almost as essential” as repudiating the confederate debt.\(^ {43}\) His revision would “put[] the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it.”\(^ {44}\) Significantly, he thought it would

be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the

\(^{39}\) Id. at 3042.
\(^{40}\) Id. at 3148–49.
\(^{41}\) See Jack Balkin, More on the Original Meaning of Section Four of the Fourteenth Amendment BALKINIZATION (July 2, 2011), http://balkin.blogspot.com/2011/07/more-on-original-meaning-of-section.html (discussing the importance of Senator Wade).
\(^{42}\) CONG. GLOBE, 39th Cong., 2nd Sess. 2768–70 (1866).
\(^{43}\) Id. at 2769.
\(^{44}\) Id.
Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress.\textsuperscript{45} Necessity demanded that the debt be protected by the Constitution because, if the rebels returned to Congress, it would be hard to “guaranty that the debts of the Government will be paid, or that your soldiers and the widows of your soldiers will not lose their pensions.”\textsuperscript{46} Senator Wade ended his explanation by expressing “hope that whether [his] amendment be adopted or not, any amendment to the Constitution which shall finally prevail will contain a clause like this.”\textsuperscript{47} The final amendment did in fact contain a very similar clause. There is no explanation as to why Senator Wade’s language was altered in the penultimate version. But, while debates were occurring over his amendment, an illuminating exchange ensued:

Mr. STEWART: . . . I was forced to the conclusion that the fifteen original slave States must shortly be handed over to the enemies of the Government to aid the Democracy in repudiating the national debt . . . .

Mr. SAULSBURY: [Interrupting . . .] Does the Senator from Nevada say that the Democratic party of this country would, if they had it in their power, repudiate the national debt or assume the confederate debt? I only refer to it because I observe the Senator has repeated an intimation which I have seen in the public press.

Mr. STEWART: I will answer the Senator very frankly. For myself, I think there is too much danger to run the risk of giving them the power, and I propose to retain it [i.e. the section securing the national debt] and not take the chances.\textsuperscript{48}

Senator Wade’s comments and the exchange between Senators William Stewart and Willard Saulsbury illustrate the fraught nature of the debate over securing the national debt. There was a very real fear among congressional Republicans that Southern Democrats might return to Congress and repudiate the Union debt. Indeed, there had been cries in the South to do just that. For instance, on September 22, 1865 the \textit{Liberator} printed a speech by Senator Charles Sumner at the Republican State Convention in Massachusetts that recounts the ominous words of a Democratic congressional candidate from Virginia:

\begin{quote}
I am opposed to the Southern States being taxed for the redemption of this [Union] debt, either directly or indirectly; and if elected to Congress, I will oppose all such measures, and I will vote to repeal all laws that have heretofore been passed for that purpose; and in doing
\end{quote}

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 2800.
so, I do not consider that I violate any obligation to which the South
was a party. We have never plighted our faith for the redemption of
the war debt.\textsuperscript{49}

It is not unsurprising, then, that no Republicans in the Senate spoke out
against Senator Wade’s proposal. It was the logical counterpart to the
unquestioned repudiation of the Confederate debt.\textsuperscript{50}

There was little discussion about the May 29th replacement to the
Wade amendment because it was largely accomplished during a closed-door
Republican Senate Caucus.\textsuperscript{51} Some Democrats, however, did question this
section. “Who,” asked Senator Thomas Hendricks, “has asked us to change
the Constitution for the benefit of the bond-holders?”\textsuperscript{52} Rather than secure
the national debt, he feared that “[a] provision like this, I should think,
would excite distrust, and cast a shade on the public credit.”\textsuperscript{53} In
unequivocal terms, however, he emphasized that he “st[oo]d by the public
credit, which is public honor and individual safety.”\textsuperscript{54} But, he continued,
there was no need for a constitutional provision guaranteeing the national
debt because, in purchasing government securities, bondholders “trusted the
good faith of the people, and there is no breach of that faith.”\textsuperscript{55} Senator
Henry Wilson, a Republican, said that the debt was incurred “in a time of
war, in an hour of need. I will adhere to that with all fidelity. It is as sacred
as any pledge we ever made, as sacred as the blood of our soldiers.”\textsuperscript{56} These
statements indicate the degree to which all members of Congress—both
Democrats and Republicans—recognized the sanctity of the public debt. By
this time, then, repudiation of the Union debt was receding as a legitimate
reaction for Southerners who desired full representation in Congress. Recall,
however, that the May 29th version only guaranteed “[t]he obligations of
the United States incurred in suppressing insurrection, or in defense of the

\textsuperscript{49} The National Security and the National Faith: Guarantees Needed for the
National Freedman and the National Creditor, LIBERATOR, Sep. 22, 1865.
\textsuperscript{50} Indeed, even Andrew Johnson was urging the Southern states to repudiate
their own war debt. See, e.g., The Rebel War Debts: Important Dispatch
from President Johnson, NEW YORK TIMES, Oct. 22, 1865 (recounting
Johnson’s demand to North Carolina’s provisional governor that “[e]very
dollar of the State debt created to aid the rebellion against the United States
should be repudiated, finally and forever”).
\textsuperscript{51} JAMES, supra note 28, at 140–41 (discussing the caucus’s work).
\textsuperscript{52} CONG. GLOBE, 39th Cong., 2nd Sess. 2940 (1866).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 2770.
Union, or for payment of bounties or pensions incident thereto.” It was not a general protection of national debt, but a limited protection of Civil War debt only.

On June 4th, Senator William Fessenden worried that “[t]here is a little obscurity, or, at any rate, the expression in section four might be construed to go further than was intended, and I have rather come to the conclusion that it was best to put sections four and five in one single section.” Unfortunately, he gave no further elaboration about the defects of section four as it then stood. In fact, the revision that came to be Section Four broadens the language of the previous proposal; it does not circumscribe it. Though originally intent on offering an amendment to cure the defects he perceived, Senator Fessenden did not offer his amendment and it is unclear what exact revision he desired. There is no record of his unoffered amendment and no further discussion on the matter ensued until the day of the final Senate vote.

Finally, on June 8th, perhaps following Senator Fessenden’s criticism of the obscurity of the two debt sections, Senator Clark offered an amendment combining sections four and five into the final version of Section Four. Significantly, however, when questioned about whether his revision “changes at all the effect of the fourth and fifth sections,” Senator Clark stated that “[t]he result is the same” as the penultimate version. The revision was then approved without another recorded word.

Despite Clark’s comments, there are significant changes between the last three versions. The antepenultimate version (Senator Wade’s May 23rd proposal), like the final version, protected national debt broadly, but said that it “shall be inviolable.” The penultimate version (the May 29th Caucus proposal), guaranteed only debt “incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto,” and it declared that this debt “shall remain inviolate.” The final adopted version harkened back to Senator Wade’s proposal by protecting the national debt broadly, but said that it “shall not

57 Id. at 2941.
58 Id.
59 Id. at 3040.
60 Id.
61 Id.
62 Id.
63 Id. at 2768.
64 Id. at 2869.
65 Id.
be questioned.”66 It is curious, then, that Senator Clark could maintain that the final version changed nothing about the penultimate version.67 Professor P.J. Eder explains this discrepancy by questioning whether Clark’s comment “[w]as not . . . a mere passing remark, not fully weighed, and of little consequence as a guide to interpretation.” 68 Professor Michael Abramowicz gives three reasons to disregard Senator Clark’s comment: first, “stylistic changes are not generally assumed to be without substantive content,” so the change likely mattered; second, the comment “may merely indicate that the [two] versions would have the same result for the purposes of Reconstruction”; and third, the Senate later rejected a proposal to revert back to the previous language, so it seems logical to conclude that there was something about the change they preferred.69

Whatever may be made of Senator Clark’s comment, it is clear that the final version of Section Four had more in common with the Wade proposal than its immediate predecessor and clearly encompassed the general national debt within its purview. Though the legislative history can be helpful in discerning the scope of the Public Debt Clause, it does not decide many of the most crucial issues confronting the country today. They most likely never occurred to the 39th Congress. Nevertheless, from this brief overview several conclusions about the Framers’ design seem reasonable: (1) the Clause protects the public debt of the United States generally, not only the debt incurred in the Civil War, (2) Congress was concerned about keeping the debt from becoming a political weapon, and (3) some legally authorized obligations—beyond just the debt issued to bondholders—appear to fall within the purview of the Clause, such as the promises of bounties and pensions to those who enlisted and served in the Union military.

B. Analysis of the Final Version

The final text of the Public Debt Clause, adopted by both chambers of Congress and ratified by the states, reads: “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”70 Because hardly any of these terms are unambiguous, comprehension of the Clause’s continuing relevance

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66 Id. at 3040.
67 Id.
68 Eder, supra note 3, at 8.
69 Abramowicz, supra note 3, at 585.
70 U.S. CONST. amend. XIV, § 4.
requires meticulous analysis of the general understanding of the Framers and their audience. Though the drafting history is an important component of any such analysis, this Article also draws on the public meaning of the provisions at the time of enactment and ratification. This approach suggests that constitutional inquiry necessitates “faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.” Together with grammatical insights from modern practitioners, the original public meaning sheds new light on the continued vitality of the Public Debt Clause. In particular, this Section argues that two important conclusions are warranted by the text and historic understanding: (1) actions by the government that create substantial doubt about the validity of the debt—actions short of direct repudiation or outright default—are unconstitutional, and (2) the “public debt” that is protected by the Clause extends beyond government securities to include all legally authorized government obligations, such as entitlements (like soldier pensions).

1. The Scope of Permissible Questioning: The Substantial Doubt Standard

The crucial question about the Public Debt Clause is what kind of conduct amounts to a questioning. There are at least three possible levels at which to draw the line of conduct that the Clause bars: the highest level—barring the least amount of conduct—is direct repudiation; the middle level is default; and finally, the lowest level is some kind of conduct below default, what this Article refers to as “substantial doubt.” If the highest level is correct, then the Public Debt Clause simply prohibits Congress from actually repudiating the debt; if the second level is correct, the Clause would prohibit the government from defaulting on its obligations; and, if the third level is correct, then some conduct short of default that causes debtholders to substantially doubt the “certainty” or validity of the debt is unconstitutional. This Section argues that the text prohibits the validity of the public debt from being put into substantial doubt and does, in that sense, prohibit a plethora of government actions during debt limit debates. Several considerations support the lower-level reading of “questioned.” It should be noted, however, that there might be lower levels, such as “reasonable doubt” or simply “any doubt,” at which the line could be drawn. This Article attempts to show that default and repudiation are inaccurately high levels and that some lower level is necessary. The following Section argues that

substantial doubt—a level higher than reasonable doubt or simple doubt—best serves the purposes of the Clause and strikes the proper balance between debtholder protection and the necessary political latitude of congressional policymaking.

First, the legislative history indicates a desire to proscribe a large category of political actions regarding the national debt. The penultimate draft said the debt “shall remain inviolate,” but the final version turned back to the passive voice introduced by Senator Wade’s proposal. If the Clause would have simply said that the debt “shall remain inviolate,” that could have easily been read to require only that Congress not directly repudiate the debt, as that version was apparently intended to do. While the passive voice on its own may not indicate much, it does support a broader reading than proposals in the active voice. Because of its open texture, the passive voice can be seen as “a reassuring promise from the Framers to bondholders” that they too will not have cause to question the debt because the government will not do anything to place its validity in doubt.

Moreover, the final text, unlike any of the previous proposals, protects not just the actual debt, but the validity of the debt. In leading dictionaries of the period, something with “validity” was said to have “legal force” or the “force to convince; certainty; value.” By preserving the validity of the debt, the Clause protects the debt from actions that would cause the debt to lose “value” or would cause debtholders to lose “certainty” in the obligations of the United States. It does not simply protect the actual debt, but guards against diminutions in its value or reductions in its certitude as well. Similarly, the 39th Congress rejected an earlier draft that would protect only wartime debt and thereby recognized that a broader principle of security for U.S. debt in general was necessary.

Added on top of these preliminary indications, the logic of the Clause also supports a lower level reading. For instance, stopping at the level of repudiation is at odds with the purposes and language of the Clause. As outlined above, the Clause is clothed in broad language, readily adaptable to a variety of circumstances. This kind of broad language is

72 CONG. GLOBE, 39th Cong., 2nd Sess. 2869 (1866).
73 Abramowicz, supra note 3, at 593. The Clause should be read, of course, as having an implicit state action requirement—only the government can violate it. See Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10, 17 (7th Cir. 1990) (recognizing that “[t]his section is only brought into play” by government action).
74 NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 488 (1831).
75 SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE 764 (1827).
unnecessary if outright repudiation is the only concern. How, one might ask, could repudiation of the debt cause the validity of the debt to be questioned? If Congress repudiates the debt, there is nothing left to question; there is nothing to doubt. The debt is quite obviously invalid. In other words, if repudiation was all that the original Congress was concerned with, then a word like questioning, with graded shades of meaning, was surely ill chosen. It would be a straightforward inquiry in every case to discover if the debt is valid: simply ask if Congress officially repudiated it. Clearly, then, the prohibition on questioning the validity of the debt must extend to actions short of repudiation. The highest level, therefore, cannot represent what the Clause means when it prohibits “questioning.”

The case of default presents a closer question. For any Treasury security, “default . . . occurs when payment on that bond is missed.”76 Similarly, for government obligations more generally, “[n]ot making legally required payments is, under both common sense and the law, defaulting.”77 As with repudiation, the inquiry for default is a simple process: check to see if the government has missed any payments on its debt. Although the simplicity of this inquiry weighs against equating “questioning” with default as it did for equating “questioning” with repudiation, default might nonetheless cause the appropriate questioning of future debt payments—of either the interest or the principal. So, while default is surely impermissible under the Clause, the issue is whether any conduct short of actual default can cause the relevant type of questioning. Default only occurs when the government has missed payment on one of its legal obligations. One might surely question the payment of the government’s subsequent legal obligations—and so question the validity of the debt—in the future, but the Clause seems to forbid more than simply action after this initial default.

There are several reasons to think that conduct short of actual default is encompassed by the term “questioned.” At the time of the drafting and ratification of the Fourteenth Amendment “to question” meant “to doubt; to be uncertain of; to have no confidence in; to mention as not to be trusted.”78 It meant that one could “doubt, . . . controvert, [or] dispute” the validity of the debt. To have a question about the debt was to quite simply

78 Johnson & Walker, supra note 75, at 587.
79 Samuel Fallows, A Complete Dictionary of Synonyms and Antonyms 212 (1898).
have a “doubt”\textsuperscript{80} about it. The lowest plausible level of conduct that the Clause might prohibit is government actions that cause substantial doubt about the debt, even if there has not (yet) been a default or act of repudiation. A lower level—such as reasonable doubt or any doubt—would be antithetical to protection of the government’s obligations because it would create a strong disincentive for the creation of legal obligations. Substantial doubt, on the other hand, appropriately balances the Clause’s prohibition on conduct short of repudiation or default with the necessity of congressional authority to discuss and debate the merits of substantive policies.

The grammatical clues and original understanding all point in the direction of prohibiting a wide swath of government conduct. But, there are also historical and contextual reasons to think that the Clause forbids the kind of actions that would cause debtholders to have substantial doubt about payment. In his 1901 Constitutional History of the United States, Professor Francis Newton Thorpe notes the breadth with which the Clause was interpreted during the ratification process:

> The national debt, which at this time had reached its highest point, over two and three quarters billions of dollars, was held chiefly at the North and its repudiation or diminution in value, or any distrust of its obligations, would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its validity was essential to our prosperity, however great the burden of payment might prove to be.\textsuperscript{81}

Thorpe reports that “validity” was equated with “diminution of value” or “any distrust” of the government’s obligations. This kind of diminution and distrust would occur far ahead of actual default or outright repudiation. It would be triggered by government conduct that caused debtholders “to doubt” or “to be uncertain of”\textsuperscript{82} the validity of the debt. The breadth of this principle was widely recognized at the time. A National Union Convention held in Pennsylvania in 1866 adopted a resolution declaring: “we hold the debt of the nation to be sacred and inviolable; and we proclaim our purpose in discharging this, as in performing all other national obligations, to maintain unimpaired and unimpeached the honor and the faith of the Republic.”\textsuperscript{83} P.J. Eder argues that the Clause was designed “to lay down a constitutional canon for all time in order to protect and maintain the

\textsuperscript{80} Web\textsuperscript{ster}, \textit{supra} note 74, at 348.
\textsuperscript{82} Johnson & Walker, \textit{supra} note 75, at 587.
\textsuperscript{83} Eder, \textit{supra} note 3, at 10.
national honor and to strengthen the national credit [and was] . . . clearly proposed also to establish a perpetual dike against momentary waves of inflation and repudiation, total or partial.\textsuperscript{84}

Finally, in its only analysis of the Public Debt Clause, the Supreme Court confirmed the breadth of its reach. In \textit{Perry v. United States},\textsuperscript{85} the Court said:

The 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.” While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. \textit{We regard it as confirmatory of a fundamental principle} which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression “the validity of the public debt” as embracing whatever concerns the \textit{integrity of the public obligations}.\textsuperscript{86}

The Supreme Court’s broad pronouncements about the “fundamental principle” enshrined in the Public Debt Clause and its application to “whatever concerns the integrity of the public obligations,”\textsuperscript{87} suggests that the Clause should be read to prohibit some conduct that falls short of outright repudiation or actual default. The kind of conduct prevented by the Clause extends to any government action that puts the validity of the debt into substantial doubt. Some doubt may be impossible to eradicate, but when the government’s actions create \textit{substantial} doubt, these actions create an unconstitutional questioning of the national debt. As Michael Abramowicz concluded after a comprehensive analysis, “the literal interpretation of the Clause is that a governmental action making uncertain whether or not a debt will be honored is unconstitutional.”\textsuperscript{88}

2. The Breadth of the “Public Debt”

A common response to the argument that the Public Debt Clause broadly protects the national debt is to urge prioritization of payment to

\textsuperscript{84} \textit{Id.} at 15.
\textsuperscript{86} \textit{Id.} at 354 (emphasis added).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} Abramowicz, \textit{supra} note 3, at 592.
bondholders when the debt nears the statutory limit. That is, if congressional actions are creating substantial doubt when the total debt is nearing the limit, then the president should simply prioritize payments to bondholders to satisfy the strictures of the Clause. This argument is based, however, on a dichotomy between bondholders and other debtholders that the Public Debt Clause does not allow. This Section contends that there are several reasons to think the phrase “public debt” did not have the same technical meaning when Section Four was adopted that it has today. Instead, it likely included all legally authorized obligations. In this sense, everyone to whom the government currently owes money under any valid law is a debtholder under the Public Debt Clause. Rather than refer to what modern economists refer to when they speak of public debt, namely, government-issued securities, the phrase should be read more broadly to include all legally authorized government obligations. Since all debtholders are equally protected, any prioritization scheme will, on its own, fail to sidestep the troubling constitutional problems of an inflexible debt limit.

First, the comments by various Congressmen and their contemporaries suggest that the public debt included many forms of government obligations. Indeed Senator Wade’s proposal explicitly took this tack: “[t]he public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident to such war.” In other words, the “debts and obligations” incurred during the Civil War, including mere government promises authorized by law, such as bounties and pensions, were assumed to be part of the “public debt.” Indeed “obligations” themselves were explicitly described as a subset of the broader “public debt.” While the May 29th substitution changed the language to “[t]he obligations of the United

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90 See, e.g., Abramowicz, supra note 3, at 587 (arguing that “the words of the Public Debt Clause suggest that the Framers were protecting a . . . broad class of obligations”).

91 See, e.g., Buchanan, Some Further Thoughts About the Debt Limit, supra note 77 (arguing that, when the Clause speaks of debt, it includes all “people who are currently owed money under valid laws”).

92 CONG. GLOBE, 39th Cong., 2nd Sess. 2768 (1866).
States, this seems to argue in favor of the conclusion that “public debt” was understood broadly at the time. A dissenting Congressman remarked of this May 29th version that its “fourth section provides that the public debt shall remain inviolate”—thereby equating “obligations of the United States” and “the public debt of the United States.” It is therefore likely that the Framers intended the Clause’s protection of the “public debt” to be extended to all government obligations authorized by law.

Second, the Supreme Court has implied that it might protect a broader class of government obligations. In Perry, after recognizing the “fundamental principle” inherent in the Clause, the Court held that it applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression “the validity of the public debt” as embracing whatever concerns the integrity of the public obligations. The Perry Court could not “perceive any reason” for restricting the Clause to government bonds. Instead, the Clause’s “broad connotation” signified that it was intended to protect a large class of legally authorized obligations—indeed anything that “concerns the integrity of the public obligations.” In fact, only a few years prior to the drafting of the Fourteenth Amendment, the Court had recognized that “the public debt authorized by law . . . includes debts of every description, without reference to their origin.” It extends, that is, to government obligations not originating in Treasury securities.

This interpretation is supported by recent Supreme Court decisions recognizing the fact that the government is legally bound by its duly

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93 Id. at 2869.
94 Id. at 2940.
95 Perry, 294 U.S. at 354 (emphasis added).
96 See Neil H. Buchanan, Borrowing, Spending, and Taxation: Further Thoughts on Professor Tribe’s Reply, DORF ON LAW (July 19, 2011), http://www.dorfonlaw.org/2011/07/borrowing-spending-and-taxation-further_19.html (“In other words, the Perry court is saying that Section 4 is not limited to Treasury securities.”)
97 Reeside v. Walker, 52 U.S. 272, 284 (1850).
98 See also BLACK’S LAW DICTIONARY 432–33 (8th ed. 1999) (defining “public debt” as “a debt owed by a municipal, state, or national government,” where the term “debt” includes “the aggregate of all existing claims against a person, entity, or state”).
authorized promises.\textsuperscript{99} Citing \textit{Perry}'s broad pronouncements, the Court in \textit{Cherokee Nation of Oklahoma v. Leavitt}\textsuperscript{100} remarked that “[a] statute that retroactively repudiates the Government’s contractual obligation may violate the Constitution.”\textsuperscript{101} Some commentators have even argued that these types of decisions might justify application of the Public Debt Clause to enforce social security payments.\textsuperscript{102} In any case, the Court’s recognition of the broad principle announced by the Public Debt Clause supports a broad reading of “public debt.”\textsuperscript{103}

Third, aspects of two other textual provisions in the Clause suggest a broad reading of public debt: the “authorized by law” and “including . . .” phrases. Specifically, the awkward placement of the phrase “authorized by law” was likely intended to connote the breadth of the government’s obligations.\textsuperscript{104} If the phrase would have been placed after “rebellion” it could have been read as a mere limit on what types of pensions, bounties, and services would qualify for constitutional protection.\textsuperscript{105} However, the Framers sought to ensure that the whole of the public debt, including—but

\textsuperscript{99} See \textit{Cherokee Nation of Okla. v. Leavitt}, 543 U.S. 631, 636 (2005) (rejecting the argument that the Government is “legally bound by its promises if, and only if, Congress appropriated sufficient funds” and recognizing that even if the government is free to not appropriate funds in the first place, once it has done so it is bound by its terms).


\textsuperscript{101} \textit{Id.} at 646.


\textsuperscript{103} See also \textit{Ohio Student Loan Comm’n v. Cavazos}, 900 F.2d 894, 902 (6th Cir. 1990) (“The Perry Court concluded that the government could not abrogate its contracts in an attempt to ‘lessen government expenditures,’ because it would question the public debt.”). \textit{But see State of Del. v. Cavazos}, 723 F. Supp. 234, 245 (D. Del. 1989) \textit{aff’d}, 919 F.2d 137 (3d Cir. 1990) (“[W]e also find that the scope of the guarantee clause [i.e. Public Debt Clause] of the fourteenth amendment is not so broad as to encompass within its coverage every debt of the United States. The wording of the amendment is specifically directed to bond debts created during the Civil War.”).

\textsuperscript{104} \textit{Abramowicz, supra} note 3, at 588 (“The Framers sought with that location [of the phrase ‘authorized by law’] to clarify that the Civil War origins of ‘pensions and bounties’ would not keep them out of the ‘public debt.’”).

\textsuperscript{105} \textit{Id.}
not limited to—all the debt incurred during the Civil War, would be protected because it was authorized by law. The phrase, then, serves to underscore that those obligations the government voluntarily takes on by enacting legislation are a part of the public debt of the United States.

Furthermore, the subordinate “including . . .” clause protecting certain types of debt indicates a broad reading. This kind of phrase presents some interpretive difficulty, however. Justice Scalia aptly illustrates the shades of meaning of this kind of subordinate clause:

The word ‘including’ can indeed indicate that what follows will be an “illustrative” sampling of the general category that precedes the word. Often, however, the examples standing alone are broader than the general category, and must be viewed as limited in light of that category. . . . [For example]: “any American automobile, including any truck or minivan” would not naturally be construed to encompass a foreign-manufactured truck or minivan. The general principle enunciated—that the speaker is talking about American automobiles—carries forward to the illustrative examples (trucks and minivans), and limits them accordingly, even though in isolation they are broader.106

In this case, then, “including” either serves to introduce examples illustrative of the “public debt” or introduces examples limited by the general term. In other words, either the “payments for pensions and bounties” are illustrative of the kinds of government obligations that constitute the public debt or they are limited by the term “public debt.” If they are limited by the term “public debt,” then only payments for pensions and bounties that are made by Treasury securities would qualify—this is the limiting sense of “public debt.” On the other hand, if the “illustrative” use of “including” is being used, then the subsequent examples are merely kinds of legally authorized government promises that are meant to be included in the term “public debt.” The illustrative use is supported by several considerations. First, the payment of pensions and bounties constituted a legally authorized obligation to individuals that was not directly tied to Treasury securities—the Union did not, for example, pay the bounties or pensions in bonds, but in cash.107 Although the Supreme Court in Nestor v.

107 See, e.g., David Stephen Heidler, Jeanne T. Heidler, and David J. Coles, ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 256 (2000) (noting that Congress authorized appropriations for bounties “only a month after Fort Sumter to enable the government to pay a bounty of up to $300”); see id. at 1439–1440 (discussing the pension system).
*Flemming*[^108] held that there are no contractual or property rights in “old-age benefits,” it relied there on Congress’s statutory retention of “the right to alter, amend, or repeal any provision of the Act.”[^109] In other words, this line of cases does not rule out the possibility of some entitlements qualifying as components of the “public debt.” And, even though Congress can alter entitlement programs, it can only do so “prospectively. That is, it may certainly decide not to pay doctors the same reimbursement rates under Medicare in 2012 as it did in 2011. It may not, however, decide on the due date that it is not paying the then-current reimbursement rates under the law.”[^110] On balance, then, the illustrative use of “including” is most supported by precedent and history. Any governmental obligations—including promises to pay pensions or bounties and other “entitlements”—constitute the “public debt” in virtue of the fact the government made a binding promise to pay them. So if the government currently owes money to these individuals, the Public Debt Clause obligates it to pay them.

Finally, there are pragmatic reasons to conclude that the “public debt” extends more broadly than the sum total of Treasury securities.[^111] Specifically, if the narrow sense of public debt is employed, then the amount of the public debt is equivalent to the value of government securities outstanding. But the *interest* on these securities is not included in this sum because the interest has not yet come due. On the narrow reading, the Public Debt Clause has nothing all to say about the government’s obligation to pay interest on the debt. All the Clause would do is require the government to pay back the principal. Payment on the interest is a simple contractual obligation, like pensions and bounties, to pay interest *when it comes due*. If “public debt” is constrained to reach only the amount of securities outstanding, then the government could, consistent with the Public Debt Clause, refuse to pay interest on the debt and simply assure debtholders that it will pay back the principal. But surely the Clause cannot produce such counterintuitive results. “No bondholder would be satisfied to learn that the government does not really owe interest, merely because interest is not included in the amount of currently outstanding debt.”[^112] It would, in fact, be precisely because the government was not paying the interest that the public debt would be “questioned.”

Text, precedent, history, and common sense support the broad reading of “public debt” that includes all of the government’s legally

[^109]: *Id.* at 611 (quotation marks omitted).
[^110]: *Buchanan, Borrowing, Spending, and Taxation*, supra note 96.
[^111]: This point was persuasively argued by Neil Buchanan. *See id.*
[^112]: *Id.*
authorized promises. When the government makes a commitment by law, that commitment obligates it to honor the terms of the agreement. And the Public Debt Clause places those commitments into the “public debt” because they directly “concern[] the integrity of the public obligations.” Significantly, 31 U.S.C § 1501, includes nine broad categories of “obligation[s] of the United States” that, this Article argues, ought to be protected by the Public Debt Clause:

(1) a binding agreement between an agency and another person (including an agency) . . .
(2) a loan agreement showing the amount and terms of repayment;
(3) an order required by law to be placed with an agency;
(4) an order issued under a law authorizing purchases without advertising . . .
(5) a grant or subsidy . . .
(6) a liability that may result from pending litigation;
(7) employment or services of persons or expenses of travel under law;
(8) services provided by public utilities; or
(9) other legal liability of the Government against an available appropriation or fund.

This does not, of course, say that there is a property or contractual right in entitlements that cannot be altered by Congress. These arguments only show that everything the government owes anyone today—including payments to contractors for services rendered,

113 The argument is not indisputable, however. For instance, several technical treatises and popular dictionaries of the time equated public debt with government borrowing. See, e.g., H.W. FOWLER AND F.G. FOWLER, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 211 (1917) (defining “national debt” as the “sum owed by the State to persons who have advanced money to it”); HENRY CARTER ADAMS, THE SCIENCE OF FINANCE: AN INVESTIGATION OF PUBLIC EXPENDITURES AND PUBLIC REVENUE 547 (1898) (referring to the “public debt” as “the issue of a loan”); ROBERT HARRY INGLIS PALGRAVE, DICTIONARY OF POLITICAL ECONOMY 507 (1894) (treating “public debt” as “borrowing by the state”). Moreover, the Public Debt Clause’s two primary expositors reached different conclusions from one another on this question. Compare Eder, supra note 3, at 9 (“It is clear that the public debt was singled out for constitutional protection, a narrower term than ‘obligations’.”) with Abramowicz, supra note 3, at 588 (reading “the ‘public debt’ to include the ordinary pensions of government employees and similar government commitments”).

compensation to federal employees for work already undertaken, reimbursement to states or health care providers for Medicare or Medicaid services, or interest on Treasury securities—constitutes the “public debt” within the meaning of the Public Debt Clause.

II. VIOLATIONS OF THE PUBLIC DEBT CLAUSE: CLARIFYING AND APPLYING THE SUBSTANTIAL DOUBT TEST

The Public Debt Clause, as we have seen, should be interpreted broadly to protect not just debt incurred during the Civil War, nor only those obligations amounting to debt owed to bondholders, nor simply preserving the public debt from repudiation or default alone. It is, this Article has argued, expansive in this three-fold sense. It protects all legally authorized government obligations from actions that create substantial doubt about their validity. This Part deals with the kind of conduct that would constitute a violation of the Public Debt Clause. To undertake this analysis, this Part lays out a test to measure whether government actions have created substantial doubt about the public debt and thereby unconstitutionally caused its validity to be questioned. First, however, this Part provides historical background on how the debt limit has operated since its creation.

A. A Brief History of the Debt Limit Statute

Since the origin of the Republic, Congress has placed limits on governmental borrowing authority.\textsuperscript{115} Prior to World War I, Congress gave the executive borrowing authority only for specific actions through targeted legislation.\textsuperscript{116} The first major statutory limit on debt was codified in the Second Liberty Bond Act of 1917 and placed different restrictions on different types of debt.\textsuperscript{117} The modern aggregated limit—which allows the Treasury to incur debt of whatever length feasible, on whatever terms necessary—traces back to 1939.\textsuperscript{118} In that year, at President Roosevelt’s

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{115} Austin & Levit, \textit{supra} note 7, at 5 (“Congress has always placed restrictions on federal debt.”).
\item \textsuperscript{116} See, e.g., Spooner Act of June 28, 1902 (32 Stat 481; P.L. 57-183) (authorizing the incurrence of debt for construction of the Panama Canal); Austin & Levit, \textit{supra} note 7, at 5 (noting that Congress usually “authorized borrowing for specified purposes” prior to WWI).
\item \textsuperscript{117} See Pub. L. No. 65-43, 40 Stat. 288 (1917).
\end{enumerate}
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urging, legislation was first passed to authorize the Treasury Security to borrow at his discretion, subject only to an aggregated debt ceiling.\(^{119}\) From its very inception the debt limit required an increase every year the United States was involved in World War II.\(^{120}\) At the end of the war, the debt limit was permanently set at $300 billion,\(^{121}\) and was only changed once in the next seven years—and that to decrease the limit from $300 billion to $275 billion.\(^{122}\)

Following this calm, Congress was forced to start increasing the debt limit on a consistent basis during the 1950s and 60s.\(^{123}\) And, though “[c]ongressional-executive interactions with respect to the debt limit remained, for the most part, harmonious”\(^{124}\) during the 1950s, even Republican members of Congress were less than sanguine about the prospect of increasing the debt limit as often as President Eisenhower desired.\(^{125}\) Nonetheless, the administrations of both Kennedy and Johnson faced strident opposition and critique during what had been, in comparison, fairly routine votes on raising the debt limit in the past.\(^{126}\) This conflict was partly a function of the increasing rapidity of necessary debt limit

\(^{119}\) Austin & Levit, supra note 7, at 7 (“When enacted on June 20, the measure created the first aggregate limit ($45 billion) covering nearly all public debt.”).

\(^{120}\) See Public Debt Acts of 1941 (P.L. 77-7), 1942 (P.L. 77-510), 1943 (78-34), 1944 (P.L. 78-333), and 1945 (P.L. 79-48).


\(^{122}\) Id. (“Between 1945 and 1953, only one amendment was made to the Second Liberty Loan Act—in 1946 to decrease the debt-limit ceiling from $300 billion to $275 billion.”).


\(^{125}\) Kowalcky and LeLoup, supra note 121, at 16–17 (outlining mounting Republican disapproval over the course of several debt limit votes).

\(^{126}\) Krishnakumar, In Defense of the Debt Limit Statute, supra note 124, at 152 (“The 1960s also initiated a new phase in congressional-executive relations concerning the debt limit statute, as Southern Democrats and Republicans in Congress began using votes on debt limit increase requests as occasions to attack the fiscal policy of the Kennedy and Johnson administrations.”).
increases, and partly a result of fragmentation over the ideological presuppositions of Keynesian economic theory—presuppositions that heralded budget deficits as effective tools to stimulate the economy. During President Johnson’s tenure, the creation of Medicare and the escalating costs in Vietnam caused mounting political division over debt limit increases. Despite increasingly rancorous debate over these increases, “it was evident that the belief in the ceiling as a means of controlling the deficit was slowly being put to rest.”

During the Ford and Carter administrations in the 1970s, a new trend developed: “the use of the debt ceiling vote as a vehicle for other legislative matters.” If debt limit increases were necessary, the minority was at least going to get some substantive concessions out of its acquiescence. This trend continued into the Reagan administration in the 1980s, but the executive-congressional relationship soured even more during the Reagan era. Despite Reagan’s credentials as a fiscal conservative, “the national debt, which topped $1 trillion for the first time during his first year in office, rose to $2.8 trillion by the time he left office.” This undeniable unsustainability of the government’s fiscal policy prompted bipartisan calls for major reform. The substantive limits

127 Austin & Levit, supra note 7, at 7 (“Since March 1962, Congress has enacted 75 separate measures that have altered the limit on federal debt.”).
128 Kowalcky and LeLoup, supra note 121, at 17–18 (laying out the contours of Keynesian theory and its impact on debt limit debates). Because the short-term incentives lined up (Republicans enjoyed the tax cuts and Democrats were able to shore up social welfare programs), Keynesianism was, for the most part, extremely popular. See Andrew L. Yarrow, Forgive Us Our Debts 40 (2008).
129 Kowalcky and LeLoup, supra note 121, at 17–18.
130 Kowalcky and LeLoup, supra note 121, at 18.
131 Id.
132 Id. at 19 (“Proposed amendments were not new to debt limit legislation; the difference was in their germaneness to the issue.”).
133 Id. at 18.
134 Krishnakumar, In Defense of the Debt Limit Statute, supra note 124, at 154 (“The decade also wrought noticeable shifts in Congress’s use of the debt limit statute.”).
135 Yarrow, supra note 128, at 42.
136 Krishnakumar, In Defense of the Debt Limit Statute, supra note 124, at 154 (“[A]s deficits spiraled out of control in the early part of the decade, members of Congress resolved to do something about it other than symbolically vote against periodic debt limit increases.”).
of these reforms, however, turned out to be “hollow” and proved unable to constrain the spending under the first President Bush necessitated by, among other things, the Gulf War and the savings and loan bailout.\textsuperscript{137} Comparatively few debt limit increases were necessary during the early 1990s,\textsuperscript{138} due in part to the “fiscal constraint exercised during the Clinton presidency and a Republican Congress, which resulted in the slowest spending growth of the [previous] fifty years.”\textsuperscript{139} Nonetheless, at the end of his first term, Clinton’s was “the fourteenth consecutive four-year presidency to generate a deficit.”\textsuperscript{140} And yet, because of four consecutive years of budget surpluses in his second term, Clinton left office “grandly proclaim[ing] in 1999 that the entire $5.6 trillion national debt could be paid off by 2015.”\textsuperscript{141} Unfortunately, the external shocks during President George W. Bush’s administration\textsuperscript{142} required that the debt limit be increased three times in slightly more than two years.\textsuperscript{143} Some of these early debates were quite acrimonious.\textsuperscript{144} Fortunately for the President, however, the increases in his second term “took a less dramatic path than those in President Bush’s first term.”\textsuperscript{145} Increases under President Obama proved eerily similar—calm at first and then involving fierce political struggles over necessary increases.\textsuperscript{146}

\textbf{B. Factors in the Substantial Doubt Test}

The Substantial Doubt Test is a test—much like rational basis review or strict scrutiny—for determining the point at which otherwise

\begin{itemize}
  \item \textsuperscript{137} \textsc{Yarrow}, \textit{supra} note 128, at 44.
  \item \textsuperscript{138} \textsc{office of mgmt. \\ & budget, fiscal year 2012 historical tables}, \textit{supra} note 2, at 138–39.
  \item \textsuperscript{139} \textsc{Yarrow}, \textit{supra} note 128, at 46.
  \item \textsuperscript{140} \textsc{robert e. kelly, the national debt of the united states, 1941 to 2008}, at 267 (2008).
  \item \textsuperscript{141} \textsc{Yarrow}, \textit{supra} note 128, at 46.
  \item \textsuperscript{142} \textit{id.} at 47 (noting that “the dot.com boom turned into a stock-market collapse; the united states was attacked by terrorists, leading to wars in afghanistan and iraq; and a mild recession depressed incomes and federal revenues”).
  \item \textsuperscript{144} \textit{See austin \\ & levit, supra} note 7, at 11–12 (outlining cantankerous debate over debt ceiling legislation).
  \item \textsuperscript{145} \textit{id.} at 14.
  \item \textsuperscript{146} \textit{See infra} Part II.B.
\end{itemize}
permissible government action becomes unconstitutional. The test simply measures whether practices of the federal government put the public debt into substantial debt. If so, they are unconstitutional. Substantial doubt—like “the integrity of public obligations” and questioning of the validity of the debt—is by no means self-explanatory. But there are reasons to think “doubt” is easier to measure objectively than “integrity” or “questioning the validity.” Doubt is a measure of the apprehension felt by all those to whom the government is indebted. This is the correct barometer to use because the Clause was designed to protect precisely these recipients of the government’s obligations. Since the Clause prohibits conduct that falls short of default, the doubt generated in debtholders is the best way to determine the constitutionality of government action.

The crucial question, then, is what actions cause substantial doubt regarding the validity of the public debt. There are two critical indicia bearing on the question of substantial doubt: (1) indications of the strength of the national economy and the health of the political environment and (2) reports of the apprehension felt by debtholders. These factors take into account the purpose of the Clause. First, the possibility of the public debt being questioned only happens under appropriately poor economic and political conditions. In a period of unmitigated prosperity, there is little reason to think that anyone would question the validity of the debt. It is when countries face difficult economic times or unworkable political machinery that debtholders fear not receiving payment. Second, when debtholders’ level of apprehension can be measured through appropriate proxies, doing so allows a decision-maker to assess the level of doubt more accurately.

The first component of the analysis looks to the economic and political factors surrounding government action. Only when the economic or political outlook is sufficiently negative is there a real threat to the validity of the debt. Economic and political research into sovereign debt explains several signals for default. The presence of a significant number of these signals, while not determinative, certainly strengthens the argument that the validity of the debt is in substantial doubt. Indeed, it is almost a threshold inquiry. The credit rating agency Standard & Poor’s relies on five different factors when rating sovereign debt: (a) “institutional effectiveness and political risk”; (b) “economic structure and growth prospects”; (c)

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147 See supra Part I.B.1.
148 The economic and political components that look to conditions for default are useful because the “substantial doubt” the Public Debt Clause is concerned about is precisely doubt about the possibility for government default.
“external liquidity and international investment position”; (d) “fiscal performance and flexibility”; and (e) “monetary flexibility.” These factors can be distilled into several main indicators: the political climate, including institutional design; the domestic economic climate; and the domestic economy’s relation to the international economy.

Like credit rating agencies, economists also rely on institutional effectiveness and political risk to predict default. Economists characterize political risk as “the risk that arises from potential actions of governments and other influential domestic forces, which threaten expected returns on investment.” Thus, when there is contentious political infighting, or an illustration that the machinery of government is grinding to a halt, political risk is high. For instance, the United States’ political risk is higher under a divided government than a united government. It is also higher when procedural impediments and excessive political posturing, caused by intense interest group pressure, make compromise exceedingly difficult. Sustained and persistent gridlock can, likewise, create higher political risk.

The other types of default predictors used by economists fit into the domestic economy and international context factors: domestic economic performance and the country’s terms of trade and borrowing cost. On the domestic front, numerous studies have confirmed that “countries that are about to default have higher debt to GDP [ratios].” Importantly, however, “what matters is whether a country’s debt to GDP [ratio] is high relative to its own mean, not whether it is high relative to other countries.” If a country has a higher than average debt to GDP ratio, it is more likely that that country will default than under alternative circumstances. On the

154 Id. at 21.
international front, countries susceptible to default have “higher volatility of terms of trade”\textsuperscript{155} and higher borrowing costs.\textsuperscript{156}

The preceding measures can be usefully employed as one component of the Substantial Doubt analysis. This is not, of course, to say that a technical economic analysis needs to be undertaken when analyzing the Public Debt Clause. It is only to say that a questioning of the debt is more likely to happen under certain economic and political circumstances. When those circumstances are present, certain governmental actions that may be permissible at other times are more likely to cause unconstitutional questioning. In assessing whether government action is unconstitutional, then, a decision-maker must assess the economic and political context in which these actions take place.

The second component of the substantial doubt analysis focuses on context- and country-specific indications of debtholder apprehension.\textsuperscript{157} One type of type of indicator asks “whether any rating service ha[s] downgraded the debt.”\textsuperscript{158} Also relevant is whether any of these agencies have issued a warning about the debt.\textsuperscript{159} Certainly the right political and economic pre-conditions are relevant, and perhaps necessary, but they will likely never be sufficient. What really matters is whether there is a reasonable basis from which to question the debt. By looking to whether a rating service has downgraded the debt, a decision-maker can tell whether the market envision the government’s action to be such a substantial variation from prior practice that there is a credible possibility of failure to meet present and future obligations. As well as an actual downgrade or warning from a rating agency, other similar indicators can be relevant to ascertain debtholders’ states of mind.\textsuperscript{160} When available, these should be relied on to help determine whether the reasonable debtholder substantially doubts the validity of the debt.

\textsuperscript{155} Id. at 14.
\textsuperscript{156} This creates a difficult problem for analysis of the U.S. system because interest rate spreads, a key determiner of borrowing costs, is defined as the difference between country X’s interest rate on a n-year bond and the U.S. Treasury’s interest rate on the n-year bond. See id. at 1.
\textsuperscript{157} Abramowicz, supra note 3, at 569.
\textsuperscript{158} Id.
\textsuperscript{159} See Abramowicz, supra note 3, at 570 n.33.
\textsuperscript{160} This category is intentionally amorphous. It could include press commentary, historical indices, statistical studies, the reaction of world markets, interest rates, and anything else that expresses the tendency of debtholders to question the debt. See, e.g., id.
Therefore, in weighing whether some government action generates questioning about the validity of the public debt by creating “substantial doubt,” a decision-maker would need to ask a number of questions:

- Do the economic and political indicators suggest the atmosphere is ripe for default?\(^{161}\)
- Has a rating agency issued a warning or downgraded the nation’s credit rating?
- Are there other indications that debtholders substantially doubt payment of the government’s obligations?

These factors are no more abstruse or difficult to apply than determining, for instance, whether the government has a sufficiently “compelling interest” to take some action.\(^{162}\) In the same way that it would be difficult to apply the strict scrutiny test in the abstract, however, a fuller analysis of the merits of the Substantial Doubt test can be seen in its application to scenarios of potential questioning surrounding the increased fractionalization in debt limit debates.

**B. Questioning and Congressional Brinksmanship**

The Substantial Doubt Test helps determine how far toward the brink of default congressional obstructionism must be for the conduct to be unconstitutional. There is no bright line or dollar amount in the Substantial Doubt analysis, so historical scenarios best illustrate the contours of the test. First, this Section analyzes the 1995–96 and 2011 debates and concludes that they violate the Public Debt Clause by creating substantial doubt about the validity of the debt. Next, it examines the 2002 debates and shows how even contentious political debate can be constitutionally permissible under the Public Debt Clause. Because most debt debates will not involve an unconstitutional creation of substantial doubt, the 2002 debates are

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\(^{161}\) This factor will, of course, not be able to keep up with individual actions taken by government officials. However, in a climate where the economic indicators show no sign of risk of default, perhaps discrete actions that would otherwise be unconstitutional (by putting the validity of the debt into question) would not be so in other economic climates.

representative of these more pacific debates. And, for just that reason, this Section singles out two unconstitutional debates to illustrate the variety of unconstitutional conduct. Rather than proceed chronologically, this Section analyzes the two unconstitutional debates side-by-side both to show the similarities between types of unconstitutional doubt creation and to more easily contrast the context of these debates with the factors characteristic of constitutionally permissible policy disputes.


a. The 1995–96 Showdown

   One of the most memorable recent debt limit clashes was President Clinton’s 1995–96 showdown with a hostile Congress.\footnote{Krishnakumar, In Defense of the Debt Limit Statute, supra note 124, at 156 (“[I]n 1995, the Gingrich-led 104th Congress openly and brazenly sought to use legislation increasing the debt ceiling to force President Clinton to accept sweeping reforms, including a seven-year plan to balance the budget . . . .”).} Unafraid to “waive the Gephardt Rule[, which was] designed to provide political cover on debt limit votes,” congressional Republicans confronted the administration’s request for an increase in the debt limit head on.\footnote{Id.} The extended debate—which lasted almost six months—\footnote{U.S. GEN. ACCOUNTING OFFICE, supra note 9, 19 (noting that the crisis lasted from October 1995 to March 1996).} was precipitated by the rise of the Newt Gingrich-led Republican House majority and its radical fiscal conservatism.\footnote{Patrice Hill, Default on National Debt Payment Looms with Gingrich Budget Threat, THE WASHINGTON TIMES, Sep. 28, 1995, at A8 (“House Speaker Newt Gingrich, with backing from freshman Republicans and GOP deficit hawks intent on balancing the budget, has said he will not allow Congress to pass an increase in the Treasury’s debt limit unless President Clinton signs a budget that will balance by 2002.”)} When analysts determined that the Treasury would reach the statutory ceiling by the end of October 1995, Republicans in Congress were adamant about refusing to increase the ceiling without serious concessions from the President.\footnote{Id.} The administration, on the other hand, was not willing to take the bitter pill of massive spending reductions and the requirement of a balanced budget that Republicans were
demanding. After two separate government shutdowns in late 1995 and early 1996, the debt limit crisis “was resolved on March 29, 1996, when Congress raised the debt ceiling to $5.5 trillion.”

Applying the Substantial Doubt test, this Section argues that the shutdown-producing congressional actions during the 1995–96 debates were unconstitutional under the Public Debt Clause. First, the political climate was extremely divisive. In the 1994 election, “[t]he Republican Party won a majority of the votes cast for Congress for the first time since 1946.” After the election, Republicans controlled both houses of Congress and faced a hostile chief executive in President Clinton. The two branches were set to collide over disagreements on the debt, with “Gingrich and his budget-cutting revolutionaries steaming in from one direction, [and] Clinton and his veto rolling in from the other.” Although the political context portended interminable conflict, the economy was in good shape—and its prospects were brightening as “the high-tech-driven economic boom of the late 1990s” promised to bring further financial prosperity. Even though the economic outlook was positive, the strident political conflict was sufficiently acrimonious to open the door for substantial doubt from debtholders. In fact, the subjective indicators of debtholder apprehension demonstrate that this was precisely their reaction.

The second factor in the Substantial Doubt test, the debtholder subjectivity element, indicates that the 1995–96 debate created substantial doubt about the debt’s validity. During the closing months of 1995, “Republicans freely dispensed threats to shut down the government and throw it into default.” These threats were taken seriously enough for the

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170 U.S. GEN. ACCOUNTING OFFICE, supra note 9, at 19.
172 Krishnakumar, Reconciliation and the Fiscal Constitution, supra note 169, at 589.
173 YARROW, supra note 128, at 46.
174 Budget Showdown Looms; U.S. Borrowing Authority Extended Until March 29, RICHMOND TIMES DISPATCH, March 8, 1996.
public in general, and debtholders in particular, to be worried about default.\textsuperscript{175} In fact, because it was “[a]larmed that the budget negotiations in Washington might lead to an unprecedented default on the $4.9 trillion national debt, Moody’s [rating agency] issued an unusually severe warning to the U.S. government: don’t miss any payments.”\textsuperscript{176} Additionally, Standard & Poor’s “also warned that ‘the global capital market’s unquestioned faith in the United States government’s willingness to honor its financial obligations has, to some degree, been diminished by the failure of the government to act in a timely fashion.’”\textsuperscript{177} These warnings by top credit rating agencies indicated the degree to which reasonable debtholders feared that the government might miss payments on its obligations. There was a general awareness that the divisiveness created by the stalemate was qualitatively different from other debates, and that congressional wielding of this potent “weapon” might harm future economic interests of the debtholders.\textsuperscript{178}

Added to these downgrade warnings was noticeable market reaction to the debt limit gridlock.\textsuperscript{179} After an extensive analysis of bond prices throughout the crisis, economists Srinivas Nippani, Pu Liu, and Craig T.

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\textsuperscript{175} See Hill, supra note 166 (recording the fear and effects of default and stating that “[t]he hostile reaction in the financial markets last week to Mr. Gingrich’s threat to permit a default suggests that the price of default would indeed be higher interest rates. Within a day, the interest rates on 30-year Treasury bond had risen from 6.46 percent to 6.62 percent.”)
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\textsuperscript{176} Deadlock Spurs Warning on Debt, RECORD-JOURNAL, Jan. 28, 1996, at E1.
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\textsuperscript{178} See, e.g., Adam Clymer, G.O.P. Lawmakers Offer To Abandon Debt-Limit Threat, NEW YORK TIMES, Jan. 25, 1996, at A1 (discussing the contentious months of debate over raising the limit). But see John Lott, Congress Can Learn From 1995-96 Debt-Ceiling Debate, FOXNEWS.COM (July 26, 2011), http://www.foxnews.com/opinion/2011/07/25/congress-can-learn-from-15-6-debt-ceiling-debate/#ixzz1hrmFwc00 (“As for interest rates, US Treasury bond rates did not go up—to the contrary, they fell almost continually during 1995 and the beginning of 1996. This indicates that, despite the warnings by the politicians and the media, investors were not at all worried about any default by the US government.”)
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Schulman concluded that “a potential Treasury default occurred in 1995–1996 when the U.S. President and Congress disagreed on passing a balanced budget bill.” This conclusion was based on the fact that the market charged a “default premium” on Treasury securities during the period in which the conflict was occurring. These default premiums are only charged when there is enough evidence for the market to reasonably infer that there is a credible possibility of default. The market thus envisioned the 1995–96 debate as sufficiently hostile to produce substantial doubt about the validity—and security—of the U.S. debt.

The bitterly divided political environment, coupled with the indications of substantial uncertainty among debtholders, leads to the conclusion that the 1995–96 debate caused an unconstitutional questioning of the debt. “This extraordinary breakdown in budget-making, while unprecedented in scope and degree, was not the first, nor is it likely to be the last ‘train wreck’ of its kind.” Indeed, this Article argues that the unconstitutional 1995–96 “train wreck” was paralleled—and in fact surpassed—in the unconstitutional 2011 debt debates.

b. The 2011 Stalemate

The 2011 debt limit debates were initiated when Treasury Secretary Timothy Geithner sent a letter to Senate Majority Leader Harry Reid requesting an increase. This letter expressed Geithner’s belief that the debt would reach the ceiling somewhere between March 31 and May 16, 2011. Geithner’s later, final estimate indicated that after August 2nd the government would be unable to meet its obligations without the ability to borrow more. The Treasury was forced to engage in a number of extraordinary measures—similar to those undertaken in years past—to keep the debt below limit. With the government again on the brink of default,

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180 Id. at 263.
181 Id.
182 Krishnakumar, Reconciliation and the Fiscal Constitution, supra note 169, at 590.
183 Letter from Timothy Geithner, Secretary of the U.S. Treasury, to Harry Reid, Majority Leader of the U.S. Senate (January 6, 2011).
184 Id.
186 AUSTIN & LEVIT, supra note 7, at 19–20.
the House and Senate passed a compromise measure that was signed into law on August 2, 2011, the very day that the Treasury estimated it would be unable to meet its obligations.187

This debt limit debate shared many facial similarities with other debt debates, but was different for a number of reasons. First, the macroeconomic indicators were substantially weaker than they had previously been. The debt was an estimated 94.3% of GDP at the end of FY2010 and would be 99% of GDP by September 30, 2011, the end of FY2011.188 Before the end of FY2009, the debt had not even reached 70% of GDP for the preceding fifty-five years.189 Furthermore, the U.S. economy had seen one of the largest GDP shrinkages in decades—negative economic growth of 2.6% in 2009 and a recession from which the country was still recovering.190 The full recession had caused a total GDP shrinkage of “4.1%, marking the deepest recession since 1947.”191

Layered on top of these poor macroeconomic factors, “[a] surprise warning about U.S. debt by credit rating agency Standard & Poor’s [on April 18] sent stocks plunging . . . and crystallized the threat that mounting federal budget deficits and national debt pose to the U.S. financial system and the American way of life.”192 In its warning about U.S. debt, Standard & Poor’s indicated its shock that “more than two years after the beginning of the recent crisis, U.S. policymakers have still not agreed on a strategy to reverse recent fiscal deterioration or address longer-term fiscal pressures.”193 On July 13, 2011, Moody’s Investor Services, another major credit rating agency, also warned the U.S. that its debt could be subject to downgrade if systemic changes were not made.194 Finally, Fitch Ratings, the

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187 Pub. Law No. 112-25.
188 Office of Mgmt. & Budget, Fiscal Year 2012 Historical Tables, supra note 2, at 134.
189 Id. at 133–34.
191 Id.
194 John Detrixhe and Daniel Kruger, Moody’s Downgrade Warning Adds Pressure on U.S. Debt Deal, Bloomberg (July 14, 2011, 10:44 AM),
third major credit rating agency, issued its warning on July 17th.\textsuperscript{195} Fitch said that failure to agree “on a credible fiscal consolidation strategy . . . will inevitably weaken the sovereign credit profile and may result in a sovereign rating downgrade.”\textsuperscript{196}

These macroeconomic indicators and the subjective debtholder apprehension were not the only harbingers of substantial doubt. The U.S. political situation was deeply divided following the 2010 midterm elections. The House of Representatives was Republican-controlled (242-193), while the Senate (53-47) and the presidency were controlled by the Democrats.\textsuperscript{197} The rising “Tea Party” movement that sought to introduce a radical fiscal conservatism into debt debates fueled this already trenchant political environment.\textsuperscript{198} Many of the newly elected Tea Party Republicans took a hard line during debates on the debt ceiling.\textsuperscript{199} Even more alarming, in early June, some Republicans were starting to call for a “technical default”\textsuperscript{200} as the price to pay for compromise.\textsuperscript{201}

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\item \textsuperscript{196} Id.
\item \textsuperscript{197} \textit{Campaign 2010}, CBS NEWS http://www.cbsnews.com/election2010/?tag=contentMain;contentBody (last visited Jan. 8, 2012).
\item \textsuperscript{198} Kate Zernike and Megan Thee-Brenan, \textit{Poll Finds Tea Party Backers Wealthier and More Educated}, NEW YORK TIMES, April 14, 2010 (remarking that most Tea Party members desire a smaller government above all else).
\item \textsuperscript{199} Huma Kahn, \textit{Debt Ceiling Debate Heats Up, Tea Party Says “Hell No” to Raising Limit}, ABC NEWS (May 16, 2011), http://abcnews.go.com/Politics/debt-ceiling-debate-heats-tea-party-hellraising/story?id=13597695 (“Many of these [Republican] members, buoyed by the Tea Party, argue they will not agree to raising the debt limit if their demands of major spending reductions are not met. Members of the Tea Party argue that claims about the repercussions of not raising the limit are over-hyped and simply ‘fear mongering.’
\item \textsuperscript{200} See Harrop, supra note 13.
\item \textsuperscript{201} Tim Reid and Steven T. Johnson, \textit{Republican Mainstream Flirts with Brief Default}, REUTERS (June 7, 2011, 11:01 PM), http://www.reuters.com/article/2011/06/08/us-usa-debt-skepticism-idUSTRE75700720110608 (“An idea once confined to the fringe of the Republican party is seeping into its mainstream—that a brief default might
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The degree of intractable political debate, fear among debtholders, and overall depressed economic conditions caused credit rating agency Standard & Poor’s to downgrade the U.S. debt for the first time in history—and this even after a “compromise” had been reached. The agency said it downgraded U.S. debt because we believe that the prolonged controversy over raising the statutory debt ceiling and the related fiscal policy debate indicate that further near-term progress containing the growth in public spending, especially on entitlements, or on reaching an agreement on raising revenues is less likely than we previously assumed and will remain a contentious and fitful process. This debt limit debate mirrored the negativity—and unconstitutionality—of the 1995–96 debates. And, though this Article argues that the 1995–96 debate was unconstitutional as well, the degree of political brinksmanship caused by the 2011 debates most vividly illustrates a violation of the Public Debt Clause.

2. Constitutional Policy Dispute: The 2002 Debt Debates

In late 2001, toward the end of President George W. Bush’s first year in office, the national debt was nearing the statutory limit. This was in spite of the four years of budget surpluses from FY1998 through FY2001. Though debt was within a mere $25 million of the debt limit at the beginning of the year, the Treasury used technical accounting measures to keep debt below the limit until the April 15th tax revenues came in. Despite this, by mid-May 2002, the debt had climbed to within $15 million of the debt limit. The Treasury was again forced to use extraordinary measures to keep debt below limit and estimated that it could not meet its

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203 Id. at 3.
204 Austin & Levit, supra note 7, at 11.
206 Austin & Levit, supra note 7, at 11.
207 Id.
obligations—without an increase—after June 28, 2002. The Senate then passed legislation increasing the debt limit on June 11th without any debate. The House, on the brink of default, passed the debt limit increase by one vote on June 27th. The legislation was signed into law on June 28th, the day Treasury estimated it would be unable to meet its obligations.

Though the national debt was extremely close to the debt limit, it does not appear that any of Congress’s actions put the debt into substantial doubt. First, under the Substantial Doubt test, the macroeconomic factors indicated that the nation’s economy was not conducive to default. For example, debt as a percentage of GDP was only 56.4% at the end of FY2001 (September 30, 2001) and 58.8% at the end of FY2002 (September 30, 2002). Comparatively, this ratio was similar to what it had been for the previous decade—indeed it was now slightly lower. Finally, economic growth, as measured by annual GDP percentage increase, was approximately 2.45% from 2001 to 2002—an average-sized increase. The macroeconomic indicators therefore did not give cause for concern.

The other subjective indications are likewise not problematic. No major credit rating agency issued a warning or downgraded the nation’s credit rating, and all signs indicated that “[n]o one believed a federal default would actually occur.” Indeed, the debate itself was more a political calculation that Democrats could extract extraneous favors by withholding votes than a principled stand against increased government indebtedness.

Finally, as a result of the 2000 elections, the Republicans had control of the House of Representatives—by a margin of 221-212—and the

209 AUSTIN & LEVIT, supra note 7, at 12.
210 Id.
212 OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012 HISTORICAL TABLES, supra note 2, at 134.
213 Id. at 133–34.
216 Id.
tie-breaking vote in the Senate—which, after the election, was split 50-50.\textsuperscript{217} They also, of course, controlled the presidency.\textsuperscript{218} Under a united government, the odds of default are certainly less than otherwise.

These factors compel the conclusion that the debt debate, though fierce, was not unconstitutional. Congress did not violate the Public Debt Clause even though it waited until the last minute to raise the debt ceiling. The macroeconomic indicators suggested a sufficiently strong economy; the subjective factors showed that debtholders did not realistically fear a government default; and the political division was not partisan enough to create the conditions for a plausible default. These results show the futility of trying to make a bright line test for the Public Debt Clause. In 2002, the debt was within $15 million dollars of the ceiling—an amount that “equaled about five minutes of federal outlays.”\textsuperscript{219} Nonetheless, because no substantial doubt was created concerning government payment, there was no constitutional violation.

The Substantial Doubt Test is not an arbitrary test that can be manipulated based on the policy preferences of the decision-maker—at least no more than any other constitutional test can be. It can be applied in a principled way by judging the observable and objective data surrounding debt limit debates and determining whether debtholders experience substantial doubt about the security of obligations owed to them. When this substantial doubt occurs, this Article argues that the Public Debt Clause has been violated.

III. THE EXECUTIVE DUTY TO DISREGARD THE DEBT LIMIT

The argument that there are some actions surrounding the statutory debt limit that can violate the Public Debt Clause says nothing about who can remedy—or indeed if anyone can remedy—this constitutional ill. This Part argues that the president can alter or ignore the debt ceiling when the debt is put into substantial doubt. After setting the stage for the problem, this Part lays out two interrelated—but conceptually distinct—arguments to support the conclusion that the president has a duty to disregard the debt

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  \item \textsuperscript{218} See Bush v. Gore, 531 U.S. 98 (2000) (ending recount efforts and effectively handing the presidency to George W. Bush).
  \item \textsuperscript{219} Austin & Levit, supra note 7, at 11 (emphasis added).
\end{itemize}
limit statute when Congress’s actions create an unconstitutional degree of doubt about the validity of the government’s obligations.

The argument for a presidential duty to disregard the debt limit is predicated upon the existence of conflicting congressional demands. Appropriations by Congress often have the effect of requiring an increase in the debt ceiling by appropriating funds that exceed revenue by an amount that necessitates borrowing above the statutory limit. Professor Laurence Tribe aptly states the problem: “In a situation where the legislatively authorized spending commitments outstrip legislatively authorized revenue, it is impossible to honor both of these allocational arrangements at once. One of them must give way.”\footnote{220} Quite simply, Congress has commanded that the president execute appropriations bills and execute the debt limit statute. When the total appropriations exceed the debt limit, the president cannot execute both. Because Article II of the Constitution requires the president to “take care that the laws be faithfully executed,”\footnote{221} what happens when these two laws are inconsistent?\footnote{222} What authority does the president have to enforce one and ignore the other?

\footnote{220} Laurence H. Tribe, Guest Post on the Debt Ceiling by Laurence Tribe, DORF ON LAW (July 16, 2011), http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html. Professor Tribe’s solution is that the president should not spend as much as authorized, rather than trying to increase revenue (e.g. through borrowing). \textit{Id}. But this misses the importance of the ICA and its \textit{requirement} that the president spend all appropriations.

\footnote{221} U.S. CONST. art. II, § 3.

\footnote{222} An objection to the current argument might protest that it frames the debate in the wrong terms. That is, the argument assumes that spending in excess of current revenue is accomplished only through borrowing and not, for instance, by taxing or printing more money. See Tribe, supra note 220; see generally Neil H. Buchanan & Michael C. Dorf, “When Constitutional Obligations Conflict: Lessons of the 2011 Debt Ceiling Standoff,” forthcoming (on file with author). The answer to this objection is (relatively) simple: in 1939 Congress ceded plenary borrowing authority to Treasury under the sole constraint of an aggregate ceiling. \textit{Austin} & \textit{Levit}, supra note 7, at 6–7 (remarking that “[t]his measure gave the Treasury freer rein to manage the federal debt as it saw fit”). Indeed the debt limit debate assumes that this borrowing authority is the Treasury’s only legitimate way to raise the revenue necessary to spend appropriated funds not covered by general revenue. See Buchanan, \textit{Borrowing, Spending, and Taxation}, supra note 96 (“[H]onestly, I do not see how we are even having this debate if any of us thinks that current law does not authorize borrowing that would push
The traditional wisdom is that when confronted with conflicting statutes, a court should either construe the more specific statute as an exception to the general one or “conclude that the legislature’s last word on the subject—the later-enacted statute—controls.” Though the presumption against implied repeals cautions a court to attempt reconciliation whenever possible, the later-in-time rule kicks in if this is not possible. Of course, these are interpretive canons that a court uses to determine which statute to consider as binding law. However, for a president to faithfully execute the law, he must also make this kind of determination and should therefore rely on these interpretive canons when they prove helpful. Significantly, though, the president is not left with these vague rules of thumb because he has a more specific duty grounded in the Constitution and confirmed by statute.

Based on these constitutional and statutory principles, the president has a duty to give effect to the appropriations bills passed by Congress and ignore the debt ceiling. The first argument is constitutional: rooted in the text, structure, and history of the Constitution is a presidential duty to refuse enforcement of unconstitutional laws. This argument is bolstered by the existence of inconsistent legislative demands. That is, the president likely does have an independent duty to always disregard unconstitutional statutes, but he undoubtedly has a duty to disregard the unconstitutional statute when determining which of two inconsistent statutes to enforce. The second argument is statutory: confronted with excessive executive control over appropriated funds, Congress passed the Impoundment Control Act of 1974 (ICA) to force the president to execute appropriations bills by taking away his unilateral power of impoundment (i.e. refusal to spend the government past the current debt ceiling.”). The Congressional Research Service notes that “[i]f the U.S. Treasury were precluded from borrowing due to a binding debt limit in times when federal outlays outpaced revenues, the government would no longer meet all of its legal obligations in a timely manner.” Austin & Levit, supra note 7, at 3. In other words, unlike the ability to raise taxes or print money at will, Congress has given Treasury authority to exclusively borrow money in the case of a budget deficit. The objection that the debt limit is not the problem is therefore unpersuasive.

224 See, e.g., Morton v. Mancari, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”).
appropriated funds). These two arguments demonstrate that the president must, when confronted with congressional actions that create substantial doubt about the validity of the debt, ignore the debt limit and continue to fund the government’s legally authorized obligations.

A. The Constitutional Argument: Executive Treatment of Unconstitutional Statutes

Occasionally, the constitutional judgment between the legislature and the executive will differ. In these situations, is the president required to acquiesce in Congress’s interpretation or can he maintain his own? Must he enforce a law he determines is unconstitutional unless and until the Supreme Court declares it so? For the purposes of this Article, there are two primary ways to conceptualize the president’s authority to ignore statutes he deems unconstitutional: (1) he can disregard statutes at his discretion when he decides they are unconstitutional, or (2) he must as a constitutional duty disregard statutes that are in his judgment unconstitutional. There are, of course, many commentators who maintain that there is “a strong argument from the text of the Constitution and the intent of the Framers that a President may never refuse to enforce a law on the ground that it is unconstitutional.” This Section analyzes the second theory—the Duty Theory—and argues that, objections notwithstanding, it has considerable textual and historical merit, and is more defensible than both the first theory and a complete ban on executive disregard. This Section further argues that the Duty Theory would require the president, under some circumstances, to ignore the debt ceiling.

226 Frank Easterbrook, Presidential Review, 40 CASE W. RES. 905, 911 (arguing that the executive branch can—and should—have its own constitutional interpretation).


228 Christopher N. May, Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative, 21 HASTINGS CONST. L.Q. 865, 986–87 (1994) (emphasis added); see also Eugene Gressman, Take Care, Mr. President, 64 N.C. L. REV. 381, 381 (1986) (“In our constitutional system of government, such a refusal by the Executive to ‘take care that the Laws by faithfully executed’ cannot and must not be tolerated.”).
The justification for the Duty Theory of executive disregard\textsuperscript{229} stems primarily from the text, structure, and history of the Constitution.\textsuperscript{230} A full defense of this theory is beyond the scope of this Article,\textsuperscript{231} but this Section seeks to show that if the Duty Theory has the textual and historical merit suggested here, then the president must sometimes ignore the debt ceiling.

As a threshold matter, because the text places limits on executive power, “the absence of a duty to enforce unconstitutional statutes and the lack of any constitutional power to enforce such laws, [means that] the President is powerless to enforce unconstitutional statutes.”\textsuperscript{232} The president cannot enforce an unconstitutional law because an unconstitutional law is no law at all.\textsuperscript{233} The Supreme Court has repeatedly declared that an unconstitutional law “is, in legal contemplation, as inoperative as though it had never been passed.”\textsuperscript{234} A president is therefore neither required, nor empowered, to enforce an unconstitutional law.\textsuperscript{235} If the law is

\begin{itemize}
\item \textsuperscript{229} This Article use the terms “executive disregard,” “executive review,” and “presidential review” interchangeably to refer to the presidents duty to independently analyze the constitutionality of statutes and refuse enforcement when he deems them unconstitutional (with some caveats).
\item \textsuperscript{230} Prakash, supra note 227, at 1629 (arguing that “a consideration of constitutional text and structure indicates that Presidents have a generic duty to disregard unconstitutional statutes”).
\item \textsuperscript{231} The debate is far too complicated and contentious, with eminent scholars on both sides, for it to be fully considered here. There are also scholars who reject both sides. See, e.g., Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, LAW & CONTEMP. PROBS. 7, 22 (2000) (taking a middle approach and declaring that “[n]either of the approaches most prevalent in the academic literature adequately describes the Presidents constitutional obligation when confronted with a constitutionally questionable statute”).
\item \textsuperscript{232} Prakash, supra note 227, at 1629; see also id. (“The President is powerless to enforce unconstitutional statutes in the same way that he is constitutionally incapable of enforcing the statutes of other sovereigns.”).
\item \textsuperscript{233} See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (“[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.”); Norton v. Shelby County, 118 U.S. 425, 442 (1886) (recognizing that unconstitutional laws are null and void ab initio).
\item \textsuperscript{234} Norton, 118 U.S. at 442.
\item \textsuperscript{235} See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18 (1992) (“Thus, the Take Care Clause does not compel the President to execute unconstitutional statutes.
\end{itemize}
unconstitutional from the start, the president does not have to wait for the Supreme Court to declare it so before he can refuse enforcement.

Moreover, the presidential oath prescribed in Article II requires the president to “preserve, protect, and defend the Constitution”—an oath impossible to uphold if the president must enforce statutes he believes are unconstitutional. Even assuming the president must defer to the Court’s interpretation of the Constitution, there is no textual or structural argument that the president must defer to Congress’s interpretation of a statute. The mere fact of congressional passage is neither dispositive nor prima facie evidence of constitutionality.

The greatest textual support comes from the requirement that the president “take care that the laws be faithfully executed.” Because the Supremacy Clause treats the Constitution as supreme Law, the president must always choose the Constitution over unconstitutional statutes in his faithful execution. This argument is buttressed by the insight that, even when the president is simply executing a statute or judicial decree, he must make interpretive choices—many of which touch on core constitutional issues; if there are two plausible ways to read a statute and one seems to the president unconstitutional, he ought to adopt the other. In this sense,

An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all.”).

236 U.S. CONST. art. II, § 1, cl. 7.
238 For the argument that the president does have to defer to the Supreme Court’s constitutional decisions, see infra Part III.A.2.
239 U.S. CONST. art. II, § 3, cl. 4; see Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 IOWA L. REV. 1267, 1280 (1996) (noting that presidential power under the Take Care Clause “is the context in which the debate over executive constitutional review . . . has primarily taken place”).
240 U.S. CONST. art. VI, cl. 2.
241 Prakash, supra note 227, at 1630.
242 Easterbrook, supra note 226, at 914; David S. Strauss, Presidential Interpretation of the Constitution, 15 CARDOZO L. REV. 113, 114 (1993) (“So, for example, whenever a federal law enforcement officer decides whether there is probable cause for an arrest, the executive branch has interpreted the Fourth Amendment.”).
243 A recent example is illustrative. The federal wire fraud statute prohibits any “scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (2006). The statute could plausibly be read to include bribes, kickbacks and undisclosed self-dealing. In Skilling v. United
“[t]he need to interpret the Constitution as a source of positive law, and to prefer the Constitution to any other source of law with which it may conflict, is as much a part of ‘the executive Power’ vested in the President as it is part of ‘the judicial Power’ vested in the federal courts.”

In Myers v. United States, the Supreme Court provided implicit support for the notion that the Take Care clause allows the president to act on his own independent constitutional judgment. An Attorney General opinion explaining Myers confidently announced:

Myers holds that the President’s constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

Opponents of executive disregard largely rest their objections on the Take Care Clause as well. These arguments rely on the unique historical circumstances surrounding the framing and ratification of the Constitution. The colonies were extremely wary of strong executive power and acted against the backdrop of the King’s asserted authority to dispense or suspend duly enacted laws when creating the Executive Branch. Certainly the

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244 Lawson & Moore, supra note 239, at 1287; see also Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217, 261 (1994) (arguing that the President must enforce laws “in accordance with a proper legal interpretation of those laws and applicable constitutional principles”).

245 272 U.S. 52 (1926).


247 See generally, e.g., Gressman, supra note 228.

248 See, e.g., May, supra note 228, at 873 (emphasizing that “the [Take Care] clause acquires a richer and more specific meaning if we view it against the historical backdrop with which the Framers were familiar—the
Framers would not, after the recent and numerous abuses of the Crown, afford the U.S. president power to refuse enforcement. Indeed, this was the whole point of the Take Care Clause—to prohibit the American president from doing what the British King did. This is a strong, perhaps fatal, objection to discretionary theories of executive disregard. These theories enhance the power of the executive and are, in that sense, precisely the kind of aggrandizement the Framers were concerned with. One of the virtues of the Duty Theory, on the other hand, is that it restricts rather than expands the power of the Executive. The president cannot disregard statutes because he thinks them unwise or politically problematic; he can only disregard them when he determines them to be unconstitutional. Far from giving the president an “absolute veto,” then, the Constitution places on him a burden of determining the constitutionality of statutes independently of Congress and refusing enforcement only when the legislation violates the Constitution.

But, the critic continues, how can one be sure he will not mask his policy preferences as constitutional judgments? The simple answer is that one cannot. But, as Judge Frank Easterbook notes, “[i]f misuse of power in the name of the Constitution is enough to condemn it, then we shall have to abandon judicial review: Lochner and Plessy reigned longer than Brown.” The argument from abuse of duty is no stronger in principle for presidents than it is for unelected life-tenured judges. The fact that a president might abuse his duty to refuse enforcement only when the statute is unconstitutional does not mean that the duty does not exist.

See Arthur S. Miller, The President and Faithful Execution of the Laws, 40 VAND. L. REV. 389, 397 (1987) (arguing that the power of executive disregard would be tantamount to giving the president an absolute line item veto).

But see John T. Pierpont, Jr., Note, Checking Executive Disregard, 84 ST. JOHN’S L. REV. 329, 361 n.4 (2010) (erroneously referring to the Duty Theory as “an unlimited power of executive disregard” (emphasis added)).

See May, supra note 228, at 986 (stating that “a loyal and resourceful Justice Department can create an array of options for executive noncompliance, to be exercised by the President as he sees fit”).

Easterbrook, supra note 226, at 11.

Id. (“Judges have given themselves immunity from damages under both Constitution and statutes, while deciding that members of other branches must pay. Judges also make decisions that promote their own conceptions of proper government, a form of self-interested behavior.”).
Constitutional structure also supports the Duty Theory. First, the strong checks and balances framework of the Constitution argues in favor of an added layer of protection against the implementation of unconstitutional laws.\textsuperscript{254} “The same considerations that made the founding generation leery . . . of placing all legislative powers in the hands of one institution also counsel in favor of dividing the power of interpretation among many different actors.”\textsuperscript{255} Opponents of executive disregard often argue that chaos will result if multiple competing interpretations are given to the same piece of legislation. Though this is possible, in a system designed to provide multiple checks upon the exercise of power, it seems fair to say that the Founders would be more comfortable with the “chaotic” possibility of under-enforcement of constitutional statutes than the predictable stability of over-enforcement of unconstitutional ones.\textsuperscript{256} It is a greater threat to liberty to require the president to enforce all congressional acts—including those that are later declared unconstitutional by the Supreme Court—than to run the risk of having constitutionally permissible statutes go unenforced for a short number of years.

Second, the structural arguments justifying judicial review—“the written nature of the Constitution, the notion that Congress cannot change the Constitution by statute, and the idea that Congress cannot be the sole judge of the limits of its powers”—also justify a presidential duty to disregard unconstitutional statutes.\textsuperscript{257} Marbury further asserted that the judiciary had the “province and duty” to decide constitutional questions

\textsuperscript{254} Easterbrook, supra note 226, at 929 (“We live in a constitutional republic in which many actors hold overlapping powers. Powers are not so much separated as duplicated and distributed, so that concurrent approval is necessary to action. This is not an efficient system; it is designed to frustrate all claims of power. Presidential review fits neatly in such a framework.”); Prakash, supra note 227, at 1640.

\textsuperscript{255} Lawson & Moore, supra note 239, at 1329–30; see also Paulsen, supra note 244, at 222 (“As a matter of first principles of constitutional structure and the political theory underlying that structure, we should be strongly disinclined to find the meta-power to interpret the Constitution (and federal laws and treaties) centralized in a single institution.”)

\textsuperscript{256} Lawson & Moore, supra note 239, at 1329 (arguing that chaos and conflict are part of the separation of powers framework imbedded in the Constitution).

\textsuperscript{257} Prakash, supra note 227, at 1640; see also Paulsen, supra note 244, at 224 (arguing that “the structural argument for executive review exactly parallels the argument for judicial review set forth in Marbury v. Madison and, before that, in The Federalist No. 78.”).
because it was applying the law to particular facts; likewise the president, when executing the law, must apply law to facts and therefore has a corresponding duty to decide constitutional questions.\textsuperscript{258}

The historical evidence also supports the Duty Theory. Indeed, a monumental force in the framing of the Constitution, James Wilson of Pennsylvania, argued that just as judges must declare unconstitutional laws void, “[i]n the same manner, the President of the United States could . . . refuse to carry into effect an act that violates the Constitution.”\textsuperscript{259} One of the earliest examples of this disregard is President Jefferson’s refusal to enforce the Sedition Act on grounds of unconstitutionality.\textsuperscript{260} He used more than his pardon power in this endeavor: he actively “directed the Attorney General and U.S. Attorneys to discontinue prosecutions under the Sedition Act”—effectively nullifying the statute during his tenure.\textsuperscript{261} President Jackson likewise argued that the president had the right of independent constitutional interpretation.\textsuperscript{262} Further, the Office of Legal Counsel has noted that Attorney General “[o]pinions dating to at least 1860 assert the President’s authority to decline to effectuate enactments that the President views as unconstitutional.”\textsuperscript{263} The historical record is replete with examples of presidents claiming, and exercising, the authority to disregard statutes that they determine are unconstitutional.\textsuperscript{264}

\textsuperscript{258} Paulsen, \textit{supra} note 244, at 243 (noting that \textit{Marbury}’s justification for judicial review carries over to presidential review).

\textsuperscript{259} \textit{The Documentary History of the Ratification of the Constitution} 450–51 (Merrill Jensen ed., 1976) (statement of Dec. 1, 1787); see also \textit{The Works of James Wilson} 168 (Robert Green McCloskey ed., 1967) (“[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature. . . . [W]hen a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge.”).

\textsuperscript{260} Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted \textit{in The Writings of Thomas Jefferson} 43–44 (Andrew A. Lipscomb ed., 1905).

\textsuperscript{261} Paulsen, \textit{supra} note 244, at 268.

\textsuperscript{262} Andrew Jackson, \textit{Veto Message} (July 10, 1832), reprinted \textit{in A Compilation of the Messages and Papers of the Presidents} 1139 (James D. Richardson, 2d ed. 1911).


\textsuperscript{264} Curtis A. Bradley & Eric A. Posner, \textit{Presidential Signing Statements and Executive Power}, 23 \textit{Const. Comment.} 307, 335 (2006); see also Paulsen,
The text, structure, and history of the Constitution all indicate that the president has an independent duty to disregard unconstitutional statutes. Importantly, however, our constitutional scheme has a unique and important role for the Supreme Court. The version of the Duty Theory defended here does not require the president to refuse to enforce the Court’s interpretation of the Constitution if it conflicts with his; it only requires him to refuse to enforce Congress’s interpretation when it conflicts with his. That is, the U.S. constitutional system has evolved around the fundamental proposition that the Court is the final arbiter of constitutional disputes. To say that the Court is the final arbiter, however, is not to say that it is the sole arbiter.\(^\text{265}\) When two branches with inferior authority to interpret the Constitution come into conflict, each is entitled to maintain its own view, and act accordingly. Thus the president must, consistent with his oath and the Take Care Clause, disregard statutes that are in his judgment unconstitutional—unless the Supreme Court declares otherwise.\(^\text{266}\)

This Section assumed (without arguing) that the text, structure, and history of the Constitution justify some strong form of judicial review—though this, of course, is not incontestable.\(^\text{267}\) This Section argued, however, that these factors also justify presidential review. It further argued for a system of qualified judicial supremacy in which the president has independent interpretive authority that is nonetheless inferior to that of the Court. While most departmentalist theories advocate for co-equal

\(^\text{supra}\) note 244, at 268 (“The practice of nonexecution of assertedly unlawful statutes has a long history.”).

\(^\text{265}\) Tyler, \(^\text{supra}\) note 242, at 2220–21 (arguing that “the Framers intended to create a system that honored departmentalism, but that also filtered departmentalism through an informal hierarchy of multilayered constitutional review. This informal hierarchy best reflected a departmental system . . . in which each branch of the national government engages in constitutional review, but in which the Supreme Court provides the most telling assessments of constitutionality”).

\(^\text{266}\) Powell v. McCormack, 395 U.S. 486, 549 (1969) (“[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.” (emphasis added)).

interpretive power between the president and the Court,\textsuperscript{268} this is not a necessary component of such a theory.\textsuperscript{269}

\textit{B. The Statutory Argument: Impoundment Control and Executive Discretion}

With bipartisan support, Congress enacted the Impoundment Control Act (“ICA”) in 1974. It was designed “to tighten congressional control over presidential impoundments,”\textsuperscript{270} which occur “whenever the President spends less than Congress appropriates for a given period.”\textsuperscript{271} These impoundments can occur when the president withholds funds temporarily (“budget deferrals”) or refuses to spend appropriated funds permanently (“budget rescissions”).\textsuperscript{272} With the ICA, Congress prohibited

\footnotesize
\begin{enumerate}
\item Paulsen, \textit{supra} note 244, at 221 (“The Supreme Court’s interpretations of treaties, federal statutes, or the Constitution do not bind the President any more than the President’s or Congress’s interpretations bind the courts.”); Strauss, \textit{supra} note 242, at 120 (arguing that “the executive should have at least as much autonomy in dealing with Supreme Court precedents as the Court itself has. At the very least, the executive branch should be free to ‘overrule’ and limit Supreme Court precedents in ways that the lower courts may not”).
\item See generally, \textit{e.g.}, Tyler, \textit{supra} note 242 (arguing that the Court’s view should be the most persuasive, but not necessarily binding on the Executive).
\item Louis Fisher, \textit{Funds Impounded by the President: The Constitutional Issue}, 38 GEO. WASH. L. REV. 124, 124 (1969); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 61 (2005) (defining impoundment as “[a]ny action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority”).
\item U.S. GOV’T ACCOUNTABILITY OFFICE, IMPoundMENT CONTROL ACT, \textit{supra} note 270, at 1.
\end{enumerate}
the president from either unilaterally deferring or unilaterally rescinding budget authority.\footnote{273} It defines a “deferral of budget authority” as

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.\footnote{274}

“Rescission of budget authority” takes place when

[T]he President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year.\footnote{275}

It is clear that Congress was concerned with restricting the discretion of the president when it came to spending appropriated funds. The ICA does, however, allow the president to send a “special message” to Congress requesting rescission if he desires to permanently withhold funds.\footnote{276} Importantly, though, Congress retains overall control by requiring that funds “shall be made available for obligation” unless Congress acts to rescind the funds requested by the president within forty-five days.\footnote{277} After conducting a detailed examination of all rescissions since 1974, the Government Accountability Office concluded that “relative to the entire federal budget, . . . rescissions have not been a major tool to reduce spending” because rescissions can only be requested for discretionary

\footnote{273} 2 U.S.C. § 683–84 (2006) (requiring the president to send requests to Congress about proposed deferrals or rescissions.

\footnote{274} 2 U.S.C. § 682(1) (2006). Moreover, deferrals could only be made for three reasons: “(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law.” 2 U.S.C. § 684(b) (2006).


\footnote{277} 2 U.S.C. § 683(b) (2006); U.S. Gov’t Accountability Office, Impoundment Control Act, supra note 270, at 8 (“[B]udget authority is not canceled unless a law rescinding existing budget authority is enacted in accordance with Article I, section 7 of the U.S. Constitution.”).
spending, which “represents less than 40 percent of the budget.” Of the hundreds of rescission requests proposed by the executive branch from 1974 to 2009, only one-third of the budget authority proposed for rescission was actually rescinded by Congress. The ICA was thus more a check on executive discretion than an effective curb on government spending.

The background purpose and context of the Act support the argument that the president must sometimes ignore the debt ceiling. The ICA was passed in response to the staggering amount of appropriated funds that President Nixon was impounding. Nixon argued that “[t]he constitutional right of the President of the United States to impound funds, and that is not to spend money, when the spending of money would mean either increasing prices or increasing taxes for all the people—that right is absolutely clear.” To be sure, prior presidents had exercised the questionable impoundment authority that “has long been regarded as a significant threat to Congress’ constitutional appropriations power.” But Nixon pushed Congress over the edge and forced it to statutorily circumscribe executive authority to impound appropriated funds. The ICA firmly “established that Congress can require the President to spend funds for domestic programs.” In fact ICA’s anti-impoundment command

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278 U.S. Gov’t Accountability Office, Impoundment Control Act, supra note 270, at 7.
279 Id. at 8.
280 See generally Wm. Bradford Middlekauff, Note, Twisting the President’s Arm: The Impoundment Control Act As A Tool for Enforcing the Principle of Appropriation Expenditure, 100 Yale L.J. 209, 228 (1990).
284 Id.; Middlekauff, supra note 280, at 228 (“From the presidency of Thomas Jefferson until the Nixon Administration, presidential impoundments were generally resolved through political channels.”).
has been enshrined as a fundamental “principle” of the federal budget process by some commentators.\textsuperscript{286}

The danger that the ICA was aimed at—excessive executive discretion in the distribution of appropriated funds—implies that its rationale would apply with equal force when funds are short. That is, rather than enable the president to decide which appropriated funds he is going to spend when the debt limit stops him from spending all of them, it appears that Congress would rather have the president spend all of them and ignore the debt ceiling. If it were otherwise, the president would be enabled to enact his own policy preferences at the expense of Congress—especially given the size of recent budget deficits. Ignoring the debt limit, on the other hand, would give the president no discretion; he could only borrow the amount necessary to fund the obligations that Congress previously authorized and appropriated funds for.

The argument from congressional intent is certainly not unquestionable, but it lends support to the independent argument that Congress’s clear demands in the ICA require the president to ignore the debt ceiling. This Article is not arguing that, given the choice between having the president ignore the debt ceiling and impound funds at his discretion, any given Congress would choose the former. However, the justifications behind the ICA are more robust than those behind the debt ceiling and the plain language of the ICA seems to demand it. And, though the president might be able to request a rescission of budget authority when the available borrowing authority is not sufficient to enable him to spend the full amount of appropriated funds, the success rate of these requests makes the outlook bleak for this option.\textsuperscript{287} If—and given the statistics, when—Congress refuses to rescind many of the funds that the president requests, he will be forced to either ignore the appropriations bill or ignore the debt limit. The ICA urges him to do the latter.

One objection to the foregoing argument might question whether the incompatibility is really between the debt ceiling and the ICA itself, not between the debt ceiling and prior appropriations bills. Why, that is, should the president disregard the debt ceiling and not the ICA? This objection misconstrues the nature of both the debt limit and the ICA. In the absence of a prior appropriations bill there would be absolutely no conflict between the ICA and the debt ceiling—the president’s choice is clearly not between these two “conflicting” statutes. The role played by the ICA is an arbiter

\textsuperscript{286} Middlekauff, \textit{supra} note 280, at 210 (“In the language of the budget, this principle prohibits the executive branch from impounding funds unless authorized to do so by Congress.”).

\textsuperscript{287} See \textit{supra} notes 278 & 279 and accompanying text.
between two actually competing statutes. It is a rule of decision that the president can rely on when deciding whether to execute the appropriations bill or the debt ceiling. These latter two are in clear contrast. The appropriations bill says, for example, spend $100 this year even though the government only brought in $70 in revenue. And the debt limit says, for example, borrow no more than $20 this year. Under this scenario, either the president spends the $90 he is able to and executes the debt ceiling statute or he spends the $100 he must and executes the appropriations bill. He simply cannot do both. The ICA merely tells the president which law to execute: the appropriations bill.

In sum, the president is required to ignore the debt ceiling by virtue of the statutory requirements that were “designed specifically to provide Congress with a means for controlling presidential deferrals [and rescissions].”\(^{288}\) Impoundment is not a solution to the conflict between appropriation bills and the debt limit. Rather, the ICA requires the president to ignore the debt limit and continue borrowing to spend appropriated funds.

**CONCLUSION**

If the foregoing accounts of the Public Debt Clause and presidential power under the Constitution are correct, then the president must refuse to enforce, that is, refuse “to carry into effect,”\(^{289}\) the limitations of the debt limit when doing so would place the validity of the public debt in substantial doubt. Because the debt limit will cause the debt to be placed in substantial doubt in precisely the circumstances in which it will conflict with prior appropriations bills, the two arguments for presidential power are related. Both the ICA and the Constitution act as guidelines that enable the president to make the choice between the appropriations bill and the debt limit. The ICA requires the president to spend the funds Congress appropriates. The Constitution requires the president to disregard unconstitutional statutes. This authority to ignore the debt limit is not a grandiose power, but a solemn duty, a restriction on the ability of the president to allow Congress to violate the Constitution by refusing to give effect to its unconstitutional legislation. If the Supreme Court ever rules on the constitutionality of the debt limit as applied to certain circumstances, and the concomitant brinksmanship it invites, the president would be bound by that decision. Given the likelihood that the Supreme Court will never decide the question, however, the president must “protect, preserve, and

\(^{288}\) City of New Haven, Conn. v. U.S., 809 F.2d 900, 909 (D.C. Cir. 1987).

\(^{289}\) Lawson & Moore, *supra* note 239, at 1284.
defend the Constitution” by “faithfully execut[ing]” the appropriations bill instead of the debt limit.

Every indication suggests that the increasing vehemence of debt limit increases will continue indefinitely. Some of these debates will be contentious, hostile, and yet constitutional. Others, when they create substantial doubt about the validity of the debt, will be unconstitutional. Directed by well-defined constitutional and statutory guideposts, the president must fulfill his duty to disregard the debt limit in those instances when congressional obstructionism rises to such a level as to create substantial doubt about the continuing validity of the public debt.