

# THE BEST CHOICE OUT OF POOR OPTIONS: WHAT THE GOVERNMENT SHOULD DO (OR NOT DO) IF CONGRESS FAILS TO RAISE THE DEBT CEILING

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## INTRODUCTION

On August 2, 2011, Congress passed the 2011 Budget Control Act<sup>1</sup> raising the debt ceiling by \$2.4 trillion, increasing it from \$14.294<sup>2</sup> trillion to \$16.694 trillion.<sup>3</sup> This increase should postpone another debt ceiling crisis until early 2013.<sup>4</sup> Prior to this passage, political tension was inflamed, and the ability for members of the U.S. Congress to compromise was seriously questioned.<sup>5</sup> If the conduct of politicians does not improve in the next two years, the United States could again face another political battle over the debt ceiling; based on the most recent negotiations, the likelihood that negotiations will fail is relatively high.<sup>6</sup> If the debt ceiling is not raised, a myriad of questions arise: *What will happen? What should be done? What can be done? Who should act? Should anything be done?*

During the 2011 debt crisis, economic and legal scholars discussed a mechanism<sup>7</sup> that received considerable debate: a rarely used, almost forgotten,

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1. Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101, 301, 302, 401, 125 Stat. 240 (codified in scattered sections of the U.S. Code) (debt ceiling will increase incrementally).

2. 31 U.S.C. § 3101 (2011). This statute, prior to the most recent increase, set the debt limit at \$14.294 trillion in February 2010.

3. §§ 101, 301, 302, 401, 125 Stat. 240 (debt ceiling will increase incrementally).

4. *Federal Debt Ceiling (National Debt)*, N.Y. TIMES, updated Dec. 26, 2012, [http://topics.nytimes.com/topics/reference/timestopics/subjects/n/national\\_debt\\_us/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/n/national_debt_us/index.html).

5. Jay Newton-Small, *Obama vs. Cantor: Tempers Flare as Debt-Ceiling Negotiations Take a Dramatic Turn*, TIME (July 14, 2011), <http://swampland.time.com/2011/07/14/obama-vs-cantor-tempers-flare-as-debt-ceiling-negotiations-take-a-dramatic-turn/>.

6. Stephen C. Webster, *McConnell: Republicans Will Block Debt Ceiling Again in 2013*, RAW REPLAY (Aug. 2, 2011), <http://www.rawstory.com/rawreplay/2011/08/mcconnell-republicans-will-block-debt-ceiling-again-in-2013/> (quoting Senator McConnell, "I expect the next president, whoever that is, is going to be asking us to raise the debt ceiling again in 2013, so we'll be doing it all over.").

7. Scholars have debated other mechanisms, such as an argument that Congress implicitly raised the debt ceiling when it passed the 2011 appropriations acts because the debt limit statute and appropriations act are "irreconcilably conflicting," and the appropriations act was last in time. See TODD B. TATELMAN & KENNETH R. THOMAS, CONG. DISTRIBUTION MEMORANDUM FROM THE CONG. RESEARCH SERV., CONSTITUTIONAL AND LEGAL ISSUES RELATED TO THE DEBT LIMIT 13-14

constitutional principle, Section Four of the Fourteenth Amendment of the U.S. Constitution, referred to as the Public Debt Clause (hereinafter “Public Debt Clause” or “Section Four”).<sup>8</sup> The Public Debt Clause 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.”<sup>9</sup> Some scholars and journalists argued that the Public Debt Clause was a tool the President could use to unilaterally raise the debt ceiling if Congress refused to raise it by the deadline imposed by the U.S. Treasury.<sup>10</sup> Before this argument can be evaluated, the Public Debt Clause must be interpreted so that an understanding can be reached as to its meaning and effect, if any, on the debt ceiling debate. Once the clause is properly interpreted, solutions to the potential problems created by failing to raise the debt ceiling can then be discussed.

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(2011) (quoting *Watt v. Alaska*, 451 U.S. 259, 266 (1981)), available at [http://op.bna.com/der.nsf/id/csaz-8vetcw/\\$File/CRS%20Debt%20Limit%20Legal%20Issue%20CD%20Memo.pdf](http://op.bna.com/der.nsf/id/csaz-8vetcw/$File/CRS%20Debt%20Limit%20Legal%20Issue%20CD%20Memo.pdf) (referring to the debt limit statute passed in 2011, Pub. L. No. 111-139, and the Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, 125 Stat. 38.). Thus, the appropriations act supersedes the debt limit statute, according to canons of statutory construction. *Id.* Scholars have also argued that the debt limit statute itself is unconstitutional. See Neil H. Buchanan, *The Debt Ceiling Law Is Unconstitutional*, JUSTIA (July 11, 2011), <http://verdict.justia.com/2011/07/11/the-debt-ceiling-law-is-unconstitutional>. *But see* Laurence H. Tribe, Op-Ed., *A Ceiling We Can't Wish Away*, N.Y. TIMES, July 7, 2011, at A23, available at [http://www.nytimes.com/2011/07/08/opinion/08tribe.html?\\_r=2](http://www.nytimes.com/2011/07/08/opinion/08tribe.html?_r=2) (Professor Buchanan argues that the debt limit statute is unconstitutional, and Professor Tribe suggests that such an argument is unpersuasive). A third mechanism proposes using a potential violation of the Public Debt Clause to trigger a Fiscal Commitments Amendment. See Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 567-81 (1997). Two other suggestions include the President “unilaterally rais[ing] taxes, thus usurping congressional power to tax; or unilaterally cut[ting] spending, thus usurping congressional power to make spending decisions and arguably violating Section [Four] of the Fourteenth Amendment as well.” Paul L. Caron ed., *Buchanan Presents Lessons From the 2011 Debt Ceiling Standoff Today at Duke*, TAXPROF BLOG (Jan. 25, 2012), [http://taxprof.typepad.com/taxprof\\_blog/2012/01/buchanan-presents-lessons.html](http://taxprof.typepad.com/taxprof_blog/2012/01/buchanan-presents-lessons.html).

8. U.S. CONST. amend. XIV, § 4; see also Abramowicz, *supra* note 7, at 561 (referring to Section Four of the Fourteenth Amendment as the Public Debt Clause).

9. U.S. CONST. amend. XIV, § 4.

10. See, e.g., Garrett Epps, *The Speech Obama Could Give: ‘The Constitution Forbids Default,’* ATLANTIC (Apr. 28, 2011, 3:56 PM), <http://www.theatlantic.com/politics/archive/2011/04/the-speech-obama-could-give-the-constitution-forbids-default/237977/>; Zachary A. Goldfarb, *Obama, Democrats Not Ready to Play 14th Amendment Card with Debt Ceiling*, WASH. POST, July 6, 2011, [http://www.washingtonpost.com/business/economy/obama-democrats-not-ready-to-play-14th-amendment-card-with-debt-ceiling/2011/07/06/gIQAVU1O1H\\_story.html](http://www.washingtonpost.com/business/economy/obama-democrats-not-ready-to-play-14th-amendment-card-with-debt-ceiling/2011/07/06/gIQAVU1O1H_story.html); MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., R41633, REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS 1 (2011), available at <http://www.fas.org/sgp/crs/misc/R41633.pdf> (The Treasury will exercise its authority “to pay federal obligations to delay the date by which the current debt limit would be reached.”).

This Note analyzes and interprets the scope of the Public Debt Clause in order to identify and discuss potential remedies regarding Congress's failure to raise the debt ceiling should the crisis arise again in 2013 or at another later date.<sup>11</sup> Ultimately, this Note will advocate for one remedy. Regardless of what the Public Debt Clause actually means, none of the solutions that result from Congress failing to raise the debt ceiling are appealing. In fact, most raise considerable legal, economic, and policy issues. This discussion aspires to make clear that the real solution to a debt ceiling crisis is for politicians to realize that they must compromise more willingly to avoid subjecting the United States to a host of bad options. Part I of this Note discusses the history of Section Four. Part II discusses potential interpretations of Section Four. Part III discusses the advantages and disadvantages of potential remedies to avoid a constitutional violation of Section Four. This Note proposes that the Public Debt Clause should be interpreted to prohibit repudiating or defaulting on debt owed to bondholders. To avoid violating the Public Debt Clause, this Note advocates that the appropriate remedy is not that President unilaterally raise the debt ceiling but instead, that Congress—or if Congress fails—the President must direct the Treasury to pay debt owed to bondholders first to avoid a constitutional violation.

#### I. HISTORY OF THE PUBLIC DEBT CLAUSE

Although the Public Debt Clause is considered to be an obscure clause, it was of utmost importance when it was written and ratified.<sup>12</sup> Yet, since the Civil War/Reconstruction Era, Section Four has rarely been invoked. One scholar went so far as to call the clause “dead.”<sup>13</sup> In 2011, the Public Debt Clause came to life in the media and political world.<sup>14</sup> An essentially unknown constitutional provision became hotly debated as to how it applied to the debt ceiling crisis.

In 1866, following the Civil War, Congress passed the Public Debt Clause as

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11. The scope of this topic could lead to many more remedies and ideas than suggested in this Note, and the discussion of these issues could go in innumerable directions, but this Note is confined to some of the more publicly debated issues. For additional ideas, see Abramowicz, *supra* note 7, and Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* 41-43 (Geo. Wash. Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 575, 2011) [hereinafter Abramowicz, *Train Wrecks*], available at <http://ssrn.com/abstract=1874746> (discussing “legislation forcing deficit reduction”).

12. Joseph B. James, author of *The Ratification of the Fourteenth Amendment*, believed the Public Debt Clause “had more influence [in assuring the [Fourteenth] Amendment's passage] than many have assumed.” The September 18, 1866 publication of the *New York Herald* described the Public Debt Clause as “the great secret of the strength of this constitutional amendment.” See Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 316-17 nn.143-44 (2006).

13. Abramowicz, *supra* note 7, at 566, 611.

14. See generally TATELMAN & THOMAS, *supra* note 7; Buchanan, *supra* note 7; Tribe *supra* note 7.

part of the Fourteenth Amendment.<sup>15</sup> With tensions still high, Northerners feared that Southerners would refuse to pay debts incurred during the Civil War, including money owed to soldiers and their families.<sup>16</sup> They also feared that if Southerners gained control of Congress in the future, they might repudiate those debts.<sup>17</sup> Thus, the Public Debt Clause was born. Three versions of the clause were introduced and the accompanying commentary from members of Congress revealed their fears.<sup>18</sup>

Limited judicial history provides another source of interpretation and history on the Public Debt Clause. The only Supreme Court case that interpreted the Public Debt Clause is *Perry v. United States*.<sup>19</sup> John Perry sought to redeem a bond purchased from the government, which he requested be redeemed in gold.<sup>20</sup> When he first purchased the bond, the terms of the bond provided he could redeem it in gold.<sup>21</sup> Between Perry's purchase and his effort to redeem the bond, Congress passed a Joint Resolution limiting bondholders' ability to choose gold as the medium of redemption, instead offering "10,000 dollars in legal tender currency."<sup>22</sup> Unhappy with this offer, Perry brought suit to receive his payment in gold.<sup>23</sup> The Court found that the Joint Resolution "went beyond the congressional power" but also found that Perry had failed to "show a cause of action for actual damages."<sup>24</sup> The Joint Resolution went beyond congressional power because

[t]he Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government . . . . The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations.<sup>25</sup>

In support of its finding that Congress exceeded its power, the Court said that the Public Debt Clause did not allow the action Congress had taken and that it

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15. CONG. GLOBE, 39TH CONG., 1ST SESS. 3040 (1866) (Senator Doolittle describes the proposed Public Debt Clause as "having reference to the public debt and the rebel debt.").

16. *Id.* at 2768; *see also* TATELMAN & THOMAS, *supra* note 7, at 2-3; Aynes, *supra* note 12, at 316-18; Goldfarb, *supra* note 10.

17. Epps, *supra* note 10.

18. For the text of these versions, see *infra* text accompanying notes 43-45.

19. 294 U.S. 330 (1935); *see* Tribe, *supra* note 7 ("The Supreme Court has addressed the public debt clause only once, in 1935, in the case of [*Perry v. United States*].").

20. *Perry*, 294 U.S. at 347.

21. *Id.* at 346-47.

22. *Id.*

23. *Id.* at 347, 355.

24. *Id.* at 354, 358.

25. *Id.* at 353.

protected against repudiating debts owed to bondholders.<sup>26</sup> However, the Court's discussion of Section Four is merely dicta, and *Perry* was a plurality decision.<sup>27</sup> Although it is the only relevant judicial decision<sup>28</sup> that interprets this constitutional provision, *Perry* does not provide an in-depth analysis of that interpretation upon which the legal field can solely rely to understand the scope of the Public Debt Clause.

At most, the legislative history and judicial history of Section Four provide the following conclusions as to what this clause means: (1) Civil War debt could not be repudiated, and (2) Section Four is not limited to only Civil War debts, which likely means that the government cannot repudiate debt owed to bondholders. However, these conclusions are inadequate to answer all questions about what the Public Debt Clause means, particularly as applied to a situation in which Congress fails to raise the debt ceiling.

## II. INTERPRETATION OF THE PUBLIC DEBT CLAUSE

To really understand what the Public Debt Clause can trigger if Congress ever fails to raise the debt ceiling, it is critical to understand the meaning and scope of the Public Debt Clause. Answering two questions, in particular, will aid in understanding its scope: (1) As used in this clause, what is public debt?; and (2) What actions does this clause protect, or in other words, what makes public debt invalid?

### A. What Does "Public Debt" Mean Under the Constitution?

Initially, it is important to distinguish "public debt" under the debt limit statute from "public debt" under the Constitution. "Public debt" under the debt limit statute includes "all of the federal government's outstanding debt."<sup>29</sup> The

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26. *Id.* at 354.

27. *Id.*

28. A few other judicial decisions have discussed the Public Debt Clause. See *Gold Bondholders Protective Council, Inc. v. United States*, 676 F.2d 643, 646 (Ct. Cl. 1982) (dealing with sovereign immunity); *Branch v. Haas*, 16 F. 53, 54 (M.D. Ala. 1883) (finding Confederate coupon bonds were "illegal and void" under the Public Debt Clause); *Pietro Campanella*, 73 F. Supp. 18, 29-30 (D. Md. 1947) (finding that an agreement for the United States to compensate ship-owners for the use of Italian ships was not considered a valid obligation under the Public Debt Clause); *Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 17-18 (7th Cir. 1990) (finding that amendments to the Higher Education Act had not "questioned" a public debt under the Public Debt Clause); *Delaware v. Cavazos*, 723 F. Supp. 234, 244-45 (D. Del. 1989) (finding that amendments to the Higher Education Act were not within the scope of the "public debt" contemplated by the Public Debt Clause).

29. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-485SP, FEDERAL DEBT: ANSWERS TO FREQUENTLY ASKED QUESTIONS 5 (2004), available at <http://www.gao.gov/new.items/d04485sp.pdf>. See also *id.* at 5-12 (defining debt subject to limit as the gross debt, debt held by the public, and debt held by government accounts).

meaning of “public debt” under the Constitution is subject to debate.<sup>30</sup> As used in the Public Debt Clause, there are two potential definitions of “public debt:” (1) it includes only payments owed to bondholders, whether through interest payments or through redeeming bonds;<sup>31</sup> or (2) it includes payments owed to bondholders and payments due through “all government obligations,” including Social Security, Medicare and Medicaid, federal employees’ salaries and benefits, and monies necessary to maintain government functions, such as the military.<sup>32</sup> Based on the legislative and judicial history discussed below, and perhaps more importantly, the United State’s past experience, public debt within the Public Debt Clause should mean payment owed to bondholders.<sup>33</sup> The barriers that exist to extending public debt to all government obligations make such a definition highly unlikely and unrealistic.

1. *“Public Debt” Could Include All Government Obligations.*—Although this Note does not endorse defining public debt to include all governmental debt, it is still important to understand how some might accept this definition and why such acceptance is problematic. Proponents of this interpretation have pointed to various sources of support, including governmental and legal definitions of public debt, evolution of the language of the clause in legislative history, construction of the clause, judicial interpretation in *Perry*,<sup>34</sup> and use of the word “debt” found elsewhere in the Constitution.<sup>35</sup>

One legal definition of public debt is “a debt owed by a municipal, state, or national government.”<sup>36</sup> Another legal definition from the U.S. Government Accountability Office (“GAO”) defines federal gross debt as debt held by the public and debt held in government accounts; *this is debt that is subject to the debt limit.*<sup>37</sup> Under this definition, debt held by the public includes “the value of all federal securities sold to the public that are still outstanding,”<sup>38</sup> or in other words, debt held by bondholders. “Debt held by government accounts” includes debt “guaranteed for principal and interest by the full faith and credit of the U.S. government,” which includes government obligations, such as entitlement

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30. Goldfarb, *supra* note 10.

31. See e.g., *Frequently Asked Questions About the Public Debt*, TREASURYDIRECT, treasurydirect.gov/govt/resources/faq/faq\_publicdebt.htm (last updated May 16, 2011); see generally *infra* Part II.A.2 (“*Public Debt*” Includes Only Payments Owed to Private Bondholders).

32. See TATELMAN & THOMAS, *supra* note 7, at 8-10.

33. See *infra* Part II.A.2 (“*Public Debt*” Includes Only Payments Owed to Private Bondholders).

34. See generally Abramowicz, *supra* note 7 (discussing language of the clause, construction of the clause, and judicial interpretation).

35. See *infra* text accompanying notes 56-62.

36. BLACK’S LAW DICTIONARY 1058, 367 (abr. 9th ed. 2010).

37. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 29, at 5, 12 (emphasis added) (defining gross debt and then discussing that “[g]ross debt of the federal government is subject to a statutory ceiling—known as the debt limit.”).

38. *Id.* at 6.

programs.<sup>39</sup> These definitions tend to support a broader definition of public debt. Modern definitions may not be conclusive as to what public debt meant at the time Section Four was passed, particularly because government programs such as Social Security had not yet been created.<sup>40</sup> Furthermore, the GAO defines these terms in context of the debt ceiling, which is different from how “public debt” is used in the Public Debt Clause.<sup>41</sup>

A scholar has argued that the evolution of the Public Debt Clause from its first proposed form to its adopted form suggests the definition of public debt deserves a broad interpretation.<sup>42</sup> The original language of Section Four was as follows: “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 loss of involuntary service or labor.”<sup>43</sup> The second proposal 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 payment of bounties or pensions incident to such war and provided for by 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.<sup>44</sup>

The adopted version of Section Four 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.”<sup>45</sup> It has been argued that this distinction indicates the intent of the drafters was for Section Four to apply to public debt more inclusively rather than exclusively.<sup>46</sup> Not only does the text of the versions of the clause indicate the drafters’ original intent, but the commentary of members of Congress who introduced these proposals reveals intent as well. As will be discussed later in this Note, this congressional commentary is supportive of a narrower understanding of public debt.<sup>47</sup>

Additional linguistic analysis, particularly the construction of the clause, could support the argument that public debt includes all governmental obligations. In analyzing Section Four, “[t]he use of the word ‘including’ rather

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39. *Id.* at 8-9.

40. Social Security was created through the Social Security Act of 1935. *See History, SOC. SEC. ONLINE*, <http://www.ssa.gov/history/35actinx.html> (last visited Aug. 24, 2012).

41. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 29, at 12-13.

42. Abramowicz, *supra* note 7, at 594; Epps, *supra* note 10.

43. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768 (1866).

44. *Id.*

45. U.S. CONST. amend. XIV, § 4.

46. Abramowicz, *supra* note 7, at 583-84.

47. *See infra* notes 92-94 and accompanying text.

than ‘in addition to’ or ‘and of’ . . . delineate[s] the expanse of the phrase ‘public debt’ rather than annexing an additional category of ‘debts’ to it.”<sup>48</sup> Further, the phrase “authorized by the law”<sup>49</sup> supports that public debt includes governmental obligations such as entitlement programs because something can only be “authorized by law” if passed by “a congressional statute.”<sup>50</sup>

The Court in *Perry* also supported that Section Four’s language “indicates a broader connotation.”<sup>51</sup> Just past that statement in the opinion, though, the Court wrote, “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 . . . .”<sup>52</sup> This interpretation appears to extend the scope of the Public Debt Clause beyond Civil War debts.<sup>53</sup> Further, this decision was limited to a bondholder’s debt, which the Court, in the above language, explicitly said is included within the contemplation of the Public Debt Clause’s language.<sup>54</sup> Despite the linguistic construction of the statute, other judicial interpretations of public debt would also make it legally difficult to accept that public debt includes all governmental obligations.<sup>55</sup>

Lastly, use of the word “debt” in other places of the Constitution may prove helpful for interpreting its meaning in this clause.<sup>56</sup> The word “debt” is used in three other locations in the Constitution, with only one of those uses providing relevant support in this context.<sup>57</sup> Article I, Section 8, Clause 1 of the U.S. Constitution states, “The Congress shall have Power . . . to pay the Debts . . . of the United States . . . .”<sup>58</sup> Two judicial interpretations of this clause support a broader definition of “Debts” as used in this clause, which could arguably provide

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48. Abramowicz, *supra* note 7, at 587-88.

49. U.S. CONST. amend. XIV, § 4.

50. Abramowicz, *supra* note 7, at 588.

51. *Perry v. United States*, 294 U.S. 330, 354 (1935).

52. *Id.*

53. For the purpose of this Note, the Public Debt Clause is assumed to apply beyond the time it was passed (post-Civil War era). For an in-depth discussion of why it is more than merely transitional, see Abramowicz, *supra* note 7, at 582-587 (“*Was the Public Debt Clause Merely Transitional?*”).

54. *Perry*, 294 U.S. at 354.

55. For discussion of these interpretations, see *infra* text accompanying notes 78-88.

56. To note, these uses of the word “debt” were included in the original Constitution, not in subsequent amendments. Further, the term at issue here is “public debt” rather than “debt.”

57. U.S. CONST. art. VI, cl.1 states, “All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.” Such use of the term “Debts” is not helpful to this discussion because there has been no judicial interpretation of this clause. “Debts” as used in U.S. CONST. art. I, § 10, cl. 1, which provides that “[n]o State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts” is only applicable to the states, not to the federal government; thus, it is not dispositive in the context of federal government debt. See *Juilliard v. Greenman (The Legal-Tender Cases)*, 110 U.S. 421, 446 (1884).

58. U.S. CONST. art. I, § 8, cl.1.

support for a broader definition of “public debt” in Section Four. In *Pope v. United States*,<sup>59</sup> the Court interpreted this clause and said the Government “is not restricted” to pay only “obligations which are legally binding on the Government” but can recognize and pay “claims which are merely moral or honorary.”<sup>60</sup> Similarly, in *United States v. Realty Co.*<sup>61</sup> the Court wrote, “The term ‘debts’ includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual;” Congress can pay these debts if it finds justice so requires.<sup>62</sup> The Court recognized the potential for an extremely broad definition of debt, including moral obligations, which one may presume is beyond, or includes, a government obligation, such as a Social Security payment. However, the Court was not requiring Congress to honor these moral obligations. Rather, the Court just gave Congress permission to do so if it wishes. This permissive language is not indicative of what “public debt” means in the Section Four.

Although the above discussion demonstrates some credible arguments for why public debt should include all government obligations, further analysis of more persuasive evidence clarifies that such a broad definition is legally unprecedented and practically unworkable.

2. “*Public Debt*” Includes Only Payments Owed to Bondholders.—Public debt includes debt owed to bondholders because both legal and practical factors support this interpretation. Similar to the above discussion, some relevant legal and governmental definitions support this interpretation.<sup>63</sup> Beyond *Perry*, judicial interpretation illustrates a narrower definition.<sup>64</sup> Legislative history, particularly comments made in conjunction with congressional proposals of drafts of Section Four, indicates the authors intended a narrower scope.<sup>65</sup> Lastly, and arguably

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59. 323 U.S. 1 (1944).

60. *Id.* at 9. This case involved a contract that petitioner had with the government for excavation work. *Id.* at 5. In a previous case brought by petitioner in the Court of Claims, the petitioner was denied relief because the compensation he sought was for work outside the boundary lines dictated in the agreement. *Id.* Subsequently, Congress passed a Special Act that allowed for the petitioner’s recovery of this additional work and instructed the Court of Claims to use a particular formula for determining the amount owed. *Id.* at 6-7. The Court found it was not beyond congressional constitutional power to turn a moral obligation into a legal one through this Special Act directive. *Id.* at 9-10.

61. 163 U.S. 427 (1896).

62. *Id.* at 440. The case involved sugar manufacturers whom the government owed a bounty under a congressional statute. *Id.* at 428-31. The bounty provision of this statute was later repealed. *Id.* at 431. These manufacturers had applied in compliance with that statute for the sugar bounties before anyone knew that the statute would be repealed. *Id.* at 433-35. Thus, Congress sought to pay these manufacturers due to a moral and equitable obligation. *Id.* at 437. The Court found that this act was an appropriate exercise of the congressional power to “pay the debts” of the United States under Article I, Section 8 of the U.S. Constitution. *Id.* at 440-41.

63. *See infra* text accompanying notes 67-68.

64. *See infra* text accompanying notes 78-88.

65. *See infra* text accompanying notes 92-96.

most important, the fact that the Public Debt Clause has not been a major subject of controversy in the courts seems to indicate that public debt does not extend beyond debt owed to bondholders. Similar crises in the past, including other debt limit crises and a government shutdown, did not result in entitlement program recipients or federal employees invoking Section Four in the courts.<sup>66</sup>

A different governmental definition of public debt supports a narrower reading. The Treasury defines “Public Debt Outstanding” as the “face amount or principal amount of marketable and non-marketable securities currently outstanding.”<sup>67</sup> Here, the use of the word securities seems to limit the Treasury’s understanding of the public debt to bonds because securities, including Treasury bills and savings bonds, are tools used to borrow money from the public to decrease the government’s deficit.<sup>68</sup> Nowhere does this definition suggest that public debt outstanding applies to any Social Security payments. Further, this definition does not mention debt subject to a debt limit statute, which is different than “public debt” as used in the Public Debt Clause.<sup>69</sup>

In defending against the claim in *Perry*, the United States posited the following argument:

The public debt is the money borrowed on the credit of the United States; indeed, the Constitutional authority to incur the public debt is “to borrow money on the credit of the United States.” Legislation enacted in the exercise of another paramount Congressional power “to coin money and regulate the value thereof” may affect or even question the validity of collateral agreements without in any sense questioning the validity of the public debt itself.<sup>70</sup>

An analogy to the Court’s statement in *Perry* is that public debt is money that is borrowed pursuant to Congress’s borrowing power<sup>71</sup> but does not include governmental revenue that is accumulated pursuant to another congressional power, such as its power to tax.<sup>72</sup> Thus, public debt could not include all governmental obligations because not all governmental obligations are incurred through the borrowing power. Particularly, entitlement programs create revenue through the power to tax and spend money in aid of the general welfare.<sup>73</sup> Although the Government in *Perry* lost on the Public Debt Clause argument, the Court indirectly accepted this argument by recognizing bonds are borrowed

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66. See *infra* text accompanying notes 97, 101, 105, 114, 117.

67. *Frequently Asked Questions About the Public Debt*, *supra* note 31.

68. *Id.*

69. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 29, at 12-13; *supra* text accompanying notes 29-30.

70. Brief for the United States at 66-67, *Perry v. United States*, 294 U.S. 330 (1935) (No. 532), 1935 WL 32938 at \*66 (citing U.S. CONST. art I, § 8, cl.2, cl. 5).

71. U.S. CONST. art I, § 8, cl. 2.

72. *Id.*, § 8, cl. 1.

73. *Id.*; *Helvering v. Davis*, 301 U.S. 619, 634, 640-45 (1937) (discussing that Old Age Benefits created in the Social Security Act was spending “in aid of the general welfare”).

pursuant to the borrowing power<sup>74</sup> and restricting its interpretation of the Public Debt Clause to bondholders.<sup>75</sup>

As mentioned, *Perry* explicitly said that the Public Debt Clause’s “language indicates a broader connotation [than Civil War era debts]. [The Court] regard[s] 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 . . . .”<sup>76</sup> Although the Court did say a broader interpretation was required, the broader interpretation is that public debt is not limited to Civil War era bonds but that the term extends to government bonds beyond that era. The implication is not that public debt applies to all governmental obligations.<sup>77</sup> Further, in *Delaware v. Cavazos*,<sup>78</sup> the court found that the wording of Section Four was “limited to bond debts” and “not so broad as to encompass within its coverage every debt of the United States.”<sup>79</sup> In *Cavazos*, the debt in question was that owed by a Delaware guaranty agency to private lenders who insured student debt on higher education loans, which was, in turn, “reinsured by the Department of Education.”<sup>80</sup> The guaranty agency would not be reimbursed for payments made to private lenders unless it complied with amendments that affected the Higher Education Act.<sup>81</sup> The court found the Public Debt Clause did not contemplate these debts.<sup>82</sup>

Other case law concurs with this restriction. For example, the Court in *Flemming v. Nestor*,<sup>83</sup> held that future Social Security payments are not guaranteed.<sup>84</sup> Congress inserted a reservation power into the Social Security Act giving it “the right to alter, amend, or repeal any provision of the [Social Security] Act.”<sup>85</sup> This reservation power extends to Congress’s ability to reduce payments to current recipients.<sup>86</sup> As a result, *Nestor*, who had been cut off from

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74. *Perry v. United States*, 294 U.S. 330, 350 (1935) (finding that bonds issued were “in the exercise of the power to borrow money on the credit of the United States”); *cf.* U.S. CONST. art. I, § 8, cl. 2 (providing, “To borrow Money on the credit of the United States.”).

75. *Perry*, 294 U.S. at 354.

76. *Id.*

77. *See id.* (finding that Section Four’s “language indicates a broader connotation . . . which applies . . . to the government bonds in question, and to others duly authorized by the Congress”).

78. *Delaware v. Cavazos*, 723 F. Supp. 234 (D. Del. 1989).

79. *Id.* at 245.

80. *Id.* at 236.

81. *Id.* at 239-41.

82. *Id.* at 245.

83. 363 U.S. 603 (1960).

84. *Id.* at 610-11 (recognizing that Congress arbitrarily refusing to pay benefits is not without constitutional restraints but also recognizing that such a decision would likely have to be “utterly lacking in rational justification” to be barred constitutionally).

85. *Id.* at 611, 624 (internal citation omitted).

86. *See Richardson v. Belcher*, 404 U.S. 78, 78-80 (1971) (finding no constitutional violation in an amendment to the Social Security Act that decreased monthly Social Security disability benefits from \$330 to \$225 for recipients in order to recognize an individual receiving state

receiving Social Security payments when he was deported, had no constitutional claim.<sup>87</sup> “The same principle that current benefit amounts may be modified has been applied to other, similar programs involving pensions, such as Federal Civil Service Retirement.”<sup>88</sup>

Recognition of the legal principle that the current Congress cannot bind a future Congress, except for payments owed to bondholders, is an implication of Congress’s reservation power.<sup>89</sup> Thus, if public debt includes all government obligations, it follows that in order to avoid violating Section Four, Congress could not refuse to fulfill these government obligations. Implicitly, this would require it to bind a future Congress from refusing to make payments or making payments at a lower rate, a legal principle that has been rejected in *Flemming*. Further, it would strip Congress of its reservation power, a legal principle that the Supreme Court has accepted.<sup>90</sup> Finding public debt to fit within the broader definition requires repealing settled legal principles. “*Flemming* and its progeny would appear to stand for the proposition that because the benefit payments are subject to amendment by Congress, they can be distinguished from those obligations that are to be included as part of the ‘public debt’ covered by [Section Four] of the Fourteenth Amendment.”<sup>91</sup>

As Section Four evolved into its adopted form, members of Congress commented on each proposal. Some of these comments affirm what is widely accepted: the purpose of the Public Debt Clause was to prevent the South, if it were to gain control of Congress in the future, from repudiating debt incurred during the Civil War.<sup>92</sup> The remarks from Ohio Senator Benjamin Wade, who made the second proposal, provided insight into what the members of Congress were thinking in terms of public debt. Senator Wade said, “[F]or 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 Constitution . . . .”<sup>93</sup> One could reasonably argue that an individual “who has property in the public funds”<sup>94</sup> is a

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workmen’s compensation benefits because the right to benefits is not so vested that reduction would amount to a Fifth Amendment taking); see also TATELMAN & THOMAS, *supra* note 7, at 9-10 (discussing the *Flemming* and *Richardson v. Belcher* decisions).

87. *Flemming*, 363 U.S. at 612.

88. TATELMAN & THOMAS, *supra* note 7, at 9.

89. See *Perry v. United States*, 294 U.S. 330, 353 (1935).

90. See *Flemming*, 363 U.S. at 611.

91. TATELMAN & THOMAS, *supra* note 7, at 9.

92. CONG. GLOBE, 39TH CONG., 1ST SESS. 2768 (1866) (Of his proposed version of Section Four, Senator Howard said, “The assumption of the rebel debt would be the last and final signal for the destruction of the nation known as the United States of America. Whatever party may succeed in so wicked a scheme, by whatever name it may be called and under whatever false guises or pretenses it may operate, if it succeed in assuming this indebtedness, puts an end first to the credit of the Government, and then, as an unavoidable consequence, to the Government itself.”).

93. *Id.* at 2769.

94. *Id.*

bondholder. A bondholder has received a stake, in the form of a bond, in the public funds, which the bondholder believes will be profitable in the future. The first and second proposals were essentially combined to form the adopted version, which passed through the House of Representatives with no changes.<sup>95</sup> The legislative history does not clearly show that Congress would not have wanted all governmental obligations to be guaranteed constitutionally by Section Four, but the legislative history also does not show that it did contemplate those programs. The legislative history does indicate that through the Public Debt Clause, Congress sought that those who had a stake in the public's funds would be ensured their investments were secured.<sup>96</sup>

The United State's own experiences, specifically previous debt limit crises and the 1995-1996 government shutdown, are perhaps the most significant aspect of history for interpreting public debt.<sup>97</sup> The 2011 debt limit crisis is not the only time this country faced a potential default.<sup>98</sup> Even though some have said past debt ceilings were raised without controversy,<sup>99</sup> that statement is not completely accurate. Previous Congresses have reached impasses similar to 2011. The Treasury took extreme measures in the past to avoid default.<sup>100</sup>

In September 1985, the debt crisis reached a point that prompted the Treasury to announce it was going to be unable to make Social Security payments.<sup>101</sup> Yet, the lack of reported cases seems to indicate that the Public Debt Clause was not invoked to suggest constitutional rights had been violated. In fact, the Government found a temporary solution, something it seems it likely would do if a default occurred today. The Treasury divested various trust funds, including the Social Security Trust Fund, by redeeming some trust fund securities earlier than usual in order to "create[] room under the debt ceiling for [the] Treasury to

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95. TATELMAN & THOMAS, *supra* note 7, at 3-4. For the text of these proposals, see *supra* text accompanying notes 43-45.

96. See *supra* notes 92-94 and accompanying text.

97. A government shutdown occurred because Congress and the President failed to reach an agreement on the budget for a particular fiscal year causing a funding gap in which money had not been appropriated. See CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 (2011), available at <http://www.washingtonpost.com/wp-srv/politics/documents/RL34680.pdf>.

98. Debt impasses were also reached in 1985 and 1995-1996, see *infra* text accompanying notes 101, 108.

99. *Obama Says Reagan Raised Debt Ceiling 18 Times; George W. Bush Seven Times*, TAMPA BAY TIMES (July 26, 2011, 12:42 PM), <http://www.politifact.com/truth-o-meter/statements/2011/jul/26/barack-obama/obama-says-reagan-raised-debt-ceiling-18-times-geo/> (quoting President Barack Obama as saying, "In the past, raising the debt ceiling was routine. Since the 1950s, Congress has always passed it, and every President has signed it. President Reagan did it [eighteen] times. George W. Bush did it seven times.>").

100. LEVIT ET AL., *supra* note 10, at 3-6 ("Past Treasury Secretaries, when faced with a nearly binding debt ceiling, have used special strategies to handle cash and debt management responsibilities.>").

101. *Id.* at 4.

borrow sufficient cash from the public to pay other obligations, including . . . Social Security benefits.”<sup>102</sup> Congress codified this option to allow federal officials to use Social Security Trust Funds for “the payment of benefits or administrative expenses” when necessary.<sup>103</sup> Thus, even if the Public Debt Clause included entitlement programs, that statute could be invoked to avoid violating the Public Debt Clause.<sup>104</sup>

When the Government shut down in 1995-1996,<sup>105</sup> several governmental obligations were “questioned”<sup>106</sup> because there was uncertainty as to whether they would be fulfilled.<sup>107</sup> A government shutdown occurs when Congress and the President fail to reach an agreement on the budget for a particular fiscal year.<sup>108</sup> Thus, money has not been appropriated for continued operations.<sup>109</sup> It is different than a debt limit crisis, which occurs when funds have already been appropriated, but the Government is unable to borrow money to fund those appropriations.<sup>110</sup> A government shutdown has harsher implications than a debt limit crisis.<sup>111</sup> As a result of the 1995-1996 government shutdown, federal employees received late or retroactive salary payments, federal contractors were not paid, and federal entities lost millions of dollars.<sup>112</sup> However, the Public Debt Clause was not invoked to suggest the shutdown was unconstitutional.<sup>113</sup>

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102. *Id.* The Social Security Trust Fund is included within the Social Security program and is the mechanism that supposedly secures Social Security payments will be made in the long-term. See John McGuire, *The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity?*, 7 *LOY. J. PUB. INT. L.* 203, 204, 209-10 (2006).

103. 42 U.S.C. § 1320b-15(a)(3) (2006).

104. *Id.* § 1320b-15(b) (“For purposes of this section, the term ‘public debt obligation’ means any obligation subject to the public debt limit established under section 3101 of Title 31.”).

105. The government shutdown lasted twenty-one days, from December 15, 1995 to January 6, 1996. See Ed O’Keefe, *Government Shutdown: Facts and Figures*, *WASH. POST* (Feb. 24, 2011, 6:00 AM), [http://voices.washingtonpost.com/federal-eye/2011/02/government\\_shutdown\\_facts\\_and.html](http://voices.washingtonpost.com/federal-eye/2011/02/government_shutdown_facts_and.html).

106. U.S. CONST. amend. XIV, § 4.

107. BRASS, *supra* note 97, at 5-9 (discussing the multiple ways in which a federal government shutdown impacts public and private matters).

108. *Id.* at 2.

109. *Id.*

110. See LEVIT ET AL., *supra* note 10, at 11.

111. CONG. BUDGET OFFICE, *THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE* 49 (1995), available at <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/48xx/doc4805/entirereport.pdf>. (“Failing to raise the debt ceiling would not bring the government to a screeching halt the way that not passing appropriations bill would. Employees would not be sent home, and checks would continue to be issued. If the Treasury was low on cash, however, there could be delays in honoring checks and disruptions in the normal flow of government services.”).

112. BRASS, *supra* note 97, at 8 (citing Dan Morgan & Stephen Barr, *When Shutdown Hits Home Ports*, *WASH. POST*, Jan. 8, 1996, at A1; Peter Behr, *Contractors Face Mounting Costs from Government Shutdowns*, *WASH. POST*, Jan. 23, 1996, at C1).

113. This is evidenced by the fact that there are no reported or published judicial opinions

Federal employee salaries were paid late because the President and Congress could not agree on a budget to provide funding for the salaries. Thus, the Government had no ability to pay and was defaulting on these payments owed.<sup>114</sup> One may ask why, when the Government defaulted on a debt owed, the Public Debt Clause would not apply. The answer must be that federal employee salaries do not fall within the term “public debt” as contemplated in the Public Debt Clause. Furthermore, no consideration was given to that fact that the Government was defaulting on its obligations because other obligations, like mandatory entitlement programs, continued to be fulfilled on time.<sup>115</sup> If Congress fails to raise the debt ceiling, employees will likely be paid, albeit with a possibility of delay, and although agencies could still obligate funds, the Treasury might “not be able to liquidate all obligations.”<sup>116</sup>

Similar to the panic that occurred during the 1985 debt limit crisis,<sup>117</sup> there was a Social Security panic during the 1995-1996 debt limit crisis. The Treasury announced it would not be able to make Social Security payments in March 1996.<sup>118</sup> In response, “Congress authorized [the] Treasury to issue securities to the public in the amount needed to make . . . benefit payments and specified that, on a temporary basis, those securities would not count against the debt limit.”<sup>119</sup> Again, government officials did not question the potential for non-payment under the Public Debt Clause.<sup>120</sup>

Some statutes suggest “non-interest obligations,” or obligations other than debt owed to bondholders, “are not sacrosanct.”<sup>121</sup> For example, “the Prompt Payment Act dictates the interest penalties the federal government must pay for late payment to commercial vendors.”<sup>122</sup> The Internal Revenue Code dictates interest penalties the federal government must pay “for late tax refunds.”<sup>123</sup> These statutes suggest that late payment for these types of governmental obligations is

regarding government shutdowns and their ties to the Public Debt Clause.

114. BRASS, *supra* note 97, at 2, 5 (discussing the problems of a funding gap).

115. *Id.* at 9 (internal citation omitted) (discussing how the Social Security Administration retained 4,780 employees during the 1996 government shutdown to “ensure the continuance of benefits to currently enrolled Social Security, SSI and Black Lung beneficiaries”).

116. LEVIT ET AL., *supra* note 10, at 10-11.

117. *See supra* text accompanying note 101.

118. LEVIT ET AL., *supra* note 10, at 4, 20.

119. *Id.* at 4-5. *See* Timely Payment of March 1996 Social Security Benefits Guaranteed, Pub. L. No. 104-103, 110 Stat. 55 (1996); Public Debt Limit: Temporary Extension, Pub. L. No. 104-115, 110 Stat. 825 (1996).

120. At least one editorial in 1995 suggested that default on the debt would be unconstitutional under Section Four. *See* George B. Tindall, Editorial, *Is This Train Wreck Constitutional?*, NEWS & OBSERVER (Chapel Hill), Nov. 15, 1995, at A25.

121. G.I., *America’s Debt: The Debt Ceiling and Default*, ECONOMIST (Jan. 13, 2011, 5:48 PM), [http://www.economist.com/blogs/freexchange/2011/01/americas\\_debt](http://www.economist.com/blogs/freexchange/2011/01/americas_debt).

122. *Id.*; *see* 31 U.S.C. § 3901 (2006) (effective Nov. 10, 1998); 31 U.S.C. § 3904 (2006) (amended 1988).

123. G.I., *supra* note 121; *see* 26 U.S.C. § 6511 (2006) (effective June 17, 2008).

legal and that they are more akin to entitlement programs or federal employee benefits, rather than debt owed bondholders. Bondholders voluntarily loan the government money in order to help fund programs and help the government function with the assumption that they will receive more money in return when they redeem their bonds. Obligations, including entitlement programs, are paid to individuals who are not always contributing to funding these programs.<sup>124</sup> Therefore, bond obligations are different than entitlement programs in that individuals invest in the government expecting to profit from that investment.

During the 2011 crisis, the Congressional Research Service suggested that the federal government must “eliminate roughly two-thirds of discretionary spending, cut nearly 40% of outlays for mandatory programs, increase revenue collection by nearly 27%, or take some combination of those actions” to avoid raising the debt ceiling.<sup>125</sup> Yet, proponents of the broader reading of public debt argue that actions such as cutting outlays of mandatory programs would violate the Public Debt Clause.<sup>126</sup> Such a reading is dangerous because if this interpretation is readily accepted, Congress may react by repealing these programs to avoid violating the Public Debt Clause. However, this overreaction is unlikely because public debt does not encompass all government obligations.<sup>127</sup> Past real-life experiences clearly have not led to dire circumstances in which Congress might repeal entitlement programs to avoid violating Section Four, as no one suggested during those times that a constitutional principle had been violated. Interpreting the meaning of “public debt” to include only debt owed to bondholders is most legally and practically accurate.

*B. Does the Public Debt Clause Prohibit Repudiation, Default,  
and/or Actions that May Lead to Either?*

Now that this Note has concluded that public debt contemplates only debt owed to bondholders, the next question that must be answered is what type of government action “question[s]”<sup>128</sup> that public debt. Three potential actions that question public debt include (1) repudiation, (2) default, or (3) any government act that may result in either repudiation or default. Repudiation means “to reject or renounce a (duty or obligation)”<sup>129</sup> and “to refuse to have anything to do with

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124. See e.g., Chris Edwards, *Food Subsidies*, CATO INST. (July 2009), <http://www.downsizinggovernment.org/sites/default/files/agriculture-food-subsidies.pdf> (stating that “[t]he food stamp program cost federal taxpayers \$56 billion in 2009” and that “[t]he maximum monthly benefit in 2009 for a household of four [was] \$668”). Thus, one can imply that individuals or households with \$0 income are not paying taxes but could be receiving food stamps, which are funded by federal taxpayers, most of whom are not receiving food stamps.

125. LEVIT ET AL., *supra* note 10, at Summary.

126. Abramowicz, *supra* note 7, at 587-89.

127. See *supra* Part II.A.2.

128. U.S. CONST. amend. XIV, § 4.

129. BLACK’S LAW DICTIONARY, *supra* note 36, at 1111.

. . . to reject . . . as having no binding force.”<sup>130</sup> As applied to the Public Debt Clause, repudiation is a refusal to recognize payments owed to bondholders. Default is “[t]he omission or failure to perform a legal or contractual duty; esp[ecially] the failure to pay a debt when due”<sup>131</sup>—or in other words, an inability to pay or not paying on time. As applied to the Public Debt Clause, failing to pay bondholders on time or not being able to pay bondholders is default. Defining the third act is difficult, but it would likely include a failure to raise the debt limit and arguably, any action that makes raising the debt ceiling unlikely or questionable.

The most widely accepted interpretation is that the Government cannot repudiate the public debt because of *Perry*.<sup>132</sup> Senator Wade’s comments regarding his Section Four proposal,<sup>133</sup> as well as the Court in *Perry*, explicitly mention that the purpose of Section Four is to avoid repudiation.<sup>134</sup> Further, “the drafters of [Section Four] of the Fourteenth Amendment consistently spoke in terms of repudiating confederate debt and preventing repudiation of Union debts.”<sup>135</sup> Thus, what is most debatable is whether the Public Debt Clause prohibits any actions beyond repudiation, and if so, what actions.<sup>136</sup> This Note endorses the interpretation that the Public Debt Clause prohibits the Government from repudiating and defaulting on payments owed to bondholders, but does not extend to any government action that questions whether payments owed to bondholders will be paid.

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130. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1058 (11th ed. 2003).

131. BLACK’S LAW DICTIONARY, *supra* note 36, at 377.

132. *Perry v. United States*, 294 U.S. 330, 354 (1935).

133. CONG. GLOBE, 39TH CONG., 1ST SESS., 2769 (1866) (“[F]or 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 . . .”).

134. *Perry*, 294 U.S. at 354 (finding that Section Four supports that overriding a valid debt obligation “went beyond . . . congressional power”).

135. TATELMAN & THOMAS, *supra* note 7, at 7.

136. In *Perry*, the parties disputed whether the Public Debt Clause prohibited only total repudiation or also partial repudiation. See Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1254-56 (2012). The Government argued it prohibited only total repudiation of federal bonds for three reasons: (1) the word “validity” in Section Four should be read as “to the essential existence of the obligation;” (2) legislative history supported the theory that the purpose of Section Four was to ensure that the South would not refuse to honor debts incurred during the Civil War; and, (3) other judicial cases that dealt with the “changes to the value of legal tender” did not say “anything about Section Four.” *Id.* at 1255 (quoting Brief for United States at 62-64, *Perry v. United States*, 294 U.S. 330 (1935) (No. 532), 1935 WL 32938, at \*62-64). *Perry* argued that an 1869 Act of Congress that read “the faith of the United States is solemnly pledged to the payment in coin or its equivalent . . . of all the interest bearing obligations of the United States . . .” confirmed that Section Four’s purpose “was definitely to prevent any attempt either to repudiate or to scale down the principal of or interest on the public debt.” *Id.* (quoting Brief of Claimant at 11, 18, 20, *Perry v. United States*, 294 U.S. 330 (1935) (No. 532), 1934 WL 31880, at \*11, \*18, \*20).

1. *The Public Debt Clause Prevents the Government from Taking Action that May Result in Repudiation or Default.*—Legal scholars have suggested that any government action inhibiting the debt ceiling from being raised is a violation of the Public Debt Clause.<sup>137</sup> Support for this argument supposedly comes from the Section Four drafters' intent, the construction of Section Four, the evolution of the language of the clause from proposal to adoption, and *Perry*.<sup>138</sup> Although some of this support is arguably valid, the potential implications of adopting such an interpretation, in addition to the country's history, suggest this is not the appropriate interpretation of the Public Debt Clause.<sup>139</sup>

As mentioned, when Section Four drafters were discussing this clause on the Senate floor, they primarily spoke in terms of seeking to prevent the South from repudiating debt incurred during the Civil War.<sup>140</sup> As one legal scholar argued, the drafters likely did not consider the distinction between a ban on government failure to honor debts and actual government action that fails to honor debts.<sup>141</sup> Since the drafters likely did not consider this distinction, there is an implication that they saw no distinction and assumed that Congress repudiating the debt or the government doing something that leads to repudiating the debt would both violate the Public Debt Clause.<sup>142</sup> Considering the evidence only supports a desire to prohibit the former, arguing that the drafters also intended the latter seems like a stretch. Congress's intent in passing the Public Debt Clause can best be derived through what they said when they passed it; none of the Senators suggested that *any* government action that could lead to repudiation of debt or not raising the debt ceiling would violate the clause.<sup>143</sup>

Turning specifically at the linguistic construction of the clause, it has been argued that the phrase "to question"<sup>144</sup> is more analogous to the phrase "to jeopardize" rather than to the phrase "to repudiate" and that "to question" and "to jeopardize" are more inclusive.<sup>145</sup> In other words, the phrases "to question" and "to jeopardize" seem to include more government action than merely the actual act that repudiates debt. Further, it is argued that the use of the phrase "to question" is telling.<sup>146</sup> In an earlier version of the clause, "shall not be

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137. See Abramowicz, *supra* note 7, at 591; Thomas Geoghegan, Op-Ed., *Dear GOP, Default Is Unconstitutional*, POLITICO (Mar. 31, 2011, 4:54 AM), [http://www.politico.com/news/stories/0311/52235\\_Page3.html](http://www.politico.com/news/stories/0311/52235_Page3.html); Epps, *supra* note 10.

138. See *infra* Part II.B.1.

139. See *infra* Part II.B.2.

140. CONG. GLOBE, 39TH CONG., 1ST SESS., 2769 (1866).

141. See Abramowicz, *supra* note 7, at 591.

142. *Id.*

143. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768-69, 3040 (1866).

144. 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.").

145. Abramowicz, *supra* note 7, at 592.

146. See *id.* at 594.

questioned” was not included, but instead the word “inviolable” was used.<sup>147</sup> “Inviolable” is closer in meaning to “unrepudiable;” the drafters were shifting away from exclusively limiting “to question” to mean only repudiation.<sup>148</sup> This “shift suggests a preference for phraseology that protects the public debt so strongly as to put the government’s commitment to it beyond question.”<sup>149</sup>

A similar argument is based on the Court’s interpretation of the clause in *Perry*.<sup>150</sup> After deciding that Section Four applied to government bonds, the Court said, “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.”<sup>151</sup> As one legal scholar argued, the word “integrity” brings to mind the word “question” and seems to be more “inclusive.”<sup>152</sup> In other words, the Public Debt Clause prevents more than just repudiation. Nonetheless, the drafters did not intend for the Public Debt Clause to prohibit any government action that could lead to or result in repudiation or not raising the debt ceiling.

To put this in context of the debt ceiling, those who endorse that the Public Debt Clause prohibits any act that may inhibit the debt ceiling from being raised argue that any speech by a member of Congress suggesting the debt ceiling not be raised is in violation of Section Four.<sup>153</sup> To expand, “any budget deficit, tax cut or spending increase could be attacked on constitutional grounds, because each of those actions slightly increases the probability of default.”<sup>154</sup> Adopting this interpretation defies legal principles and common sense. First, finding congressional speech or debate between parties during a congressional session in an attempt to find a compromise to be unconstitutional seems to be itself unconstitutional, namely under the First Amendment’s right to freedom of speech.<sup>155</sup> Second, taxing and borrowing are explicitly authorized by the Constitution as congressional powers.<sup>156</sup> Currently, the United States deficit is so enormous and constantly growing that a budget deficit seems perpetual.<sup>157</sup> The country would constantly violate the debt ceiling because the debt incessantly increases. Moreover, such an interpretation would be unenforceable, making the

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147. CONG. GLOBE, 39TH CONG., 1ST SESS., 2768 (1866).

148. Abramowicz, *supra* note 7, at 594; CONG. GLOBE, 39TH CONG., 1ST SESS., 2768-69 (1866).

149. Abramowicz, *supra* note 7, at 594.

150. *Perry v. United States*, 294 U.S. 330, 354 (1935) (quoting U.S. CONST. amend XIV, § 4).

151. *Id.*

152. McGuire, *supra* note 102, at 215.

153. Geoghegan, *supra* note 137.

154. Tribe, *supra* note 7.

155. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

156. U.S. CONST. art. 1, § 8, cl. 2 (“Congress shall have the Power . . . [t]o borrow Money on the credit of the United States . . .”); U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes . . .”).

157. For an up-to-date depiction of the United States’ debt, see U.S. DEBT CLOCK.ORG, [www.usdebtclock.org/index.html](http://www.usdebtclock.org/index.html) (lasted visited Aug. 25, 2012).

Public Debt Clause obsolete. It would be impossible to monitor all governmental action and identify every act that questions whether debts will be honored (e.g. knowing what a member of Congress says at all times to ensure nothing he or she says could lead to not raising the debt ceiling). To think that a court would entertain such claims is nonsensical.

All this evidence does is support the theory that the Public Debt Clause was intended to prohibit more than repudiation, but a boundary must be established for the clause to have any force. An appropriate boundary is that the Public Debt Clause not only prohibits repudiation of debts owed to bondholders but also protects against default on debts owed to bondholders.

2. *Public Debt Clause Prohibits Repudiation and Default.*—As discussed above, there is legislative history and legislative intent that suggest that the Public Debt Clause is meant to be more inclusive and to protect against more than just repudiation.<sup>158</sup> The optimal interpretation is that it also prohibits the Government from defaulting. Applying this interpretation in context, the Public Debt Clause prohibits the Government from both repudiating and defaulting on payments owed to bondholders.<sup>159</sup> In other words, the Government cannot constitutionally refuse to recognize or revoke debt owed to bondholders or fail to make payments to bondholders when they come due. “The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress . . . . The bond now before us is an obligation of the United States.”<sup>160</sup> Thus, if not raising the debt ceiling causes either repudiation or default, the Government’s inaction would violate the Public Debt Clause.

It is imperative to understand that the Public Debt Clause prevents both repudiation and default and that these are two different concepts. Saying, “Your debt will not be honored”<sup>161</sup> is different from saying that a debt *cannot* be honored. Therefore, defaulting on debt, or the inability to pay debt owed to bondholders because of a failure to raise the debt ceiling, is different than repudiating debt, or refusing to recognize debt owed to bondholders by not raising the debt ceiling.

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158. *See supra* Part II.B.1.

159. With this interpretation, it is important to remember the distinction between an individual defaulting and the Government defaulting. It is logical to think that the Public Debt Clause does not extend to default because if an individual defaults on obligations he or she owes, creditors do not assert that he or she is violating the Fourteenth Amendment. This clause does not apply to individuals, though; it applies to the Government. *See e.g.*, *Perry v. United States*, 294 U.S. 330, 348 (1935) (citation omitted) (“The bond in suit differs from an obligation of private parties, or of states or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress. . . . The bond now before us is an obligation of the United States.”).

160. *Id.* (citation omitted).

161. Abramowicz, *supra* note 7, at 592 (Abramowicz used this argument to support his position that advocates for extending the Public Debt Clause to any action that jeopardizes the debt, and I’m using his similar analogy to show the difference between repudiation and default.).

“[V]alidity . . . shall not be questioned”<sup>162</sup> should be interpreted to mean “a debt cannot be called ‘valid’ if existing laws will cause default on it.”<sup>163</sup> In 2011, 31 U.S.C. § 3101, which set the debt ceiling, would have caused default had Congress not reached an agreement. Currently, the Budget Control Act of 2011 could potentially cause a default if the debt ceiling is not raised again in 2013. A debt cannot be valid if Congress’s inaction to change existing laws (passing a bill to raise the debt ceiling) will cause default on it. Therefore, if Congress fails to raise the debt ceiling, causing the Government to be unable to make payments owed to bondholders, it would violate the Public Debt Clause.

The change in the wording of earlier versions of the clause, and the clause in its adopted form support this connotation,<sup>164</sup> as does the *Perry* interpretation. “[A]lthough *Perry* concerns only direct repudiation of bonds, its holding would have lent credence [to a broad reading] of the Public Debt Clause.”<sup>165</sup> The Court cited other reasons why Congress could not repudiate the debt owed to Perry, namely, its borrowing power.<sup>166</sup> Thus, if other constitutional provisions prevent repudiation of government bonds, it would be redundant for the Public Debt Clause to prevent the same thing. It follows that the Public Debt Clause prevents more<sup>167</sup> default.

Again, the most persuasive evidence that the Public Debt Clause applies to both repudiation and default, but not to all government action that could lead to a failure to pay debts, is the historical precedent created during the previous debt limit crises and the 1995-1996 government shutdown. The debt impasses in 1985 and 1995-1996 “jeopardized” monthly Social Security payments because the Treasury could not borrow against the debt ceiling.<sup>168</sup> Yet, the Public Debt Clause was not judicially invoked or spurred into public debate while this jeopardizing conduct was occurring.<sup>169</sup> Arguably, this lack of action proves two things: the Public Debt Clause does not contemplate obligations such as entitlement programs,<sup>170</sup> or even if it does include entitlement programs, jeopardizing conduct is not sufficient to trigger Section Four. The latter idea supports the theory that the Public Debt Clause applies to conduct that results in repudiation or default but not any “jeopardizing” conduct.

Practically, the Public Debt Clause must prevent more than just total repudiation. If not, “Section Four would impose no real limit on federal authority, as Congress could decide to meet .01% of bond payments and still be

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162. U.S. CONST. amend. XIV, § 4.

163. Abramowicz, *supra* note 7, at 594.

164. *See supra* text accompanying notes 43-45.

165. Abramowicz, *supra* note 7, at 604.

166. *Id.*

167. *Id.*

168. LEVIT ET AL., *supra* note 10, at 4-5 n.15.

169. Neither politicians nor the Government brought up this argument, but at least one editorial in 1995 suggested that default on debt would be unconstitutional under the Public Debt Clause. *See Tindall, supra* note 120.

170. *See supra* Part II.A.2.

acting lawfully.”<sup>171</sup> In order for this constitutional provision to have any real force, finding that Section Four prohibits defaulting on bonds is the best interpretation.<sup>172</sup> Thus, a delay in payments to bondholders or a failure to make “retroactive payments”<sup>173</sup> would result in a violation of Section Four.

Underlying this interpretation is the assumption that the Government would not be able to make the payments owed to bondholders should the debt ceiling not be raised. In fact, during the 2011 debt crisis, figures were published that demonstrated that the Government’s incoming revenue was sufficient to pay principal and interest payments due to bondholders.<sup>174</sup> According to one member of Congress, only 10% of incoming revenue is necessary to pay bondholders.<sup>175</sup> However, this position assumes that the Government will only pay bondholders and a portion of other obligations.<sup>176</sup> In 2011, the Treasury said it would not “‘prioritize’ payments” and that Congress required all obligations to be paid in full, on time as each becomes due.<sup>177</sup> Using this argument, the Government could miss a payment to a bondholder,<sup>178</sup> thus violating the Public Debt Clause.

The key interpretation to this section is what actions or results the Public Debt Clause constitutionally prohibits. As legislative history, legislative intent, and judicial precedent demonstrate, the Public Debt Clause seems to be “bizarrely” broad.<sup>179</sup> What Section Four prohibits has never been determined. On one hand, the argument that it prohibits any actions that jeopardize a failure to honor debts seems to go too far as that suggestion has no historical, legal, and practical support.<sup>180</sup> On the other hand, the clause seems to suggest it prevents more than repudiation. The next logical step is that it prohibits the Government from defaulting on debt owed to bondholders. As the Treasury said, bondholders

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171. Magliocca, *supra* note 136, at 1256.

172. Another plausible and slightly different interpretation that has a strong chance of “reconcil[ing]” the different positions on the interpretation of the Public Debt Clause is that it “bars the federal government from substantially defaulting on its bonds” so that “[a] short suspension of debt payments—as was threatened during the 2011 debt ceiling debate—would probably not meet this standard, especially if the bondholders were made whole when payments resumed.” *Id.*

173. *Id.*

174. G.I., *supra* note 121.

175. *Georgia Republican Tom Price Says Paying Debtholders First Will Stave Off Default*, POLITIFACT & ATLANTA J. CONST. (July 24, 2011), <http://www.politifact.com/georgia/statements/2011/jul/26/tom-price/georgia-republican-tom-price-says-paying-debtholde/>.

176. *Id.* For example, this could mean a delay in obligations such as Pell grants, educational loans, federal employees’ salaries and benefits, and welfare programs, among others. *Id.*

177. Neal Wolin, *Treasury: Proposals to ‘Prioritize’ Payments on U.S. Debt Not Workable; Would Not Prevent Default*, U.S. DEP’T OF THE TREASURY (Jan. 21, 2011), <http://www.treasury.gov/connect/blog/Pages/Proposals-to-Prioritize-Payments-on-US-Debt-Not-Workable-Would-Not-Prevent-Default.aspx>.

178. G.I., *supra* note 121.

179. McGuire, *supra* note 102, at 213.

180. *See supra* Part II.B.2.

must be paid in full and on time.<sup>181</sup> Thus, the Public Debt Clause is properly interpreted as prohibiting the Government from repudiating or defaulting on paying debts owed to bondholders.

### III. REMEDIES

With a proper interpretation of the Public Debt Clause in mind, various remedies can be considered as to how the Government can avoid violating it. The following are some potential remedies: (1) allowing the courts to handle bondholders who bring suit claiming the Government has defaulted or repudiated; (2) permitting the President to unilaterally raise the debt ceiling; (3) Congress or the President directing the Treasury to use a prioritization system for paying off the debt, with payment to bondholders as the first priority; and (4) the Government doing nothing. The best choice is the third one. To understand why this is the best choice, it is important to weigh the positive and negative aspects of each option. Even the best option has negative implications, demonstrating why it is of utmost importance that Congress, in the future, reach a compromise in raising the debt ceiling.

#### *A. Option 1: Let the Courts Handle It*

The argument for letting the judiciary determine a remedy for a violation of the Public Debt Clause is that if Congress does not raise the debt ceiling, causing the Government to miss payments due to bondholders, then bondholders should file an action, claiming Congress violated the Public Debt Clause. The positives to this option are limited. First, the President need not unilaterally take action without the consent of Congress, which avoids implicating the separation of powers. Second, the courts might finally render a decision providing more guidance as to how to interpret Section Four. Other than these two benefits, it is difficult to imagine others.

The downside to this option includes both legal impediments and potentially dangerous financial consequences. The first legal barrier is that a bondholder must have standing.<sup>182</sup> To establish standing, one bringing an action must: (1) have an “injury in fact,” which is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” (2) show “a causal connection between the injury and the conduct complained of,” and (3) demonstrate that a remedy must be “‘likely’” to redress the injury.<sup>183</sup> As to the first requirement, “[r]epudiation of debts creates a direct and substantial injury.”<sup>184</sup> Failure to raise the federal debt ceiling could establish a causal connection.<sup>185</sup> Further, bondholders must ensure the remedy they propose would be a solution to their

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181. Wolin, *supra* note 177.

182. Tribe, *supra* note 7 (“Only someone who has suffered a ‘particularized’ harm—not one shared with the public at large—is entitled to sue.”).

183. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

184. Abramowicz, *supra* note 7, at 607.

185. *Id.*

injury—that raising the debt ceiling would compensate them for payment owed. Bondholders may be able to establish standing, but their injuries may not be redressed for several years because litigation is typically a drawn out process.

Even if a bondholder could demonstrate standing, who would the bondholder sue? The most likely candidate is the Government. Yet, the Government could invoke sovereign immunity, a doctrine that prohibits the Government from being sued in its own court unless it has waived this immunity.<sup>186</sup> Some examples of claims that overcome or waive sovereign immunity, include a violation of the Takings Clause,<sup>187</sup> Contracts Clause,<sup>188</sup> or an unconstitutional taxation.<sup>189</sup> The federal government's default on its debt arguably would violate both the Takings and Contract Clause.<sup>190</sup> Further consideration demonstrates such claims would be unlikely to prevail.<sup>191</sup> “First, recovery for a debt default requires the payment of monies from the [T]reasury to compensate for previous violations. This is the area in which sovereign immunity is at its strongest.”<sup>192</sup> This reason also supports why the Treasury officials likely would have sovereign immunity.<sup>193</sup> Second, the

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186. See, e.g., *Chisholm v. Georgia*, 2 U.S. 419, 478 (1793) *superseded on other grounds by* U.S. CONST. amend. XI, *as recognized in Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (choosing not to permit suit against the United States because “there is no power which the Courts can call to their aid”); *United States v. Clarke*, 33 U.S. 436, 444 (1834) (The United States is “not suable of common right;” thus, “the party who institutes such suit must bring his case within the authority of some act of [C]ongress, or the court cannot exercise jurisdiction over it.”).

187. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

188. U.S. CONST., art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”).

189. See John Lobato & Jeffrey Theodore, *Federal Sovereign Immunity*, 4, 15 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 21 Draft 2006), *available at* [http://www.law.harvard.edu/faculty/hjackson/FedSovereign\\_21.pdf](http://www.law.harvard.edu/faculty/hjackson/FedSovereign_21.pdf).

190. *Id.*

191. *Id.* at 16-18.

192. *Id.* *Ex parte Young*, 209 U.S. 123 (1908) allowed claims against individual public officers but was later severely limited by *Edelman v. Jordan*, 415 U.S. 651 (1974), which found that *Young* applied only to “pre-collectment challenges” and not “post-collectment challenges . . . seek[ing] retroactive relief.” Lobato & Theodore, *supra* note 189, at 18-19. *Papason v. Allain*, 478 U.S. 265, 281 (1986), further limited *Young* when “the Court refused to allow plaintiffs to recover for a continuing breach of trust on the grounds that the recovery would in effect be for an accrued monetary liability.” Lobato & Theodore, *supra* note 189, at 20. Thus, bondholders who wait to sue the Government or officers until after they were supposed to be paid likely would be prohibited from seeking retroactive damages by sovereign immunity via *Edelman* and *Papason*, and those who attempt to sue before they are supposed to be paid likely would lack standing because they have yet to suffer a concrete and particularized injury. Lobato & Theodore, *supra* note 189, at 17-20.

193. *Id.* at 16-17, 20 (discussing *Papason v. Allain*, 478 U.S. 265 (1986)).

courts may decide that “market consequences” lend to this issue being solved politically, not judicially.<sup>194</sup> Third, nineteenth century judicial precedent illustrates that courts “reject[ed] various suits, nominally against state officials, to force state governments to honor their debts.”<sup>195</sup> Further, a claim under the Contracts Clause would not be viable against the federal government because the Contracts Clause is only applicable to the states.<sup>196</sup> “Indeed, the Supreme Court has noted that contractual obligations between the nation and an individual are binding to the extent of the sovereign’s ‘conscience’ and do not create an independent right of action.”<sup>197</sup>

One may argue the Tucker Act is an avenue bondholders could pursue; this act can waive sovereign immunity in suits arising out of contracts to which the Government, or its agencies, are parties and provides jurisdiction for such suits.<sup>198</sup> However, this action provides jurisdiction for such claims when the Government *chooses* to waive its sovereign immunity.<sup>199</sup> Further, limits subsequently placed on this Act by judicial precedent make it unlikely for bondholders to avoid Congress invoking its sovereign immunity.<sup>200</sup> Additionally, *Gold Bondholders Protective Council, Inc. v. United States*<sup>201</sup> found a joint resolution that withdrew its consent to be sued for gold clause obligations properly invoked sovereign immunity.<sup>202</sup> Congress’s Joint Resolution of August 27, 1935,<sup>203</sup> at issue in *Gold Bondholders*, was in response to Congress’s Joint Resolution of June 5, 1933, the joint resolution that the *Perry*<sup>204</sup> Court found unconstitutional.<sup>205</sup> *Gold Bondholders* found this new joint resolution to be constitutional and a proper invocation of sovereign immunity.<sup>206</sup> Accordingly, Congress potentially could pass a similar joint resolution, which would withdraw the Government’s consent to be sued by bondholders, without violating the Constitution. Such an act would make this remedy—to let the courts handle any dispute under the Public Debt

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194. *Id.* at 16.

195. *Id.* (listing nineteenth century cases including *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52 (1886); and *Louisiana v. Jumel*, 107 U.S. 711 (1883)).

196. *See Lynch v. United States*, 292 U.S. 571, 580-81 (1934).

197. Lobato & Theodore, *supra* note 189, at 12.

198. 28 U.S.C. § 1491 (2006).

199. Lobato & Theodore, *supra* note 189, at 13-14.

200. *Id.* at 15-16 (referring to *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), which allows Congress to limit its own liability in such cases so “in the absence of congressional waiver, there will be no basis for a claim against the federal government . . . . Even the Tucker Act does not create any cause of action against the government” but only provides for jurisdiction if the substantive claim, here contract law, creates a waiver of sovereign immunity).

201. 676 F.2d 643 (Ct. Cl. 1982).

202. *Id.* at 646.

203. *Id.* at 645 (stating the Joint Resolution was codified at 31 U.S.C. § 773).

204. *Perry v. United States*, 294 U.S. 330, 347 (1935) (stating the Joint Resolution was codified at 31 U.S.C. §§ 462-63, 48 Stat. 113).

205. *Gold Bondholders*, 676 F.2d at 646.

206. *Id.*

Clause—unavailable. If a bondholder cannot sue the Government, there are no other parties he could bring a claim against. Sovereign immunity stands in the way of this remedy as a viable option.

*B. Option 2: President Unilaterally Raises the Debt Ceiling*

In presenting an argument that the President should unilaterally raise the debt ceiling without congressional approval if Congress fails to raise it,<sup>207</sup> legal scholar Garrett Epps writes what he imagines, or desires, a president's speech to be on such occasion.<sup>208</sup> His support for this argument comes from both the Take Care Clause<sup>209</sup> and the Public Debt Clause.<sup>210</sup> The Take Care Clause requires the President to "take Care that the Laws be faithfully executed."<sup>211</sup> The advantages of this option are obvious. First and foremost, the Government would not default.<sup>212</sup> The Government would continue to make payments to bondholders, federal employees, and entitlement program beneficiaries.<sup>213</sup> Possibly, investor confidence in the United States would not suffer (at least not as much as if default were to occur); thus, interest rates on government issued bonds would not skyrocket.<sup>214</sup> The nation's credit<sup>215</sup> likely would remain intact.<sup>216</sup>

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207. Under the Budget Control Act of 2011, Congress approved a mechanism through which the President can potentially raise the debt ceiling if Congress fails to do so: "The [Budget Control Act] stipulates that when U.S. debt obligations are within \$100 billion of exceeding the debt limit, the President may submit a certification to Congress calling for a \$900 billion increase. Automatically, the debt ceiling increases by \$400 billion, and if Congress fails to respond in fifty days, the debt ceiling increases by an additional \$500 billion. Subsequently, when debt obligations again reach the \$100 billion danger zone, the President may file a second certification, this time calling for a default increase of \$1.2 trillion. If Congress does not respond in fifteen days, the debt limit rises to the level commanded by the President. In both rounds, to prevent a debt-ceiling increase as large as the President requests, Congress may pass a 'joint resolution of disapproval,' like an ordinary bill, subject to a presidential veto and in turn, a veto override." *Constitutional Law—Separation of Powers—Congress Delegates Power to Raise the Debt Ceiling*.—Budget Control Act of 2011, Pub. L. No. 112-24, 125 Stat. 240 (to be Codified in Scattered Sections of the U.S. Code), 125 HARV. L. REV 867, 869-70 (2012) (citing the Budget Control Act of 2011, Pub. L. No. 112-25, § 301(a)(2), 125 Stat. 240, 251-52, 255).

208. Epps, *supra* note 10.

209. U.S. CONST. art. II, § 3 ("[T]he [President] shall take Care that the Laws be faithfully executed . . ."). Epps also argues that these clauses require the President to raise the debt ceiling unilaterally and to pay all obligations, not just payments owed to bondholders. See Epps, *supra* note 10. However, because I have already rejected that interpretation, Epps' commentary regarding those issues is not relevant to this part of the Note.

210. Epps, *supra* note 10.

211. U.S. CONST. art. II, § 3.

212. Epps, *supra* note 10.

213. *Id.*

214. Some have suggested that if the Government were to default, it is not implausible that investors would lose confidence in the U.S.'s ability to make payments due; for investors to

Invoking the Public Debt Clause to unilaterally raise the debt ceiling has major legal ramifications. It may be difficult to argue that one constitutional principle is more important than another, but anyone who has studied this nation's history understands that a provision like the Thirteenth Amendment of the U.S. Constitution,<sup>217</sup> which abolished slavery, seems to have a more thunderous impact than some others. Similarly, some provisions in the Constitution have been so developed that they seem to exude more power than others.<sup>218</sup> Constitutional powers that have been explicitly and expressly granted to Congress seem to do just that.<sup>219</sup> In fact, Section Five of the Fourteenth Amendment gives Congress the power to enforce the Public Debt Clause, thus leaving the raising of the statutory debt ceiling in the hands of Congress.<sup>220</sup> Some of these powers could be negatively implicated if the President were to unilaterally raise the debt ceiling. The President likely would have to exploit one of these powers that are explicitly reserved for Congress, namely its borrowing<sup>221</sup> or taxing authority.<sup>222</sup> “An increase in the debt limit is, by definition, an

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continue investing, interest rates on government borrowing instruments would increase substantially. See LEVIT ET AL., *supra* note 10, at 11.

215. The Credit Agency Rating Reform Act of 2006 requires the Securities and Exchange Commission to set guidelines for establishing nationally recognized statistical ratings organizations or “NRSROs.” See 15 U.S.C. § 78o-7 (2006) amended by Pub. L. No. 111-203, §§ 932(a), 933(a), 934, 935, 124 Stat. 1872, 1883, 1884 (2010).

216. Two of the most widely reputed NRSROs, Fitch, Inc. and Moody's Investors Services, Inc., did not downgrade the U.S. credit rating upon passage of the Budget Control Act, but the NRSROs eventually changed their outlook to negative. See Matt Egan, *Fitch Keeps U.S. Credit Rating at 'AAA,' Cuts Outlook to Negative*, FOXBUSINESS (Nov. 28, 2011), <http://www.foxbusiness.com/economy/2011/11/28/fitch-keeps-us-credit-rating-at-aaa-cuts-outlook-to-negative/>; Annalyn Censky, *Moody's Keeps U.S. Credit Rating in Place*, CNNMONEY (Nov. 23, 2011, 11:10 AM), [http://money.cnn.com/2011/11/23/news/economy/moodys\\_credit\\_rating/index.htm](http://money.cnn.com/2011/11/23/news/economy/moodys_credit_rating/index.htm). It is possible that the nation's credit would suffer because at least one NRSRO downgraded the U.S. credit rating even after Congress passed a bill to raise the debt ceiling due to the extreme political dispositions and controversies. See *S&P Downgrades U.S. Debt*, CBSNEWS (Aug. 5, 2011, 8:37 PM), <http://www.cbsnews.com/stories/2011/08/05/national/main20088944.shtml>.

217. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

218. *E.g.*, U.S. CONST. amend. XIV (the Due Process Clause and the Equal Protection Clause).

219. See U.S. CONST. art. I, § 8.

220. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

221. U.S. CONST. art. 1, § 8, cl. 2 (“The Congress shall have the Power . . . [t]o borrow money on the credit of the United States . . .”).

222. U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have the Power To lay and collect Taxes . . . .”); see also Erwin Chemerinsky, *The Constitution, Obama, and Raising the Debt Ceiling*, Op-Ed., L.A. TIMES (July 29, 2011, 11:41 AM), <http://opinion.latimes.com/opinionla/2011/07/erwin-chemerinsky-on-why-obama-cant-raise-the-debt-ceiling.html> (“The power of the

authorization to borrow money, a power given to the Congress to grant and not to the President to create in the absence of legislation authorizing it.”<sup>223</sup> Thus, by unilaterally raising the debt ceiling, the President is violating well-settled and accepted constitutional principles. It is difficult “to see how the President can ‘defend the Constitution’ while usurping the powers of the Congress under it to engorge his own.”<sup>224</sup>

Additionally, it is not clear that the Take Care clause would give the President the power to unilaterally raise the debt ceiling without congressional approval:

It is a note-worthy fact in our history that whenever the exigencies of the country, from time to time, have required the exercise of executive . . . power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was found, in every instance, necessary to invoke the interposition of the power of the national legislature.<sup>225</sup>

Even when President Lincoln suspended the writ of habeas corpus during the Civil War<sup>226</sup> without a legislative act, the legislature eventually passed legislation to approve of that action.<sup>227</sup> Several questions are left unanswered about the “Take Care” clause: Does “Take Care” mean the President is to “be careful” or “be certain” in executing the laws? What does “faithfully” mean? Does “faithfully” mean the President must enforce the letter of the law, the spirit of the law, or both? To what extent are they to be executed?

Unilaterally raising the debt ceiling potentially could lead to impeachment or congressional legal action.<sup>228</sup> If Congress believed the President taking such

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purse—including the authority to tax, spend, and borrow—is quintessentially legislative.”); Tribe, *supra* note 7.

223. Dan Miller, *The President Has No Authority to Increase the Debt Limit Unilaterally*, OP. FORUM (July 24, 2011), <http://opinion-forum.com/index/2011/07/the-president-has-no-authority-to-increase-the-debt-limit-unilaterally/>.

224. *Id.*

225. *Cunningham v. Neagle*, 135 U.S 1, 96 (1890).

226. The Constitution could be interpreted to allow such an act but this act was likely reserved to Congress as it fell in Article I. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

227. Congress subsequently authorized the suspension on March 3, 1863, almost two full years later. See James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS’N 47, 50 (2008), <http://quod.lib.umich.edu/cgi/p/pod/dod-idx/lincoln-s-suspension-of-the-writ-of-habeas-corpus.pdf?c=jala;idno=2629860.0029.205>.

228. U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments . . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

unilateral action qualified as a “Treason, Bribery, or other high Crimes and Misdemeanors,”<sup>229</sup> the House of Representatives could attempt to impeach the President,<sup>230</sup> and the Senate could convict and remove him from office.<sup>231</sup> Because there is uncertainty as to what constitutes “high crimes and misdemeanors,”<sup>232</sup> impeachment and conviction is not likely.<sup>233</sup> Impeachment and conviction would be even more difficult under a Congress similar to the makeup of the current Congress in which there is an apparent unwillingness to compromise. Congress also could try to take action by suing the President. Yet, “case law is quite clear that a member of Congress, even if joined by a dozen or two colleagues, cannot get standing in court to contest a constitutional issue.”<sup>234</sup>

This remedy puts the President in a catch-22: he may have to violate multiple constitutional principles to enforce another. The key here is that, under the proper interpretation of the Public Debt Clause, the Government must avoid defaulting or repudiating on payments owed to bondholders.<sup>235</sup> Thus, the President has another option by which he can avoid violating each of these constitutional principles discussed. That option is to direct the Treasury to make payments owed to bondholders first.

### C. Option 3: Make Payments to Bondholders First

The only way to avoid violating the Public Debt Clause is to ensure that the Government does not repudiate or default on payments owed to bondholders. Thus, ensuring payment to bondholders if Congress fails to raise the debt ceiling

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229. *Id.* art. II, § 4.

230. *See id.* art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”).

231. *See id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments . . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

232. *What Are “High Crimes and Misdemeanors”?*, SLATE (Feb. 4, 1999, 6:06 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/1999/02/what\\_are\\_high\\_crimes\\_and\\_misdemeanors.html](http://www.slate.com/articles/news_and_politics/explainer/1999/02/what_are_high_crimes_and_misdemeanors.html).

233. *See History of Impeachment*, UNIV. OF ILL. AT CHIC. (Mar. 6, 2004, 3:10 PM), <http://www.uic.edu/depts/lib/documents/resources/history.shtml>. Nine Presidents have had impeachment charges filed against them. *Id.* The House only impeached two of them, President William Clinton and President Andrew Johnson. *Id.* The Senate convicted neither Clinton nor Johnson. *Id.* President Nixon resigned before he could be impeached. *Id.*

234. Matthew Zeitlin, *The Debt Ceiling: Why Obama Should Just Ignore It*, NEW REPUBLIC (June 24, 2011, 12:00 AM), <http://www.tnr.com/article/politics/90659/debt-ceiling-obama-congress> (quoting Louis Fisher, a former Congressional Research Service employee and an expert on the separation of powers); *see, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 813-14, 819, 830 (1997) (holding that action brought by individual congressmen challenging the constitutionality of the Line Item Veto Act did not have “concrete and particularized injury,” the first requirement for one to have standing in court).

235. *See supra* Part II.

is the remedy with the fewest negative consequences. That remedy would require Congress to pass legislation, or if Congress refuses, for the President to issue an Executive Order directing the Treasury to prioritize its legal obligations so bondholders are paid first.<sup>236</sup> This mechanism of priority would ensure that the President does not overstep constitutional barriers that leave the raising the debt ceiling to Congress<sup>237</sup> but also ensure the country does not default.

Throughout the 2011 debt crisis, many observed that payments to bondholders could be paid merely with incoming revenue; thus, a failure to raise the debt ceiling would not cause a default nor be a violation of Section Four.<sup>238</sup> This conclusion, though, assumes that the Government would not be paying other obligations as they become due. The Government may have sufficient incoming revenue to pay off debt owed to bondholders, but if the Treasury pays obligations as they become due it “could clearly mean missing an interest payment” owed to bondholders.<sup>239</sup> In fact, the Treasury explicitly said that it would not employ a prioritization system and would make payments on all legal obligations as they become due.<sup>240</sup> Further, Treasury officials asserted that they “lack[ed] legal authority to establish priorities . . . .”<sup>241</sup> Under the current regime, the Treasury would continue to make payment on each legal obligation as it becomes due, resulting in default to some bondholders.

These claims by the Treasury of an inability to prioritize are not without rebut. During the 1985 debt limit crisis, the GAO issued a letter “that it was aware of no requirement that [the] Treasury must pay outstanding obligations in the order in which they are received.”<sup>242</sup> The “GAO concluded that [the] ‘Treasury is free to liquidate obligations in any order it finds will best serve the interests of the United States.’”<sup>243</sup> Essentially, Congress is silent on this particular action. Two government agencies have interpreted this silence differently. The Treasury interprets it as a lack of authority, and the GAO interprets it as a lack of restriction. Because of this silence, the President should unilaterally direct the Treasury to establish payments owed to bondholders as priority number one.

Arguably, Congress has addressed this issue indirectly. According to 31 U.S.C. § 3102, “With the approval of the President, the Secretary of the Treasury

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236. This mechanism is similar to the priority scheme used in the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 507 (2006), which sets forth the order for paying certain expenses, individuals, and creditors.

237. *See* U.S. CONST. amend. XIV, § 5.

238. *See Georgia Republican Tom Price Says Paying Debtholders First Will Stave Off Default*, *supra* note 175; G.I., *supra* note 121.

239. G.I., *supra* note 121.

240. Wolin, *supra* note 177; *see also* TATELMAN & THOMAS, *supra* note 7, at 12.

241. TATELMAN & THOMAS, *supra* note 7, at 12 (citing S. COMM. ON FIN. INCREASE OF PERMANENT PUBLIC DEBT LIMIT, S. REP. NO. 99-144, at 5 (1985)).

242. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B-138524, LETTER FROM GAO TO THE HON. BOB PACKWOOD, CHAIRMAN OF S. FIN. COMM. (1985), *available at* <http://redbook.gao.gov/14/fl0065142.php>).

243. *Id.*

may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds . . . .”<sup>244</sup> One scholar argues that this statute, “does not currently allow for such preferential treatment; the Treasury pays obligations on a rolling basis.”<sup>245</sup> The statute is permissive, though. By using the word “may” the Treasury has an option to pay obligations on a rolling basis. If the statute used “shall,” then Congress would be requiring the Treasury to pay obligations on a rolling basis. This statute is not dispositive that prioritization cannot be utilized.

Because Congress is essentially silent on prioritization, the President’s executive power is not at its “lowest ebb” or its highest ebb, so he must rely on his independent powers to act.<sup>246</sup> The executive power here that gives him the ability unilaterally to give this order to the Treasury could be found in the Take Care Clause<sup>247</sup> or through invoking the Public Debt Clause. “[T]here is no dispute that the President has an Article II, [Section] [Three] duty to ‘take Care that the Laws are faithfully executed,’ which would entail compliance with [Section] [Four] of the Fourteenth Amendment . . . .”<sup>248</sup> Even if this may be out of the ordinary, it is not unprecedented for the President to act unilaterally.<sup>249</sup> Other past presidents have taken unilateral action.<sup>250</sup>

It is unknown at this time whether Congress would subsequently approve of the President directing the Treasury to make its first priority the payment of bondholders. Typically, actions taken pursuant to the Take Care power do require “interposition” of Congress.<sup>251</sup> Concededly, these acts or attempted acts

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244. 31 U.S.C. § 3102 (2006).

245. Abramowicz, *Train Wrecks*, *supra* note 11, at 38.

246. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain . . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

247. U.S. CONST. art. II, § 3 (The President “shall take Care that the Laws be faithfully executed . . . .”).

248. TATELMAN & THOMAS, *supra* note 7, at 11.

249. Through an Executive Order to the Secretary of Commerce, President Truman attempted to seize control of the steel industry during the Korean War, but Congress had forbidden the President from taking such action by rejecting an amendment to the Taft-Hartley Act that would have given the President this power, so his Order was found to be an unconstitutional exercise of executive power. *See Youngstown*, 343 U.S. at 586-89.

250. *See supra* text accompanying notes 226-27.

251. *Cunningham v. Neagle*, 135 U.S. 1, 95-96 (1890).

were taken during times of war and as a more direct result of war.<sup>252</sup> It is unclear whether a financial crisis could be seen as an emergency.<sup>253</sup> Even if it would be considered an emergency, that reason alone is unlikely to endow the President with some inherent emergency powers unless Congress promulgates a statute that does so.<sup>254</sup> The President may also find some persuasive support for ordering this prioritization because such practice is similarly allowed on the state level, without legal action questioning it.<sup>255</sup> Even if the Take Care Clause is insufficient, the President will invoke the Public Debt Clause. This clause requires the Government to pay bondholders on time;<sup>256</sup> if Congress refuses to ensure compliance with this clause,<sup>257</sup> the President must take care that the Government complies with it. Prioritization would avert a violation of this constitutional principle.

From a legal perspective, the best benefit of this choice is that it would not violate the Constitution because bondholders would be paid, and the President would not be invoking any powers enumerated to Congress in Article I, Section 8 of the U.S. Constitution. As a result of making payments to these bondholders, investors would continue to have confidence in the United States; thus, they would continue to invest in the government, keeping interest rates on Treasury investment instruments low.<sup>258</sup> “Full investor confidence in the validity of the debt requires not just a constitutional nonpayment ban, [sic] but also a statutory regime that provides for payment.”<sup>259</sup> Other benefits include maintaining a high credit rating.<sup>260</sup>

There are financial disadvantages if the President orders the Treasury to make payment to bondholders first. Other legal obligations under the debt ceiling (which are different than those under the Public Debt Clause)<sup>261</sup> may not be met.

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252. See *supra* text accompanying notes 226-27.

253. I acknowledge that very detailed analysis could go into this consideration, but this level of detail is outside the scope of this Note.

254. *Youngstown*, 343 U.S. at 652-53 (Jackson, J., concurring); Congress authorized President Bush to suspend habeas corpus pursuant to the Military Commissions Act of 2006. See Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006).

255. G.I., *supra* note 121 (“[I]n California, for example, bond holders stand ahead of all creditors except schools. Illinois has remained current on its bond debt while racking up some \$6 billion in unpaid bills to other creditors.”).

256. See *supra* Part II.

257. See U.S. CONST. amend. XIV, § 5.

258. See LEVIT ET AL., *supra* note 10, at 11.

259. Abramowicz, *supra* note 7, at 595.

260. Two of the most widely reputed NRSROs, Fitch, Inc. and Moody’s Investors Services, Inc., did not downgrade the U.S. credit rating upon passage of the Budget Control Act but eventually changed their outlook to negative. See Egan, *supra* note 216; Censky, *supra* note 216. It is possible that the nation’s credit would still suffer because at least one NRSRO downgraded the U.S. credit rating even after a bill to raise the debt ceiling was passed due to the extreme political dispositions and controversies. See *S&P Downgrades U.S. Debt*, *supra* note 216.

261. See *supra* text accompanying notes 29-30.

These “perceptions . . . are difficult if not impossible to predict”; thus, “it is not clear what the effects of prioritization would be, in the event of an impasse.”<sup>262</sup> However, some historical evidence demonstrates there may be some mechanisms to mitigate damages. For example, 42 U.S.C. § 1320b-15 provides, “No officer or employee of the United States shall . . . redeem prior to maturity amounts in any Federal fund which are invested in public debt obligations for any purpose *other than the payment of benefits or administrative expenses from such Federal fund.*”<sup>263</sup> During the 1985 debt ceiling crisis (which was before this statute was promulgated), the Government took action similar to what this statute would eventually allow. It divested various trust funds, including the Social Security Trust Fund, by redeeming some trust fund securities earlier than usual in order to “[create] room under the debt ceiling for [the] Treasury to borrow sufficient cash from the public to pay other obligations, including . . . Social Security benefits.”<sup>264</sup> The Treasury also warned that economic consequences could include “risers in mortgage interest rates and other borrowing costs . . . [and] reductions in the value of homes, 401(k)s and other retirement savings . . . .”<sup>265</sup>

From a different perspective, some experts in the financial world believe that even if the Government did default on these legal obligations under the debt ceiling, only a technical or short-term default would occur, so the actual backlash would be less than that expected.<sup>266</sup> This concept will be explored further later, but it is relevant to note that the disastrous predictions of what could occur if the Government defaults under the debt limit may be exaggerated.<sup>267</sup>

Although these disadvantages admittedly have significant negative consequences, an act or omission that would violate the Public Debt Clause, is unprecedented and potentially catastrophic.<sup>268</sup> *The Economist* raises some potential issues that could occur if the Government fails to make payment to bondholders:

Would banks around the world have to classify Treasury holdings as non-performing? Would money-market mutual funds break the buck?

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262. LEVIT ET AL., *supra* note 10, at 15.

263. 42 U.S.C. § 1320b-15(a)(3) (2006) (emphasis added). Under this statute, “‘public debt obligation’” is defined as “any obligation subject to the public debt limit established under section 3101 of Title 31.” *Id.* § 1320-15(b). “‘Federal fund’” includes “the Federal Old-Age and Survivors Insurance Trust Fund; the Federal Disability Insurance Trust Fund; the Federal Hospital Insurance Trust Fund; and the Federal Supplementary Medical Insurance Trust Fund.” *Id.* § 1320b-15(c).

264. LEVIT ET AL., *supra* note 10, at 4; the Social Security Trust Fund is included within the Social Security program and is the mechanism that supposedly secures long-term payment of Social Security benefits. See McGuire, *supra* note 102, at 209-10. For further discussion and explanation, see *id.*

265. Wolin, *supra* note 177.

266. See James Freeman, Op-Ed., *What if the U.S. Treasury Defaults?*, WALL ST. J., May 14, 2011, <http://online.wsj.com/article/SB10001424052748703864204576317612323790964.html>.

267. See *infra* text accompanying notes 271-74, 278.

268. *Id.*

Would all federal entities lose their AAA-credit rating? Would the Federal Deposit Insurance Corporation's ability to backstop the nation's banks come into question? Would foreign central banks start to shift out of dollars?<sup>269</sup>

These potential implications arguably are more significant than the negatives discussed. Refusal to prioritize payments would violate Section Four of the Fourteenth Amendment. Not only could the negative financial consequences of not meeting all legal obligations occur, but additionally, all of the disadvantages if the Government defaults on payments owed to bondholders could also occur. Eliminating some bad consequences, while leaving another remaining, is better than not eliminating any of the bad consequences.

#### *D. Option 4: Do Nothing*

Some experts in the financial world believe that the best choice in response to a failure to raise the debt ceiling is to do nothing and let a technical default occur.<sup>270</sup> In this sense, a technical default is a short-term default.<sup>271</sup> The driving force behind this proposition is that allowing a technical default to occur would force the Government to solve the “real problem”—end the Government's “addiction” to spending and come to an agreement that ultimately puts the country on the right path to financial stability.<sup>272</sup> Advocates of this remedy admit that a technical default would be “horrible” in the short-term but reiterate that not solving the “real problem” would be “catastrophic” in the long-term.<sup>273</sup> This remedy is a method to stop the Government from acting as political extremists and do what is best for the long-term.<sup>274</sup> There may be some support for this dire financial outlook because Standard & Poor's (S&P) downgraded the United States' credit rating even though Congress passed a bill by the default deadline to avert the 2011 threatened default.<sup>275</sup> S&P's reasoning for this credit downgrade was that it had lost confidence in the Government and that the bill actually passed did not “go far enough” to provide stability.<sup>276</sup> S&P's further stated that if the United States Government continues to act how it has recently, the long-term outlook is negative and could lead to S&P further downgrading the credit rating.<sup>277</sup>

Financially, most experts do believe that doing nothing will have some

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269. G.I., *supra* note 121.

270. Freeman, *supra* note 266. This is assuming that bondholders would be barred from suing by either lack of standing or sovereign immunity.

271. *Id.*

272. *Id.*

273. *Id.* (referring to statements made by Stanley Druckenmiller, a “legendary investor.”).

274. *Id.*

275. *S&P Downgrades U.S. Debt*, *supra* note 216.

276. *Id.*

277. *Id.*

problems but that those problems can be minimized.<sup>278</sup> Interest payments due to bondholders may be delayed some time, but these economists believe that the bondholder still knows he or she will receive the interest payment.<sup>279</sup> This risk is worth it if, in exchange, there are massive cuts in entitlements that enables the Government to make payments. Accordingly, bondholders in the long-term “are much more assured.”<sup>280</sup> Further, they predict that other markets, such as the Chinese government, understand that they would still be paid in a technical default, so these types of investors will not immediately sell their Treasury debt upon default.<sup>281</sup> Support for this claim comes from the fact that when the credit rating went down, the sales for Treasury bonds increased.<sup>282</sup> In the eyes of economists, this increase suggested increased confidence by consumers in that “[i]nvestors have voted and are saying the U.S. is going to pay them.”<sup>283</sup> Similar investor confidence was portrayed in September 1995, during a debt ceiling crisis and a government shutdown, when “the bond market rallied,” and interest rates continued to decrease.<sup>284</sup>

Proponents of this remedy overlook legal and other financial implications. Legally, doing nothing would be a violation of the Public Debt Clause because it would result in a failure to pay bondholders.<sup>285</sup> It also could lead to more than a technical default if members of Congress do not feel as if the technical default is forcing their hand. Doing nothing results in all of the disadvantages previously discussed, which could result if neither bond payments nor other legal obligations are paid. These disadvantages include belated government payments on obligations, loss of interest of federal trust funds, the full faith and credit of the United States being threatened, increase in interest on government bonds,<sup>286</sup> “rises in mortgage interest rates and other borrowing costs . . . reductions in the value of homes, 401(k)s and other retirement savings.”<sup>287</sup> If the default goes on long enough, the Government may eventually retire to its last resort—printing more money.<sup>288</sup> As a result, there would be inflation and potentially, “hyperinflation,” a disaster from which it is difficult to efficiently recover.<sup>289</sup>

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278. See, e.g., *id.* (referring to financial investment expert, Stanley Druckenmiller).

279. Freeman, *supra* note 266.

280. *Id.*

281. *Id.*

282. *S&P Downgrades U.S. Debt*, *supra* note 216.

283. *Id.* (quoting Mark Zandi, chief economist of Moody’s Analytics).

284. Freeman, *supra* note 266 (quoting Stanley Druckenmiller).

285. See *supra* Part II.

286. LEVIT ET AL, *supra* note 10, at 9-10.

287. Wolin, *supra* note 177.

288. Research Recap, *Federal Reserve May Be Forced to Print More Money to Avert Profound Recession*, FIN. CONTENT (Sept. 30, 2011, 10:00 AM), [http://markets.financialcontent.com/stocks/news/read/19593132/Federal\\_Reserve\\_May\\_Be\\_Forced\\_to\\_Print\\_More\\_Money\\_to\\_Avert\\_Profound\\_Recession](http://markets.financialcontent.com/stocks/news/read/19593132/Federal_Reserve_May_Be_Forced_to_Print_More_Money_to_Avert_Profound_Recession).

289. Omar Hossini, *Are We Really Printing Money to Finance Our Debts?*, HISTORY NEWS NETWORK (Feb. 14, 2009, 3:39 PM), <http://hnn.us/articles/60041.html>.

## CONCLUSION

With another debt limit crisis looming in the future, the United States must have a plan in place in case the Government does not come to a last minute compromise like it did in 2011.<sup>290</sup> If the debt ceiling is not raised in the future, the Government would be violating the Public Debt Clause by defaulting or repudiating on debts owed to bondholders.<sup>291</sup> Legislative history, judicial precedent, and real-life historical precedent support this interpretation of Section Four.<sup>292</sup> To avoid this constitutional violation, the Government—either Congress or the President (if Congress is unwilling)—should direct the Treasury to ensure payments made to bondholders is its first priority, over all other obligations it has under the debt limit statute.<sup>293</sup> This is the best choice because it has fewest legal barriers and the fewest negative financial and legal consequences. Finally, this choice “reflect[s] the Framers’ commitment to the sanctity of full faith and credit.”<sup>294</sup>

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290. The Treasury gave the Government an August 2, 2011 deadline to pass a bill. *See* LEVIT ET AL., *supra* note 10, at 3, 6. The Government passed the bill raising the debt ceiling on August 2, 2011. *See* Budget Control Act of 2011, Pub. L. No. 112-25, §§ 101, 301, 302, 401, 125 Stat. 240 (codified in scattered sections of the U.S. Code).

291. *See supra* Part II.

292. *See supra* Part II.

293. *See supra* Part III.C.

294. Abramowicz, *supra* note 7, at 595.