

NOTES

FORGOTTEN BUT NOT LOST: THE ORIGINAL PUBLIC MEANING OF SECTION 4 OF THE FOURTEENTH AMENDMENT

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INTRODUCTION

IN the summer of 2011, an intransigent Republican Congress refused to raise the statutory debt ceiling without budget cuts from President Barack Obama.¹ Several noted academics called for the President to raise the debt ceiling unilaterally.² In support of such action, these professors cited the first sentence of Section 4 of the Fourteenth Amendment to the U.S. Constitution. The first sentence 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.”³

Those advocating for a presidential power to raise the debt ceiling argued that the first sentence of Section 4, also known as the Public Debt Clause, should be read broadly.⁴ Under such a reading, the Public Debt

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¹ See Paul Davidson, A Primer on the Debt-Ceiling Debate, USA Today (July 28, 2011, 9:28 PM), http://usatoday30.usatoday.com/news/washington/2011-07-28-debt-ceiling-questions_n.htm.

² See generally Garrett Epps, The Speech Obama Could Give: ‘The Constitution Forbids Default’, The 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/>; Adam Liptak, The 14th Amendment, the Debt Ceiling and a Way Out, N.Y. Times, July 25, 2011, at A10 (quoting Professor Jack Balkin).

³ U.S. Const. amend. XIV, § 4.

⁴ Professor Garrett Epps writes that the Public Debt Clause “establishes a complete firewall against the misuse of governmental power by one political faction to get its way by wrecking the public credit.” Epps, *supra* note 2, at 1. Jack Balkin views Section 4 as a “fail-

Clause authorizes the President to borrow funds to pay the federal debt when Congress refuses to raise the debt ceiling. One of the few scholarly articles with a primary focus on interpreting the first sentence of Section 4, authored by Professor Michael Abramowicz in 1997, also proposed a broad reading of the Public Debt Clause.⁵ Specifically, Abramowicz argued that one should read the phrase “the validity of the public debt . . . shall not be questioned” broadly to prohibit any governmental action that “jeopardizes” the validity of the public debt.⁶ This Note strongly disputes such a broad reading of that phrase by offering an alternative interpretation grounded in its original public meaning.

In the last several years, a consensus has emerged among constitutional scholars that the original public meaning of a phrase should be the starting point in constitutional interpretation. Both originalists and living constitutionalists have shifted ground in the debate over constitutional interpretation. Professor James Ryan writes, “Many, including prominent scholars like Professors Akhil Amar and Jack Balkin of Yale Law School, also agree that the original public meaning of the constitutional text must be the starting point in constitutional interpretation.”⁷ While some, including Judge Richard Posner, still object to the use of original meaning in constitutional interpretation, most constitutional scholars, in addition to several members of the Supreme Court, now agree that original public meaning has at least some relevance in interpreting the Constitution.⁸

safe” for preventing a political party from “hold[ing] the validity of the public debt hostage to achieve political ends” Liptak, *supra* note 2.

⁵ Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment’s Public Debt Clause* 24–25, 31 (George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 575), available at <http://ssrn.com/abstract=1874746>.

⁶ *Id.* at 24–30.

⁷ James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *Va. L. Rev.* 1523, 1525 (2011). Amar and Balkin are two leading progressive constitutional scholars.

⁸ Recently, Judge Posner criticized the use of original public meaning in a review of Justice Antonin Scalia’s newest book. See Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, *The New Republic*, Sept. 13, 2012, at 18, 19. Posner argues that attempting to discern the original meaning of vague phrases in the Constitution is essentially impossible. Justice Scalia provides several answers to such critiques in Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 862, 864 (1989). Judge Posner advocates a pragmatic approach to interpretation that places much less emphasis on the text of a legal document. See Richard A. Posner, *Law, Pragmatism, and Democracy* 11, 72 (2003) [hereinafter *Posner, Pragmatism*]. Notwithstanding Judge Posner’s critique, many scholars agree that original

An extensive search found no published article that locates the original public meaning of the Public Debt Clause. Abramowicz's article fails to mention original public meaning or a similar concept.⁹ He does not cite a single dictionary or legal treatise contemporary to the adoption of the Fourteenth Amendment that supports a broad interpretation of the phrase "[t]he validity of the public debt . . . shall not be questioned."¹⁰ He also fails to explore the historical context of Section 4 in any detail outside of a brief examination of the legislative history of that section.¹¹ The only Supreme Court case addressing the meaning of the Public Debt Clause does not explore the original meaning of the clause.¹² Finally, several recent student notes dealing with the meaning of the Public Debt Clause fail to provide a complete account of the clause's original public meaning.¹³ This Note rectifies these omissions by providing the first

meaning is the starting point for constitutional interpretation. See Ryan, *supra* note 7, at 1525.

⁹ Abramowicz, *supra* note 5. Several articles on the meaning of the Public Debt Clause fail to mention original public meaning. See Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff, 112 *Colum. L. Rev.* 1175 (2012); Phanor J. Eder, A Forgotten Section of the Fourteenth Amendment, 19 *Cornell L.Q.* 1 (1933); Gerard N. Magliocca, *The Gold Clause Cases* and Constitutional Necessity, 64 *Fla. L. Rev.* 1243 (2012); Kelleigh Irwin Fagan, Note, The Best Choice out of Poor Options: What the Government Should Do (or Not Do) if Congress Fails to Raise the Debt Ceiling, 46 *Ind. L. Rev.* 205 (2013); Daniel Strickland, Note, The Public Debt Clause Debate: Who Controls this Lost Section of the Fourteenth Amendment?, 6 *Charleston L. Rev.* 775 (2012).

¹⁰ U.S. Const. amend. XIV, § 4.

¹¹ On the importance of historical context in constitutional scholarship, see Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 *Va. L. Rev.* 1, 66–67 (1996).

¹² *Perry v. United States*, 294 U.S. 330 (1935). *Perry* extended the scope of the Public Debt Clause to protect debts created after the Civil War. *Id.* at 354. This Note does not dispute the Court's interpretation of this aspect of the scope of the Public Debt Clause, articulated and defended ably in Abramowicz's article. See Abramowicz, *supra* note 5, at 6. In *Perry*, the Court also stated: "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." 294 U.S. at 354. This Note disagrees with this aspect of the Court's opinion. As a primary matter, the Court's statement is arguably dictum because the court decided the case on other grounds. *Id.* at 358. The Court also provided no historical support for this interpretation.

¹³ Jacob Charles, Note, The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism, 62 *Duke L.J.* 1227 (2013); Fagan, *supra* note 9; Strickland, *supra* note 9.

comprehensive account of the original public meaning of the Public Debt Clause.¹⁴

The original public meaning of the phrase “[t]he validity of the public debt . . . shall not be questioned” in the Public Debt Clause was narrow.¹⁵ The phrase was understood at the time of ratification to be technical language prohibiting direct governmental debt repudiation only. Contemporary legal sources confirm that “questioning” the validity of a debt during that time meant the attempted legal repudiation of that debt. Further, there is very little contemporary evidence suggesting that acting to jeopardize indirectly the validity of a debt was equivalent to “questioning” the validity of that debt, as Abramowicz contends.

The historical context of Section 4 also supports the assertion that the original meaning of the Public Debt Clause was precise. It does so in three ways. First, the threat of federal debt repudiation at the time of the ratification of the Fourteenth Amendment was particularized and well defined. Specifically, Republicans feared that Southern Democrats would join forces with Northern moderates in Congress to repudiate the federal debt. They wrote the first sentence to address this threat; they understood the meaning of the sentence as prohibiting the federal government from direct federal debt repudiation.

Second, the meaning of the first sentence of Section 4 must be understood in light of the historical realities addressed by both sentences in Section 4. Notably absent from the recent discussions of the meaning of the first sentence of Section 4 is any reference to the second sentence of that section.¹⁶ The second sentence of Section 4 reads:

¹⁴ In determining the original meaning of a phrase in the Constitution, the starting point should always be the text of that phrase. See Caleb Nelson, *What is Textualism?*, 91 *Va. L. Rev.* 347, 351–52 (2005). By consulting contemporary dictionaries, newspapers, legal treatises, and other contemporary sources, one can deduce the meaning of the words and phrases in the Constitution as they were originally understood. See Ryan, *supra* note 7, at 1533. In addition, the historical realities addressed by a particular phrase can make the meaning of that phrase more concrete. See *id.* at 1548. Finally, the sentences and phrases surrounding a particular constitutional provision, also known as semantic context, can shed light on the original meaning of that provision. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70, 91 (2006). The D.C. Circuit recently issued an opinion employing this methodology to interpret a constitutional provision. See *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281).

¹⁵ U.S. Const. amend. XIV, § 4.

¹⁶ In determining the original public meaning of a phrase, semantic context is also critical. See Manning, *supra* note 14, at 91. Taking words or phrases out of context can lead to confusion about the original meaning of those words or phrases. To interpret the first sentence in a

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But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.¹⁷

The framers of the Fourteenth Amendment would have found the modern emphasis on and isolation of the first sentence of Section 4 surprising.¹⁸ This is because they understood that the threat of federal debt repudiation was relatively small, while the twin threats of state compensation for emancipated slaves and honoring Confederate war debt were very serious. This Note provides the most thorough research to date on the threats addressed in Section 4 of the Fourteenth Amendment.¹⁹ It highlights the extensive, organized nature of the threats to repay the rebel war debt and to obtain compensation for emancipated slaves in the Southern states. The research also confirms that there was no organized threat by those in the South to repudiate the federal debt. These historical realities support a specific and more judicious interpretation of the first sentence of Section 4. One of the few individuals to write about Section 4 of the Fourteenth Amendment argued, “The second part of the section . . . is of historic interest only.”²⁰ One of the purposes of this Note is to rebut that assertion.

Finally, the history surrounding the Fourteenth Amendment indicates that the framers of that amendment inserted the first sentence of Section 4 late in the drafting process for primarily political purposes. In fact, pressure from several special interest groups led to the insertion of the first sentence of Section 4. Consequently, one should read that sentence as highly political and as having a very specific original meaning tailored to pacify certain constituencies’ fears.

vacuum, then, without reference to the second sentence of Section 4, leads to misinterpretation.

¹⁷ U.S. Const. amend. XIV, § 4.

¹⁸ For examples of scholarship isolating the first sentence, see Charles, *supra* note 13. Charles goes so far as to assert that the President has the power to ignore the statutory debt ceiling because it is unconstitutional. His note provides little historical evidence for a broad reading of the Public Debt Clause besides a limited summary of the legislative history of that clause and a short discussion of the original meaning of the clause using contemporary lay dictionaries. *Id.* at 1231–46.

¹⁹ See *infra* Part II.

²⁰ Eder, *supra* note 9, at 1.

This Note is divided into three Parts. Part I argues that the original public meaning of the phrase “the validity of the public debt . . . shall not be questioned” in the first sentence of Section 4 was narrow. Specifically, the phrase prohibited all legal action by the federal government directly repudiating the federal debt. Contemporary legal sources, dictionaries, and treatises confirm this understanding of the phrase.

Part II then argues for a specific interpretation of the Public Debt Clause based on the history surrounding Section 4. Section II.A fleshes out the three threats addressed in Section 4. Exploring these threats buttresses the assertions that the threat of federal debt repudiation was narrow and small and that one cannot interpret the first sentence of Section 4 without reference to the second sentence of that section. Section II.B provides historical evidence indicating that Congress inserted the first sentence of Section 4 late in the drafting process for primarily political purposes. This reality further confirms that the original meaning of the first sentence is narrow.

Part III addresses a serious potential objection to a narrow understanding of the Public Debt Clause and offers an additional argument for such an understanding. The objection that language with a broad apparent meaning in the Constitution should be interpreted liberally fails with regard to the first sentence of Section 4. This is because the original public meaning of the first sentence is narrow. Finally, even if one rejects the proffered arguments based on original public meaning, separation of powers concerns should cause one to interpret the Public Debt Clause narrowly.

I. ORIGINAL PUBLIC MEANING AND THE PUBLIC DEBT CLAUSE

In Michael Abramowicz’s article on the Public Debt Clause, he relates an anecdote about a protestor holding a sign in Lafayette Park.²¹ The sign read: “Arrest Me. I Question the Validity of the Public Debt. Repeal Section 4, Fourteenth Amendment to the U.S. Constitution.”²² This anecdote serves to underline the point that a word, in this instance “question,” can have multiple meanings. The broadest and most basic meaning of the verb “to question” is “to ask a question of or about.”²³

²¹ Abramowicz, *supra* note 5, at 3.

²² *Id.*

²³ Webster’s Third New International Dictionary of the English Language Unabridged 1864 (1976).

The protestor, on the other hand, apparently employed the verb in a different sense to mean “to express doubt about.”²⁴ It seems obvious that the meaning of the word “questioned” in the Public Debt Clause does not encompass “asking a question of” the public debt. Nor does the meaning encompass an individual who “expresses doubt about” the public debt.²⁵ In order to discern what exactly the Public Debt Clause prohibits, one must understand what the clause meant at the time of ratification.

This Part argues that the text of the phrase “the validity of the public debt . . . shall not be questioned” in Section 4 has a precise original public meaning.²⁶ The text prohibits all governmental action directly repudiating the federal debt. Contemporary legal sources confirm that to “question the validity of a debt” meant to take legal action to repudiate that debt. In addition, dictionaries from the time of the ratification of the Fourteenth Amendment provide evidence that “to question” the validity of a debt meant to repudiate, or to deny the validity of, that debt. Both of these pieces of evidence suggest that the Public Debt Clause prohibits only direct legal action by all three branches of the federal government to repudiate the federal debt. The clause forbids congressional statutes repudiating federal debt, court judgments invalidating federal debt, and executive action declaring federal debt to be invalid. The clause, however, does not prohibit congressional action that merely jeopardizes the validity of the public debt.

A. Contemporary Legal Sources and the Public Debt Clause

At the time of the ratification of the Fourteenth Amendment, the phrase “the validity of the public debt . . . shall not be questioned” was understood to be legal language prohibiting only direct federal debt repudiation. As Professor Caleb Nelson argues, legal documents sometimes “include technical terms of art, which laymen and lawyers alike

²⁴ *Id.*

²⁵ No scholar has explored the First Amendment implications of the language “shall not be questioned,” most likely because it has none. The authors of this language did not discuss whether it was an exclusion to the free speech provision of the First Amendment.

²⁶ For more on original public meaning, see John O. McGinnis & Michael B. Rappaport, A Pragmatic Defense of Originalism, 101 *Nw. U. L. Rev.* 383 (2007); Caleb Nelson, Originalism and Interpretive Conventions, 70 *U. Chi. L. Rev.* 519 (2003); Ryan, *supra* note 7; Clarence Thomas, Judging, 45 *U. Kan. L. Rev.* 1 (1996).

can grasp only after doing considerable research.”²⁷ In the mid-1800s, to “question the validity” of something had a unique legal meaning. Specifically, parties to legal transactions “questioned the validity” of a legal instrument or legal action involved in that transaction by bringing a legal claim in a lawsuit. For example, in a treatise on mortgage law published in 1864, an assignee of a mortgage from a mortgagor “stands in the place of the mortgagor, with the same rights which he had; and, like an assignee in bankruptcy, or an executor, or administrator, may question the validity of the debt outstanding against the estate.”²⁸ The act of questioning in this instance meant that the assignee of the mortgage could bring a legal challenge to invalidate the debt.²⁹

Judge John Bouvier’s legal dictionary from 1864 provides further insight into the legal meaning of the verb “to question.”³⁰ Bouvier’s dictionary first labels “question” as a legal “practice.”³¹ This indicates that the verb can have a more precise legal definition than the common definition ascribed to it. The dictionary then defines “question” as, “A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.”³² Questioning the validity of a legal instrument, therefore, meant making a legal claim in a lawsuit so that a judge or jury could rule on its validity.

Section 25 of the Judiciary Act of 1789 provides an example of the legal meaning of “question.”³³ Section 25 was valid federal law in 1866 when Congress authored the Fourteenth Amendment.³⁴ Therefore, those in Congress likely would have known about the language in the section.³⁵ Section 25 reads:

And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in

²⁷ Nelson, *supra* note 14, at 367.

²⁸ 1 Francis Hilliard, *The Law of Mortgages of Real and Personal Property* 600 (Boston, Little, Brown & Co. 3d. ed. 1864).

²⁹ *Id.*

³⁰ 2 John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union: With References to the Civil and Other Systems of Foreign Law* 415 (Philadelphia, Childs 11th ed. 1864).

³¹ *Id.*

³² *Id.*

³³ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

³⁴ See Michael G. Collins, *Reconstructing Murdock v. Memphis*, 98 Va. L. Rev. 1439, 1486–87 (2012). Professor Collins notes that Congress amended a different provision of Section 25 in 1867, one year after drafting Section 4. See *id.*

³⁵ See *id.* at 1486–89.

the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is i[n] favour of such their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error³⁶

In this usage, a litigant or judge “question[ed]” the validity of a legal instrument or authority in the context of a formal legal proceeding, and he did so by denying that the instrument or authority had legal effect.

A law passed in 1861 in Illinois further illustrates the legal use of the verb “to question.” The law, dealing with payment of taxes and revenue via land deeds, states: “[T]he validity of all such deeds, hereafter made by the proper officers, for real estate sold for the non-payment of taxes, shall not be questioned in any suit or controversy in this State”³⁷ In order to “question the validity” of a legal instrument, in this instance a deed, the party must bring a legal challenge to the validity of the legal instrument. Only certain people, usually parties to the transaction, possess the legal power to bring suit. The Illinois law precludes suit on the validity of deeds created pursuant to the revenue law.

Justice Joseph Story provides another example of this usage of “to question” when he writes, “It seems at one time to have been thought, that no person but a creditor . . . could question the validity of a disposition made of assets by an executor It is now well understood that pecuniary and residuary legatees may question the validity of such a disposition”³⁸ Justice Story highlights the ability of parties to a transaction to bring a legal claim disputing that transaction in court. He uses the verb “to question” in a technical sense to encompass legal action in the context of a lawsuit. A treatise on commercial law from 1861 states: “An assignment is only fraudulent and void as to those creditors who choose to question its validity.”³⁹ The treatise went on to explain,

³⁶ Judiciary Act of 1789, § 25.

³⁷ Public Laws of the State of Illinois Passed by the Twenty-Second General Assembly, Convened January 7, 1861, at 170 (1861).

³⁸ 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* 404 (Boston, Little, Brown & Co. 8th ed. 1861).

³⁹ Amos Dean, *Bryant & Stratton’s Commercial Law* 410 (New York, D. Appleton & Co. 1861).

“As the instrument is deemed valid until a creditor, *by filing his bill*, calls it in question A creditor who designs to question an assignment, is in no condition to do so, until the validity of his claim is legally settled by a judgment.”⁴⁰ To question the validity of the legal instrument, in this case the assignment of a debt, was to bring a legal action seeking a judgment on that legal instrument’s validity.

In the state of New York in 1863, a party to a transaction was not “allowed to question the validity, or the terms of an instrument executed by him.”⁴¹ This meant that such a party was “estopped” from bringing legal claims concerning that instrument.⁴² In another treatise from the mid-1800s, the purchaser of a mortgage was “entitled to the equity of redemption merely, and cannot question the validity of the prior mortgage.”⁴³ This statement, essentially equivalent to “the validity of the mortgage shall not be questioned,” meant that the new mortgagee cannot bring a suit in court disputing the validity of the mortgage. This is further evidence that the verb “to question” in the first sentence of Section 4 is a narrow legal term of art meaning “to challenge legally.”

This background knowledge is critical to understanding the meaning of the first sentence of Section 4. Its authors understood the legal implications of the phrase “the validity of the public debt . . . shall not be questioned.” The phrase meant to prohibit a debtor, in this case the government of the United States of America, from taking legal action to repudiate the federal debt. Concretely, the federal government is estopped from denying the validity of the federal debt as a plaintiff or defendant in court.⁴⁴

⁴⁰ Id. at 411 (emphasis added).

⁴¹ 2 Henry Whittaker, *Practice and Pleading in Actions in the Courts of Record in the State of New York, Where Applicable With an Appendix of Forms 98* (New York, J.S. Voorhies 3d ed. 1863).

⁴² Id.

⁴³ J.W. Blydenburgh, *A Treatise on the Law of Usury 252* (New York, J.S. Voorhies 1844).

⁴⁴ While the federal government is normally immune from suit, it can waive sovereign immunity by consenting to suit. See Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 921 (1970). The Tucker Act provides one such waiver from sovereign immunity. 28 U.S.C. § 1491(a)(1) (2006). The Act states:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

In the absence of the Public Debt Clause, the United States government might have various means to try to invalidate its own debt, including some means not available to private debtors. For example, the federal government could seek to invalidate debt via congressional legislation or executive order. If a creditor sued the United States government to honor its debt, the government might point to such a statute or order and claim that the debt is invalid. The Public Debt Clause prohibits such a defense, however. It does so because the original meaning of “to question” in the first sentence encompasses *all* legal attempts to repudiate debt in a lawsuit. A debtor can “question” the validity of debt both by bringing a suit regarding the validity of a certain debt or by asserting a defense that a debt is invalid in a suit by a creditor. The Public Debt Clause prohibits both actions by the federal government.⁴⁵

More generally, the phrase forbids Congress, the President, and federal courts from taking legal action to repudiate federal debt. Legislation, executive orders, and court judgments purporting to invalidate the federal debt are unconstitutional. This is the case for two reasons. First, the original meaning of “to question” in the first sentence is broad enough to include all legal action available to a debtor. When the phrase is applied to the federal government, it is difficult to see how the phrase does not outlaw congressional legislation, executive action, and judicial decisions repudiating the debt. Second, as will be discussed in Part II, the authors of Section 4 understood the first sentence to prohibit Congress from passing legislation repudiating the debt. The phrase proscribed other legal action besides government lawsuits, or government defenses in law-

Id. Creditors of the United States have an “express contract” with the United States for repayment of debt. These creditors may sue the United States because the United States government has, via the Tucker Act, waived immunity to a suit “founded upon” such a contract. One scholar notes that “when a Tucker Act claim is founded upon contract, the source of substantive law is a federal common law of contracts.” Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 *Geo. Wash. L. Rev.* 602, 614 (2003).

⁴⁵ One might raise the objection that this reading of the Public Debt Clause prohibits the government from defending against specious debts. For example, an individual might write on a piece of paper: “The federal government owes me one million dollars.” She might then bring a suit to enforce such a debt. Under the proffered reading of the Public Debt Clause, one might argue, the federal government cannot question the validity of that “debt.” This argument fails, however, because the piece of paper is not actually a debt. Bouvier’s dictionary defines debt as, “A sum of money due by certain and express agreement.” 1 Bouvier, *supra* note 30, at 379. The Public Debt Clause does not prohibit the government from questioning whether an obligation is legally a debt, but from questioning the validity of that debt.

suits, attempting to repudiate the federal debt. It makes sense, then, that the phrase forbids Congress, the President, and federal courts from taking legal action to repudiate federal debt. As a result of this understanding, the Public Debt Clause does not forbid congressional action that merely jeopardizes the validity of the federal debt.

B. Contemporary Dictionaries and the Public Debt Clause

Separate from the legal term of art argument, contemporary lay dictionaries also provide evidence that the meaning of “to question” in the Public Debt Clause is specific. Webster’s Dictionary from 1866 defined the transitive verb form of the word “question” in the following way: “1. To inquire of by asking questions; to examine by interrogatories. 2. To be uncertain of. 3. To have no confidence in; to treat as doubtful.”⁴⁶ The first definition does not fit because one cannot ask questions of the validity of a debt. Posing a question to a debt, or piece of paper, makes no sense because the debt cannot respond.

The second definition appears more plausible. The framers, one might argue, meant to prohibit any government action that might cause creditors “to be uncertain of” the validity of government debt. Other contemporary dictionaries also define to “question” as “doubt.”⁴⁷ This definition also does not fit well for two reasons. First, the passive construction of the phrase is not conducive to such a definition. If the framers wanted to prohibit Congress from taking any action that would make the validity of the public debt uncertain, they could have been clearer. Second, being uncertain is a subjective action. Absent clear textual indication, constitutional provisions are usually constraints on government, not citizens.⁴⁸ It seems unlikely that Congress would use language prohibiting citizens from feeling a certain way or expressing that feeling.

Only one definition remains: “To have no confidence in.” In this instance, one might proffer an argument similar to the one made against

⁴⁶ Noah Webster, *A Dictionary of the English Language; Exhibiting the Origin, Orthography, Pronunciation, and Definitions of Words* 806 (London, George Rutledge & Sons 10th ed. 1866) [hereinafter *Webster’s Dictionary*].

⁴⁷ See Robert Sullivan, *A Dictionary of the English Language, for the Use of Schools, and for General Reference* 366 (Dublin, Marcus & John Sullivan 12th ed. 1862); Joseph E. Worcester, *A Comprehensive Dictionary of the English Language* 356 (Boston, Swan, Brewer & Tileston 1860).

⁴⁸ See Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 Va. L. Rev. 1767, 1769 (2010). The authors note that “the Constitution includes hardly any rules that apply directly to private people.” *Id.*

the second definition: Congress cannot regulate subjective feelings of confidence. The phrase “the validity of the public debt shall not be made the subject of no confidence” seems somewhat awkward, but at least more plausible than “the validity of the public debt shall not be made to be uncertain.” This is because the former phrase is much less subjective. The phrase prohibits actions that destroy all confidence in the public debt. Repudiation would clearly be such an action. This construction, however, still seems awkward and ill-fitting.

Synonyms for the verb “to question” include to “controvert” and to “dispute.”⁴⁹ To “controvert” means “to dispute; to oppose by reasoning; to contend against in words or writings; to deny, and attempt to disprove or confute; to agitate contrary opinions.”⁵⁰ The phrase “the federal debt shall not be controverted” would prohibit official governmental action that disputes the validity of the public debt. The construction is much less awkward than any of the previous constructions. This definition also fits with the legal definition of “question” outlined previously because the definition of to “controvert” includes the idea of dispute and contention “in words or writings.”⁵¹ “Controvert” is the best definition of “question,” given the context of the Public Debt Clause.⁵² It is also the narrowest definition because, for an action to controvert the validity of the public debt, it must dispute or deny the validity of that debt. It cannot merely cast the validity of the debt into doubt.

The original meaning of the word “question” in the Public Debt Clause is narrow, especially when its history as a legal term of art is understood. As contemporary dictionaries confirm, the word meant to controvert, which means to deny or dispute. Thus the clause prohibits only direct governmental debt repudiation. While constitutional interpretation “of the first glance” might not conclude that the meaning of the Public Debt Clause is narrow, historical research confirms its specific meaning.

⁴⁹ Webster’s Dictionary, *supra* note 46, at 806.

⁵⁰ *Id.* at 224.

⁵¹ *Id.*

⁵² Jacob Charles argues that government action causing “substantial doubt” about the validity of the federal debt questions the validity of that debt. Charles, *supra* note 13, at 1231–32. As previously mentioned, it is difficult to imagine a constitutional provision that regulates subjective feelings. In addition, Charles fails to mention the legal meaning of “question,” which, as previously discussed, has great significance in interpreting the Public Debt Clause.

II. THE HISTORICAL CONTEXT OF SECTION 4

The historical context of Section 4 also provides strong evidence that the meaning of the Public Debt Clause is narrow. Historical context is critical in ascertaining the original public meaning of a constitutional provision.⁵³ Professor Amar, a leading constitutional scholar, places great emphasis on historical context in constitutional interpretation:

Amar's approach is holistic. He relies on text, history, and the structure of the Constitution and the government it establishes to elucidate the best and truest meaning of the language contained in the document. His examination of history includes not simply the specific enactment history, but the broader historical context surrounding the enactment, which is crucial to understanding the purpose behind and reason for the inclusion of particular language.⁵⁴

The purpose of the Fourteenth Amendment generally was to embed in the Constitution "the results of the Civil War."⁵⁵ Radical Republicans feared that President Andrew Johnson, with the help of more moderate Republicans and Southern Democrats, would squander the opportunity to achieve the racial equality and citizenship created by Union victory.⁵⁶ One historian writes:

[T]he aims of the Fourteenth Amendment can be understood only within the political and ideological context of 1866: the break with the President, the need to find a measure able to unify all Republicans, and the growing party consensus in favor of strong federal action to protect the freedman's rights⁵⁷

Section 4 is tied to the provisions on citizenship, due process and equal protection in the Fourteenth Amendment in that they are all measures designed to safeguard the fruits of the Union victory—especially Republican political dominance. This historical context supports a narrow

⁵³ The D.C. Circuit recently endorsed the use of "[n]ot only logic and language, but also constitutional history" in constitutional interpretation. *Noel Canning v. NLRB*, 705 F.3d 490, 500 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281).

⁵⁴ Ryan, *supra* note 7, at 1548.

⁵⁵ Eric Foner, *A Short History of Reconstruction, 1863–1877*, at 114 (1990).

⁵⁶ *Id.* at 113–14. Republicans viewed freedmen's rights as "being among the most important of the fruits of victory" after the Civil War. Herman Belz, *A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861 to 1866*, at xii (2000).

⁵⁷ Foner, *supra* note 55, at 115–16.

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reading of the first sentence of Section 4 because Republicans sought to protect the federal debt from direct repudiation by a future Congress.

Two pieces of evidence from the historical context surrounding the Fourteenth Amendment buttress the assertion that the original public meaning of the first sentence of Section 4 was narrow. First, the threat of federal debt repudiation at the time of the ratification of the Fourteenth Amendment was small and specific. The threats addressed by the second sentence of Section 4, on the other hand, were very serious. The authors of Section 4 narrowly tailored the first sentence to address the small and specific threat of federal debt repudiation. Second, pressure from several interest groups resulted in the insertion of the first sentence into Section 4. The language in the first sentence has a specific meaning reflecting the legislative response to such pressure.

A. The Threat of Federal Debt Repudiation

The threat of federal debt repudiation was specific in the minds of Northern Republicans during the drafting of the Fourteenth Amendment. Northerners feared that Southern Democrats would join with moderate Northerners to repudiate the debt. In each of the Southern states, however, the actual threat of Southern politicians organizing with Northerners in Congress to repudiate the federal debt was minimal.

1. The Nature of the Threat of Federal Debt Repudiation

Both the Report of the Joint Committee on Reconstruction (hereinafter “Report”) and congressional records indicate that the threat of federal debt repudiation was specific. The Joint Committee on Reconstruction (hereinafter “Committee”) repeatedly asked those testifying about the potential for a North-South coalition in Congress to repudiate the debt. For example, the Committee asked Union Lieutenant Colonel Dexter H. Clapp about the threat of Southern Democrats uniting with Northern politicians to repudiate the federal debt.⁵⁸ Clapp testified that some in the South hoped to repudiate the federal debt via this method.⁵⁹ He provided no specifics about an organized effort to take over Congress by the Southerners. When asked if there was a “combination” in Virginia to take over the federal government and repudiate the federal debt, George

⁵⁸ J. Comm. on Reconstruction, 39th Cong., Rep. of the J. Comm. on Reconstruction, pt. 2, at 207–08 (Gov’t Printing Office 1866) [hereinafter Report].

⁵⁹ *Id.*

S. Smith, a Virginian sympathetic to the North, said that there was a conspiracy by some in Virginia to join with Western representatives in Congress to repudiate the federal debt.⁶⁰ When asked about the particulars of such a plot, however, he gave none.⁶¹

Union Brigadier General Charles H. Howard testified that the people of South Carolina might send men to Congress who were opposed to paying the federal debt in response to a question about this possibility from the Committee.⁶² J.A. Campbell, a Northerner, also stated that the people of North Carolina “would repudiate [the national debt] if they could.”⁶³ Union Brevet Brigadier General George E. Spencer testified that Alabamians might try to repudiate the federal debt “when they get power,” implying a congressional takeover.⁶⁴ Dr. James M. Turner, a Union sympathizer, testified that people in the South would be opposed to paying the national debt only because they were not currently represented in Congress, and they did not want to be taxed without representation.⁶⁵ Presumably, once they had gained representation in Congress this objection would cease.

Several members of Congress were concerned about congressional debt repudiation. In the House of Representatives, Representative Samuel J. Randall offered a resolution on the federal debt that read:

Resolved, That, as the sense of this house, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and inviolate, and must and ought to be paid, principal and interest; that any attempt to repudiate or in any manner to impair or scale the said debt shall be universally discountenanced and promptly rejected by Congress if proposed.⁶⁶

Randall offered no evidence that Southern states were threatening to take over Congress and propose debt repudiation measures, however. Calling for a constitutional amendment protecting the federal debt from repudiation, Representative Hiram Price offered a resolution that stated in part:

⁶⁰ Id. at 15.

⁶¹ Id.

⁶² Id. pt. 3, at 33, 39.

⁶³ Id. pt. 2, at 213.

⁶⁴ Id. pt. 3, at 9.

⁶⁵ Id. pt. 4, at 128.

⁶⁶ H.R. Journal, 39th Cong., 1st Sess. 17 (1865); see also Eder, *supra* note 9, at 7.

[W]hereas an attempt to assume the rebel debt in some shape, and to repudiate the national debt in some manner, and also to pay for the slaves who have been made free, are among the possibilities of the future; and whereas the most effectual way of preventing either or all of these would be so to amend the Constitution of the United States as to preclude for all time to come any chance of either of these results⁶⁷

A federal debt protection provision was not inserted into the Fourteenth Amendment until May 23, 1866.⁶⁸ In his rationale for the debt protection provision, Senator Benjamin Wade mentioned the threat of future repudiation by a Congress taken over by Southern Democrats and moderate Northerners.⁶⁹ Senator Wade stated, “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”⁷⁰ Wade stated that “open and hostile rebels” might join with sympathetic Northerners in Congress to repudiate the federal debt.⁷¹

2. The Seriousness of the Threat of Federal Debt Repudiation

There was no organized effort to gain a majority in Congress and repudiate the war debt in Virginia. E.F. Keen stated, “I believe there is a general disposition on the part of the people of Virginia to sustain the credit of the government in every respect.”⁷² Confederate General Robert E. Lee echoed that sentiment.⁷³ Charles Lewis, a pro-Union official, stated that most of the politicians in Virginia had no intention to repudiate the federal debt and that “[t]he masses of the people would be disposed to meet all their obligations to the nation.”⁷⁴ The Report did state that almost all who testified on the matter of the federal debt agreed that “the people of the rebellious States would, if they should see a prospect of success, repudiate the national debt.”⁷⁵ The prospects for debt repudi-

⁶⁷ H.R. Journal, 39th Cong., 1st Sess. 75 (1865).

⁶⁸ Cong. Globe, 39th Cong., 1st Sess. 2769 (1866).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Report, *supra* note 58, pt. 2, at 165.

⁷³ *Id.* at 129.

⁷⁴ *Id.* at 146.

⁷⁵ *Id.* preface, at xvii.

ation, however, were not good. The Committee notably did not include a provision protecting the federal debt when it proposed a constitutional amendment after the Civil War.⁷⁶

The people of North Carolina never seriously threatened to take over Congress and repudiate the federal debt. James Sinclair, a neutral Southern minister, testified that the people of North Carolina were willing to pay the national debt even though they hated the idea of paying it.⁷⁷ Union Colonel E. Whittlesey testified that he had never heard one North Carolinian say that he was opposed to paying the national debt.⁷⁸ Thomas Cook, a pro-Union newspaper correspondent, stated that the people of North Carolina would consent to paying the national debt “cheerfully.”⁷⁹ Homer A. Cooke, a Union soldier, noted that they would vote “no” to pay the federal debt, but he did not offer any evidence of an organized plan in North Carolina to repudiate the federal debt.⁸⁰ In Georgia, Sidney Andrews, a Northern newspaper correspondent, stated, “I heard but little said by anybody in respect to the payment of the federal debt.”⁸¹

Stephen Powers, another Northern newspaper correspondent who testified about the citizens of Florida, stated, “They will, of course, grumble at being compelled to pay the national debt, but they will offer *no serious resistance*, at least none, in most cases, which will require the presence of the national troops to quiet it.”⁸² In Texas, Union General George A. Custer thought, “If they were allowed to legislate upon the question they would be opposed to paying their share of the national debt unless the rebel debt was incorporated with it.”⁸³ Thus the threat of federal debt repudiation would not have been concrete but was dependent upon the final disposition of the rebel debt. Finally, T.J. Mackey, a Union officer, testified that some in Louisiana and Texas might also hesitate to pay taxes and their burden of the national debt.⁸⁴ He did not mention a specific plan to repudiate the federal debt. One South Carolina

⁷⁶ In the first sentence of the Committee’s report on this matter, the report states, “The witnesses examined as to the willingness of the people of the south to contribute, under existing laws, to the payment of the national debt, prove that the taxes levied by the United States will be paid only on compulsion and with great reluctance” *Id.*

⁷⁷ *Id.* pt. 2, at 172.

⁷⁸ *Id.* at 184.

⁷⁹ *Id.* at 279.

⁸⁰ *Id.* at 204.

⁸¹ *Id.* pt. 3, at 172.

⁸² *Id.* pt. 4, at 146 (emphasis added).

⁸³ *Id.* at 75. This is the same General Custer who died in the Battle of Little Bighorn.

⁸⁴ *Id.* at 154.

newspaper reported a speech by Governor James Lawrence Orr of South Carolina, where he said, “In regard to the national debt, South Carolina, with her sister States, though the debt was incurred in conquering the Southern States, yet they will not consent to repudiate one dollar of it.”⁸⁵

Scattered reports of inchoate threats of federal debt repudiation, combined with the conjectural nature of the testimony given to the Joint Committee on Reconstruction, indicate that Congress understood the threat of federal debt repudiation was minimal in the Southern states. As previously discussed, however, that threat was specific. The drafters of the Fourteenth Amendment wrote the first sentence in response to these realities. The broad meaning Abramowicz and others give to that sentence is inconsistent with the historical facts just discussed. There is little evidence to support the broad interpretation Abramowicz and others advocate. The next Part will lay out the serious nature of the threats described in the second sentence of Section 4. This context will make clear that it is a mistake to give the first sentence a broad meaning by isolating the first sentence from the second sentence of Section 4.

B. The Twin Threats in the Confederate States

At the conclusion of the Civil War in April 1865, the Southern states were in disarray.⁸⁶ Many in the South hoped to soften the economic toll of the war on families and individual citizens. Consequently, many state governments were threatening to honor outstanding Confederate debt. Further, these governments threatened to compensate slave owners for emancipated slaves. But what exactly was the nature of these threats?

1. The Threat of Assumption of the Confederate Debt

The second sentence of Section 4 of the Fourteenth Amendment has two distinct provisions. The first provision deals with the Confederate debt and reads: “But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States . . . but all such debts, obligations and claims shall be held illegal and void.”⁸⁷ This provision plainly applies to war debts incurred by individual states as well as debts incurred by the Con-

⁸⁵ James Lawrence Orr, Governor of S.C., Speech at National Guard Hall, Philadelphia (Aug. 13, 1866), *in* Edgefield Advertiser, Aug. 22, 1866.

⁸⁶ See John Hope Franklin, *Reconstruction After the Civil War* 3 (1994).

⁸⁷ U.S. Const. amend. XIV, § 4.

federate government. By one contemporary account, the debt of the Confederate government from the war was “over \$2 billion, while individual states and local governments had incurred another billion dollars of debt.”⁸⁸ Combined, these debts exceeded the value of all the property in the South in 1870 by \$1 billion.⁸⁹ After the end of the war, many in the South hoped to use state governments to honor state-issued debt as well as the debt of the Southern government.⁹⁰ One can confidently define the threat of state debt assumption as organized and serious. More importantly, such a plan did not depend on gaining control of Congress.

In Virginia, the threat of assumption of the Confederate debt was grave. An editorial in the *Daily Dispatch*, a pro-Confederate Richmond newspaper, described the injustice of repudiating the Confederate debt and depriving Confederate soldiers of their pensions.⁹¹ The *Richmond Enquirer* also agreed with this assessment of rebel debt repudiation.⁹² Confederate General Robert E. Lee testified to the Committee that he thought Virginians would pay the Confederate debt “if they had the power and ability to do it.”⁹³ Colonel Orlando Brown of the Union army, who had been living in Richmond after the war, stated that he thought Southerners would “prefer to pay the southern debt rather than the northern debt.”⁹⁴ Lieutenant W.L. Chase, a Union officer stationed in Virginia, thought that if Virginians had an opportunity to vote, they would vote to assume the rebel debt.⁹⁵

The people of North Carolina expressed the strongest desire among the Confederate states to assume the rebel debt. In that state there was an organized, government-sponsored effort to assume the war debt. On December 13, 1866, the North Carolina legislature overwhelmingly reject-

⁸⁸ Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 *Akron L. Rev.* 289, 317 (2006). All amounts listed are in United States dollars unless otherwise noted.

⁸⁹ *Id.* at 318.

⁹⁰ The testimony given to the Joint Committee on Reconstruction by Lewis McKenzie, a representative in the Virginia legislature during the Civil War, is a clear indication of the threat of rebel debt assumption: “Question. If the rebels had the opportunity, would they assume the payment of the rebel debt? Answer. Why of course. All the rebel States would if they could do it.” Report, *supra* note 58, pt. 2, at 13.

⁹¹ *What Will They Do with Us?*, *Daily Dispatch*, Feb. 13, 1865, at 1.

⁹² *The Southern War Debt*, *The Norfolk Post*, Nov. 1, 1865, at 2.

⁹³ Report, *supra* note 58, pt. 2, at 129.

⁹⁴ *Id.* at 126.

⁹⁵ *Id.* at 96.

ed the adoption of the Fourteenth Amendment.⁹⁶ One article describes the approach North Carolina took to the rebel debt in 1866:

North Carolina never seriously considered either voiding Confederate-era debts or valuing them at par with United States currency; instead, the Restoration convention declared that all wartime contracts and debts were valid and instructed the legislature to create a statutory scale, possibly unique among ex-Confederate states, for converting depreciated Confederate debts into federal currency.⁹⁷

The convention's act flew in the face of the language of the Fourteenth Amendment. The North Carolina Supreme Court also upheld the validity of contracts payable in Confederate currency.⁹⁸ J.A. Campbell, a Union officer, speaking about the citizens of North Carolina, stated, "The debt is in such a condition that they consider the State of North Carolina responsible for part of it. That part of it they would pay."⁹⁹

Several other states sought to assume the rebel debt and were extremely resistant to the Fourteenth Amendment. One house of the South Carolina state legislature voted down the amendment almost unanimously in 1866.¹⁰⁰ The *Columbia Phoenix* declared, "Confederate notes, on the attainment of our independence, *will be paid . . .*"¹⁰¹ Speaking of the Tennessee state legislature, *Brownlow's Knoxville Whig and Rebel Ventilator* stated, "If the Legislature does not . . . unite with other Southern States to pay the Confederate debt, it will be from fear or policy, and not from want of sympathy or desire."¹⁰² Another writer, noting that, as a condition for readmission, Tennessee would have to repudiate the rebel debt, argued, "It is impossible for such [a] condition[] to be accepted without outraging all sense of equity, and without violating the principles of our form of government."¹⁰³

⁹⁶ James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 58 (1997).

⁹⁷ Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 *Tex. Wesleyan L. Rev.* 1, 14 (2002).

⁹⁸ *Id.*

⁹⁹ Report, *supra* note 58, pt. 2, at 213.

¹⁰⁰ Bond, *supra* note 96, at 121.

¹⁰¹ "Pay-Day" of the Nation, *Columbia Phoenix*, Apr. 1, 1865.

¹⁰² A.J. Fletcher et al., *Memorial to the Committee on Reconstruction, Brownlow's Knoxville Whig, and Rebel Ventilator*, Jan. 31, 1866, at 1.

¹⁰³ Report of the Reconstruction Committee Relative to Tennessee, *Daily Union & Am.* (Nashville), Mar. 10, 1866, at 2.

Georgia was a hotbed of debate about the rebel debt. Sidney Andrews, a newspaper correspondent who traveled extensively throughout Georgia, stated, “There was a great deal of talk in the State about the payment of the rebel debt.”¹⁰⁴ Andrews thought that Georgia would have assumed the debt if the federal government had not intervened and forced it to repudiate that debt.¹⁰⁵ As one scholar noted, “Particular decisions that vexed [Georgians] more than others included . . . repudiation of the war debt.”¹⁰⁶ Georgia would not ratify the Fourteenth Amendment until 1868 under a Reconstruction government.¹⁰⁷

The people of Alabama and Mississippi evidenced a general desire to assume the rebel debt. When asked about the feelings of the people of both of these states towards rebel debt assumption, Union General B.H. Grierson stated, “I think there is a great desire manifested by them for the assumption of their debt.”¹⁰⁸ One Nashville newspaper reported, “Powerful influences will be brought to bear in Alabama, to induce the State Convention, now in session at Montgomery, to recognize the legality of her debt.”¹⁰⁹

Stephen Powers, a newspaper correspondent in Florida, stated that “[a] majority of the thinking and influential people of Florida . . . were in favor of paying the rebel debt.”¹¹⁰ Benjamin C. Truman, a correspondent for the *New York Times* who spent a good deal of time in the South, similarly reported, “A majority of the politicians and others seemed to be in favor of paying the debt.”¹¹¹ Finally, Union General George Custer, testifying before the Joint Committee, predicted that Texans too would assume the rebel debt if they had the opportunity.¹¹²

2. *The Threat of Compensation for Emancipated Slaves*

The second provision of the second sentence of Section 4 prohibits compensation for emancipated slaves.¹¹³ The value of slaves in the South after the war was staggeringly large; one estimate placed the value at

¹⁰⁴ Report, *supra* note 58, pt. 3, at 172.

¹⁰⁵ *Id.*

¹⁰⁶ Joseph B. James, *The Ratification of the Fourteenth Amendment* 94 (1984).

¹⁰⁷ *Id.* at 274.

¹⁰⁸ Report, *supra* note 58, pt. 3, at 123.

¹⁰⁹ War Debts of Rebel States, *Nashville Daily Union*, Sept. 21, 1865, at 2.

¹¹⁰ Report, *supra* note 58, pt. 4, at 146.

¹¹¹ *Id.* at 140.

¹¹² See *id.* at 75.

¹¹³ U.S. Const. amend. XIV, § 4.

over two billion dollars.¹¹⁴ One article describes the financial situation caused by the emancipation of slaves in the South as follows: “A committee of the Forty-Second Congress placed the loss at \$1.6 billion. To place this amount in context, one needs to note that the South’s entire property, including slaves, was assessed in 1860 at \$4.4 billion and in 1870 at \$2.1 billion.”¹¹⁵ After reading these figures, it is clear why Southerners demanded compensation for the loss of their slaves. It is equally clear, however, why Northern politicians saw this demand as a serious threat to the finances of the Union. Each of the Southern states sought to provide compensation for emancipated slaves, and they did not need congressional approval to do so. Some in those states also wished that Congress would provide compensation for emancipated slaves.

In Virginia, many hoped to receive compensation for their slaves from the state or federal governments, but few thought that the Union would allow such compensation. Union Colonel Orlando Brown testified, “I have heard men who have been loyal [to the Union] throughout express that expectation, that they were entitled to compensation for their slaves.”¹¹⁶ Throughout the Union, moreover, there was “perpetual fear of an alliance between former slaveholders and their former allies, northern Democrats,” which might lead to payment for emancipated slaves.¹¹⁷ Judge John Underwood, a Union sympathizer, testified that if Virginians could get control of the Congress, they “would attempt . . . [to claim] compensation for their negroes [T]he leading spirits would claim compensation for their negroes.”¹¹⁸

When asked about the sentiments of those in South Carolina with regard to compensation for slaves, Union General Charles H. Howard replied:

Your question has brought to my mind something which has been quite frequently expressed to me directly, and has been told to me by northern men, as being found to be the invariable sentiment—that the government of the United States should take measures to pay for the slaves. . . . A large number of men in the interior seem to think

¹¹⁴ See Aynes, *supra* note 88, at 318.

¹¹⁵ *Id.*

¹¹⁶ Report, *supra* note 58, pt. 2, at 124.

¹¹⁷ Aynes, *supra* note 88, at 319.

¹¹⁸ Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 283 (1914).

that . . . some measure would be taken to remunerate them for the loss of their slaves.¹¹⁹

Although the record is limited, many of the citizens of Tennessee also hoped to obtain compensation for their slaves. Indeed, one of the conditions for the readmission of Tennessee into the Union was that slave owners agreed “never to ask Congress or the State Legislature for any compensation for their emancipated slaves.”¹²⁰

In 1866 in Arkansas, “party spirit ran high” and pro-Confederate legislators sought “indemnity for losses in the war,” which included compensation for emancipated slaves.¹²¹ In Georgia, “Blocking payment for slaves was not pleasing to many . . .”¹²² As one historian has reported, “Particular decisions that vexed [Georgians] more than others included nonpayment for slaves.”¹²³ In Mississippi, one proponent of compensation for emancipated slaves argued, “My own opinion is that if . . . the Southern people are to be deprived of \$4,000,000,000 worth of property without compensation . . . the people of Mississippi should not by their action give sanction to this enormous public wrong.”¹²⁴ Union Major General Edward Hatch testified that the citizens of Alabama would seek compensation for freed slaves.¹²⁵

In both Florida and Louisiana, many hoped that either the state government or the federal government would provide compensation for emancipated slaves. Union Colonel Israel Vogdes testified that “a very large portion of [Floridians] still hope for compensation for their slaves, and that they will abandon that hope with great reluctance.”¹²⁶ In Louisiana, Dr. James M. Turner, a Union sympathizer, testified that “[t]he most of those with whom I conversed seemed . . . to think that eventually they would be paid for their slaves, if they can arrange matters in Congress as they hope to do.”¹²⁷ A newspaper account of the Louisiana Democratic Convention also reported that the Convention claimed “the

¹¹⁹ Report, *supra* note 58, pt. 3, at 39–40.

¹²⁰ Edmund Cooper, Speech in Shelbyville (Apr. 2, 1866), *in* *The Nashville Daily Union*, Apr. 4, 1866, at 1.

¹²¹ Thomas S. Staples, *Reconstruction in Arkansas 1862–1874*, at 106 (1923).

¹²² Joseph B. James, *The Ratification of the Fourteenth Amendment* 80–81 (1984).

¹²³ *Id.* at 94.

¹²⁴ See James Wilford Garner, *Reconstruction in Mississippi* 83 (1902).

¹²⁵ Report, *supra* note 58, pt. 3, at 5.

¹²⁶ *Id.* pt. 4, at 121.

¹²⁷ *Id.* at 128.

right of petition for compensation for the loss of slaves.”¹²⁸ By some accounts, even pro-Union politicians in Louisiana sought compensation for their emancipated slaves.¹²⁹

Finally, many in Texas also sought to obtain compensation for their slaves. Immediately after the war, there was a “belief . . . that compensation might yet be secured for the loss of slaves, and hence a reluctance to take the amnesty oath lest it should in some way estop claims for the compensation.”¹³⁰ General Custer also believed that in Texas, “Indemnification would be claimed and insisted upon for all losses sustained.”¹³¹

The historical realities just described significantly inform the original public meaning of the first sentence of Section 4 of the Fourteenth Amendment. The threat addressed in the first sentence was much less serious than the threats addressed in the second sentence. As a consequence, the authors of Section 4 narrowly tailored the first sentence. A broad reading of the first sentence is inconsistent with the historical context of Section 4. If the threat addressed in the first sentence was more expansive and serious than the threats addressed in the second sentence, then a broad reading of the first sentence might be more plausible.¹³² But the reality that the threats addressed in the second sentence of Section 4 were very serious casts doubt on any interpretation of Section 4 that isolates the first sentence and gives that sentence a broad meaning.

One noted historian had this to say about Section 4 of the Fourteenth Amendment: “As for Section four, it was entirely unnecessary, and since it was designed to catch votes, especially those of the soldiers, it deserved to be classified as mere political buncombe.”¹³³ The previous Parts of this Note, however, at least partially refute that claim. The twin threats that the states would pay compensation for freed slaves and repay the Confederate debt were very serious from 1865 to 1867. Thus, the second sentence of Section 4, which addresses those threats, was not

¹²⁸ The Louisiana Democratic Convention, *The Daily Phoenix* (Columbia), Oct. 25, 1865, at 1.

¹²⁹ See John Rose Ficklen, *History of Reconstruction in Louisiana (Through 1868)* 111 (1910).

¹³⁰ Charles William Ramsdell, *Reconstruction in Texas* 62 (1910).

¹³¹ Report, *supra* note 58, pt. 4, at 75.

¹³² The broad reading of the first sentence advocated by Abramowicz and others would be more plausible if, for example, there was clear historical evidence of a serious, organized Southern threat to jeopardize the federal debt via any means possible.

¹³³ Kendrick, *supra* note 118, at 350.

motivated by political reasons, but by a desire to respond to a concrete, state-sponsored threat.

The first sentence of Section 4, however, does seem somewhat rhetorical and political when juxtaposed with the second sentence. While, as previously discussed, there was a small threat of Southern Democrats and moderate Northerners joining forces in Congress and repudiating the federal debt, this threat hardly seems worthy of the language in the first sentence. Consequently, it is only the first sentence of Section 4, and not the entire section, that “deserve[s] to be classified as mere political buncombe.”¹³⁴

Those who read Section 4 at the time the Fourteenth Amendment was ratified would have understood as much. As previously mentioned, the draft of the Fourteenth Amendment presented by the Joint Committee on Reconstruction did not include a provision on the federal debt, but did include provisions that prohibited both the paying of the rebel debt and paying compensation for emancipated slaves. It is also startling to note that the leading Republican senators inserted the first sentence of Section 4 into that section late in the drafting process and after a secret caucus.¹³⁵ This fact indicates that something more may have been at work when the national debt provision was introduced as the first sentence of Section 4 of the Fourteenth Amendment.

C. Political Pressures and the First Sentence of Section 4

The first sentence of Section 4 of the Fourteenth Amendment was introduced after a secret five-day caucus of radical Republican senators. This is a fascinating piece of history. What was said in the caucus? Why did the senators choose the language they did for the first sentence of Section 4? The historical record provides evidence for one theory that might answer such questions. Powerful political interest groups, including bondholders and former soldiers and sailors, organized to pressure members of Congress to protect the federal debt, including pensions. This impetus ultimately led to the precise language adopted in the first sentence of Section 4. It is for this reason that the meaning of that text should be understood as cabined by the political realities that led to its drafting.

¹³⁴ *Id.*

¹³⁵ Eder, *supra* note 9, at 6–7.

As a primary matter, language passed for political reasons remains the law regardless of why it was originally drafted. Context is critical, however, in more clearly understanding the meaning of specific provisions in a text. Indeed, the textual and political context of a provision can provide powerful insights into that text's meaning.¹³⁶ The political context in which the first sentence of Section 4 was drafted suggests that its meaning is limited by a very particular set of historical circumstances.

1. The Soldiers and Pensioners

The first political faction that sought an amendment to the Constitution to protect the federal debt, including soldiers' pensions, was Northern Civil War veterans. One historian notes that Section 4 "was designed to catch votes, especially those of the soldiers."¹³⁷ That the soldiers were specifically targeted is borne out by the final language of Section 4, which protects not only the debt, but the debt "including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion."¹³⁸ Union soldiers returning from the war obviously had an interest in making sure the federal government paid their pensions. But why were soldiers so interested in a constitutional amendment protecting the federal debt and their pensions? The answer has to do with the burgeoning pension system at the end of the Civil War.

Over two million people fought for the North between 1861 and 1865.¹³⁹ Although many of those who fought never came home, their widows and children "were entitled to receive the same pension which the husband or father would have received in case of total disability."¹⁴⁰ And even those who came home had no means to provide for themselves or their families after four years of war.¹⁴¹ Even before the end of the war, Congress was forced to expand the pension system for Civil War veterans.¹⁴² One historian describes the pension system in 1864:

¹³⁶ See generally Manning, *supra* note 14, at 110.

¹³⁷ Kendrick, *supra* note 118, at 350.

¹³⁸ U.S. Const. amend. XIV, § 4.

¹³⁹ Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* 3 (2008).

¹⁴⁰ 4 John William Oliver, *History of the Civil War Military Pensions, 1861–1885*, at 10 (1917).

¹⁴¹ *Id.* at 19.

¹⁴² See *id.* at 8–9.

By the close of the year 1864, the subject of pensions was playing a large part in national affairs. Within two years, Congress had passed two important and far-reaching pension laws. In his annual report for 1864, Commissioner Barrett stated: “No other nation has provided so liberally for its disabled soldiers and seamen, or for the dependent relatives of the fallen.”¹⁴³

Later in 1865, the Thirty-ninth Congress provided even further for the disabled veterans of the Civil War. “In the Thirty-ninth Congress, the soldiers found a responsive body of men.”¹⁴⁴ Congress authored several bills expanding the pension system:

Thus during the first session of the Thirty-ninth Congress, and within an interval of six weeks, two very liberal pension laws had been passed. Pension applications for specific disabilities, and on behalf of dependent widows, fathers, and orphans, began to pour into the Pension Bureau. . . . More than 33,000 pension claims had been increased, and the annual amount now expended for pensions exceeded \$18,000,000.¹⁴⁵

The new pensioners had a large interest in the federal debt for two reasons. First, if the federal government defaulted, the veterans would likely not receive their pensions. Second, some sought to tie the pensions of veterans directly to the national debt. One approach, taken by Senator Thaddeus Stevens, called for paying pensioners with the interest earned on government bonds from money made from confiscated Southern property:

Of the total, \$300,000,000 should be invested in six per cent government bonds, and the interest used in paying pensions. On December 20, he presented a bill in Congress, in which he proposed to double all pensions caused by the late war, and the funds to pay for the increase were to be raised by a plan similar to the one just mentioned.¹⁴⁶

While Senator Stevens’ provision never passed, the pensioners remained generally and deeply concerned with the protection of the federal debt.

¹⁴³ Id. at 17.

¹⁴⁴ Id. at 19.

¹⁴⁵ Id. at 22.

¹⁴⁶ Id. at 20 (footnote omitted).

Union veterans expressed their concern for federal debt protection in the conventions of soldiers and sailors held across the country after the Civil War.¹⁴⁷ These conventions were held in Pittsburgh and Cleveland after the passage of the Fourteenth Amendment in Congress, and “did more to popularize the Fourteenth Amendment as a political issue than any other instrumentality of the year.”¹⁴⁸ The Pittsburgh Convention of Soldiers and Sailors, which met on September 26, 1866, stated, “That the action of the present Congress in passing the pending constitutional amendment is wise, prudent, just. . . . It puts into the very frame of our Government the inviolability of the national debt”¹⁴⁹ This is further evidence that Congress felt pressure to protect the federal debt and consequently the pensioners in a constitutional amendment.

Finally, congressional members acknowledged that the provision guaranteeing the national debt was a result of pressure to protect the pensioners. The author of the first sentence, Senator Wade, stated: “This section of my amendment goes further, and secures the pensioners of the country.”¹⁵⁰ The impetus for the provision was to “do something to protect those wounded patriots who have been stricken down in the cause of their country.”¹⁵¹ He said that he was “anxious to put the pensions of our soldiers and their widows and children under the guardianship of the Constitution”¹⁵² Senator Charles Sumner’s earlier proposal concerning the readmission of the states also mentions the “adoption . . . of the national debt and the national obligations to Union soldiers.”¹⁵³

By 1865, the ranks of the pensioners were growing at an alarming rate. Congress sought to provide protection to this interest group by including language directed towards protecting pensions and the federal debt in the Fourteenth Amendment. Knowledge of these political realities informed and limited the original public meaning of the first sentence of Section 4.

¹⁴⁷ See Eder, *supra* note 9, at 10.

¹⁴⁸ *Id.* at 10 n.29 (quoting 2 James G. Blaine, *Twenty Years of Congress* 233 (1866)).

¹⁴⁹ Edward McPherson, *The Political History of the United States of America During the Period of Reconstruction* 242 (Washington, James J. Chapman 3d ed. 1880).

¹⁵⁰ *Cong. Globe*, 39th Cong., 1st Sess. 2769 (1866).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *S. Journal*, 39th Cong., 1st Sess. 6 (1865).

2. *The Bondholders*

The other group that had a vested interest in protecting the federal debt was the bondholders. In 1860 the federal debt stood at just over \$61 million.¹⁵⁴ By June 30, 1866 that debt had ballooned to almost \$2.8 billion.¹⁵⁵ A large amount of that debt was in the form of bonds held by individuals across the country.¹⁵⁶ Constitutional protection for these bonds would assure their value and create financial stability in the Union. It is hard to imagine that those who had such a huge stake in the federal debt would not push for a constitutional amendment protecting that debt.

Senator Wade described the first sentence of Section 4 as designed to protect the interests of the bondholders.¹⁵⁷ He stated:

I believe that to do this will . . . be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution¹⁵⁸

This statement seems to imply that the first sentence of Section 4 is, in essence, “political buncombe,” a provision inserted specifically to satisfy a particular interest group.¹⁵⁹ Some have even argued that this provision was designed to drive up the price of federal debt in a particular way.¹⁶⁰ By securing all federal bonds under the Constitution, those bonds would become more secure and more attractive to potential investors. This would drive the price of those bonds even higher, thus profiting the bondholders.

Opponents of a federal debt protection provision decried the first sentence of Section 4 precisely because it was political language. Senator Thomas Hendricks,¹⁶¹ speaking against the provision, stated: “Who has

¹⁵⁴ 1 Ellis Paxson Oberholtzer, *Jay Cooke: Financier of the Civil War* 124 (1907).

¹⁵⁵ 2 *id.* at 2.

¹⁵⁶ See *id.* at 1–2.

¹⁵⁷ See Cong. Globe, 39th Cong., 1st Sess. 2769 (1866).

¹⁵⁸ *Id.*

¹⁵⁹ Kendrick, *supra* note 118, at 350.

¹⁶⁰ See Eder, *supra* note 9, at 14–15 (quoting Cong. Globe, 41st Cong., 1st Sess. 64, 66 (1869) (statement of Sen. Sprague)).

¹⁶¹ Thaddeus Stevens, the leader of the Radical Republicans, stated, “The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors.” Cong. Globe, 39th Cong., 1st Sess. 3148 (1866). While Senator Hendricks was a Northern Democrat in a strongly Republican Congress, he can hardly be

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asked us to change the Constitution for the benefit of the bond-holders? Are they so much more meritorious than all other classes that they must be specially provided for in the Constitution? . . . Why then do they ask this extraordinary guarantee?"¹⁶² The provision was the product of a special interest lobby backed by bondholders who wanted to make sure they made as much money as possible on the bonds. In fact, Senator Hendricks thought the actual effect of the provision "would excite distrust, and cast a shade on public credit."¹⁶³

Even Northern states attacked the first sentence of Section 4 of the Fourteenth Amendment as politically motivated claptrap. In withdrawing its consent to the proposed Fourteenth Amendment, New Jersey argued thus in one of its resolutions on the matter:

[The first sentence of Section 4] appeals to the fears of the public creditors by publishing a libel on the American people, and fixing it forever in the National Constitution, as a stigma upon the present generation, . . . as if it were possible that a people who were so corrupt as to disregard such an obligation would be bound by any contract, constitutional or otherwise.¹⁶⁴

The first sentence was placed in one of the Reconstruction amendments partly because of pressures from a powerful interest group, namely the bondholders.

These historical accounts are further evidence that Congress drafted the first sentence of Section 4 for political purposes.¹⁶⁵ Several interest

called a traitor. For more on his life, see generally John W. Holcombe & Hubert M. Skinner, *Life and Public Services of Thomas A. Hendricks* (Indianapolis, Carlon & Hollenbeck 1886).

¹⁶² Cong. Globe, 39th Cong., 1st Sess. 2940 (1866).

¹⁶³ *Id.*

¹⁶⁴ See Eder, *supra* note 9, at 13 (quoting 5 *Documentary History of the Constitution of the United States of America* 533, 536–37 (1905)).

¹⁶⁵ Describing the politicization of the threat of federal debt repudiation by Republicans, one historian wrote:

The Republicans had exploited anxiety over the public debt for its full worth, whipping up potential threats to the sacred debt into panics and crises for political gain. The Party then hastily smothered the fire it created when it threatened to be successfully used against them by the Democrats.

Thus, when the Republicans wanted to secure their agenda for Reconstruction and their political security in Congress by writing them into the Constitution, they bundled the controversial propositions with one that embodied fears over the public debt that they had played up into a crisis of repudiation. The Republicans then engendered a

groups stood to gain dramatically from that provision. This is evident to both proponents and opponents of the first sentence of Section 4; it would certainly have been evident to one seeking to ascertain the meaning of Section 4 in 1866.

3. The Republican Party Platform

Finally, after the Civil War, the Republican Party platform included, as one of its pillars, the debt provision.¹⁶⁶ The Republican Party of Pennsylvania sent a memorial to Congress imploring the legislators to protect the federal debt even before the Fourteenth Amendment was drafted:

The President pro tempore presented a memorial of the Union State Central Committee of Pennsylvania, praying that the Constitution of the United States may be so amended as forever to prohibit Congress, or any convention or other authority, from assuming to pay any part of the debt incurred in opposition to the general government, and from ever repudiating any part of the national debt¹⁶⁷

The Republican Party convention held in Philadelphia in 1866 had as one of its resolutions: “[W]e hold the debt of the nation to be sacred and inviolable”¹⁶⁸ The Democratic Party platform endorsed the payment of the federal debt in greenbacks.¹⁶⁹ The Republican Party’s endorsement of a provision protecting the federal debt supports the assertion that there was political pressure on Congress to pass an amendment protecting the federal debt.

The authors of the Fourteenth Amendment drafted the first sentence of Section 4 in response to specific political pressure. Powerful political interest groups had a financial stake in preventing governmental repudiation of the debt. These groups were interested in preventing direct repudiation. This reality casts light on the meaning of the language in the second sentence of Section 4. There is no evidence that the authors of that sentence, as well as those who advocated its passage, were con-

panic over repudiation to defeat the Democrats in the 1866 elections, and in the process guaranteed the ratification of the Fourteenth Amendment.

Franklin Noll, *Repudiation! The Crisis of United States Civil War Debt, 1865–70*, at 25 (Graduate Inst. of Int’l & Dev. Studies, Geneva Pierre du Bois Found.), available at <http://ssrn.com/abstract=2196409>.

¹⁶⁶ Eder, *supra* note 9, at 11 n.32.

¹⁶⁷ *S. Journal*, 39th Cong., 1st Sess. 28 (1865) (emphasis omitted).

¹⁶⁸ See Eder, *supra* note 9, at 10.

¹⁶⁹ See *id.* at 11 n.32.

cerned with stopping fiscal irresponsibility in Congress. They were concerned with the direct repudiation of the federal debt. The language they used reflects this concern.

III. TWO OBJECTIONS ANSWERED

One might raise two obvious objections to the reading of the Public Debt Clause just proffered. First, citing Jack Balkin, Professor Ryan notes that when the framers use broad language in the Constitution, they do so in order to allow for new applications over time.¹⁷⁰ According to this theory, the framers of the Fourteenth Amendment intentionally used broad, ambiguous language (“the validity of the public debt . . . shall not be questioned”), and therefore the original meaning of that language is broad. Although this type of inference may be valid as a general matter, it can be rebutted by specific historical evidence that dictates a contrary original meaning for the phrase in question. In the case of Section 4, this Note has provided a historical argument that the original meaning of the Public Debt Clause is actually quite narrow, despite its ostensibly broad language.

The second objection one might raise to a narrow interpretation of the Public Debt Clause is methodological: Why use the original public meaning? Pragmatists like Judge Posner advocate picking interpretations that meet the needs of a changing country.¹⁷¹ A broad reading of the Public Debt Clause that allows the President to raise the statutory debt ceiling is eminently pragmatic, he might argue.

While scholars on both sides agree that original meaning is central to constitutional interpretation, there is another reason, apart from the original public meaning of Section 4, that should prompt even a pragmatist like Judge Posner to interpret the Public Debt Clause narrowly. To allow the President to raise the debt ceiling unilaterally by borrowing money to pay the national debt gives the President the power “[t]o borrow Money on the credit of the United States,” which is specifically given to Congress elsewhere in the Constitution.¹⁷² An interpretation of the Public Debt Clause that allows such action has the extremely negative effect of destroying a fundamental component of the separation of powers in the Constitution.

¹⁷⁰ See Ryan, *supra* note 7, at 1544.

¹⁷¹ See Posner, *Pragmatism*, *supra* note 8, at 71–73.

¹⁷² U.S. Const. art. I, § 8.

Pragmatists might respond that the President can only borrow money in limited circumstances under the Public Debt Clause, but attempts at cabinining this newly-found presidential borrowing power seem impossible. What would limit the President from bypassing Congress and borrowing money to pay for items he thought necessary to protect the public debt? Could the President engage in military action and borrow money for those hostilities if he thought them necessary to pay the public debt, perhaps in the service of national security? In addition, any time Congress appropriates money that exceeds the statutory debt limit, the President could borrow money to pay such expenses, rendering the borrowing power meaningless. Appropriating would equal borrowing. The potential negative effects of a broad interpretation of the Public Debt Clause outweigh the benefits of such an interpretation.

In addition, given the language of the Public Debt Clause and the explicit grants of power to Congress in the Constitution, the burden of proof is on those trying to show that the clause gives the President new power. The Constitution very clearly gives Congress borrowing and spending power.¹⁷³ To allow the President to borrow to pay down debts, as some have argued, would have significant negative effects for the structure of the United States government. For this reason, one should reject any interpretation of the Public Debt Clause that is broad enough to allow such action.

CONCLUSION

In the middle of the summer of 2011, former President Bill Clinton suggested that the President could use the first sentence of Section 4 of the Fourteenth Amendment as a basis for unilaterally raising the statutory debt ceiling.¹⁷⁴ After understanding the meaning of the text of that provision and exploring the history surrounding Section 4, one can conclude that such a reading of the first sentence seems unwarranted. First, as Part I of this Note argues, the text of the Public Debt Clause has a narrow original public meaning. The phrase prohibited only direct debt repudiation. Second, Part II of this Note argues that the history and the political climate surrounding Section 4 indicate that the first sentence of Section 4 had a narrow original public meaning. In addition, those who

¹⁷³ *Id.*

¹⁷⁴ James Oliphant, *Bill Clinton Would Raise Debt Ceiling, Bypass Congress*, L.A. Times, July 19, 2011, <http://articles.latimes.com/2011/jul/19/news/la-pn-clinton-debt-ceiling-20110719>.

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reject the use of original public meaning should still interpret the Public Debt Clause narrowly for separation of powers reasons assuming they do not wish to abandon connections to constitutional text and structure. Each of these points supports the assertion that the first sentence of Section 4 is a shaky basis for a broad general presidential power to raise the debt ceiling.¹⁷⁵

Regarding the statutory debt ceiling, congressional refusal to raise the debt ceiling does not violate the Public Debt Clause. Under the original public meaning of that clause, only legal action directly repudiating the federal debt is unconstitutional.¹⁷⁶ While refusing to raise the debt ceiling might potentially jeopardize the validity of the federal debt, this action does not “question” the validity of that debt under the original public meaning of the Public Debt Clause. Because congressional refusal to raise the debt ceiling is constitutional, a President will not find any justification for unilaterally raising the debt ceiling in the Public Debt Clause.¹⁷⁷

The D.C. Circuit recently stated, “When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitu-

¹⁷⁵ Harvard Law Professor Laurence Tribe argues that those who claim the Public Debt Clause gives the President a unilateral power to raise the debt ceiling go “too far.” Laurence H. Tribe, *A Debt Ceiling We Can’t Wish Away*, N.Y. Times, July 8, 2011, at A23.

¹⁷⁶ One author argues that the Public Debt Clause also prohibits the federal government from defaulting on the public debt. Fagan, *supra* note 9, at 225. Fagan maintains that “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.” *Id.* While Fagan provides helpful analysis in the debate over the meaning of the Public Debt Clause, she adduces little contemporary evidence from either the original public meaning of the Public Debt Clause or the history surrounding that provision suggesting the clause prohibits federal government default. The original meaning of the Public Debt Clause, as previously discussed, only proscribes legal action by the government directly repudiating the federal debt. Congressional refusal to authorize the borrowing of additional funds to pay existing debt is not “questioning” the validity of the debt because it is not legal action seeking to have a debt declared null and void by a court. By analogy, an individual who refused to borrow money to pay existing debts is not questioning the validity of that debt.

¹⁷⁷ Daniel Strickland argues that Section 5 of the Fourteenth Amendment also prohibits the President from raising the debt ceiling unilaterally. Strickland, *supra* note 9, at 802. One scholar criticized such an argument because it is inconsistent with Fourteenth Amendment jurisprudence. Jonathan Zasloff, *The Worst Argument Against Using the 14th Amendment, The Reality-Based Community* (July 28, 2011, 4:28 PM), <http://www.samefacts.com/2011/07/law-notes/the-worst-argument-against-using-the-14th-amendment/>.

tion.”¹⁷⁸ Careful historical study can shed light on long-neglected provisions of the Constitution and aid in finding their original public meaning. Hopefully, this study has provided insight into the original public meaning of the first sentence of Section 4. Perhaps, if one day in the future, a President attempts to unilaterally raise the debt ceiling using the first sentence of Section 4 as her justification, this study can help avoid a constitutional crisis.¹⁷⁹

¹⁷⁸ *Noel Canning v. NLRB*, 705 F.3d 490, 511–12 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281). The court went on to argue, “The power of a written constitution lies in its words. It is those words that were adopted by the people.” *Id.* at 511–12.

¹⁷⁹ Another standoff between the President and Congress over the debt ceiling is expected in 2013, and if recent history is any guide, conflict over the ceiling will continue for years to come. Many public officials are again calling for the President to raise the debt ceiling unilaterally. See Doug Mataconis, *The Debt Ceiling and the 14th Amendment, Outside The Beltway* (Jan. 7, 2013), <http://www.outsidethebeltway.com/the-debt-ceiling-and-the-14th-amendment/>.