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Beyond Balanced Budgets, Fourteenth Amendment Style

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BEYOND BALANCED BUDGETS, FOURTEENTH AMENDMENT STYLE

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This Article raises a historical constitutional puzzle in an effort to shed light on a modern one. The historical puzzle concerns an obscure constitutional provision buried in a prominent constitutional amendment. Section 4 of the Fourteenth Amendment states that "[t]he validity of the public debt of the United States . . . shall not be questioned," but the courts have never applied this provision to constrain congressional budgeting. What did this provision once mean, and why has it effectively fallen out of the Constitution? This Article argues that originalist adherence to the provision would have had several significant consequences for modern congressional budget practice. While the provision could have served as a weak version of a Balanced Budget Amendment, today it is clearly dead. This Article asks why and provides an unsettling answer—the Clause was effectively forgotten. For even if the Clause is dead, the principle underlying it illuminates a modern constitutional puzzle, if and how lawmakers should amend the Constitution to tame the growing national debt. This Article begins by arguing that a Fiscal Commitments Amendment, similar to the Public Debt Clause but more clearly stated, might be an economically sound alternative to a Balanced Budget Amendment.

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> *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. . . .* [1]

Milling among the tourists and homeless in Lafayette Park across from the White House in the mid-1980s was a protester carrying a sign with a unique political message: "Arrest Me. I Question the Validity of the Public Debt. Repeal Section 4, Fourteenth Amendment to the U.S. Constitution."[2] Although we can safely dismiss the protester's tongue-in-cheek concern that Section 4 overrides the First Amendment, the mock protest makes two points worth noting. First, the wording of the first sentence of Section 4 is open to a wide range of interpretation. Second, the section has become obscure, less likely to be cited in policy discussion[3] than in a Washington joke.

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1. U.S. CONST. amend. XIV, § 4. Section 4 continues:
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.

2. Irvin Molotsky, *Lafayette Park: Not Just Another Pretty Postcard*, N.Y. TIMES, Sept. 7, 1984, at A13.

3. Indeed, the protester's cryptic reference is the only citation of § 4 in LEXIS/NEXIS's *New York*

This Article takes Section 4 seriously, but it does not seek to encourage a new breed of protestors to descend on the District of Columbia with placards urging the courts and Congress to abide by what Section 4 requires. The slide down from constitutional law to the proverbial historical dustbin is surely easier than the climb back up could ever be. Rather, animating this exercise in constitutional exegesis are the dual motivations of backward-looking curiosity and forward-looking purpose. In examining the past, this Article asks how a section of the Fourteenth Amendment with potentially broad sweep became an item of constitutional trivia. The answer to this puzzle will prove strangely elusive, but this Article aims at least to show that those who believe that there is no puzzle should read the first sentence of Section 4, which this Article dubs the Public Debt Clause,[4] with more care.

This Article's forward-looking aspiration is to suggest that the principle underlying the Clause could inform the contemporary movement for budget reform. After all, some might say that since the 1980s, the congressional budget process itself has become a Washington joke. Congress and the President compete over budget policy in a high-stakes game of fiscal chicken.[5] Deficits add to an accumulating debt[6] that is sure to escalate beyond the time horizons of balanced-budget plans.[7] And politicians agree only on the sanctity of entitlement spending,[8] even as economists warn that the United States of the twenty-first century will be unable to deliver on its twentieth century promises.[9]

Times database. *See* Search of LEXIS, News Library, NYT File (Nov. 9, 1997).

4. The provision is so obscure in Fourteenth Amendment scholarship that no commentator appears even to have taken the trouble to name it. This Article remedies this oversight. Those who assume the provision is meaningless would perhaps prefer a name like the "Pensions and Bounties Clause." This Article, however, will show that the phrase "Public Debt Clause" is more appropriate.

5. *See* Stephen Barr & Michael A. Fletcher, *Government Shuts Again After Talks Collapse*, WASH. POST, Dec. 16, 1995, at A1; Jackie Calmes & David Rogers, *Federal Offices Are Preparing for Shutdown*, WALL ST. J., Nov. 10, 1995, at A2 (anticipating possibility of government shutdown and bond default). At the end of the fiscal year 1996 impasse, Congress blinked. By then, the government had shut down twice, but avoided default on its bonds. *See* Monica Borkowski, *The Budget Truce: Status Report*, N.Y. TIMES, Apr. 26, 1996, at A22; Christopher Georges, *Congress Passes Debt-Ceiling Measure, Agrees to Spend More on Social Security*, WALL ST. J., Mar. 29, 1996, at A12.

6. The 1996 budget deficit has been projected at $34 billion. *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 1–2 (1997).

7. Currently, the deficit is at its lowest point in twenty years, largely "because of strong economic growth that brought a surge in tax revenue." Richard W. Stevenson, *Federal Deficit at Lowest Point in Two Decades*, N.Y. TIMES, Oct. 27, 1997, at A1. The President and Congress have agreed to plans that they claim would balance the budget by 2002. *See* Alison Mitchell, *Clinton and G.O.P. Cheer Plan to Balance Budget*, N.Y. TIMES, July 30, 1997, at A1; Richard W. Stevenson, *After Years of Wrangling, Accord Is Reached on Plan to Balance Budget by 2002*, N.Y. TIMES, May 3, 1997, § 1, at 1. Economists caution, however, that it is too early to stop worrying about the debt, which continues to grow. *See, e.g.*, Janet Yellen, *The Job's Not Done Yet*, N.Y. TIMES, July 18, 1997, at A29; *see also* GEORGE HAGER & ERIC PIANIN, WHY NEITHER DEMOCRATS NOR REPUBLICANS CAN BALANCE THE BUDGET, END THE DEFICIT, AND SATISFY THE PUBLIC (1997). Indeed, the Congressional Budget Office projects that deficits will climb after 2002, especially beginning in about 2010 with the retirement of the baby-boom generation. *See* CONGRESSIONAL BUDGET OFFICE, LONG-TERM BUDGETARY PRESSURES AND POLICY OPTIONS: THE LONG-TERM BUDGET OUTLOOK 1 (1997).

8. *See, e.g.*, Robert Bixby, *The Missing Debate: Hard Choices on Entitlements*, ST. PETERSBURG TIMES, Oct. 6, 1996, at 1D.

9. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1997–2006, at xxiii ("The path of spending and revenues . . . clearly cannot be sustained because the debt-to-GDP ratio spirals out of control after 2030.") [hereinafter CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET OUTLOOK]; *see also* CONGRESSIONAL BUDGET OFFICE, *supra* note 6, at 10 ("If discretionary outlays

In short, the budget process needs mending.[10] To this crisis, some have responded by demanding a Balanced Budget Amendment,[11] while others have hoped simply for a sudden congressional commitment to fiscal soundness. The Framers of the Fourteenth Amendment knew better. More prominent provisions of the Fourteenth Amendment have long overshadowed the Clause,[12] assumed to be an anachronism[13] from a war whose fiscal rifts healed faster than its emotional scars. While the Clause did arise in the peculiar context of Reconstruction, this Article argues that the Framers sought to transform the Fiscal Constitution[14] by allowing Congress to tie its own hands with irrevocable budgetary promises,[15] and by reducing Congress's power accordingly by blocking

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grew with inflation, federal debt would rise to 171 percent of GDP by 2035; if they grew with the economy, federal debt would surge to almost 2.5 times GDP. With federal debt growing so rapidly, the economy would enter a period of accelerating decline.").

10. *See* Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992) (assessing budget process reform proposals).

11. *See* S.J. Res 1, 105th Cong. (1997); S.J. Res. 1, 104th Cong. (1995). In 1995, the Amendment failed in the Senate, effectively one vote short of the needed two-third majority. *See* 141 CONG. REC. S3310-13 (daily ed. Mar. 12, 1995). The subsequent November, 1996 elections led to an increase in the Republicans' Senate majority, bringing speculation that a balanced-budget amendment might now have enough votes to pass that body. *See* Eric Pianin & Guy Gugliotta, *Budget Amendment Gets Warmer Climate*, WASH. POST, Nov. 11, 1996, at A4. The proposal, however, failed again by one vote. *See* 143 CONG. REC. S1921-22 (daily ed. Mar. 4, 1997); David E. Rosenbaum, *Republicans' Budget Amendment Is Headed for Defeat in the Senate*, N.Y. TIMES, Feb. 27, 1997, at A1 (reporting Sen. Robert Torricelli's announcement reneging on campaign promise to support Balanced Budget Amendment).

Legal scholars have debated whether a Balanced Budget Amendment would be wise and effective. *See* Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed To—And No More*, 106 YALE L.J. 1449 (1997) (describing proposed Amendment as potentially unenforceable and as poorly drafted); Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & Pol. 153 (1996) (asserting that judicial intervention in budget matters will bring unintended consequences); Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065 (1983); David Lubecky, Comment, *The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. CIN. L. REV. 563 (1996) (comparing different states' balanced budget amendments).

12. Even at the turn of the century, treatises on the Fourteenth Amendment ignored the Clause. *See, e.g.*, HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 7 (1901) (quoting Fourteenth Amendment as containing only §§ 1 and 5).

13. In this sense, the Clause is assumed to be the Reconstruction analogue of a provision in the original Constitution: "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." U.S. CONST. art. VI, cl. 1. Placing aside the possibility of a lingering debt from the eighteenth century, this provision is no longer operative. However, the decision of the Framers of the Fourteenth Amendment not to echo this provision by using the phrase "before the Adoption of this article," as they chose to echo other provisions in § 1 of the Fourteenth Amendment, suggests that they sought to establish a broader principle in the first sentence of § 4. The second sentence of § 4 has little applicability today.

14. For assessments of restrictions that the Constitution imposes on the budget process, see Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); and Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988). Professor Dam defines the "Fiscal Constitution" as including "Supreme Court decisions interpreting the Constitution, key framework legislation, and implicit understandings derived from existing practice." Dam, *supra*, at 271. The irony of this definition is that though it is part of the Constitution and relates to fiscal matters, the Public Debt Clause is not part of the Fiscal Constitution.

15. The economic notion that a government may benefit by "tying its hands," i.e. providing an institutional mechanism that forces a government to stick to its initial policy commitments, has received more attention in the context of monetary than in the context of fiscal policy. *See* Robert Barro & David Gordon, *Rules, Discretion, and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983) (developing theory); Francesco Giavazzi & Marco Pagano, *The Advantage of Tying One's Hands: EMS Discipline and Central Bank Credibility*, 32 EUR. ECON. REV. 1055 (1988) (applying theory to European Monetary System).

it from repudiating or jeopardizing such commitments. Although the Public Debt Clause has lost its meaning, a new constitutional amendment could revive it, and an amendment enabling fiscal precommitment might be a more appropriate and more complete antidote to today's fiscal mess than a Balanced Budget Amendment.

To achieve both its backward-looking and forward-looking ambitions, this Article will indulge science fiction by traveling back to the future. It does so first by imagining in the not-too-distant future the success of a new movement to amend the Constitution, a movement based not on the idea of budget balance but on the principle of fiscal precommitment. Then, it travels back to the past to ask whether such a constitutional amendment already exists, and it concludes that the hypothetical Fiscal Commitments Amendment is a disguised Public Debt Clause, differently worded. Finally, it returns to the present and asks why the Clause never achieved its promise.

Before beginning this journey, it makes sense to map out its argumentative details. Part I mounts a theoretical and practical case that a new constitutional amendment focusing on fiscal precommitment would be superior to existing proposals for balancing the budget. The crux of the theoretical case is that it makes sense to allow Congress to make fiscal promises that subsequent Congresses cannot repeal. The practical case is that a Fiscal Commitments Amendment would be more expansive and yet more moderate than a Balanced Budget Amendment. It would be more expansive because it would attack problems other than budget balance, such as budget agreement stalemates and possibly entitlements spending. It would be more moderate, however, because it would not typically require outlays to be equal to expenditures. At some point, though, rapid accumulation of debt would place the government's ability to honor preexisting debt in doubt and thus violate the hypothetical Fiscal Commitments Amendment by making default seem possible, though not necessarily inevitable. By barring further debt accumulation when the government reaches such a point, which is surely a long way off, the Amendment would place a modest but important constraint on fiscal policy. Developing jurisprudential tests for identifying this point turns out to be difficult, because there are many ways of making the concept of placing a debt in doubt concrete. This part explores this problem in considerable detail, partly as a way of foreshadowing the next part's treatment of the Public Debt Clause.

Part II returns to the passage of the Fourteenth Amendment in 1868 and asks what the Clause means, properly interpreted. It argues first that the Framers meant for the Public Debt Clause to apply beyond Reconstruction. Although there are few historical records available to help us discern the Framers' intention, the history of the Clause's adoption shows that Congress did not intend to limit its applicability to Civil War debt, but rather sought to embed fiscal honor within the Constitution. In addition, the language and history of the Clause show that the "public debt" could include more than just bonds. Finally, this part argues at length that formal repudiation of debt need not occur for its validity to be questioned, and that an originalist interpretation of the Clause would

thus demand judicial intervention as soon as a government action jeopardized a debt, even if that action would not necessarily have led to repudiation.

Ultimately, Part II's interpretation of the Clause makes it seem almost identical to the hypothetical Fiscal Commitments Amendment proposed in Part I. This congruence means that the same difficulties that the Amendment presented would confront anyone trying to apply the Clause as well. Yet, if courts had accepted this part's interpretion of the Clause, then they would have needed to do with the Public Debt Clause what they have long done with other provisions of the Fourteenth Amendment: struggle to develop jurisprudential tests to give the Clause meaning. Part I's development of tests for the Fiscal Commitments Amendment shows that such a task, though difficult, would not be impossible, even though the tests Part I developed do not have an exclusive claim to legitimacy. Taken together, Parts I and II thus show that the Clause might reasonably have evolved to place modest but meaningful constraints on congressional budgeting.

Of course, such evolution never occurred. Therefore, Part III jumps back to the present, but with an eye to the past. It explores different possible explanations of why the Public Debt Clause is not today a significant part of the Fiscal Constitution. While Part II's argument that the Framers did not intend for the Clause to self-destruct eliminates a likely suspect in the Clause's death, this part considers other candidates. While the courts might well be blamed for killing a more prominent clause in the Fourteenth Amendment,[16] they are not to blame for the Public Debt Clause's lack of prominence. The Supreme Court has considered the Clause in just one case,[17] and its decision in that case reaffirms this Article's argument that the Public Debt Clause was not merely transitional. Moreover, the Court cannot be blamed for killing the Clause indirectly by crafting justiciability doctrines that would discourage prospective litigants. Part III concludes by considering the possibility, most appealing yet also perhaps most disturbing, that the Public Debt Clause died simply because the Reconstruction and immediately succeeding Supreme Courts did not have the chance to develop it.

The conclusion reverts to the argument's premise by explaining why the Clause should be thought of as dead and why the Supreme Court should not attempt to revive it, unless Congress and the states do so by drafting a new constitutional amendment.

I. IMAGINING THE FUTURE: THE FISCAL COMMITMENTS AMENDMENT

Congress shall have the power to make binding fiscal commitments and shall take no action that could place its ability to honor such debts in doubt.

16. The allusion is to the Privileges and Immunities Clause. *See* U.S. CONST. amend. XIV, § 1.
17. *See* Perry v. United States, 294 U.S. 330 (1935).

This section imagines the possibility that the words above could become the Constitution's Twenty-Eighth Amendment. The purpose, of course, is not to predict that an amendment focusing on "Fiscal Commitments" will be passed. Nor is it even to argue that Congress necessarily should pass such an amendment. The Constitution should not be amended on a whim, and perhaps any change in the Fiscal Constitution would dangerously destabilize political processes that have worked, more or less, for over two centuries. Moreover, like the Balanced Budget Amendment, a Fiscal Commitments Amendment would invite judicial intervention in the economy,[18] and perhaps alternative means of fiscal enforcement would be preferable.[19]

Rather, this part's purpose is simply to suggest that a Fiscal Commitments Amendment might be preferable to a Balanced Budget Amendment, even for, indeed especially for, those who consider themselves hawks on issues of fiscal responsibility. The argument is in three parts. First, Part I.A briefly argues that while the principle of budget balance is economically meaningless, the idea of precommitment that underlies the Fiscal Commitments Amendment is theoretically justifiable. Second, Part I.B argues that although the Fiscal Commitments Amendment is somewhat open-ended, it would be no harder to interpret than a Balanced Budget Amendment. Third, Part I.C explores what the practical ramifications of a Fiscal Commitments Amendment would be. The Fiscal Commitments Amendment would be more moderate than the Balanced Budget Amendment in that it would still allow Congress to run countercyclical fiscal policies. At the same time, the Fiscal Commitments Amendment would be more sweeping, in that it would reform problems in the budget process other than a bias towards deficits and in that it would give Congress a role in reducing debt.

A. From Balanced Budgets to Fiscal Commitments

Economists agree that a budget deficit of zero is an arbitrary target.[20] This is not a conclusive argument against a Balanced Budget Amendment, because even if there is nothing magic about the number zero, perhaps constraining budget deficits to this size is better than allowing Congress to accumulate massive deficits. However, the arbitrariness of zero dooms any argument that the Balanced Budget Amendment is superior to a Fiscal Commitments Amendment simply because the latter will not ensure budget balance. As Part I.C.1 will

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18. *See A Sense of Balance*, ECONOMIST (London), Mar. 11, 1995, at 18 (arguing against Balanced Budget Amendment for this reason). *Compare* Peter W. Rodino, Jr., *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785, 801 (1983) (arguing that courts do not have the expertise to assess budgetary issues), *with* James W. Bowen, *Enforcing the Balanced Budget Amendment*, 4 SETON HALL CONST. L.J. 565, 589-93 (1994) (arguing that courts are competent to make legal judgments concerning budgetary issues).

19. *See* Seto, *supra* note 11, at 1511-15 (proposing the creation of a nonjudicial independent scorekeeper to enforce a Balanced Budget Amendment).

20. *See, e.g.*, WILLIAM R. KEECH, ECONOMIC POLITICS: THE COSTS OF DEMOCRACY 123 (1995) ("A nominal balance of the government's revenues and expenditures is a thoroughly arbitrary target, although it is very appealing politically because it is simpler than any other target and thus is more widely understood among voters.").

argue, the Fiscal Commitments Amendment would provide some constraint on budget deficits without hamstringing congressional fiscal policy. Determining which Amendment draws the better line is a complicated economic question beyond this Article's legal scope, but the Fiscal Commitments Amendment's failure to mandate budget balance cannot count a priori as a weakness.

Instead of focusing on an arbitrary number, the Fiscal Commitments Amendment would enshrine into constitutional law a simple principle, that the government should meet its promises.[21] Building an economic case for such a principle is easy work: By allowing Congress to tie its own hands, the Fiscal Commitments Amendment would increase the credibility of congressional commitments and would thus make it easier for the government to enter into contractual arrangements. Individuals will be more inclined to hold and purchase government bonds if they believe that the government will be required honor those obligations; the resulting lower interest rates would in turn make it easier for the government to meet its obligations.[22] The economic literature recognizes the benefits of precommitment generally,[23] and legal scholars have discussed the advantages of legal institutions that can bind themselves.[24]

Whether the benefits of allowing precommitment exceed the costs, namely the inability to escape from commitments that ultimately prove to have been ill-advised, is an empirical question. Part I.C will attempt to assess this empirical question in the context of the Fiscal Commitments Amendment by surveying what the Amendment's practical consequences would be.

B. Interpreting the Fiscal Commitments Amendment

In a recent article, Theodore Seto has demonstrated convincingly that a declaration of a zero deficit target does not translate easily into an administrable test.[25] The Balanced Budget Amendment would leave unanswered such ques-

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21. *See, e.g.*, Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1132 (1996) ("We generarally believe it is a good idea for the government to keep its contractual promises, those made to private parties and those made to other governments."). Professor Logue argues that the government may benefit by precommitting to maintaining incentive subsidies that it offers. While Professor Logue considers a variety of institutional mechanisms that would allow for such credible precommitment, *see id.* at 1181-94, passage of a constitutional amendment akin to the Fiscal Commitments Amendment would provide the ultimate precommitment device.

22. *See* Guillermo A. Calvo, *Servicing the Public Debt: The Role of Expectations*, 78 AM. ECON. REV. 647 (1988) (arguing that expectation of debt repudiation makes such repudiation more likely).

23. *See, e.g.*, Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977). Professors Kydland and Prescott show that optimal control theory may not apply to dynamic economic systems. In other words, when expectations of future policy influence policy effectiveness, a time-inconsistent policy, i.e. one that prevents policymakers from taking the optimal path at each point in time, may be *ex ante* optimal. This insight is relevant to debt because a government that can tie its own hands through time-inconsistent policy changes expectations and reaps the lower interest-rate benefits of higher confidence in its bond issues.

24. *See, e.g.*, Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 496-98 (1997) (discussing precommitment theory).

25. *See* Seto, *supra* note 11, at 1478-1501.

tions as when money is spent,[26] what besides cash counts as an expenditure,[27] and what constitutes debt.[28] Common law development might help to resolve these questions over time, but the Balanced Budget Amendment is not necessarily easier to clarify than the Fiscal Commitments Amendment would be.

To be sure, the Fiscal Commitments Amendment would leave many uncertainties as well. Most critically, a court would need to address whether a questioned congressional action "could place its ability to honor such debts in doubt." In the 1990s, it is possible that no government action would place the government's ability to honor debts in doubt because the government's credit rating is so high, but the courts would need to develop tests to identify when the government lost this ability. Perhaps ideally, the Fiscal Commitments Amendment would be more specific, and nothing in this Article should discourage Congress from developing the notion of fiscal commitment in more detail. This Article has stated the Amendment in sweeping though vague terms because the Article compares the Amendment to the Public Debt Clause, and a purpose of this part is to preview how sweepingly the Clause might have been interpreted. The bulk of Part II will argue that the Clause should be interpreted to mean roughly the same thing as the Fiscal Commitments Amendment.[29] This still leaves the difficulty, and it is a weighty one, of determining what the language of the Fiscal Commitments Amendment means.

It is possible to construct tests that would serve as proxies for identifying when congressional actions place commitments in doubt. A fact-finder could assess purported breaches of the Amendment using either an objective or a subjective standard.[30] The objective standard inquires into whether a governmental action in fact jeopardizes fiscal commitments, while the subjective standard asks whether those who hold government debts genuinely doubt whether the government will be able to honor them. These standards in turn can be translated into bright-line rules. For example, a bright-line test of the objective standard might be whether the United States would meet its obligations if Congress never passed another law (or approved only statutes adhering to long-term budget projections).[31] Similarly, with bond debt, a bright-line test of the subjective standard might be whether any rating service had downgraded the debt.[32] While it might seem odd for a constitutional test to depend on the ac-

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26. *See id.* at 1478-82.

27. *See id.* at 1488-89.

28. *See id.* at 1489-91.

29. For a discussion of the differences between the Fiscal Commitments Amendment and the Public Debt Clause, *see infra* Part II.E.

30. This section uses the terms "objective" and "subjective" to refer to whether a test considers debtholders' state of mind, not to whether a test may be administered without bias.

31. For example, if Congress repealed a statute providing for repayment of a debt not yet due, thus leaving it to the discretion of a future Congress whether to honor the debt, the repeal would violate the objective test. *See also infra* note 149.

32. Bright-line subjective tests for non-bond debt are more difficult, but not impossible, to develop. For example, a bright-line test of the solidity of pensions that the government has committed to paying might find a debt questioning if a given percentage of government employees began to purchase private insurance against the possibility of decreased payments.

tions of private agencies, this approach makes sense if the test's aim is to determine whether debtholders are genuinely concerned about government action.

Are these tests any good? Surely, these are not the only tests that one can imagine.[33] There are, however, at least two axes along which one might evaluate a jurisprudential test for a constitutional amendment: fidelity and administrability. Fidelity is perhaps the trickier axis, because the broad nature of constitutional provisions means that their language often does not correspond to unique tests. The Fiscal Commitments Amendment provides an illustration of the difficulty of crafting faithful tests, but the courts would not be able simply to ignore such an Amendment if it were passed. They would need to struggle to create tests intrepreting it. The objective and subjective tests suggested above are good candidates for two reasons. First, they provide plausible explanations of what it means for a debt to be placed in doubt. Naturally, many debts identified as being in doubt would not in fact be repudiated in the absence of the Amendment, but this accords with the Amendment's purpose of providing prophylactic assurance of debts' validity. Second, the tests are relatively administrable. It need not be difficult to apply a test once selected,[34] even if it is difficult to pick a test from among those possible.[35]

It is impossible to prove that the bright-line objective and subjective tests sketched above are the best tests or that one is better than the other. However, there are practical reasons to prefer these tests over others, and to prefer the objective over the subjective. An advantage of both tests is that they do not turn the word "could" into a hair-trigger that would prevent the government from making relatively innocuous economic policy choices because of very small impacts that those choices would have on the riskiness of debt. A wide range of governmental actions presumably has marginal effects on both the probability of default and concern about the possibility of such default,[36] but to conclude that all of these actions would violate the Fiscal Promises Amendment would turn the Amendment into a caricature of itself. Because nothing in the phrase "could place" indicates the degree of likelihood necessary before a court may

33. For example, an alternative bright-line test for the objective standard would consider a warning by a ratings service to constitute a debt questioning. The subjective standard, meanwhile, could be assessed using a multi-factorial test, in which a judicial fact-finder might consider bond ratings, stock and bond prices, statistical studies, newspaper commentary, and testimony by debt-holders. Or a court might create a balancing test that allowed limited questionings where the government had substantial or compelling interests.

34. Even if the best test required a judge to make an intuitive finding about whether a debt questioning had occurred, such a judgment might still be superior to a rule narrowing debt questioning to repudiation. For example, judicial tests for violations of the Fourteenth Amendment, such as the intermediate scrutiny Equal Protection Clause test for quasi-suspect classifications, are often difficult to apply but are applied nonetheless. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 742-44 (1982) (Powell, J., dissenting) (disagreeing with Court's conclusion under the intermediate-scrutiny test).

35. The difficulty in picking appropriate tests has not led the courts to assume that other constitutional provisions should be applied as narrowly as possible. Rather, the judiciary actively debates what are appropriate tests for violation, for example, of the Equal Protection Clause. *See, e.g., id.* at 724 n.9 (majority opinion) (confronting objections to the intermediate-scrutiny test).

36. For example, any increase in debt presumably raises the probability that the government will be unable to meet existing debts ever so slightly, since a massive increase in debt would have a noticeable effect. But a rule preventing the government from issuing any new debts would clearly sweep too far and, indeed, defeat a purpose of the Fiscal Commitments Amendment, the securitization of the nation's debt issuance.

find that a governmental action endangers its ability to honor a debt,[37] it makes sense for tests of debt endangerment to take a balanced approach. A test should not brand as unconstitutional government actions that have trivial, negligible effects on the probability that the government will not be able to honor its debts. Tests can recognize this by identifying only substantial increases in the probability of debt repudiation or in debt-holders' concern about it. The objective test accordingly finds a questioning only when the existing statutory scheme would in fact lead to default on a debt in the absence of further congressional action. Similarly, the subjective test triggers the Clause only when a bond agency lowers the rating of U.S. debt because its riskiness passes a substantial threshold.[38] Ultimately, however, whether these tests are too strict or not quite strict enough is not a question that the language of the Amendment can answer.

C. Applying the Fiscal Commitments Amendment

This section surveys the potential applications of the Fiscal Commitments Amendment. As with developing tests to interpret the Amendment, this may seem like a silly exercise because Congress could write a more detailed amendment that would make its applications patent. The exercise will serve two purposes, however. First, it will indicate what could have been at stake in defining the limits of the Public Debt Clause, given Part II's argument that the Clause's meaning is very close to that of the Amendment. Second, this discussion will show how the principle of fiscal commitment may serve as a touchstone for a Congress considering how to draft an amendment to reform congressional budgeting.

1. Deficits and Debt

The applicability to the debt of the hypothetical Fiscal Commitments Amendment is straightforward. When the federal government issues bonds, it enters into a promise to repay that debt. Assuming that the government pledges its full faith and credit to the debt, it has attempted to bind itself to repayment. Allowing the debt to climb too high might place the federal government's ability to pay off already existing debt into doubt. The following two subsections argue first, that the Amendment would prevent unsustainable debt accumulation, a more moderate prescription than budget balance; and second, that the Amendment might allow Congress to bind itself into a Gramm-Rudman-Hollings type scheme to achieve deficit reduction.

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37. While "could place" might be read as "possibly could place," it can also be read as "reasonably could place" or as "with some substantial probability could place."

38. Relying on bond ratings rather than bond prices is essential. If the test targeted a decline in bond prices, it would inappropriately assume that investor jitters were a proxy for the probability of default. Bond prices reflect not only the probability of default but also changes in the time value of money and the availability of alternative investments. Bond ratings, however, reflect only those jitters caused by perceptions of an increased probability of default.

a. Unsustainable Debt Accumulation

The U.S. debt today is relatively small,[39] and American bonds are considered among the "world's safest investments."[40] Economists warn, however, that if the United States fails to increase taxes or reduce spending, the debt will spiral to unprecedented levels.[41] Indeed, without change, the debt would increase faster than the growth of the economy itself. Economists define such growth as unsustainable,[42] since if it remained unchecked, payments on the debt would ultimately consume the nation's entire economic output. Of course, at some point Stein's Law will become operative: "If something cannot go on forever, it will stop."[43] The question is whether it will stop before a crisis of confidence in U.S. debt, after such a crisis but before repudiation, or after national insolvency.[44] Most of the United States's debt is internally held,[45] so a political constituency would oppose any effort at debt repudiation. But some have credited massive debt levels with bringing about the French and Russian Revolutions,[46] and a true debt crisis could force the government to cut social services and bring unpredictable unrest.

The Fiscal Commitments Amendment's "could place . . . in doubt" language allows the courts to intervene before debt repudiation becomes a viable option.[47] The quandary, however, is in the line-drawing. Whenever the United

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39. The debt held by the public at the end of fiscal year 1996 is projected at 52.1% of GDP; in other words, the debt is only about half one-year's national income. *See* HISTORICAL TABLES, *supra* note 73, at 90. The United States's structural budget deficit is smaller than that of all but two other OECD industrialized countries. *See* CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET OUTLOOK, *supra* note 9, at 90. For a review of the causes of large debts in OECD countries, see ALBERTO ALESINA & ROBERTO PEROTTI, THE POLITICAL ECONOMY OF BUDGET DEFICITS (International Monetary Fund Working Paper No. WP/94/85, Aug. 1994).

40. *See, e.g., Financial Markets*, L.A. TIMES, Jan. 25, 1996, at D3 (noting that U.S. bonds retain highest possible ratings despite the 1996 fiscal year debt crisis).

41. The Congressional Budget Office has projected that without policy changes, the debt-to-GDP ratio could climb to 311% by 2050. *See* CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET OUTLOOK, *supra* note 9, at 77. *But see* CONGRESSIONAL BUDGET OFFICE, *supra* note 7, at 11–12 tbls.4, 5 (lowering these estimates).

42. *See* CONGRESSIONAL BUDGET OFFICE, ECONOMIC AND BUDGET OUTLOOK, *supra* note 9, at xxiii ("For a path of spending and revenues to be sustainable, the resulting debt must eventually grow no faster than the economy.").

43. *See, e.g.*, Herbert Stein, *Leave the Trade Deficit Alone*, WALL ST. J., Mar. 11, 1987, at A20.

44. In a technical sense, governments cannot go bankrupt, since bankruptcy proceedings do not apply to the federal government. Moreover, the government can always whittle the debt down through inflation, except to the extent the debt is held in inflation-indexed bonds. *See* John R. Wilke, *Treasury Plans to Sell Inflation-Indexed Bonds*, WALL ST. J., May 16, 1996, at C1 (noting first planned Treasury issue of bonds protected against inflation).

45. Approximately 20 percent of the national debt is held by foreigners. *See* DEPARTMENT OF THE TREASURY, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1996, at 195-96 (1995) [hereinafter ANALYTICAL PERSPECTIVES].

46. *See* Seto, *supra* note 11, at 1459 & nn.24–25.

47. This suggests a paradox: If the Supreme Court held debt accumulation to constitute a violation of the Amendment, then presumably it would also hold repudiation illegal, but that precedent would mean that debt accumulation could not constitutionally lead to repudiation, and thus the accumulation ought not violate the Amendment. A resolution to this paradox views the government's actions independent of the Amendment's constitutional restraint. This is the only way to honor the words "could place in doubt." Moreover, Article V permits repeal of constitutional provisions, so fiscal unsustainability places the validity of debt in doubt. Even without Article V, the Supreme Court might in a national crisis overrule precedent and allow debt repudiation. *Cf. infra* note 188 (discussing the possibility that the Public Debt Clause might be unrepealable).

States runs a deficit, it moves closer to an unmanageable debt level, but applying a hair-trigger test to debt accumulation would inflate the Fiscal Commitments Amendment into a full-scale Balanced Budget Amendment. If this were the right approach, then because any fiscal commitment increases the national debt or at least creates a competing obligation to it, the Fiscal Commitments Amendment bans the making of any fiscal commitments. This approach would apply the Clause too soon; waiting for debt repudiation applies it too late.

Both the objective and subjective tests of debt questioning[48] provide ways to apply the Amendment in between these extremes. The subjective standard would be triggered when debt accumulation becomes so excessive that bond rating agencies downgrade U.S. debt, indicating that the Congress's ability to honor the debt is in doubt. The objective standard would preclude any budget that would cause the debt to cross the economic threshold of unsustainability.[49] A deficit hawk might seek earlier application of the objective test by noting that the statutory scheme places the economy on the way to unsustainability. Such an anticipatory thrust is two levels removed from actual default, but there is no compelling counter-argument to this expansive interpretation of "could place . . . in doubt."[50] In addition, it makes normative sense to deal with problems sooner rather than later,[51] and it therefore might be healthy for the courts to ask Congress to clarify its long-term goals.

Whether the courts would apply the subjective or the objective test suggested, or some other test altogether, the Fiscal Commitments Amendment would constrain debt growth less than application of the Balanced Budget Amendment. A principal criticism of the latter is that it would prevent the operation of a countercyclical fiscal policy.[52] Progressive tax rates and government programs like unemployment compensation tend to stimulate the economy in a recession. At the same time, such policies moderate economic growth in an expansion and thus do not necessarily have an adverse effect on long-term debt accumulation. A Balanced Budget Amendment would force Congress to craft a noncyclical fiscal policy, but the Fiscal Commitments Amendment would not. Moderate deficits would not lead debt rating agencies to lower the United States's bond rating and would not constitute unsustainable debt growth. The Fiscal Commitments Amendment might also tolerate extraordinary expenditures that would increase the debt dramatically without decreasing the likelihood that

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48. *See supra* Part I.B.

49. Application of such a standard would require a determination of whether interest payments on the debt are increasing or will increase at a faster rate than the economy will grow. Predictions of economic growth are uncertain, but given governmental economic statistics, this standard should be easy to apply. The statistics might in fact be inaccurate, but by mapping an isomorphism between the Congress's ability to honor the debt and its sustainability, the standard allows for dispassionate, bright-line assessment.

50. Whether a budget on the path to unsustainability fails the objective test depends on whether the test asks what would happen if Congress passes no further statutes or what would happen if Congress sticks to its long-term plans.

51. *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 450 (1996) (arguing for addressing spending growth before retirement of baby boomers).

52. *See, e.g.*, WILLIAM A. COX ET AL., A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: ECONOMIC ISSUES 15-17 (Congressional Research Serv., Dec. 1994); Seto, *supra* note 11, at 1473.

Congress would be able to honor preexisting debt.[53]

b. Legislation Forcing Deficit Reduction

Although Congress twice has just missed the supermajority needed to send the Balanced Budget Amendment to the state legislatures for ratification,[54] congressional support for a scheme that would tie Congress's hands and force budget balance has long been strong. Indeed, with the Balanced Budget and Emergency Deficit Control Act of 1985,[55] popularly known as Gramm-Rudman-Hollings, Congress attempted to create a statutory regime that would force budget balance by requiring the Comptroller General to implement an across-the-board cut, known as a sequestration, of non-entitlement expenditures to achieve balance if Congress failed to reach balance on its own.[56] Although the Supreme Court found the Comptroller General's role in this scheme unconstitutional in *Bowsher v. Synar*,[57] Congress cured the statute's constitutional infirmities.[58] Deficits continued to climb, however, as Congress and the Office of Management and Budget took advantage of accounting loopholes,[59] and ultimately Congress gave up on the Gramm-Rudman-Hollings approach altogether, replacing it with the Budget Enforcement Act of 1990,[60] which relied mostly on voluntary congressional compliance with deficit targets. In the end, Congress was unable to resist the lure of deficit spending.

Gramm-Rudman-Hollings failed because of the general rule that later legislative enactments are given priority over earlier ones.[61] But later statutes may not *unconstitutionally* repeal earlier ones, and the Fiscal Commitments Amendment might make it unconstitutional for Congress to deviate from a course of deficit reduction. If Congress creates a scheme to ensure that it will be able to pay its debts in the future, and a subsequent Congress attempts to repeal that

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53. As Seto notes, although the Louisiana Purchase drastically increased the U.S. debt, the Purchase arguably created offsetting benefits that put the United States in a stronger economic position. *See* Seto, *supra* note 11, at 1473; *see also* Act of Nov. 10, 1803, stat. I, ch. II, 2 Stat. 245.

54. *See supra* note 11.

55. Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

56. *See generally* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593 (1988).

57. 478 U.S. 714 (1986). The Court held that because Congress reserved the right to remove the Comptroller General, Gramm-Rudman-Hollings violated separations-of-powers principles by giving Congress a role in the execution of the laws. *See id.* at 736.

58. *See* The Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, tits. I-II, 101 Stat. 754 (1987).

59. For a description of these loopholes, as well as of the failure of Gramm-Rudman-Hollings and the adoption of the Budget Enforcement Act, see Joyce & Reischauer, *supra* note 10, at 433-40.

60. Pub. L. No. 101-508, tit. XIII, 104 Stat. 1388 (codified as amended at 2 U.S.C. §§ 901-922 (1996)).

61. *See, e.g.*, Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 440 (1853) (precluding one legislature from stopping a later one from levying taxes); Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949) (holding that later budgets override inconsistencies with earlier ones); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament."); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 247-248 (1997) (discussing various cases upholding priority of subsequent legislative acts over earlier ones).

scheme, such repeal may be said to put Congress's ability to pay off the debt "in doubt."

This argument would be strongest for a statute explicitly invoking the Fiscal Commitments Amendment and providing that it may be amended only if the modification would not constitute a debt questioning.[62] A court scrutinizing an amendment to or a repeal of such legislation would then apply an incarnation of either the subjective or the objective test of the Fiscal Commitments Amendment.[63] As usual, the subjective test would consider whether the change undercut the bond markets' faith in government debt. The alternative objective test would assess whether the change would cause unsustainable debt growth or, using a broader version of the test, would put the government on the path to such unconstitutional growth.

There would be two supplemental reasons for viewing the Amendment as allowing Congress to tie its own hands with a Gramm-Rudman-Hollings plan. First, the Fiscal Commitments Amendment is inherently intertemporal, providing that Congress may not renege on an earlier Congress's budgetary commitments. Thus, overriding the usual rule that later legislation trumps earlier legislation would not be anomolous in the context of this Amendment. Second, the passage of a statute that limits its own amendability might be considered an exercise of the Congress's power under the Amendment to make binding fiscal commitments. If Congress were to frame a Gramm-Rudman-Hollings scheme as a promise to future purchasers of government securities that it will adhere to a specific budgetary path, or if it incorporated such a promise directly in the bond contract, then deviating from that path might be considered a default on that promise.

The Fiscal Commitments Amendment would provide a dynamic role to Congress in creating administrative structures that would allow it to contain deficit growth. Congress might not be able to pass a Balanced Budget Statute that would effectively bind future Congresses, because repeal of such a statute would probably not place the United States's ability to honor debts into sufficient doubt. But the Amendment would make it possible for Congress to respond to evolving economic conditions by updating schemes to ensure the soundness of the debt. As long as the economy justified Congress's replacement of one scheme to ensure soundness with another, the Fiscal Commitments Amendment would tolerate the change. If, however, Congress attempted to repeal a statutory scheme passed pursuant to the Fiscal Commitments Amendment so that it could engage in a dangerous spending or tax-cut binge, the Amendment would kick in and bind Congress to its earlier plan.

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62. Even a court that would not have found the abandonment of Gramm-Rudman-Hollings unconstitutional might be wary if Congress had earlier limited a debt-reduction statute's amendability.

63. *See supra* Part I.B.

2. Budget Impasses

Congressional budget impasses introduce the specter of "train wrecks."[64] The metaphor goes like this: When Congress and the President fail to agree on a budget by the beginning of the fiscal year, the previously smooth-running government train begins to derail, with non-essential services[65] pushed along only if Congress and the President can agree on "continuing resolutions."[66] The train continues to edge forward until the government both runs out of cash and reaches the federal limit on borrowing. Then, the government train crashes and stops, a wreck that only a subsequent infusion of cash or a suspension of the debt limit can budge.

No budget impasse has ever led to a "train wreck," but impasses have come close, most recently and precariously at the start of the 1996 fiscal year,[67] when the inability of Congress and the President to agree on a budget or a debt-limit increase threatened default on the debt.[68] The government shut down non-essential services, but temporary waivers of the federal debt limit[69] and accounting tricks by the Treasury[70] kept the government from reaching the limit.[71] Although the Congressional Budget Office has recommended abolition of the federal debt limit,[72] Congress has not responded. The possibility of a

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64. *See, e.g.*, Michael Wines, *The Budget: A Train Wreck?*, N.Y. TIMES, June 18, 1995, at 22.

65. Non-essential services are those not "involving the safety of human life or the protection of property." 13 U.S.C. § 1342 (1996).

66. *See, e.g.*, Act of Nov. 20, 1995, Pub. L. No. 104-56, 109 Stat. 548 (allowing temporary funding of some federal government programs).

67. An earlier debt-ceiling crisis occurred in 1985. *See, e.g.*, Alan Murray, *Treasury Says U.S. Will Default Friday Without Debt Bill*, WALL ST. J., Nov. 13, 1985, at A1.

68. *See, e.g.*, Leon Hadar, *US Default on Debt? Oh Yes, It Can Happen*, BUSINESS TIMES, Jan. 19, 1996, at 10; Alan Murray, *Debt-Limit Crisis Is Not Over Yet*, WALL ST. J., Nov. 27, 1995, at A1.

69. *See, e.g.*, Act of Feb. 8, 1996, Pub. L. No. 104-103, 110 Stat. 55 (exempting amount equivalent to one month of Social Security payments from being counted toward debt ceiling); Act of March 12, 1996, Pub. L. No. 104-115, 110 Stat. 825 (exempting government trust fund investments and reinvestments from debt ceiling).

70. Treasury Secretary Rubin took advantage of statutory changes passed in the wake of the 1985 debt-ceiling crisis designed to help avert default. *See* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, tit. VI, § 6002(a)-(c), 100 Stat. 1874, 1931. The changes authorized him to redirect investments in pensions funds, *see* 5 U.S.C. § 8348(j)(1) (1996), and "to sell or redeem securities, obligations, or other invested assets of the Fund before maturity in order to prevent the public debt of the United States from exceeding the public debt limit." § 8348(k)(1). The Secretary may take these actions only during a "debt issuance suspension period," defined in § 8348(j)(5)(B) as "any period for which the Secretary of the Treasury determines . . . that the issuance of obligations of the United States may not be made without exceeding the public debt limit." The General Accounting Office later determined that the Treasury's actions were authorized by the statute. *See* GENERAL ACCOUNTING OFFICE, DEBT CEILING—ANALYSIS OF ACTIONS DURING THE 1995-1996 CRISIS (1996); Clay Chandler, *GAO Says Rubin Tapped Retirement Funds Legally*, WASH. POST, Sept. 7, 1996, at D2. Republicans have charged, however, that Secretary Rubin exceeded his legal authority. *See* NICK SMITH, REPORT OF THE HOUSE TASK FORCE ON THE DEBT LIMIT AND MISUSE OF THE TRUST FUNDS (1996) (questioning Secretary's authority to declare debt issuance suspension period); *Constitutional Debt Crisis*, ST. LOUIS POST-DISPATCH, Jan. 12, 1996, at 15C (noting statements of former Attorneys General and Treasury Secretaries warning of illegality of Treasury Secretary Rubin's plans).

71. *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 301, 110 Stat. 847 (resolving crisis by raising debt ceiling).

72. *See* CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: AN UPDATE 48, 54 (1995). The General Accounting Office has long favored elimination of the statutory debt limit. *See* GENERAL ACCOUNTING OFFICE, A NEW APPROACH TO THE PUBLIC DEBT LEGISLATION SHOULD BE CONSIDERED (1979). Bills accomplishing a repeal were considered in the last Congress. *See, e.g.*, H.R. 215, 104th Cong.

future train wreck thus raises two questions: First, would it be constitutional under the Fiscal Commitments Amendment for the government to stop payments on bonds and other obligations? And second, would the debt-limit statute that makes a train wreck possible itself be constitutional?

a. Governmental Failure to Make Payments on Bonds

If the debt were to reach the statutory ceiling,[73] the Treasury might fail to make a required interest payments on its bonds.[74] Such a failure would go a step beyond placing the United States's commitment to the debt in doubt; it would constitute partial invalidation of the debt, because the Treasury commits in its regulations to make interest payments at certain times.[75] A "partial-faith-and-credit" principle not only would allow the government to liquidate its debts for nominal consideration, but also would place the United States's commitment to paying remaining debts into doubt.[76]

What would be the measure of damages for a breach of the Fiscal Commitments Amendment?[77] Because bond markets are highly competitive, a bondholder presumably could have purchased a close substitute for a U.S. bond, so the bondholder's damages are the same using either an expectancy or a reliance formulation.[78] Under either scheme, the government would owe not just

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(1995).

73. The debt limit is set in 31 U.S.C.A. § 3101 (West Supp. 1997), which currently provides that "[t]he face amount of obligations . . . whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $5,500,000,000,000 outstanding at any one time . . . ." For a comprehensive history of section 3101, see DEPARTMENT OF THE TREASURY, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996, HISTORICAL TABLES 92-94 (1995) [hereinafter HISTORICAL TABLES].

74. The United States has failed to make timely payments before, most recently in 1979, when despite the resolution of a debt-limit crisis, administrative snafus at the Treasury Department led to delayed payments on some bond issues. *See* James J. Angel, *Looking Back at Debt Defaults in U.S. History*, CHI. TRIB., Feb. 1, 1996, at 21 (arguing that default "would have serious consequences, but . . . would not be the end of the world").

75. *See* 31 U.S.C. § 3121(a)(5) (1994) (authorizing Treasury to specify dates on which it will pay bonds' principal and interest).

76. Even the possibility of a partial repudiation caused investors to lose some faith in U.S. bonds. *See* David E. Sanger, *S&P Strongly Warns U.S. on the Danger of Default*, N.Y. TIMES, Nov. 11, 1995, at 37 (reporting that faith of investors in government debt had been diminished, despite Standard & Poor's decision not to lower United States's AAA credit rating).

77. Just because the United States would presumably need to pay damages for failing to honor a debt does not mean that it would be constitutional for the United States not to honor a debt, as long as it pays later. In other words, there would be no reason to import into the Fiscal Commitments Amendment the limited, Holmesian view of contractual obligation: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass." OLIVER WENDELL HOLMES, THE COMMON LAW 301 (1881). The Amendment would change the promisor's ordinary choice by requiring the United States to meet its fiscal commitments. For the Amendment to be enforceable, the courts will need to be able to impose damages if the United States fails in its constitutional duty, but this does not mean that the government has taken a constitutionally permissible step by failing to make a debt payment. Nonetheless, there is something anomalous about enforcing a constitutional requirement that the government keep promises by allowing the government to break promises and then pay damages. The cure in the case of the budget impasses is for the courts to strike down the debt-limit statute that makes default possible, as explained below.

78. *See, e.g.*, E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 225 n.20 (1987) (noting conditions for merger of expectancy and reliance damages).

the missed interest payment, but also interest on that payment that would have accumulated during litigation. Even these damages might not fully compensate bondholders, however, since the debt repudiation would hurt the United States's credit rating and thus lower the value of outstanding bonds.[79]

b. Non-Bond Obligations

The government's reaching the debt ceiling would stop not just interest payments on bonds, but also payments to meet other government obligations. Unless the Fiscal Commitments Amendment applies only to debts explicitly made on the credit of the United States, ceasing payments for some of these obligations would also raise constitutional questions. Indeed, such a cessation would be problematic not only if it occurred because of a debt-ceiling crash, but also if Congress and the President failed to reach a budget agreement and the government shut down, as in 1995-96. For example, the Fiscal Commitments Amendment would probably require the government to make payments to government employees on salaries already earned.

c. The Federal Debt-Limit Statute

Regardless of which governmental obligations would be unconstitutional to repudiate, the federal debt-limit statute makes train wrecks and thus repudiation possible. Although the debt-limit statute is theoretically written in pursuance of goals that the hypothetical Fiscal Commitments Amendment also seeks to attain,[80] it works counter to the Amendment's goal of ensuring the validity of bond debt. The statute precludes government borrowing above a level that Congress has set, even if that borrowing is needed to meet expenses required to honor existing debts. Whether the statute in fact increases or decreases the probability of default or investor confidence is impossible to determine *a priori*.[81] Under the objective and subjective tests for debt repudiation discussed above,[82] however, it is not necessary to weigh these effects speculatively,[83] and the statute flunks at least the objective test and possibly the subjective test

79. Computing such damages would be difficult, because a court decision reimbursing a bondholder would reinstill confidence in U.S. bonds and cause them to appreciate. It is possible that the bonds would rise to even greater than their initial value, since such a decision could reassure bondholders about the vitality of the Public Debt Clause and make uncompensated repudiation seem even less likely than initially. On the other hand, bondholders might not have confidence in the precedential value of the court decision, and the willingness of the government to default might overshadow the willingness of the court to order compensation. In addition, any uncompensated litigation costs incurred in defending bonds adds to the cost of their ownership.

80. The drafters of the proposed Balanced Budget Amendment effectively sought to constitutionalize the debt-limit statute by requiring a three-fifths majority of both Houses to raise the debt limit. *See* S.J. Res. 1, § 2 (1995). *But see* Seto, *supra* note 11, at 1516–19 (criticizing this enforcement mechanism).

81. The empirical question is whether the statute, by reflecting a congressional commitment not to let the debt rise above a certain level, inspires confidence in U.S. bonds that makes up for the chance of repudiation in the event of a "train wreck." Because the debt limit has so far failed to stem long-term debt growth but has come close to bringing a train wreck, it seems intuitively likely that the statute decreases confidence.

82. *See supra* Part I.B.

83. That the tests do not require such a weighing makes sense in this context for two reasons. First, the tests are bright-line rules and thus designed not to entail abstract balancing. Second, Congress could exempt payments on the debt from the statute and thus preserve its debt-ensuring effects.

also.

The Fiscal Commitments Amendment bars congressional actions that could place the nation's ability to honor debts in doubt. The debt limit will necessarily lead to the repudiation of governmental obligations in the absence of congressional action, as the statutory scheme does not guarantee that a later Congress will honor the public debt by changing the laws. The debt ceiling thus fails the objective test. Even if the Amendment allowed one Congress to count on a future Congress to pay required debts, the debt limit statute is still suspect, because in the absence of the statute, repayment would necessarily occur.[84] The debt limit thus takes an *affirmative* step toward repudiation and places in doubt Congress's commitment elsewhere expressed to pay the debt.

In addition, the statute functionally has allowed Congress to play chicken in Washington fiscal negotiations;[85] Congress runs the budget train directly toward the debt limit, hoping to force the President to make the turn that Congress prefers.[86] If this abuse of the public-debt statute causes bondholders to doubt the validity of their debts, the Amendment might be breached under a subjective test of its meaning,[87] even if no default occurs. In addition, this abuse of the debt-limit statute militates against a conclusion that Congress's intent in the statue is genuinely to protect the debt.

As long as tax receipts are greater than payments on the debt, a prioritization of public debt payments over other expenses could harmonize a debt-limit statute with the Fiscal Commitments Amendment. The statutory scheme, however, does not currently allow for such preferential treatment; the Treasury pays obligations on a rolling basis.[88] When the debt reaches the ceiling, the Treasury makes a payment only if it has sufficient governmental receipts to do so. Government receipts arrive sporadically throughout the tax year,[89] and a lump sum of receipts might be depleted by non-public debt expenses just before a debt payment becomes due. Therefore, even with a budget in balance or surplus, the government might temporarily hit the debt ceiling in the middle of the year and fail to pay off debts that have come due. It is theoretically possible that the timing of receipts and expenses would work out such that this would not occur, but nothing in federal budget practice guarantees this.

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84. *Cf.* 31 U.S.C. § 3123(a) (1994) (pledging faith of the United States in paying its bond obligations).

85. *See, e.g.*, Adam Clymer, *G.O.P. Lawmakers Offer to Abandon Debt-Limit Threat*, N.Y. TIMES, Jan. 25, 1996, at A1 (describing Republicans' offer to raise debt limit in exchange for "down payment" on balanced budget).

86. In theory, the game might flip, with the executive branch refusing to approve an increase in the public debt limit unless the legislative branch caves in to budget demands. Congress, however, has rigged the game by providing in 31 U.S.C. § 3101 that the House can unilaterally raise the debt ceiling as necessary under its House Rule XLIX, also known as the Gephardt Rule. This rigging further undermines the claim that the debt ceiling's goal is to preserve the validity of the debt.

87. Under the subjective test proposed, the Amendment would not have been breached in the 1995-96 crisis since the debt was not downgraded. However, under a different formulation of the test considering any investor skittishness sufficient to trigger the Amendment, it might have been violated.

88. Under 31 U.S.C. § 3102 (1994), the Treasury Secretary may issue bonds to cover expenses as they become due.

89. For example, in December, 1995, a sudden infusion of quarterly estimated tax payments helped keep the government briefly afloat. *See* GENERAL ACCOUNTING OFFICE, *supra* note 70, at 24-25.

A debt-limit statute aimed only at preventing increases in the debt would exempt borrowing for payments on the debt. In the absence of such an amendment, it is difficult to imagine a modification, either judicially or congressionally imposed, that could save the debt-limit statute's constitutionality given passage of the Fiscal Commitments Amendment. A statute might allow the Treasury Secretary to anticipate the possibility of a debt-ceiling crisis and stop non-debt expenses to save for impending debt payments. The Treasury Secretary, however, might fail to anticipate a debt-ceiling crisis[90] or might underestimate its duration. Thus, unless the Secretary ultimately has the authority to borrow to make payments on the public debt, the debt-limit statute leaves open the possibility of default and would violate the Amendment.

3. Entitlements

The Fiscal Commitments Amendment might give encouragement to those who oppose cuts in Social Security and other entitlement spending. After all, Social Security is a social contract providing for insurance payments to be made in exchange for beneficiaries' earlier contributions.[91] In essence, with Social Security and Medicare, the United States has accumulated an "implicit pension debt"[92] that the Constitution protects.

Or so the argument goes. But there are reasons, textual and practical, that protecting entitlements with the Fiscal Commitments Amendment would begin to stretch its meaning. First, the social contract that Social Security embodies might not trigger the Clause, because the government has not entered into written agreements with beneficiaries. Second, the Amendment might not be implicated when citizens are required to acquire government obligations. Regardless of label, Social Security insurance contributions are a tax. Like the first argument, this one draws a wall, perhaps artificial, between agreements embodied in statutes and those on paper.

The third, practical reason to be wary of arguments that the Fiscal Commitments Amendment would protect entitlements is that such arguments would transform the Amendment from a brake against fiscal chaos to an accelerator that could push the economy off the fiscal cliff. If the government must meet its entitlements promises, then it will need to pay for these promises with high tax rates and drastic reduction in other government services.[93] If a goal of the

90. Indeed, existing law already gives the Secretary authority to declare a debt issuance suspension period and take certain defensive actions. *See generally* Smith, *supra* note 70. But like politics generally, debt-ceiling crises can be unpredictable.

91. *See, e.g.*, William G. Dauster, *Protecting Social Security and Medicare*, 33 HARV. J. ON LEGIS. 461 (1996) (describing entitlement programs and urging continued funding).

92. *See* Cheikh Kane & Robert Palacios, *The Implicit Pension Debt*, FIN. & DEV., June 1996, at 36 (describing magnitude of unfunded pension obligations in both industrialized and developing countries). The authors note that many countries' debt promises are constitutionally protected. *See id.* at 36.

93. Of course; if it became clear in the near future that Congress will not be able to renege on its entitlement obligations, Congress might prospectively reform the system by replacing the pay-as-you-go approach with a fully funded, actuarially sound alternative. *See* James Tobin, *The Future of Social Security: One Economist's Perspective*, *in* SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS 41 (Theodore R. Marmor &

Fiscal Commitments Amendment would be to save the nation from fiscal disaster, then it ought not be interpreted to make such disaster inevitable.

II. REMEMBERING THE PAST: THE FOURTEENTH AMENDMENT'S PUBLIC DEBT CLAUSE

Applying the Fiscal Commitments Amendment is, of course, a hypothetical exercise. Or is it? This part argues that the principle the Amendment would stand for is already in the Constitution, specifically the Fourteenth Amendment's Public Debt Clause. While the Clause is not alive and well—after all, the federal debt-limit statute has remained on the statute books for years, and the courts did not oblige Congress to adhere to its Gramm-Rudman-Hollings targets—this part contends that an originalist interpretation of the Clause produces a constitutional principle strikingly similar to that of the Fiscal Commitments Amendment. This part's goal is not to argue that the courts should adopt the originalist interpretation explored here. Rather, the exploration of original meaning that follows is ultimately a historical exercise both for its own sake and to justify the meaningfulness of Part III's exploration of why the Clause has not been actively applied.

Part II.A shows that in the Public Debt Clause, the Framers intended not to establish a transitional rule for Reconstruction, but a fiscal constraint for all time. While the Clause itself contains allusions to the historical context in which the Framers enacted it, the historical evidence suggests that the Framers intended to ensure the validity of the public debt indefinitely. This history, however, contributes only to an understanding of the temporal scope of the provision, and the remaining sections answer additional questions about the Clause's meaning: What constitutes the "public debt"? Similarly, what type of action entails a questioning of the debt's validity?

These questions, never addressed in a committee report or on the floor of the Senate, are inherently difficult. One response might be to construe the Public Debt Clause as narrowly as possible,[94] but the language of Section 4, literally read and using standard principles of construction,[95] demands a broad ap-

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Jerry L. Mashaw eds., 1988) (suggesting system linking contributions and benefits). Or, Congress might, as Charles Tiefer predicts, budgetize entitlements entirely by subjecting them to the rigors of the appropriations process. *See* Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 459 (1996).

94. The narrowest possible construction of Public Debt Clause would read it out of the Constitution altogether, by applying it only to Civil War debt. The Supreme Court, of course, has never adopted the principle that ambiguity should always be resolved by limiting constitutional provisions' scope to circumstances that they unambiguously cover. *Cf.* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 405 (1870) (noting need to resolve ambiguities in the Constitution by selecting interpretation that "best harmonizes with the nature and objects, the scope and design, of the instrument").

95. This Section adopts three interpretive principles to resolve ambiguity. First, interpretations that would read words or phrases out of the Clause are rejected in preference for interpretations that consider the meaning of each word. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . . ."). Second, the presence of a particular word or phrase in the Clause leads to the assumption that the Framers intended to use that word rather than another that would correspond to an alternative reading. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987)

plication. As Part II.B argues, the Clause encompasses not just bonds, but also any financial obligation stemming from an agreement. Meanwhile, Congress need not repudiate a debt to trigger the Clause; Part II.C maintains that if Congress indirectly makes it so that a debt will not be paid in the absence of subsequent congressional remedial action, it has violated the Clause. Part II.D explores further questions about the Clause's meaning, and Part II.E returns to the exercise of Part I by asking how the Clause, if it were alive, would apply to congressional budget practice today.

A. Was the Public Debt Clause Merely Transitional?

The Public Debt Clause emerged not from a congressional debate about the dynamics of the Fiscal Constitution, but from a Thirty-Ninth Congress focused on reconstructing a war-ravaged nation. It is not surprising then that no member of the House or Senate commented for the record[96] on the Clause's consequences for posterity.[97] This lack of articulation does not mean that the Framers sought to modify the Constitution for only the crisis at hand, as some have assumed.[98] Rather, it demands attention to the evolution of Section 4's language and the context in which Congress crafted its words. Indeed, the only scholar to examine the Clause's history tentatively concludes that "the intention was to lay down a constitutional canon for all time in order to protect and maintain the national honor and to strengthen the national credit."[99] In the context of the Equal Protection Clause, the Supreme Court has long recognized the broad applicability of the Fourteenth Amendment.[100] The historical records suggest that Congress chose to do in the Public Debt Clause what it did in Section 1 of the Amendment—set forth a general principle as applicable today as in Reconstruction.

(noting strong presumption that Congress expresses its intent through language it chooses). Third, the meaning of words is construed by reference to the surrounding words. *See, e.g.*, Neal v. Clark, 95 U.S. 704, 709 (1877) (discussing the canon known as *noscitur a sociis*).

96. Aside from the *Congressional Globe*, which recorded statements on the floor of the House and Senate, the primary source of information about the Congress's intent is BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914), which contains the proceedings of the joint House-Senate committee that produced an initial draft of the Fourteenth Amendment.

97. The limited discussion in Congress on the Fourteenth Amendment is a problem not just for Public Debt Clause scholarship, but for examinations of more prominent parts of the Amendment as well. *See, e.g.*, JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 192 (1951) ("Considering the character of the contemplated action and the fact that a constitutional amendment was at stake, very little was said on the floor of either House, and what was said related primarily to the more obviously political sections of the proposal.").

98. *See, e.g.*, Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 YALE L.J. 53, 85 (1934) (asserting that Public Debt Clause "does not seem to proclaim a principal [sic] of legal philosophy, but to envisage a particular situation existing at the time of its enactment (1866)."). Professor Nussbaum offered no evidence for his interpretation.

99. Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L.Q. 1, 15 (1933).

100. *See, e.g.*, Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394 (1886) (repudiating theory that Equal Protection Clause related only to black freedmen by holding that the Clause was more general in application, concerning even corporations, and thus presumably also persons other than blacks.).

1. Evolution of the Clause in Congress

The present version of the Public Debt Clause emerged whole with little explanation during the final Senate floor debate on the Fourteenth Amendment.[101] While the history is therefore insufficient to answer many questions about the provision,[102] there are enough clues to justify confidence that the Clause applies to debts incurred after the Civil War. On its face, the provision appears to apply to the entire public debt, including war-related debts but not excluding other debts. Distinctions between the final wording and the language of earlier versions of Section 4 suggest that the general wording was not accidental. In particular, the previous version of the Clause[103] unambiguously limited the Clause's applicability to debts "incurred in suppressing insurection [sic]." The addition of the word "including" suggests at least a latent congressional preference for a provision of general applicability.

Indeed, Section 4 had evolved to its present state through gradual steps of increasing generality. An early draft[104]of Section 4 was clearly limited to repudiating the Confederate debt, reflecting the Joint Committee on Reconstruction's apparent lack of concern about the possibility that repudiation of Union debt was imminent.[105] Congress tinkered with the provision, repudiating debt prospectively from any future insurrections instead of just from the "late rebellion."[106] More importantly, Congress added a separate sentence securing the validity of the Union debt.[107] Recommending this addition, Senator Howard stated that the provision "not only accepts honesty as a principle, but indorses [sic] it as the highest and best policy of the State as well as of individuals."[108]

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101. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3040 (1866). The final language was drafted by Senator Clark, who also synthesized the debt validity and debt repudiation provisions, which were previously two separate sections, into § 4.

102. As one scholar has concluded in reference to § 4, "We are on an uncharted sea and, . . . it would be hazardous to venture on any dogmatic assertions." Eder, *supra* note 99, at 4.

103. This version, approved during debate on June 4, 1866, read: "The obligations of the United States, incurred in suppressing insurection [sic], or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate." CONG. GLOBE, 39th Cong., 1st Sess. 2938-41 (1866).

104. Senator Howard initially proposed a debt repudiation provision as an independent constitutional amendment, which would read:

> That the payment of every kind of indebtedness arising or growing out of the late rebellion, contracted or accruing in aid of it or in order to promote it, is forever prohibited to the United States and to each of the states; such indebtedness and all evidences thereof are hereby declared and in all courts and places shall be held and treated as in violation of this Constitution, and utterly void and of no effect.

KENDRICK, *supra* note 96, at 62.

105. The Committee, which had jurisdiction over questions related to the readmission of states, gave prominent consideration to debt issues generally in examining a draft of the proposed resolution to readmit Tennessee. The first section of the proposed resolution addressed debt issues, with secession and suffrage provisions relegated to the second through fourth sections. However, the Committee voted to amend the proposal by eliminating language preventing the state from repudiating "any debt or obligation contracted or incurred in aid of the Federal government against said rebellion." *Id.* at 68-69.

106. The change to general language was gradual; an April 20 version of the provision introduced by Representative Stevens referred to "Debts incurred in aid of insurrection or of war against the Union." *Id.* at 84. The final version replaces "the Union" with "the United States," thus removing any doubt as to the applicability of the second sentence of § 4 to future rebellions.

107. *See supra* note 103.

108. CONG. GLOBE, 39th Cong., 1st Sess. 3036 (1866). Senator Howard also stated that the provision was "a proper precaution against the establishment of parties hereafter appealing to the sordid interests and lowest

Though a last-minute substitution, the final version of the section harkened back to the language of an earlier proposed version of the Public Debt Clause that never reached a vote in the Senate.[109] This version is stylistically much closer to the final language than was the penultimate proposal.[110] The drafter of the final version therefore probably used this earlier proposal rather than the penultimate proposal as a starting point. Therefore, because the meaning of the earlier proposal is clear and the final version appears to revert to this meaning, the earlier proposal and the final version probably share the same meaning. This inference is especially strong because the penultimate version clearly indicated a meaning different from both the earlier and final version.[111]

In fact, the earlier version differed from the penultimate in two critical ways that suggest it was intended to be generally applicable. First, the earlier version, like the final version, used the non-exclusive word "including" to place war debts within the broader category of the public debt. Second, the last two words of the earlier proposal are "be inviolable" rather than the retrospectively oriented "remain inviolate." The statements of Senator Wade in support of the earlier proposal also suggest an intent to embed in the Constitution a general economic principle.[112] Because the earlier proposal was intended to apply beyond Reconstruction and the final version reverted to similar language, the final version too was probably generally applicable. The Congress drafting Section 4 chose from a menu of linguistic variants. The subtle but clear distinctions in these variants suggest that Congress meant to make Section 4 applicable beyond Reconstruction.

An argument against the applicability of the Public Debt Clause to post-Civil War Debt would likely focus on a single statement by the sponsor of the final language of Section 4, agreeing that the new language did not change the effect of the provision.[113] There are three reasons not to focus too much on

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passions of men." *Id.*

109. The first sentence of the 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.

CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866).

110. *Compare supra* text accompanying note 1, *with supra* note 103 (penultimate version), *and supra* note 109 (earlier version).

111. Ordinarily, evidence from drafts of statutory or constitutional provisions can cut two ways. Either the first version provides evidence of what the drafters meant in the second, or the change in language suggests that the drafters intended to change the underlying meaning. With the Public Debt Clause, however, the existence of a meaning shared by the first and third drafts and a different meaning in the second draft means that both inferences point in the same direction. Both the similarity between the first and third drafts and the difference between the second and third suggest that the drafters intended to recapture the original meaning and discard the second version's meaning in the final version.

112. While Senator Wade noted specially that the provision would put "the debt incurred in the civil war on our part under the guardianship of the Constitution," he added that this would "give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States." *Id.* at 2769. In other words, the nation would benefit by increasing the security of its bond issues; this allows the country to borrow more cheaply in the future. This benefit is irrelevant for past debt accumulation, suggesting that Senator Wade saw this version of the Public Debt Clause as providing a prospective benefit.

113. After Senator Clark introduced the proposed substitute that was ultimately passed, Senator Johnson said, "I do not understand that this changes at all the effect of the fourth and fifth sections. The result is the

this brief comment. First, stylistic changes in constitutional provisions are not generally assumed to be without substantive content and thus are not ignored in favor of penultimate drafts.[114] Second, the senator's statement may merely indicate that the versions would have the same result for the purposes of Reconstruction, since the generalization of the language would have impact only in future times. Third, the Senate rejected a subsequent proposal to revert the provision to its prior language.[115] The significance of this rejection is unclear, because the proposal focused on changes other than the reversion of wording in Section 4.[116] However, the Senate had just voted to accept the current language, so an independent proposal to revert it probably would have failed.

2. The Political and Economic Context of the Framing

Perhaps the Public Debt Clause has become obscure because Section 4 contains so many implicit references to the Civil War that readers may assume that Congress could not have been concerned about anything else in passing it. However, a congressional desire to impose a permanent prohibition against default makes sense in the economic and political context of Reconstruction. Economically, financial instruments were precarious in the 1860's. The value of U.S. debt tumbled during the Civil War;[117] while some of the decline may be attributable to the rising interest rates that accompanied the climb in the national debt, the bonds' continuing decline in value as maturity approached suggests skittishness about the possibility that the United States might default.[118] Congressmen professed the moral necessity of paying the debt,[119] but perhaps they felt the need to do so partly because it was so high.[120] A constitutional guarantee provided meaningful assurance to those who might purchase future government debt.

The Public Debt Clause also reflects the Thirty-Ninth Congress's almost religious commitment to hard-money principles. The financial exigencies of the War had led to passage of the Legal Tender Acts[121] and the resulting issue of

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same." Senator Clark agreed, "The result is the same." *Id.* at 3040.

114. *See* Nixon v. United States, 506 U.S. 224, 231-32 (1993) (rejecting argument that Committee of Style's changes should be ignored in favor of second to last draft, because that would ignore Framers' decision to pass final draft).

115. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3040 (1866).

116. Senator Doolittle's proposal would have both reverted the provision to its prior language and allowed states to ratify some but not all sections of the Fourteenth Amendment. The proposal was defeated, 33-11 with 5 absent. *See id.*

117. Ten-year, six-percent bonds issued in 1858 had declined in value 14% by 1861, 36% by 1862, and 46% by 1864. *See* DOUGLAS B. BALL, FINANCIAL FAILURE AND CONFEDERATE DEFEAT 132 (1991).

118. *See* George T. McCandless, Jr., *Money, Expectations, and the U.S. Civil War*, 86 AM. ECON. REV. 661 (1996) (arguing that war news was primary determinant of value of Northern and Southern currency).

119. The House of Representatives had earlier voted 162-1 to approve a resolution calling the public debt "sacred and inviolate" and urging "that any attempt to repudiate, or in any manner to impair or scale the said debt, should be universally discountenanced by the people, and promptly rejected by Congress if proposed." CONG. GLOBE, 39th Cong., 1st Sess. 10 (1865).

120. The debt had climbed from $64.8 million in 1860 to $2.76 billion in 1866. *See* JAMES D. SAVAGE, BALANCED BUDGETS & AMERICAN POLITICS 288 (1988).

121. Act of Feb. 25, 1862, ch. 33, 12 Stat. 345; Act of July 11, 1862, ch. 142, 12 Stat. 532; Act of Mar. 3, 1863, ch. 72, 12 Stat. 709.

greenbacks, though in ordinary fiscal times Treasury Secretary Chase and Congress would never have tolerated the distribution of Treasury notes not convertible to gold or silver.[122] After the War, Congress passed a resolution, by a vote of 144-6, urging a return to the former monetary regime in which paper was backed by metal.[123] Although the greenbacks' convenience relative to bank drafts thwarted Congress's resolution to cash them in,[124] the Thirty-Ninth Congress surely remembered both the difficulty that the Treasury had experienced in borrowing money[125] and the wartime Congress's fiscal gluttony. The Public Debt Clause served to demonstrate that Congress remained committed to sound financial management.

Underlying the Framers' political concern in Section 4 is the ironic electoral calculus that members of the Thirty-Ninth Congress faced. Victory on the battlefields did not bring political security to the Republicans, but rather the prospect that they might lose their hold on Congress. In freeing the slaves, the Emancipation Proclamation[126] unraveled the Three-Fifths Compromise[127] and thus increased the population base that determined the South's representation.[128] Repudiation of rebel debt was consistent with Republican interpretations of existing law,[129] but a Democratic Congress conceivably might have

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122. *See generally* BRAY HAMMOND, SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR 165-229 (1970) (describing Treasury and Congress's reluctant accession to Legal Tender Acts); MARGARET G. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 150 (1970) (describing Chase as "a hard-money man, as suspicious of bank paper as Jackson and Benton had been"). Even after Treasury Secretary Chase became Chief Justice Chase, he never became entirely comfortable with the Legal Tender Acts, which the Supreme Court initially found unconstitutional in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), *overruled by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870). *See generally* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

123. *See* CONG. GLOBE, 39th Cong., 1st Sess. 75 (1865).

124. Congress faced "a sudden, impatient, popular belief—quite opposite to the Jacksonian hard-money notions previously prevailing and to the intent of the war-time advocates of the notes—that an abundant currency based simply on federal credit and the country's worth was required for the general good." HAMMOND, *supra* note 122, at 253.

125. Because there had been no national bank since the Jackson Administration, the Lincoln Administration could not simply auction off debt to the highest bidder. Rather, the federal government resorted to commercial banks. Despite high levels of reserves, these banks were hesitant about lending to the federal government, because "they faced a revolutionary change in their business, with a different kind of borrower." HAMMOND, *supra* note 122, at 76. The problem was exacerbated by federally imposed specie rules, which required the federal government to take physical control of gold when it borrowed, instead of merely receiving credit on the bank's books like other borrowers. *See id.* at 59-70. The amount borrowed grew so high that the banks were unable to meet the government's demand for specie, resulting in delays in the United States's payment of creditors, employees, and suppliers. *See id.* at 162.

126. While the Thirteenth Amendment's ratification in 1865 assured the immediate goal of the Proclamation itself, the purpose that unified the various provisions of the Fourteenth Amendment was the securing of the remaining "fruits of the war." *See* KENDRICK, *supra* note 96, at 266-67 (listing civil rights and debt provisions among victory spoils that all Republicans sought); *see also* TENBROEK, *supra* note 97, at 184 (noting that Congressmen wanted to place achievements of civil rights bills beyond reach of shifting Congressional majorities).

127. *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths persons for purpose of representation in House).

128. Representative Conkling estimated that the South would gain twelve representatives by Emancipation, in addition to the eighteen representatives that the South previously was allotted on account of its slave population. *See* CONG. GLOBE, 39th Cong., 1st Sess. 356-59 (1866). In addition, each rebel state's entitlement to two senators upon readmission was beyond even the power of a constitutional amendment. *See* U.S. CONST. art. V (prohibiting amendments depriving unconsenting states of equal suffrage in Senate).

129. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3036 (1866) (arguing that invalidity of rebel debt

honored the debt or might even have repudiated the Union debt. To minimize the chance of a Democratic resurgence, the Congress included Sections 2 and 3 in the Fourteenth Amendment.[130] Thus, the probability of repudiation of the Union debt in the absence of Section 4 was small.[131] But the insertion of the uncontroversial[132] Section 4 did more than provide insurance precluding a future Congress from retreating on the Thirty-Ninth Congress's commitment to repay the national debt.[133] Just as important, the provision cemented the North's military victory with a rhetorical one by declaring Confederate obligations (and thus the Confederacy itself) "illegal and void" and by elevating the United States to the fiscal high road.

B. Was the Public Debt Clause Just About Bonds?

To the modern economist, the words "public debt" may connote only bond obligations; in today's budget process, "public debt" is a technical term with a narrow scope.[134] *Black's Law Dictionary*, however, defines the public debt as "[t]hat which is due or owing by the government of a state or nation,"[135] and the words of the Public Debt Clause suggest that the Framers were protecting a similarly broad class of obligations. A key to understanding the scope of the provision lies in the phrase, "including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion." The use of the word "including" rather than "in addition to" or "and of" shows that the enumerated rebellion-related debts[136] delineate the expanse of the phrase "pub-

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reflected common law principle that agreements founded on immoral consideration are unenforceable). Representative Miller, however, had earlier noted that if the rebel states were considered to have left the Union and were then reannexed, principles of international law would demand assumption of the states' debts. *See id.* at 2087.

130. Section 2 provided that representation in the House would be proportionately diminished when males over 21 years old were excluded from the franchise. Section 3 prohibited many Confederate officers and officials from membership in Congress.

131. Arguing against what became § 4, Senator Saulsbury asked, "Does the Senator from Nevada say that the Democratic party of this country would, if they had it in their power, repudiate the national debt or would assume the confederate debt? I should like a frank answer." Senator Stewart of Nevada did not answer the question. CONG. GLOBE, 39th Cong., 1st Sess. 2800 (1866). *See also id.* at 2940 (statement of Senator Hendricks) ("Who has attacked public credit, or questions the obligation to pay the public debt?"). Testimony before the Joint Committee, however, indicated that Southerners hoped to repudiate the Union debt if the Democrats regained Congress, but would settle for like treatment of Union and Confederate debt. *See* KENDRICK, *supra* note 96, at 283.

132. Section 4 was the subject of little comment on the floor of Congress largely because of its uncontroversiality. After extensive discussion of other provisions of the Amendment, Representative Stevens noted simply, "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); *see also id.* at 2530 (statement of Senator Randall).

133. Congress acted on its intent to repay much of the Civil War debt at about the same time that it was considering the Fourteenth Amendment by passing a statute permanently appropriating funds to pay off much of it. *See* Act of May 2, 1866, ch. 70, § 2, 14 Stat. 41, 41–42.

134. The federal government currently defines "public debt" to include only bond obligations issued by the Treasury; debt issued by administrative agencies is tallied separately as "agency debt." *See* ANALYTICAL PERSPECTIVES, *supra* note 45, at 188.

135. BLACK'S LAW DICTIONARY 404 (6th ed. 1990); *see also* Reeside v. Walker, 52 U.S. (11 How.) 272, 284 (1850) (defining "public debt" as including "debts of every description, without reference to their origin").

136. One might construe the phrase "pensions and bounties for services in suppressing insurrection or

lic debt" rather than annexing an additional category of "debts" to it. In other words, the "including" phrase indicates that the Framers conceived the "public debt" as including not just financial instruments, but also such promises as war pensions and bounties.[137] This interpretation is further supported by the use of the words "debts incurred" rather than, for example, "notes and contracts." The word "debts" draws a parallel with the phrase "public debt," suggesting that the Framers naturally thought of pensions and bounties as being part of the "public debt."

This Article construes the "public debt" to include the ordinary pensions of government employees and similar government commitments. This construction might appear to read out of the Clause the phrase limiting pensions and bounties to those incurred in suppressing insurrection. This language was essential, however, because the South claimed that secession was legal and the suppression of it illegal. Without an unambiguous syntactic indication that the war-related debts were part of the public debt authorized by law, the Public Debt Clause would have left open the possibility that a Democratic Congress could have repudiated the Union's Civil War bonds as illegal and not part of the public debt. This appears to explain the awkward location of "authorized by law" in between the "including" phrase and "the public debt of the United States."[138] The Framers sought with that location to clarify that the Civil War origins of "pensions and bounties" would not keep them out of the "public debt."

The phrase "authorized by law" and the word "debt" provide plausible limits on the scope of the Public Debt Clause. While Part III of this Article does not depend on these limits, it is useful to see that this Part's construction of the Clause need not radically change the legal order by forcing Congress to follow through on all of its earlier intentions. First, a governmental promise is "authorized by law" only if it is contained in a congressional statute.[139] Sec-

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rebellion" by applying the "for" phrase to the word "bounties" but not to "pensions." This approach would be consistent with the general interpretive rule that a phrase applies only to its immediate antecedent. *See, e.g.*, Virginia v. Browner, 80 F.3d 869, 877 (4th Cir. 1996). This interpretation would mean that even if the public debt did not ordinarily include pensions, these are specifically protected by the Public Debt Clause, whether or not insurrection-related. However, this construction seems forced, considering the parallelism of the words "pensions" and "bounties."

137. The irony of this interpretation is that the presence of the "including" phrase may explain why those not scrutinizing § 4 might conclude that the entire section is no longer relevant. The reference to insurrection or rebellion connects the Public Debt Clause with the second sentence of § 4, which no longer is generally applicable. But once it is conceded that the words "validity of the public debt" have general applicability, as argued in Part II.A, *supra*, the "including" phrase may be seen as narrowing rather than widening the Public Debt Clause only if the enumerated items are read exclusively. Such a reading is implausible, however, since the Clause surely encompasses at least formal debt instruments, which are not specifically enumerated in the "including" phrase.

138. If "authorized by law" were moved after the "including" phrase, it could be seen as a limit on the scope of "pensions and bounties."

139. The phrase "authorized by law" thus applies a common-sense limitation to the Public Debt Clause that is also found in the law of government contracts, declaring contracts signed by government employees unenforceable if those employees were unauthorized to sign them. *See, e.g.*, United States v. Amdahl Corp., 786 F.2d 387, 392 (Fed. Cir. 1986). In addition, the omission of the words "or equity" reinforces the Public Debt Clause's exclusion of obligations or claims.

An alternative construction of the phrase "authorized by law" would be that the phrase restricts the

ond, a debt is "[a] sum of money due by certain and express agreement."[140] Applying this definition to the Public Debt Clause, the United States incurs a public debt only if a statute embodies an agreement, or, more restrictively, only if the government issues a written agreement.[141] Since a gratuitous promise does not ordinarily constitute a legally enforceable agreement, the Clause could be further limited to governmental promises made in exchange for good consideration.[142] The requirement of an agreement honors Section 4's distinction among debts, obligations and claims. While the Public Debt Clause itself uses only the word "debt," the second sentence of Section 4 uses the terms "debt or obligation" and the phrase "claim for the loss or emancipation of any slave." By including only the first of these within the public debt, the Public Debt Clause excludes money that the United States ought to pay merely by virtue of a moral obligation.[143]

C. Did the Public Debt Clause Prevent Only Direct Repudiation?

Once Congress makes a promise that becomes part of the public debt, its "validity . . . shall not be questioned."[144] But questioned by what? A nihilistic interpretation would append to the Clause "by this Section," thus reducing it to a nullity, but the language of Section 4 makes this construction insupportable.[145] A better interpretation, therefore, is that no state action may question a debt's validity. This does not resolve, however, what "questioned" means. Dismissing the Lafayette Park protester's interpretation of the word[146] leaves two

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Clause's applicability to those debts that had already been authorized before the Amendment's adoption. Two factors militate against this reading. First, the phrase "authorized by law" is more naturally construed as a present participial phrase. *Cf.* Linsalata v. Clifford, 290 F. Supp. 338, 342 (S.D.N.Y. 1968) (defining phrase "authorized by law" in contractual context to contemplate subsequently enacted statutes). Second, if the Framers had intended explicitly to limit the Clause's temporal applicability, they could easily have indicate this intent clearly, for example with the phrase "heretofore accumulated."

140. BLACK'S LAW DICTIONARY 403 (6th ed. 1990).

141. This restriction suggests that the government cannot become an involuntary debtor for Public Debt Clause purposes through commission of a tort on an individual with which it does not have a contract. In other words, the Public Debt Clause does not override the government's sovereign immunity in tort suits, *cf.* Dalehite v. United States, 346 U.S. 15 (1953) (accepting statutory immunity of United States in tort suit), or require that the government become an involuntary debtor.

142. Thus, a statute providing all Californians with a written promise of annual payments of $500 in perpetuity might not create a public debt.

143. This analysis does not resolve the question of whether a moral obligation may rise to the level of a moral consideration by virtue of a congressional statute. For example, if Congress had passed a statute promising to give $500 monthly to Oliver Sipple, credited with saving the life of President Ford, would that promise have become part of the public debt? *See, e.g.*, Hawkes v. Saunders, 98 Eng. Rep. 1091 (1782) (providing classic statement of "moral consideration" contract doctrine).

144. The language echoes the words of the Speech and Debate Clause: "The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses . . . and for any Speech or debate in either House, they *shall not be questioned* in any other Place." U.S. CONST. art. I, § 6, cl. 1 (emphasis added). Whether this was intentional or coincidental, it does not much help, since questioning a congressman does not seem analogous to questioning the public debt.

145. First, it is implausible that the Framers could have seen the need to clarify that the second sentence of § 4 does not invalidate the Union debt, since that sentence clearly invalidates only debts "incurred in aid of insurrection or rebellion against the United States." Second, the use of the imperative "shall" instead of "is" removes the possibility that the first sentence of § 4 merely comments on the second.

146. *See supra* text accompanying note 2.

possibilities. "To question" could mean either "to repudiate" or "to jeopardize." As will become clear in Part III, this distinction is important. The following subsection conceptualizes the choice between these alternatives, and the three subsections that follow mount an affirmative case for the preferability and the manageability of the latter.

1. Possible Levels of Generality

The question is at what level of generality the Framers drafted the Public Debt Clause.[147] A provision protecting only Civil War Union debt would be a low level of generality. By establishing that the Clause does not apply only to Civil War debt, Part II.A of this Article rejects this possibility. An intermediate level of generality would be a permanent ban on governmental failure to honor debts. Finally, a high level would be a prohibition not only of governmental failure to make payments on a debt, but also of government action that will ultimately lead to such failure.[148] Only the high level comes into play when Congress passes a statute that will cause default on a debt unless a future Congress changes the statute.[149]

The following subsections argue for the high level of generality by discussing the Clause's language and historical context. Three factors should be kept in mind in assessing this evidence. First, as defined so far, "jeopardization" and "repudiation"[150] differ only in timing: Congress jeopardizes debts as soon as it places the government on the road to default, but repudiation occurs only when Congress fails to change course and the government reaches the end of that road. There are, however, other ways one might define "repudiation" and thus other ways to conceptualize the difference between the intermediate and high levels of generality. In particular, "repudiation" could refer to government action that *intentionally* leads to debt nonpayment.[151] However, there is no rea-

147. *Cf.* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1926–28 (1995) (discussing level-of-generality problem in context of Equal Protection Clause).

148. At an even higher level of generality would be a general requirement of sound financial management, but this is clearly too general because the text of the Clause is concerned only with "the public debt." Part II of this Article attempts to achieve some aspects of this general goal by identifying practices threatening the validity of the debt. This Article does not attack other governmental practices that might be fiscally undesirable, such as taxation policies that arguably discourage savings, because these practices are unrelated to the public debt.

149. For example, suppose Congress were to repeal a statute providing for the automatic payment of a debt that is due a number of years hence. Under the high level of generality, the statute would be unconstitutional, since it jeopardizes the debt by depending on a future Congress to unrepeal the statute. Under the intermediate level of generality, the repeal statute is constitutional; an unconstitutional event would occur only once the government failed to restore the statute in time to make the payment.

150. This Article uses these words as shorthand references for the timing distinction, but different definitions of these words are possible. For example, "repudiation" might be defined to occur only when a statute explicitly states that a debt will not be paid. Under this definition, repudiation would occur in the example of note 149 as soon as the repeal statute was passed. But if the government failed to make a payment even though a statute required it, that would not constitute repudiation under this definition. Though this is a plausible definition of "repudiated," it is not a plausible interpretation of "validity . . . shall not be questioned." *See infra* note 163; *see also* discussion *infra* Part II.C.2.c (discussing use of "validity of the" in the Clause).

151. "Repudiation" might also refer to action *directly* leading to debt nonpayment. However, assessing the

son to read an intentionality requirement into the Public Debt Clause, especially since assessment of congressional motive is a disfavored method of interpretation.[152] Moreover, much of the evidence that militates against the intermediate level of generality as defined above also militates against alternative definitions of the intermediate level.[153]

Second, there is no smoking gun. The Framers of the Fourteenth Amendment probably did not consider the distinction between the intermediate and high levels directly. Thus, the proper inquiry is dependent upon which level of generality is more consistent with the tenor of the Clause and the purposes of Congress. The answer depends largely on whether Congress envisioned the Clause as a technical rule allowing bond-holders to recover in court after missed debt payments or as a more amorphous commitment by the government ensuring the debt's validity. If the Framers intended the Clause only as a technical ban on nonpayment, the intermediate level of generality is the correct interpretation. But if the Framers intended it as a statement of a broad principle constraining Congress, the high level is preferable, because that level identifies a violation of the Clause when Congress contravenes the principle rather than when this contravention affects debt-holders.[154]

Third, it is important to avoid making reflexive assumptions. There is no default rule that suggests constitutional provisions should be interpreted as narrowly as possible, at least as a matter of originalist interpretation. The advocate of the high level of generality would bear the burden of proof only if there were some *a priori* evidence suggesting that the Framers intended the Public Debt Clause to be narrow.[155]

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directness of a congressional action's effect on debt really involves assessing timing and intentionality. Saying that a congressional action directly affects a debt means either that the action affects the debt right away or that Congress meant to legislate about debt rather than about something else. While the word "directness" might refer to some combination of these, there is no reason to consider directness independently of timing and intentionality issues.

152. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."); United States v. O'Brien, 391 U.S. 367, 383–84 & 383 n.30 (noting that Court will generally avoid inquiry into congressional intent in constitutional cases because different legislators may have different motives in passing legislation).

153. *See infra* notes 157, 160, and 165; text accompanying notes 168–169, 174–175.

154. A ban on nonpayment furthers the principle of debt validity but not enough to meet the demands of a general principle. If Congress fails to ensure the validity of debts, the courts might be unable to help, and the need to resort to the courts undermines confidence in debt issues. *See infra* note 171. Moreover, assuming that Congress did not have a specific technical ban in mind, there is no reason to read into the Clause a distinction between actions repudiating and actions jeopardizing debts. Both type of actions mean that Congress has failed to ensure the debt's validity, and restricting the Clause to the former entails an assumption that the Clause directly constrains the courts but not Congress.

155. If one were (foolishly) to guess at a level of generality without scrutinizing the Clause's language or history, the high level would seem more plausible than the intermediate. First, the fact that the Framers clearly rejected the low generality level suggests a preference for more general provisions. Second, the Framers wrote § 1 of the Amendment at perhaps the broadest level of generality imaginable. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976) ("[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."). The Framers not only did not limit § 1 to a constitutionalization of the Civil Rights Act of 1866, but did not even limit the Equal Protection Clause to protecting blacks. Of course, this is hardly conclusive about § 4. But it suggests that any reflex to assume that provisions were meant narrowly is particularly inappropriate in the context of a Fourteenth Amendment constitutional provision.

2. Linguistic Evidence

The words of the Public Debt Clause are consistent with an interpretation that bars statutes jeopardizing the validity of debts. First, the verb "to question" is closer to the verb "to jeopardize" than it is to the verb "to repudiate." Second, the passive construction of the words "shall not be questioned" indicates an intent to inspire confidence in bond-holders that the government will take no action interfering with their debts. Third, the word "validity" implies that the government's obligation to ensure its credit extends over the entire time period during which debt obligations are being held. Fourth, the evolution of the Clause suggests that the Framers chose the Clause's words deliberately. The following subsections consider in turn these linguistic reasons for preferring the high generality level interpretation of "validity . . . shall not be questioned."

a. Meaning of "to Question"

The verb "to question" would be an odd synonym for "to repudiate." Questioning a proposition is not equivalent to insisting that the proposition is false but merely entails suggesting that it might be. To say, "I question whether your debt will be honored," is different from saying, "Your debt will not be honored." Analogously, to say that a statute must not question a debt's validity is different from saying that a statute must not repudiate a debt.[156] Intuitively, the verb "to question" is much closer to the verb "to undermine" than to the alternative "to cancel."[157] Therefore, the literal interpretation of the Clause is that a governmental action making uncertain whether or not a debt will be honored is unconstitutional.[158]

b. Passive Construction

The passive construction of the phrase "shall not be questioned" provides additional evidence about how the Framers conceptualized the Public Debt Clause and thus helps explain why the Framers used the word "questioned."

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156. For another analogy, consider Justice Brandeis's famous remark: "When the *validity* of an act of the Congress is drawn in *question* . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (Brandeis, J., concurring) (emphasis added). While the similarity in language to the Public Debt Clause is almost surely coincidental, this quotation helps reveal what it means to question something's validity. Justice Brandeis of course did not mean that a statute should be narrowly construed when a constitutional provision has made it unambiguously of no force; he meant that when it seemed there might be an issue of constitutionality, the Court would try to avoid that issue. Likewise, the Public Debt Clause is triggered not only when the government has made it absolutely clear through a failure to make payment that a debt will not be honored, but also when the government's actions effectively raise the issue.

157. In addition, nothing in the verb "to question" makes it more like "to undermine intentionally" than like "to undermine inadvertently." True, the sentence "I question the debt," makes it sound like I am questioning the debt intentionally. But that is only because the verb has a subject. *See infra* note 160. By contrast, the phrase "the debt is now questioned" does not imply that anyone intended the act that caused the questioning.

158. A counterargument might charge that the Framers used the verb "to question" as a restrained way of saying "to repudiate." This is a weak counter, because its only impetus is an *assumption* that the Framers must have meant to preclude only direct repudiation, the meaning of the words of the Clause notwithstanding.

The Framers were not fond of the passive voice; indeed, the Joint Committee voted to change a passive version of what became the second sentence of Section 4 to the active voice.[159] Passive sentences are useful for authors who do not wish to restrict a verb to a particular subject. If the Framers meant only that the United States must not question the validity of its debts, they could have used the compact phrase, "The United States shall not question the validity of its public debt . . . ." While the Public Debt Clause surely means at least this, it might also convey, "the validity of the public debt . . . shall not be questioned by the people."

The passive construction thus allows for a reading of the Clause as containing a reassuring promise from the Framers to bondholders. Moreover, the passive language makes the Clause more evocative than descriptive, more like an announcement of a general principle of debt validity than like a technical rule barring failure to make debt payments. It would be inconsistent with this promissory announcement and with the word "questioned" if a statute could cause bondholders to believe that their debts will not be paid as promised and that they will need to seek redress in the courts to recover belated payment.[160]

c. The Word "Validity"

A debt does not become valid or invalid only at the moment payment is due. A debt's validity may be assessed at any time, and a debt is valid only if the law provides that it will be honored.[161] Therefore, a requirement that the government not question a debt's validity does not kick in only once the time comes for the government to make a payment on the debt. Rather, the duty not to question is a continuous one. If as a result of government actions, a debt will not be paid absent future governmental action, that debt is effectively invalid.[162] The high level of generality recognizes that instead of referring to payment of debts, the Clause bans government action at any time that affects the validity of debt instruments.

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159. *See* KENDRICK, *supra* note 96, at 103.

160. Interpreting the Clause as containing a promise to debtholders also problematizes a reading of the Clause as prohibiting only congressional acts intentionally leading to nonpayment. Debtholders would care not about whether Congress meant to place their debts into question, but about whether they could count on receiving payment. If the Clause means that debtholders shall have no reason to question their debts—a meaning which the passive construction allows—then there is no reason to limit the Clause with an intentionality requirement.

161. Among the legal definitions of "valid" is "sustainable and effective in law, as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law." BLACK'S LAW DICTIONARY 1440 (6th ed. 1990). None of the definitions of "valid" suggests that the attribute of validity exists only at the time of contract performance or debt payment. Therefore, government action may constitute validity questioning not only when the government fails to make a payment, but also when action brands a debt invalid.

162. The Public Debt Clause does not distinguish debts that are invalid for all practical purposes from debts that the law explicitly brands as invalid. The word "validity" does not implicitly contain such a distinction, and it is not modified by the word "legal." Reading the distinction into the Clause would allow the government to pass one statute providing that debts shall be legally valid, but another providing that the Treasury must not make payment on them. This perverse definition of validity would allow an end-run around the Clause and would defy the Framers' intent to reassure debt-holders that their debts would be honored.

The word "validity" indicates that not merely the existence of the public debt, but also its binding force on the government "shall not be questioned."[163] The government thus may not acknowledge that the public debt exists but refuse to pay it. If the government fails to make a debt payment, the debt instrument is at least temporarily invalid for legal purposes.[164] Moreover, there is no such thing as a valid debt that will nonetheless not be honored; a debt cannot be called "valid" if existing laws will cause default on it.[165] So as soon as Congress passes a statute that will lead to default in the absence of a change of course, the debt is invalid (or at least of questionable validity) and Congress has violated the original meaning of the Public Debt Clause.

d. Evolution of the Language

The evolution of the Clause suggests that Congress' choice of language was not accidental. As discussed above,[166] the final language of the Clause was close to the language of an earlier proposal, but it differed in that the phrase "validity . . . shall not be questioned" was substituted for "shall be inviolable." The change suggests a conscious choice of "validity . . . shall not be questioned" over "inviolable," which is close to "unrepudiable."[167] Why would the Framers shift to the word "questioned" if the original language was what they actually meant? At the least, the shift suggests a preference for phraseology that protects the public debt so strongly as to put the government's commitment to it beyond question. The only way to give effect to this preference is to interpret the Clause as precluding government action that makes default possible.

3. Historical Evidence

Three historical factors suggest that the Framers viewed the Clause not just as a ban on nonpayment but rather as a more general expression of the government's commitment to ensuring the debt's validity. First, as argued

163. In the absence of the words "validity of the," the Public Debt Clause might be viewed as establishing only a default rule. In other words, by pronouncing the legitimacy of "the public debt," this version of the Clause would mandate the repayment of debts, including those incurred in suppressing rebellion, unless a future Congress specified otherwise. Such a clause would preclude judges from holding that Congress was unauthorized to accumulate a public debt, but would not prevent future Congresses from repudiating their obligations.

164. Thus a governmental delay in paying a debt violates the Clause. If the government refuses to make a payment on a debt at the time due but promises to make it later, the government has not maintained the validity of the debt. Rather, the government has effectively canceled the debt and substituted another one. While the government may well make good on its promise, but this compensation validates the later promise, not the original one.

165. A debt may become invalid regardless of whether Congress intended to make it so. The Clause's focus on the validity of debts rather than on congressional action thus suggests that whether Congress intended for nonpayment to result is irrelevant.

166. *See supra* text accompanying note 109.

167. The difference between "inviolable" and "unrepudiable" is that the former makes clear that a partial invalidation of debt, such as a promise to pay back a bond but without interest, is impermissible. The phrase "the validity . . . shall not be questioned," also appears to bar such violation, because a partial cancellation invalidates a debt obligation and replaces it with a lesser one.

above,[168] imminent debt repudiation was extremely unlikely given the passage of Section 3 of the Amendment. Thus, there is little reason that the Framers would have been more concerned with the possibility that Congress would intentionally cancel debts than with the government's general duty to secure payment of its debts. Indeed, the Clause reflected the Framers' commitment to the sanctity of full faith and credit,[169] and a purpose of the Clause was the securing of the nation's credit by guaranteeing payment to bondholders.[170] Full investor confidence in the validity of the debt requires not just a constitutional nonpayment ban, but also a statutory regime that provides for payment.[171]

Second, participants in the ratification debate did not conceptualize the Clause as being only a technical ban on the failure of the government to make debt payments. Both proponents and opponents of the Clause agreed that it precluded taxation of income from outstanding bonds.[172] Such taxation would not trigger the intermediate level of generality, which bans only nonpayment, not actions occurring before or after scheduled payments that lower the value of the debt.[173] The debate suggests that the Clause was viewed as a general principle requiring the government to ensure the full and unconditional validity of debts.

Third, just a month before the final debate on the Fourteenth Amendment, Congress passed a statute converting the bulk of bond payments into a permanent appropriation.[174] Thus, instead of leaving bondholders to the whims of future Congresses or the courts, Congress sought to place the public debt above the fray.[175] Accepting the intermediate level of generality would mean that Congress could repeal this statute and substitute an annual appropriation. It would be odd if a constitutional limitation and a statute passed at about the same time pursued the same goal of protecting government debt, but the constitutional provision would tolerate repeal of the statute and thus subversion of

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168. *See supra* text accompanying notes 126-133.

169. *See supra* notes 121-125.

170. *See supra* note 112.

171. Even with constitutional protection, a statute providing for payment will boost investor confidence. *See supra* note 47. Investors are more likely to perceive the Public Debt Clause as securing their debts if the Clause is applied to strike down statutes that would result in default. Even if debt-holders ultimately received payment, that payment would be delayed, the value of the debts would likely decline because of the initial repudiation, and the debt-holders would suffer litigation risk. In addition, if Congress were to engage in a course of action that would make it impossible (either practically or mathematically) for a successor Congress to honor all of its debts, then the constitutional provision probably wouldn't work. The Supreme Court might refuse to apply the Public Debt Clause, or it might be repealed through Article V amendment.

172. *See, e.g.*, JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 18, 224 (1984).

173. The high level of generality probably does ban taxation of government bonds, at least at rates higher than those existing at the time of the bonds' purchase. A tax jeopardizes debts by providing that they will not be honored in full unless Congress repeals the tax after payment. However, the Sixteenth Amendment's allowance of income taxes arguably trumps the Public Debt Clause's prohibition of excess bond taxation.

174. *See supra* note 133. Routine appropriations were made on an annual basis. *See, e.g.*, Act of Apr. 6, 1866, ch. 27, 14 Stat. 14 (providing miscellaneous appropriations).

175. The statute may also reflect administrative simplicity, since Congress could know in advance when bonds would become due. However, in no meaningful sense is it more difficult for the government to budget expected payments during each budget cycle rather than in advance. What makes a permanent appropriation unique is that money will be spent unless Congress affirmatively repeals it. *See, e.g.*, Tiefer, *supra* note 93, at 415-16 (contrasting annual and permanent appropriations).

the goal.

D. Outer Reaches of the Clause's Meaning

In sum, an originalist reading of the Public Debt Clause leads to a construction that is broad in two senses. First, the "public debt" includes statutorily authorized congressional budgetary promises besides financial bond instruments. Second, governmental actions short of direct repudiation may trigger the Public Debt Clause if they endanger the validity of debts. This broad construction may not be the only plausible interpretation of this Clause; the Framers might have intended something much narrower but drafted the provision carelessly. The point is, however, that it is certainly plausible that the Framers intended to write the Clause that they wrote and that history has defied their intent.

This Article's interpretation of the Public Debt Clause hardly exhausts questions about the Clause's substantive limits.[176] For example, did the Framers intend for the Clause to encompass debts that the government incurs through compulsion, or only those in which the government's promise serves as an incentive in the open market for assumption of government debts?[177] May Congress make a promise that would ordinarily become part of the public debt, but reserve to itself the right to change or renege on its promise?[178] Does the Public Debt Clause encompass all debts, or only those that the Congress explicitly makes on the credit of the United States or pursuant to the Clause itself?[179]

These questions are difficult both interpretively and normatively. Nothing in the history or language of the Clause indicates to what extent Congress was to control whether a given transaction implicates the Clause. Allowing Congress to withhold full-faith status from obligations seems counter to the nature of a constitutional provision limiting congressional power and discretion. On the

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176. Equally difficult are questions about the Clause's procedural limits; what happens when Congress appears to violate the Public Debt Clause? Some of these questions are addressed in Part III.B, *infra*, which asks to what extent constitutional infirmities in budget processes and policies are justiciable.

177. For example, one might argue that if the government were to require all Americans to buy $500 bonds, those bonds would not implicate the Public Debt Clause. Since the government could have simply compelled purchase without exchanging a promise, it has not taken advantage of the credibility that the Public Debt Clause provides. This argument, however, may at odds with a central purpose of the Clause: assuring the public that greenbacks, which the Legal Tender Acts forced on government contractors, would remain valid. *See supra* text accompanying notes 121-124. On the other hand, government contractors retained the option of leaving the market altogether.

178. Suppose, for example, that the Congress issued bonds with a maturity value of $500, but provided in the bonds' terms that Congress shall pay on maturity $500, or such other amount as it might subsequently decree by law. Although the bondholder recognizes *ex ante* that the bond's value is subject to congressional discretion, one might argue that the Public Debt Clause precludes the government from issuing non-full faith debt or, more generally, reserving to itself the right to renege on its promises. On the other hand, if one accepts the principle that the government may reserve to itself the unilateral right to modify promises, one might further argue that such a reservation is inherent in the legislative power itself.

179. A rule that Congress incurs a debt only by specific reference to the Clause would be tantamount to a default rule treating congressional promises as retractable. Such a default rule might be a sensible bright-line rule if recipients of governmental promises ordinarily realize that the government is likely to renege. The counterargument, of course, would be that the point of the Public Debt Clause is to instill confidence in the reliability of government promises more generally.

other hand, robotically tossing all congressional promises into the public debt would have left open the possibility that Congress might use the Public Debt Clause as a constitutional trick to impose its substantive budgetary preferences on future Congresses.

Of course, that the Public Debt Clause contains ambiguity does not explain why it has never been applied. The courts could have settled on sensible middle-ground positions; for example, they might have considered the Clause to be binding whenever Congress made an unqualified promise and could have reasonably believed that binding itself would be beneficial. To be sure, there is room for argument about how far the Clause extends on an originalist reading, but there is no reason to believe that courts would have been institutionally incapable of placing appropriate limits on the Public Debt Clause.[180]

E. Originalist Application of the Public Debt Clause

This section explores how the Public Debt Clause could have changed congressional budgeting. By now, it should be clear that the Public Debt Clause means approximately the same thing as the hypothetical Fiscal Commitments Amendment discussed in Part I. The Public Debt Clause was meant to apply not just to bonds, but to a broad range of fiscal commitments. A congressional action jeopardizing repayment of a debt triggers the Clause under an originalist interpretation, just as any statute placing repayment of a debt in doubt would trigger the Fiscal Commitments Amendment. The caveats that apply to Part I's interpretation of the Amendment attach to the Clause as well. Just as it was difficult to craft tests to identify what it means to place a debt into doubt, so too is it difficult to determine what it is to question the validity of a debt. However, if one accepts Part II.C's argument that jeopardization of a debt would violate an originalist reading of the Public Debt Clause, then the jurisprudential tests for the Fiscal Commitments Amendment suggested in Part I could apply as well to the Clause under an originalist reading. As before, one might argue for a test that would be easier or harder to trigger. The purpose of this Part, though, is not to uncover a definitive test that originalist courts necessarily would have applied. Rather, it is to show that if courts had struggled to define the Clause as they have struggled with other provisions of the Fourteenth Amendment, they might reasonably have imposed limitations on congressional budget practice that could have served, among other things, as a weak substitute for a Balanced Budget Amendment.

The same objective and subjective tests suggested for the Fiscal Commitments Amendment would have also provided appropriate tests for the Public Debt Clause without turning it into a hair-trigger. Just because "questioned" is

180. Any jurisprudential rules limiting the Clause's applicability would have needed to clarify first, how unequivocally Congress must act in making a promise for it to become part of the public debt, and second, what showing Congress must make to establish that the promise reflects a genuine debt rather than a substantive value preference. The broadest possible interpretation of the Clause would place any congressional promise into the debt without examining Congress's motives.

roughly synonymous with "jeopardized" does not provide a textual argument that any statute increasing the probability of repudiation even marginally should be held to constitute a debt questioning. And just because this Article has concluded that "to question" most closely means "to jeopardize" does not mean that it must conclude that "to question" means "to jeopardize even just a little bit." "To question" might also mean "to jeopardize somewhat" or "to jeopardize a lot." The objective and subjective tests reflect different purposes of the Clause and the different plausible subjects of the past participle "questioned." Essentially, the objective test identifies a questioning by the government and thus is compatible with an interpretation of the Clause as banning any congressional or judicial action making a debt's repayment uncertain. The subjective test reflects the reassurance component of the Clause and asks whether the people have genuine concerns about the government's actions. The objective standard may therefore be preferable, because the Clause achieves its goal of reassuring debtholders through its central mechanism, a limit on governmental action.[181]

As with the Fiscal Commitments Amendment, reading the Public Debt Clause as requiring a balanced budget would be a remarkable feat of interpretive legerdemain. After all, the Framers of the Fourteenth Amendment had just accumulated massive deficits and certainly were not promising never to do so again. However, just because the Clause is not a Balanced Budget Amendment in disguise does not mean that it could not have served as a substitute for such an amendment. If the accumulation of deficits makes questionable the government's ability to meet existing debt obligations, then the Clause may be triggered. Thus, the courts might have interpreted the Clause to be a weak version of a Balanced Budget Amendment by asking whether debt growth was economically unsustainable or whether markets were losing faith in the debt.

Assessment of whether the Public Debt Clause could have protected a legislative scheme like Gramm-Rudman-Hollings is, however, somewhat more complicated than with the Fiscal Commitments Amendment. If Congress explicitly creates a scheme to secure the validity of the public debt, and a subsequent Congress overturns that scheme, such a reversal might constitute a "questioning" of the validity of the debt. However, the case is stronger with the Fiscal Commitments Amendment, because that amendment explicitly would grant Congress the power to make binding fiscal commitments. The Public Debt Clause itself would protect only promises made pursuant to some other congressional power.[182] Therefore, one could argue that even if the Clause would protect a fiscal commitment, Congress cannot make a commitment to reduce the deficit pursuant to the Clause.

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181. However, one could argue that either test alone or both tests together should identify a debt questioning for the Clause to be triggered. If the Public Debt Clause is seen as protecting against only those governmental actions threatening repudiation and worrying debt-holders, then both tests should be necessary conditions for triggering the Clause. In contrast, if the Clause is seen as protecting against only the possibility of repudiation or against only concern about repudiation, then the single appropriate test should be sufficient.

182. For example, the Public Debt Clause would have protected debts incurred pursuant to Congress's power "to borrow Money on the credit of the United States." U.S. CONST. art. I, § 8, cl. 2.

However, the Clause, in an originalist reading, might protect a legislative scheme adopted pursuant to the Public Debt Clause and Section 5 of the Fourteenth Amendment.[183] Whether Section 5 would grant Congress the power to create a binding fiscal promise to reduce the deficit ultimately depends on whether the creation of such a promise would be seen as an attempt to prevent the unconstitutional possibility of default on debt or would make a substantive change in the governing law by extending the Public Debt Clause beyond what the Framers intended.[184] This line, of course, is hard to draw.[185] However, a statute that allowed itself to be repealed only if such repeal did not call the validity of any debts into question would clearly pass Section 5 muster. Moreover, the only type of legislation that could ensure the validity of the public debt against the will of future Congresses is legislation that ties Congress's hands, so unless Section 5 was not meant to apply to Section 4, not enforcing hand-tying legislation thwarts a part of the Framers' intent in Section 5.[186]

The Public Debt Clause's application to budget impasses is similar to the Fiscal Commitments Amendment's. Perhaps the most obvious application of the Clause is that it meant that the government could not constitutionally fail to make a payment on bonds,[187] unless it first repealed the Clause.[188] Moreover, as with the Fiscal Commitments Amendment, the federal debt-limit statute jeopardizes existing debts, because it means that unless Congress changes course, debts will not be paid. After all, the Public Debt Clause promises bondholders not just that bonds will remain valid, but that their validity will not be questioned.[189]

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183. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." For a useful discussion of Section 5, see Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 169-88 (1997).

184. In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Supreme Court struck down the Religious Freedom Restoration Act, which Congress had predicated on its § 5 power. The Act, the Court held, attempted not to enforce the Due Process Clause and the First Amendment incorporated through it, but sought to change the underlying constitutional law. *See id.* at 2168-72. However, the Court carefully confined its holding, by noting that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 2163 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

185. "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed." *Id.* at 2164.

186. Professor Seto similarly notes in the context of the Balanced Budget Amendment that a provision giving Congress enforcement power might allow Congress to override the ordinary rule that subsequent laws supersede prior laws. *See* Seto, *supra* note 11, at 1527. The problem with such reasoning generally is that it seems too broad, since it would afford all debt legislation quasi-constitutional status. Indeed, such a reading might suggest that Congress may not repeal, or even amend, the debt-limit statute. This would bludgeon Congress into crafting balanced budgets and could lead to unconstitutional debt defaults if Congress failed. But this problem vanishes if §§ 4 and 5 are read together as allowing Congress to preclude its successors from amending a debt-reduction statute in a way that would constitute a debt questioning.

187. At least two newspaper editorials have suggested that default on the debt would be unconstitutional. *See* Steve Charnovitz, *Extortion and the Debt Ceiling*, J. COM., Nov. 16, 1995, at 10A; George B. Tindall, *Is This Train Wreck Constitutional?*, NEWS & OBSERVER (RALEIGH), Nov. 15, 1995, at A25.

188. One could argue that the Public Debt Clause was meant to be unrepealable. If repeal were proposed in a national crisis, the debt would unconstitutionally be in question after repeal seemed viable but before ratification by the states. However, Article V's strong presumption of amendability probably means the Framers of the Fourteenth Amendment did not intend to make an exception to Article V.

189. *See supra* Part II.C. Under this Article's interpretation of "validity . . . shall not be questioned," the

Determining which government payments are discretionary and which are required under an originalist reading of the Public Debt Clause may be difficult in some instances, but some ordinary government expenditures fit squarely within the broad construction of the public debt defended above. For example, government civil-service pension payments and money owed to independent contractors represent unambiguous obligations that the government owes because of past agreements in which the debt-holders have already fulfilled their part of the bargains. There are gray areas in which recipients of government money have an expectation of continued receipt but in which there may or may not be an agreement triggering the Public Debt Clause. If the Public Debt Clause applies to obligations that the government requires individuals to purchase, a budget crisis might not relieve the government of its duty to issue Social Security checks, since it has promised to make payments from a trust fund accumulated in part through recipients' own contributions.[190]

A failure by the government to make a Social Security payment because of a train wreck would breach a statutorily established agreement that the government will provide beneficiaries means of subsistence in exchange for their earlier contributions.[191] Medicare is less likely to qualify as a government agreement with beneficiaries, because there is less of a nexus between an individual's contributions and benefits than in the case of Social Security.[192] Similarly, current government employees expect to be paid, but they are subject to dismissal,[193] and the annual budget process serves as an implicit annual review of which employees' contracts to renew. Whether the government would need to make salary payments depends on whether the government incurs a public debt when it hires an employee or when the employee has actually performed contracted-for duties. This hinges in turn on whether the government is considered to have formed agreements of continued employment with its employees.

Third, it is easy to see how a vigorously enforced Public Debt Clause might have affected entitlements policy, although, as with the Fiscal Commitments Amendment, applying the Clause to this area might have exceeded the Framers' intent. In *Flemming v. Nestor*,[194] the Court ruled constitutional a statute retroactively withdrawing Social Security benefits from aliens deported for Communist Party affiliations. Congress, the Court ruled, has the right to cancel

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debt-limit statute may be attacked on its face and not merely only when it leads to repudiation of a debt in a particular circumstance.

190. *See* Social Security Act of 1935, 49 Stat. 622 (principally codified as amended at 42 U.S.C. §§ 401-433 (1996)).

191. The counterargument is that the government has not entered into agreements with beneficiaries, but rather has established a statutory scheme that it can change. *See supra* Part II.D. Even if the government has reserved the right to alter Social Security in general, however, a beneficiary might claim that the government must continue to make payments until it changes the statutory scheme to discontinue them.

192. Medicare is a hybrid system, codified primarily in scattered sections of 42 U.S.C. Part A of Medicare, providing hospital insurance, is funded like Social Security, through a special payroll tax that accumulates in a trust fund. Part B, offering supplemental medical insurance, is funded primarily through general tax revenues. *See, e.g.*, Tiefer, *supra* note 93, at 417.

193. *Cf.* Crenshew v. United States, 134 U.S. 99 (1890) (holding that government employee has no contractual right against termination by Congress on public-policy grounds).

194. 363 U.S. 603 (1960).

Social Security payments. The Court noted that Congress had reserved to itself "[t]he right to alter, amend, or repeal any provision" of the Social Security Act,[195] and found the beneficiary's absence from the United States a sufficient rationale for the statute to pass muster under the Due Process Clause of the Fifth Amendment.[196] Even though the Clause probably does not apply to Social Security specifically because Congress reserved itself the right to retract benefits, an activist Supreme Court might well have reached a contrary holding on the basis of the Clause, which textually seems more on point than the Due Process Clause. Moreover, if the Clause had been generally known and applied, Congress might well have elected to place entitlement obligations on the full faith and credit of the United States and issued written agreements promising to honor them, an action which would have had considerable implications for entitlements policy today.

It is conceivable that if Congress waits too long to respond to the impending entitlements crisis, the Court could overrule *Flemming* in the "generational warfare" that some say would result.[197] For example, the Court could hold that *Flemming* failed to consider the Due Process Clause,[198] or it could seize on the *Flemming* Court's comment that its holding does not mean that "Congress may exercise its power to modify the statutory scheme free of all constitutional restraint."[199] Yet it seems intuitively unlikely that the Court would ever uphold *Flemming*'s interpretation of the Due Process Clause but reach a contrary result on the basis of the Public Debt Clause. After all, if the Supreme Court did do such a thing, critics would complain that the Public Debt Clause is so inappropriate that it was not even considered when *Flemming* was first decided. Further, they would argue that no one ever even attempted to invoke the Clause to preserve Gramm-Rudman-Hollings or to challenge the federal debt limit statute.[200] The Clause, they would say, has long been dead. And they would be right. But how did this come to be?

III. UNDERSTANDING THE PRESENT: THE DEATH OF THE PUBLIC DEBT CLAUSE

Assuming Part II's assessment of the Public Debt Clause is correct (or

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195. This reservation remains in force. *See* 42 U.S.C. § 1304 (1994).

196. *See Flemming*, 363 U.S. at 611-12.

197. *See, e.g.*, John A. Cutter, *Tsongas Warns Against 'Generational Warfare,'* ST. PETERSBURG TIMES, Mar. 20, 1994, at 7A.

198. Charles Reich bitterly critiqued *Flemming* in his ultimately vindicated analysis of "new property." *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 768-71 (1964). But the Court has so far followed *Flemming*, holding in 1986 that the Social Security Act created no contractual or property rights. *See* Bowen v. Public Agencies Opposed To Social Security Entrapment, 477 U.S. 41, 55 (1986).

199. *Flemming*, 363 U.S. at 611.

200. A recent Supreme Court decision makes clear that the historic failure of parties to bring a constitutional challenge may serve as the basis of a historical argument that the challenge could not have been brought. *See* Raines v. Byrd, 117 S. Ct. 2312, 2322-23 (1997) (arguing with historical examples that if legislators had standing to bring suits challenging the constitutionality of acts, such suits would have been brought many times before).

even plausible) as an originalist matter, then the language of the Clause itself cannot account for its irrelevance to modern congressional budgeting. This part explores the question of how the Clause effectively fell out of the Constitution. It finds that there is no easy answer. Part III.A reviews the limited jurisprudence addressing the Clause and concludes that it does not contradict Part II's originalist reading of the Clause; indeed, the limited case law can even be read as encouraging a broad interpretation. Part III.B considers a more subtle version of the theory that the courts are at fault, asking whether twentieth-century justiciability doctrine led plaintiffs to decide not to bring Public Debt Clause claims. This theory too turns out to be untenable, as plaintiffs in hypothetical cases brought under the Clause have direct financial interests that would satisfy even rigid justiciability hurdles. Finally, Part I.C suggests that perhaps the Public Debt Clause died simply from disuse. Because the Clause is awkwardly worded and there are relatively few factual situations implicating the Clause, potential plaintiffs probably never thought of basing a suit upon the Clause. Even the passage of a constitutional amendment, it seems, does not guarantee a change in the law.

A. Death by the Courts?

The intuitively likely suspect in the death of a constitutional provision is the judiciary, which can endorse narrow, careless, or even convoluted interpretations of constitutional provisions that nonetheless receive the benefit of stare decisis. Jurisprudential redefinition, however, did not kill the Public Debt Clause; the courts have barely considered it and never blatantly misinterpreted it. The Supreme Court has expounded on the Public Debt Clause just once, in *Perry v. United States*.[201] Part III.A.1 of this Article narrates the facts and holding of the case, and Part III.A.2 explains that while *Perry* and subsequent decisions are inconclusive, they did not kill the Clause and may even have strengthened it.

1. *Perry v. United States*

Perry was one of the *Gold Clause Cases*, which concerned bonds issued by Congress that included a "gold clause" stipulating that "[t]he principal and interest hereof are payable in United States gold coin of the present standard of value."[202] When gold subsequently appreciated vis-à-vis the dollar, Congress retreated, finding "payment in gold or a particular kind of coin or currency [to be] against public policy,"[203] and providing for payment in dollars only. Perry, a bondholder, sued for the dollar equivalent of the gold he would have received at the earlier exchange rates.

The Supreme Court held the Public Debt Clause applicable:

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201. 294 U.S. 330 (1935).
202. *Id.* at 347.
203. Joint Resolution of June 5, 1933, 48 Stat. 113.

> While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted.[204]

The Court used the Public Debt Clause as support for a structural argument that the Constitution did not allow the federal government to change the terms of its bonds. The Court rested most heavily on the clause of the unamended Constitution authorizing Congress "to borrow Money on the credit of the United States."[205] The Court noted, "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 . . . the Congress has not been vested with authority to alter or destroy those obligations."[206]

While the *Perry* Court might have taken advantage of the opportunity to delineate more clearly the meaning and limits of the Public Debt Clause, the decision at least facially indicated that the Clause was applicable.

2. Perry's Jurisprudential Vitality

Neither subsequent case law nor the circumstances or details of the *Perry* decision can explain the lack of attention to the Public Debt Clause. An attack on *Perry*'s relevance would likely focus on the peculiar timing of *Perry* and on the decision's primary reliance on the "borrow Money" Clause. None of these arguments would seriously have undermined *Perry*, however, and in a technical sense, it remains good law.

The timing argument against *Perry* would argue that it was decided at the height of the constitutional crisis between the Roosevelt Administration and the Court over New Deal legislation, two years before the "switch in time that saved nine."[207] In post-1937 cases, the Court backed away from earlier activist stances limiting the government's ability to craft economic policy.[208] But this Article's reading of the Public Debt Clause is hardly comparable to the Court's activist interpretation of the Fourteenth Amendment's Due Process Clause. Moreover, the *Perry* Court appeared determined not to upset governmental policy and ultimately did not award Perry damages. Because there was no free domestic market for gold, the majority reasoned, Perry would not have been able to sell any gold on the hypothetical world market on which his calculations

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

205. U.S. CONST. art. I, § 8, cl. 2.

206. *Perry*, 294 U.S. at 353.

207. *See generally* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504 (1987) (discussing Court activism and retrenchment).

208. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . .").

were based.[209] Therefore, it is implausible that plaintiffs would have assumed that *Perry* had little precedential relevance simply because of when it was decided.

That the *Perry* Court's analysis of the Public Debt Clause was one support for a broader argument that the Constitution precludes debt repudiations also would not have narrowed its relevance. Just because there are additional reasons that the repudiation in *Perry* was unconstitutional does not change that, according to the Court, the Public Debt Clause confirmed the unconstitutionality of repudiation. Moreover, although *Perry* concerns only direct repudiation of bonds, its holding would have lent credence to Part II's expansive interpretation of the Public Debt Clause. For if the Constitution already banned debt repudiation, then restricting the Public Debt Clause to outright repudiation of bonds, rather than allowing it to encompass non-bond obligations or extend to actions placing debts into question, would be redundant.

Despite these considerations, a claim based on the Public Debt Clause would be unlikely to succeed today, except perhaps in the extreme *Perry* circumstance of direct partial or full repudiation of bond debt. Indeed, several federal appellate courts in 1989–90 declined to apply the Clause in cases involving a federal program providing reinsurance to state-designated student loan guarantee agencies.[210] After Congress created new provisions with which several agencies failed to comply, the Secretary of Education withheld guarantee payments. Because the agreements with the agencies bound them to any changed statutes or regulations[211] and allowed the Secretary to punish violations with such withholdings, the courts were probably correct in finding that no debt was questioned.[212] However, none of the courts took the Clause seriously or engaged a more-than-superficial assessment of the Clause's relevance. While two of the courts' opinions could be read as implying that the Clause remained applicable,[213] none said so directly. Perhaps even more significantly, two other courts noted the Clause's Civil War origins and suggested it applied only to bond debt.[214] Of course, while these lower courts may have driven another nail into the Public Debt Clause's coffin, by the time the courts issued their decisions, the Clause had long been dead.

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209. *See Perry*, 294 U.S. at 357. Four dissenters argued that the government ought to pay damages. *See id.* at 369-70 (McReynolds, J., dissenting); *see also* Currie, *supra* note 207, at 539 n.161 (calling finding of no damages "bizarre").

210. *See* Great Lakes Higher Educ. Corp. v. Cavazos, 911 F.2d 10 (7th Cir. 1990); Ohio Student Loan Comm'n v. Cavazos, 900 F.2d 894 (6th Cir. 1990) (reversing district court application of Clause); Colorado v. Cavazos, Civ. A. No. 88-C-2073, 1990 WL 367621, at *5 (D. Colo. Aug. 21, 1990); Delaware v. Cavazos, 723 F. Supp. 234 (D. Del. 1989), *aff'd*, 919 F.2d 137 (3d Cir. 1990).

211. *See, e.g.*, *Great Lakes*, 911 F.2d at 12 n. 1.

212. This accords with an interpretation of the Clause as allowing Congress to reserve the right to modify its debt. *See supra* Part II.C.

213. *See Great Lakes*, 911 F.2d at 17 ("This section is only brought into play when some state or federal government agency questions a debt."); *Ohio Student Loan*, 900 F.2d at 902 ("[B]ecause we find no abrogation of the 'contract' in the instant case, we conclude that there was no violation of section four of the Fourteenth Amendment.").

214. *See* Colorado v. Cavazos, 1990 WL 367621, at *5; Delaware v. Cavazos, 723 F. Supp. at 244–45.

B. *Death by Nonjusticiability?*

Just because the courts have not directly narrowed the Public Debt Clause does not mean that they did not discourage suits under it indirectly. In particular, perhaps doctrines of justiciability would have caused dismissal of cases under the Clause. The principal problem with this view is that there are no cases holding that the Clause is nonjusticiable. One could attempt to argue that the law of justiciability is so clear that plaintiffs would not even dare to bring a case under the Clause. This part surveys the sovereign immunity, standing, political questions, and ripeness doctrines, as well as separation-of-powers considerations that overlap these areas, to show that the justiciability hurdle is not nearly so imposing.

Before proceeding with an analysis of justiciability law, it bears mentioning that under one view of justiciability, this separate inquiry ought not be required. William Fletcher has argued in the context of standing that the justiciability question is on the merits.[215] Courts, according to Fletcher, should grant standing to anyone in whom the relevant constitutional or statutory provision sued upon grants legal rights. Similar analyses are possible for other prerequisites to jurisdiction;[216] for example, a case would be ripe when a legal injury occurred under a particular provision's definition of injury. Under these formulations, this Article's justiciability analysis is done, because the Article conceptualizes the Public Debt Clause as investing legal rights against the United States in debt-holders. Thus, in this view, the Clause overrides sovereign immunity, grants standing, does not delegate a political question to a co-equal branch, creates ripe cases whenever the debt has been questioned, and provides a check on the legislative branch.

The Supreme Court has not embraced this mode of analysis. For example, in *Lujan v. Defenders of Wildlife*,[217] the Court held that the Endangered Species Act's grant of citizen standing exceeded the bounds of the Article III judicial power. In nullifying an explicit congressional vesting of a legal right, the Court perpetuated its "injury in fact" jurisprudence.[218] This test stands in direct opposition to Fletcher's approach, which assesses legal injuries instead of reading a limit to adjudicable harms into Article III. Thus, this Article must conduct an independent analysis of the current state of justiciability law to determine whether there would be any remedy to those governmental practices that would be unconstitutional under an originalist reading of the Public Debt Clause.

If it turned out that justiciability had effectively killed a constitutional provision, Fletcher's arguments against justiciability hurdles would deserve a second look. As it happens, however, the Clause would be justiciable, because

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215. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

216. *See, e.g.*, Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that "governments have neither 'sovereignty' nor 'immunity' to violate the Constitution").

217. 504 U.S. 555 (1992).

218. *See id.* at 562–63 (citing Sierra Club v. Morton, 405 U.S. 727, 734-35 (1992)).

the private rights protected by the Clause would provide a means to enforcing the Clause's public values. Justiciability doctrines may well endanger many constitutional challenges to the Congress's administration of fiscal policy,[219] but the Public Debt Clause's protection of debt-holders provides an anchor on which jurisdiction would rest comfortably. The Public Debt Clause facially appears to have paved the road to judicial enforcement by conferring rights in a class of individuals whose financial interests are aligned with the social interest in sound financial management.

1. Sovereign Immunity

Waivers of sovereign immunity are strictly construed by the courts.[220] Existing grants of such waivers by Congress would cover an action by debt-holders, however. First, the Tucker Act[221] granted the sovereign's clear permission to be sued for money damages on an express contract. Indeed, in *Perry v. United States*,[222] the Supreme Court held that the Claims Court would have had jurisdiction where the petitioner's calculations of damages were correct, but that it could not take jurisdiction over claims for nominal damages.[223] Therefore, if the government were to repudiate a bond debt, or another debt founded on an express contract, a debt-holder could sue the United States for damages. Second, the United States has consented to suits for relief for other than money damages, as long as the suit is nominally filed against an agency or an official.[224] Thus, a debt-holder may either file for declaratory judgment[225] against the Treasury, or seek a declaration that the federal debt-limit statute or other statute constituting a "debt questioning" is unconstitutional, without violating the United States's sovereign immunity.

The more difficult question is whether the United States would have sovereign immunity if Congress passed a statute withdrawing its consent. In the context of the Fifth Amendment's Just Compensation Clause, the Supreme Court stated that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking" and thus waives sovereign immunity.[226] The Court could have applied similar reasoning to the Public Debt Clause or read the Clause in tandem with the Just Compensation Clause to require compensation for debt repudiations. Indeed, the *Perry* Court suggested

219. *See, e.g.*, Raines v. Byrd, 117 S. Ct. 2312 (1997) (denying standing to members of Congress in challenge to Line Item Veto Act); Crosthwait, *supra* note 11 (arguing that Balanced Budget Amendment would be nonjusticiable); Ondrea D. Riley, Comment, *Annual Federal Deficit Spending: Sending the Judiciary to the Rescue*, 34 SANTA CLARA L. REV. 577, 594–601 (1994) (assessing standing barriers to challenges of debt accumulation, without considering Public Debt Clause).

220. *See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (requiring courts to "construe waivers strictly in favor of the sovereign").

221. Act of March 3, 1887, 24 Stat. 505 (codified as amended at 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1996)).

222. 294 U.S. 330 (1935).

223. *Id.* at 355.

224. *See* 5 U.S.C. § 702 (1996).

225. *See* 28 U.S.C. § 2201 (1996).

226. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 n.9 (1987).

there might be some limit on Congress' power to make an end-run around the United States' duty to fulfill its credit obligations.[227] This suggestion recognizes that a key justification of sovereign immunity—"that there can be no legal right as against the authority that makes the law on which the right depends"[228]—does not apply to constitutional provisions in general and to the Public Debt Clause in particular, since the Clause's purpose was to bind Congress to its earlier commitments. However, in the only case to consider whether Congress may withdraw its consent to be sued in a case arising under the Clause, the Court of Claims held that sovereign immunity did protect such a withdrawal.[229]

2. Standing

Although the Supreme Court's approach to standing is at best confused,[230] debt-holders almost certainly have the concrete interest in relevant aspects of government fiscal management that the general public lacks. In *Allen v. Wright*,[231] Justice O'Connor noted that "application of the constitutional standing requirement [cannot be] a mechanical exercise," but stated that the injury alleged must be "distinct and palpable," "traceable to the challenged action," and "not 'abstract' or 'conjectural' or 'hypothetical.'"[232] Repudiation of debts creates a direct and substantial injury, so a challenge to such repudiation would overcome these *Allen* hurdles. Moreover, even restrictive standing decisions have required only that the plaintiff "personally has suffered some actual *or threatened* injury. . . . "[233] Therefore, the possibility of injury from, for example, the federal debt-limit statute would be sufficient to allow debt-holders standing to sue on the theory that a debt has been questioned.[234]

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227. *See Perry*, 294 U.S. at 353 ("The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared."). Later language makes the import of this statement unclear. *See id.* at 354 ("While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.").

228. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.).

229. Gold Bondholders Protective Council, Inc. v. United States, 676 F.2d 643 (Ct. Cl. 1982). The case was a delayed Gold Clause action concerning a 1918 bond. After *Perry v. United States*, 294 U.S. 330 (1935), Congress withdrew its consent to be sued in cases arising under the gold clause provisions of U.S. securities. *See* 31 U.S.C. § 773b (1983). The court noted, "In an unbroken line of decisions, it has been held that Congress may withdraw its consent to sue the Government at any time" and interpreted dicta in *Perry* as implying that the Public Debt Clause did not affect this principle. 676 F.2d at 646. *But cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding the Fourteenth Amendment overrides sovereign immunity of states under the Eleventh Amendment). Similarly, the courts could hold that the Fourteenth Amendment's Public Debt Clause overrides the federal government's sovereign immunity.

230. *Compare* Flast v. Cohen, 393 U.S. 83 (1968) (allowing taxpayer standing to challenge government spending in Establishment Clause cases), *with* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (denying standing in similar case).

231. 468 U.S. 737, 751 (1984).

232. *Id.*

233. *Valley Forge*, 454 U.S. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)) (emphasis added).

234. A counter-argument would equate bondholder standing with taxpayer standing. The government obtains revenue both by borrowing and taxation, so, the argument concludes, bondholders should not have

3. Political Questions

The political question prong of justiciability bars adjudication of constitutional questions where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ."[235] A requirement that "Congress shall ensure the validity of the public debt" might be a delegation of the constitutional issue to Congress, but the passive language of the Public Debt Clause suggests that all the branches of government share the responsibility of ensuring that the debt not be questioned. In addition, although the language of the Public Debt Clause does not eliminate ambiguity, this Article argues that it would be possible to create administrable tests for applying it.[236] Certainly the Clause is no less conducive to the adoption of judicial standards than are other provisions of the Fourteenth Amendment to which the courts have added a thick gloss.

4. Ripeness

The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[237] Government default is not required to make a disagreement concrete; a debt questioning will do. If a governmental action is found to be debt questioning under an objective test, then the action has increased the risk of default and thus lowered the value of debt, decreasing the wealth of debtholders. If a subjective test identifies a debt questioning, then the public has become suspicious of a debt's validity, and the debt will thus be harder to sell. Under either test, a debt questioning ultimately inflicts a concrete financial injury on debt holders. While debtholders may be less concerned about these small injuries than about the possibility of greater injury in the future, the Supreme Court has made clear that immediate, collateral injuries are sufficient to make cases justiciable.[238]

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standing where taxpayers would lack it. This argument misses a critical distinction between bondholders and taxpayers: Bondholders, in addition perhaps to the satisfaction of helping fund government programs that may benefit them, have a right to a return on the money they provide. Bondholders would have no greater right than taxpayers to challenge the situation in *Allen*, in which parents of black school children were concerned that the IRS granting of tax-exempt status to racially discriminatory schools would adversely affect their children's ability to receive an education. Bondholders would have standing, however, to challenge any policy that threatened to burden them with a financial loss, just as taxpayers have standing to attack the constitutionality of tax laws imposing burdens on them. Like such taxpayers, bondholders may well be concerned less about their financial well-being than about the state of constitutional law and government financial management, but public-spiritedness has never deprived a plaintiff with a concrete interest in a case's outcome of standing.

235. Baker v. Carr, 369 U.S. 186, 217 (1962).

236. *See supra* Part II.E.

237. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

238. *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978) (finding a suit challenging constitutionality of law limiting liability in event of nuclear accident ripe because presence of plant would lead to additional, immediate environmental injury).

5. Separation of Powers

Separation-of-powers considerations would have provided perhaps the most formidable obstacle to the Public Debt Clause. These considerations have independent significance but have also been folded into the standing and political questions inquiries. For example, in *Valley Forge*, the Court noted that a plaintiff may have standing only if a federal court is capable of dispensing relief consistent with the separation of powers.[239] Also bounded up with separation of powers are "prudential questions" about the wisdom of judicial involvement in particular areas, though this may have lost vitality as an independent doctrine.[240]

Separation-of-powers questions require analysis of whether the courts have the power to order a remedy. Invocation of the Public Debt Clause to invalidate a debt repudiation or the federal debt-limit statute would have been an unremarkable exercise of the judicial "duty . . . to say what the law is."[241] The application of the Clause to excessive debt accumulation would have been more troubling. While the courts might issue mandamus ordering the deficit be lowered, congressional defiance of such an order would leave the courts without recourse, since rewriting a budget is a quintessentially legislative task that inevitably implicates economic value judgments other than debt reduction.[242] One solution would be to resolve such cases by granting only money damages; bondholders would be compensated for any decline in the value of their bonds attributable to debt questioning. Though potentially workable, this approach would not have vindicated the Public Debt Clause's values. First, it would have exacerbated debt accumulation and thus led to increased questioning of the remaining portion of the debt. Second, without some form of injunctive relief, it would have allowed unconstitutional debt accumulation to continue.

Passage of a debt-reduction statute pursuant to Sections 4 and 5 of the Fourteenth Amendment[243] may have allayed separation-of-powers concerns. If Congress had passed a statute tying its hands, later judicial enforcement of this Congress' will against the will of a future Congress would have been less countermajoritarian than garden-variety judicial review. The enforcement would have been consistent with the will of a Congress and would have reflected the people's desire to create time-inconsistent policies, i.e. policies that produce optimal results *ex ante* only by precluding later exercise of policymaking dis-

239. *See Valley Forge*, 454 U.S. at 473-74; *see also* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); Crosthwait, *supra* note 11, at 1107 n.31. *But see* Flast v. Cohen, 392 U.S. 83, 98-101 (1968) (asserting that separation-of-powers is part of a political questions inquiry but does not involve standing).

240. *See* Crosthwait, *supra* note 11, at 1089 (arguing that "prudential doctrine is so ill-defined that it is of little use to courts faced with difficult justiciability questions"). *But see* Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (maintaining that political questions doctrine derives "in large part from prudential concerns about the respect we owe the political departments").

241. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

242. *Cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that the Constitution does not prefer certain economic policies over others).

243. *See supra* Part II.E.

cretion.[244] Such a statute could also have mitigated the difficulty of crafting a judicial remedy. By providing a congressionally approved sequestration method, a statute pursuant to both Sections 4 and 5 would have provided a default rule that judges could have returned to if a later statute were held to breach the Public Debt Clause.

C. Death by Desuetude?

The absence of a jurisprudential explanation for the death of the Public Debt Clause and the impossibility of determining whether lawyers ever fleetingly considered filing suits under the Clause mean that we will never know for sure what happened to it. It seems likely, however, that the Clause died from disuse. Yet the desuetude that killed the Clause is not desuetude of a typical sort, for society cannot be said to have outgrown the Clause. While an outdated criminal law may be enforced arbitrarily,[245] this danger does not inhere in constitutional law. Moreover, when a statute falls into disuse, it may no longer reflect the consensus of society.[246] By contrast, constitutional provisions are inherently countermajoritarian, binding one generation to at least the words chosen by another.[247] Moreover, this Article's argument that the principle underlying the Public Debt Clause could form the basis of a new constitutional amendment proves that the Clause is no anachronism.

The desuetude that killed the Public Debt Clause has more to do with chance than with change. The absence of early cases on the Clause, combined with the allusions within the Clause to events of the Civil War, probably meant that few have given the Clause more than a superficial glance. And with so much time elapsing since the Clause's adoption, during which time the court failed to consider it carefully, few would dare invoke the Clause in the courts. This outcome could have been different. Suppose that the Reconstruction Congress had attempted to repudiate debt acquired shortly after the Civil War. With the ratification of the Fourteenth Amendment so recent in memory, litigation might have resulted, and the Court would have had an occasion to clarify the meaning of the Clause. Such litigation would have made the Clause better known and made subsequent challenges to congressional practices arguably infringing on the Clause more likely.

Probably few constitutional provisions have, like the Public Debt Clause, effectively been forgotten. There is, however, a lesson in its example: legislators sometimes craft law with one particular circumstance or factual scenario in mind but write a provision of more general applicability. If the particular circumstance envisioned never arises, that may make it less likely that plaintiffs

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244. *See supra* note 23.

245. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 153 (1962) (arguing that obsolete statutes are subject to discriminating enforcement).

246. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 21 (1982); *see also* Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 453.

247. Perhaps recognizing this argument, the Supreme Court has held that longstanding government practice does not waive a constitutional violation. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 942 (1983).

will bring claims that fit within a more general understanding of a law. Judges, after all, may well be more willing to take a small step from precedent than a large step from a statute; without an expectation of such caution, judges might abuse their power by misreading legislative intent. But the expectation that the common law process will elaborate the meaning of legal provisions slowly over time means that judges may never elaborate some provisions at all.

IV. CONCLUSION: OF COMMITMENTS, FISCAL AND CONSTITUTIONAL

This Article has consistently assumed that plaintiffs' consistent failure to invoke the Public Debt Clause means that the Clause is dead. This assumption can be read both descriptively and prescriptively, as a statement that the Clause is inoperable as a matter of fact and as a conclusion that courts should not revive the Clause.

The relevant descriptive observation is that plaintiffs have had ample opportunity to bring claims colorable under this Article's originalist reading of the Clause. No one has used the Clause to challenge the federal debt-limit statute, the accumulation of federal debt, Congress's failure to adhere to the projections of Gramm-Rudman-Hollings, or rollbacks in entitlements. Of course, this does not necessary mean that no plaintiffs ever will bring a claim. Indeed, if Congress were to commit a particularly egregious violation of the Clause, for example by repudiating the national debt, it is certainly conceivable that the Supreme Court would use the Clause to strike down Congress's action. Such litigation could even lead to further development of the Clause in subsequent cases. While one might therefore argue that the Clause is merely sleeping, the slumber is deep enough that only a tremendous shock seems likely to wake it.[248]

The prescriptive conclusion that the Clause should not be revived will be more troubling to some. If an originalist interpretation of the Clause dooms various laws, some will say that those laws should be struck down. Why should supporters of fiscal prudence need to pass a new Fiscal Commitments Amendment when a similar constitutional provision already exists? Indeed, the idea that we should learn from a constitutional provision by passing it again may seem particularly anomalous in an Article that emphasizes the value of commitment.

There is, however, an important difference between fiscal and constitutional commitments. Binding fiscal commitments make the future more clear by reducing policy options. If Congress knew, for example, that it would be re-

248. One sign that the Clause is dead is that the principle underlying it has animated some constitutional jurisprudence that the Supreme Court has not tried to defend by citing to the Clause. For although the Court has not developed the Public Debt Clause, it has strained to find its core elsewhere. The Court has read a version of the Contracts Clause, which applies only to states, into the Fifth Amendment's Due Process Clause. *See* Lynch v. United States, 292 U.S. 571, 579-82 (1934); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 613 (2d ed. 1988). The Court has also recognized that statutes may vest recipients of government benefits with property interests that cannot be taken away without procedural due process. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

quired to meet certain deficit targets, then it would reach them, if not by itself, then with the help of the courts. Thus, making fiscal commitments binding reduces uncertainty. Constitutional commitments are more likely to be subject to interpretation then fiscal ones.[249] While this Article interprets the Clause from an originalist perspective, some might accept this perspective but argue for different conclusions. Others might reject originalism altogether and urge different conclusions based on another perspective. For example, some might argue that the Clause provides support for mandating reparations for descendants of slaves, though the Framers did not contemplate this result, which would require that one consider moral obligations to be part of the public debt. Active reconsideration of some constitutional provisions might be dangerous because those provisions are so open-ended that if the courts were to consider them, damaging uncertainty about the structure of government would result.[250] Thus, superimposing onto the Constitution a high-level interpretive principle that undeveloped clauses should remain undeveloped would reduce uncertainty.[251] And so the Public Debt Clause, though it may inspire the future, should itself perhaps, remain part of the past.

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249. For an argument that the nation's commitment to a constitutional provision is relevant to the interpretation of that provision, see Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

250. As another example, the Constitution's Guarantee Clause could conceivably be interpreted to disallow a wide range of state practices viewed as undemocratic. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."); *see also, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) ("The concept [of Republican Government] is indeed a spacious one, and many particular ideas can comfortably nestle under its big tent."); Debra F. Salz, Note, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993) (arguing that Colorado's Amendment 2 violated the Guarantee Clause). Even if such an interpretation were correct, adjudication of such claims could mean that the structure of state governments would be modified whenever the composition of the Supreme Court changed and constitutional doctrine surrounding the Clause evolved. Such considerations may underlie the Supreme Court's holdings that Guarantee Clause claims are not justiciable. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that determination of which of two rival claimants was rightful government of Rhode Island required congressional resolution); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (reaffirming that Guarantee Clause claims are not justiciable); *see also* Nixon v. United States, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (arguing that political questions doctrine is based on prudential concerns). Because passage of a statute requires the approval of both houses of Congress and approval by the President (or a veto override), congressional resolution of Guarantee Clause claims may be more final than Supreme Court rulings, and it may therefore be wise for the courts not to hear constitutional claims where finality in constitutional principle is particularly important. Likewise, because adjudication of Public Debt Clause claims could have significant consequences for congressional budgeting, and because reasonable judges could differ on how far the Clause should extend, the best policy for the Court might be not to revive the Clause.

251. Such a principle flips that of *stare decisis* by letting stand the absence of a decision. *See also supra* note 200; *cf.* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (arguing that constitutional *stare decisis* has particular force where a "rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling").