

Unconstitutional Debt Ceilings

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INTRODUCTION

Section Four of the Fourteenth Amendment states that “[t]he validity of the public debt of the United States . . . shall not be questioned.”¹ All federal treasury securities are backed by the “full faith and credit” of the United States of America.² The budget stalemates of 2011 and 2013 demonstrate how little politicians heed those words.

When the federal government’s expenditures exceed its revenues, it must borrow money to make up the difference. The aggregate of that borrowing comprises the outstanding public debt, which is capped by Congress.³ Historically, this “debt ceiling” has been largely a formality, and Congress has authorized a higher ceiling each time the debt has brushed up against the statutory limit.⁴ But in 2011, Republicans in both chambers attempted to use the threat of a sovereign default to extract political concessions from Democrats, like reductions in previously authorized spending and even a balanced-budget amendment to the U.S. Constitution.⁵ In 2013, House Republicans attempted to again use the threat of default to coerce Democrats to bargain on entitlement reform and Obamacare.⁶

This game of political chicken came to a head in both cases when, just twenty-four hours before the Treasury was to run out of cash, Democrats and Republicans struck a deal to authorize more borrowing.⁷ Republicans appeared victorious in the 2011 aftermath; they extracted the deep spending cuts promised during their campaigns without conceding to a single dollar in tax increases and managed to avoid the economic implosion that would have resulted from a default.⁸ In 2013, it was the Democrats who claimed victory, if only in the war of public opinion. Yet, in another sense, everybody lost. The Republicans had introduced an economic weapon of mass destruction into the political arena and convinced the world that they were indeed willing to use it. For the first time in history, investors began to question not only the *ability* but *intent* of

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¹ U.S. CONST. amend. XIV, § 4.

² *Treasury Bills*, TREASURYDIRECT,

http://www.treasurydirect.gov/indiv/research/articles/res_invest_articles_tsbills_104.htm (last visited July 19, 2014).

³ See 31 U.S.C. § 3101(b) (2012).

⁴ Donny Shaw, *Why Congress is Even Voting on the Debt Limit*, OPENCONGRESS (Apr. 22, 2011),

<http://www.opencongress.org/articles/view/2271-Why-Congress-is-Even-Voting-on-the-Debt-Limit>.

⁵ Pete Kasperowicz, *Balanced-Budget Amendment Passage Not Required for Second Debt-Limit Hike*, HILL (Aug. 1, 2011, 1:28 AM), <http://thehill.com/blogs/floor-action/house/174611-balanced-budget-amendment-passage-not-required-for-second-debt-ceiling-increase>.

⁶ Tim Alberta, *House Republicans Draft Their Debt-Ceiling Playbook*, NAT’L J. (July 7, 2013),

<http://www.nationaljournal.com/congress/house-republicans-draft-their-debt-ceiling-playbook-20130707>.

⁷ Lori Montgomery & Rosalind S. Helderan, *Congress Sends Obama Bill to End Shutdown*, WASH. POST (Oct. 17, 2013), http://www.washingtonpost.com/politics/house-effort-to-end-fiscal-crisis-collapses-leaving-senate-to-forge-last-minute-solution/2013/10/16/1e8bb150-364d-11e3-be86-6aeaa439845b_story.html; Lori Montgomery & Paul Kane, *Debt-Limit Deal is Struck: Party Leaders, White House Agree on Plan to Avert Default*, WASH. POST (Aug. 1, 2011), http://www.washingtonpost.com/National-Economy/reid-signs-off-on-debt-deal-hopes-for-vote/2011/07/31/gIQALCW4II_story.html.

⁸ Montgomery & Helderan, *supra* note 7.

the U.S. government to fulfill its debt obligations. In response, bond-rating agencies downgraded the quality of U.S. sovereign debt in 2011⁹ and threatened to do so again in 2013.¹⁰ The credit downgrade was another first.¹¹

This Note argues that when Congress appropriates funds in excess of its expected revenues, it implicitly authorizes the Treasury to borrow the amount necessary to meet that shortfall. By requiring *separate* authorization to increase the debt limit, Congress leaves open the possibility that politicians will cause the government to default on its obligations. Thus, a separate requirement is an unconstitutional subversion of the full faith and credit of the United States.

Part I surveys the history of the debt ceiling in the United States leading up to the modern debt crises. Part II analyzes the consequences of failing to meet our financial obligations and asserts that such an abdication of responsibility is unconstitutional given Congress's sacrosanct duty to protect the nation's credit. Part III explores the "nuclear option" proffered by Democrats to insure against the Republicans' obstruction and argues that, although potentially legal, it is not viable and fails to address the underlying issue. Finally, this Note concludes by arguing that the debt ceiling should automatically rise to accommodate shortfalls in expenditures.

I. HISTORY

The debt ceiling is "the total amount of money that the United States government is authorized to borrow to meet its existing legal obligations The debt limit does not authorize new spending commitments. It simply allows the government to finance existing legal obligations that Congresses and presidents . . . have made in the past."¹²

The debt ceiling did not exist in its current incarnation until 1917.¹³ Whereas previous Congresses had to authorize specific loans, the Second Liberty Bond Act provided relatively broad flexibility in handling federal obligations.¹⁴ The greater independence allowed the Treasury to keep borrowing costs low, helping the United States finance a pair of world wars.¹⁵ However, the Treasury's latitude was always constrained by a borrowing cap.¹⁶

With a few brief pauses, the debt ceiling has increased almost perpetually since its creation.¹⁷ Before long, the act of raising the debt ceiling became little more than a formality. Congress has permanently raised, temporarily extended, or revised the definition of the debt limit almost 100

⁹ Binyamin Appelbaum & Eric Dash, *S.&P. Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES, Aug. 6, 2011, <http://www.nytimes.com/2011/08/06/business/us-debt-downgraded-by-sp.html>.

¹⁰ James O'Toole, *Fitch Puts U.S. on Notice for Downgrade*, CNNMONEY (Oct. 15, 2013, 8:02 PM), <http://money.cnn.com/2013/10/15/news/economy/fitch-downgrade/index.html>.

¹¹ Appelbaum & Dash, *supra* note 9.

¹² *Debt Limit*, TREASURY, <http://www.treasury.gov/initiatives/Pages/debtlimit.aspx> (last visited July 19, 2014).

¹³ D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 2 (2008), available at <http://fpc.state.gov/documents/organization/105193.pdf>.

¹⁴ Second Liberty Bond Act, Pub. L. No. 65-43, 40 Stat. 288 (1917) (codified as amended at 31 U.S.C. § 3101).

¹⁵ AUSTIN, *supra* note 13, at 3.

¹⁶ Created in 1917, the ceiling has been perpetually raised to over \$16 trillion today. D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 16-20 (2013), available at <http://fas.org/sgp/crs/misc/RL31967.pdf>.

¹⁷ See generally AUSTIN, *supra* note 13.

times since its creation,¹⁸ and seventy-eight times since 1960.¹⁹ In fact, from 1979 to 2011, the “Gephardt Rule” provided for automatic endorsement of debt limit increases within the House of Representatives.²⁰ The authorization bill did not require a sponsor and could accompany the budget to the Senate without being specifically voted upon in the House.²¹ It was routine. It was boring. But it did not last.

As the tone of political discourse in the Capitol became more vitriolic, the debt limit morphed from a neglected stepchild into Washington’s most valuable hostage.²² The Democrats broke the seal by attempting to block the debt-ceiling vote when receipts were tight in 2002,²³ but Republicans opened the floodgates with their suicide pact in the summer of 2011.

In February 2010, Congress set the debt ceiling at \$14.3 trillion.²⁴ In April 2011, it passed a budget for 2011 containing expenditures of \$3.8 trillion and revenues of \$2.2 trillion.²⁵ This left a shortfall of \$1.6 trillion, which exceeded the existing space below the 2010 cap. Congress knew this but passed the budget anyway. Treasury Secretary Timothy Geithner employed a series of emergency measures to meet the obligations but estimated that by August 2, 2011, “the borrowing authority of the United States [would] be exhausted.”²⁶ The Secretary would have to determine which bills to pay because, in order to remain under the existing cap, federal spending would need to be cut nearly in half overnight.

Failure by the United States to meet all of its financial obligations would result in an unmitigated disaster.²⁷ A crisis was on hand, and Republicans sensed an opportunity to win the spending cuts they had promised constituents during the 2010 midterm elections. And so they remained obstinate in the face of Democrats’ pressure to raise the debt limit, demanding a dollar of spending reduction for every corresponding dollar increase to the debt ceiling, spending caps,

¹⁸ Ariana Eunjung Cha et al., *What’s the Debt Ceiling, and Why is Everyone in Washington Talking About It?*, WASH. POST (Apr. 18, 2011), http://www.washingtonpost.com/business/economy/whats-the-debt-ceiling-and-why-is-everyone-in-washington-talking-about-it/2011/04/15/AFSS4R1D_story.html.

¹⁹ *Debt Limit*, *supra* note 12. Of these seventy-eight affirmative acts, forty-nine occurred under Republican presidents and twenty-nine under Democratic presidents, so the act itself cannot be traced to any particular partisan ideology. *See id.*

²⁰ Shaw, *supra* note 4.

²¹ *Id.*

²² Indeed, Senate Minority Leader Mitch McConnell described it as such in the aftermath of the 2011 standoff, saying: “I think some of our members may have thought the default issue was a hostage you might take a chance at shooting. Most of us didn’t think that. What we did learn is this—it’s a hostage that’s worth ransoming. And it focuses the Congress on something that must be done.” David A. Fahrenthold et al., *In Debt Deal, the Triumph of the Old Washington*, WASH. POST (Aug. 2, 2011), http://www.washingtonpost.com/politics/in-debt-deal-the-triumph-of-the-old-washington/2011/08/02/gIQARSFfql_story_1.html.

²³ Richard W. Stevenson, *House Raises Debt Ceiling and Avoids a Default*, N.Y. TIMES (June 28, 2002), <http://www.nytimes.com/2002/06/28/us/house-raises-debt-ceiling-and-avoids-a-default.html>.

²⁴ H.R.J. Res. 45, 111th Cong. (2010).

²⁵ U.S. GOV’T PRINTING OFFICE, THE BUDGET FOR FISCAL YEAR 2012, at 171 (2011), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-BUD/pdf/BUDGET-2012-BUD-29.pdf>.

²⁶ Colleen Murray, *As US Reaches Debt Limit, Geithner Implements Additional Extraordinary Measures to Allow Continued Funding of Government Obligations*, TREASURY NOTES (May 16, 2011), <http://www.treasury.gov/connect/blog/Pages/Geithner-Implements-Additional-Extraordinary-Measures-to-Allow-Continued-Funding-of-Government-Obligations.aspx>.

²⁷ U.S. DEP’T OF THE TREASURY, THE POTENTIAL MACROECONOMIC EFFECT OF DEBT CEILING BRINKSMANSHIP 1 (2013), available at <http://www.treasury.gov/initiatives/Documents/POTENTIAL%20MACROECONOMIC%20IMPACT%20OF%20DEBT%20CEILING%20BRINKSMANSHIP.pdf>.

and a balanced-budget amendment to the Constitution.²⁸ Various commissions were created to work toward compromise,²⁹ but Republicans assumed—correctly—that their counterparts would not allow the government to default and therefore refused to even consider tax increases as part of the solution.³⁰

This debate consumed the news cycle and spooked investors throughout the spring and summer months. That there was even a debate as to whether Congress would support financing for the spending it had already authorized convinced everyone who still needed convincing that Washington was, in fact, broken. Finally, on July 31, less than forty-eight hours before the government was to become illiquid, the parties broke through with an “agreement” that contained a higher debt limit, spending cuts, and incentives to reduce the deficit further.³¹ The immediate crisis had passed, but the damage was done.

Five days after the deal, Standard & Poor’s, one of the three major credit-rating agencies, downgraded the long-term credit rating of the U.S. government—the first time this has ever happened.³² The downgrade was based not on the country’s *ability* to repay the money it borrows but rather on the government’s dysfunction and pervasive cavalier attitude about potential default.³³

Perhaps more important still was the precedent set by the 2011 crisis. In anticipation for the 2013 budget negotiations, Republicans were already gearing up to use the threat of default to again extract concessions from their opponents.³⁴ President Obama resolved not to negotiate, vowing that Republicans would “not collect a ransom in exchange for not crashing the American economy.”³⁵ But Speaker Boehner did not relent, perhaps encouraged by a desensitized public. More than half of all Americans believed that raising the debt ceiling would be a bad thing.³⁶

The debt crises of 2011 and 2013 were entirely self-inflicted, but they will have lasting implications on how the world perceives our *willingness* to fulfill our financial obligations. The

²⁸ See Cut, Cap, and Balance Act of 2011, H.R. 2560, 112th Cong. (2011).

²⁹ See, e.g., NAT’L COMM’N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH: REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM 6–7 (2010), available at http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf; John D. McKinnon, *Gang of Six Plan Cuts Both Ways*, WALL ST. J. (July 21, 2011), <http://online.wsj.com/news/articles/SB10001424053111904233404576458362024552134>. The National Commission on Fiscal Responsibility and Reform is also known as the Simpson–Bowles Commission after its co-chairmen. See *Commission Members*, NAT’L COMM’N ON FISCAL RESPONSIBILITY & REFORM, www.fiscalcommission.gov/members (last visited July 19, 2014).

³⁰ Andrew Taylor, *John Boehner: Tax Reform ‘Under Discussion’ in Debt Ceiling Talks*, HUFFINGTON POST (July 7, 2011, 12:18 PM), http://www.huffingtonpost.com/2011/07/07/john-boehner-taxes-debt-ceiling_n_892271.html.

³¹ The Budget Control Act’s incentive was a sequestration measure that ultimately resulted in more spending cuts, divided roughly equally between military and nonmilitary spending, that made the consequences unpalatable to each party. See SUSAN B. EPSTEIN, CONG. RESEARCH SERV., R42994, THE BUDGET CONTROL ACT, SEQUESTRATION, AND THE FOREIGN AFFAIRS BUDGET: BACKGROUND AND POSSIBLE IMPACTS I (2013), available at <http://fas.org/sgp/crs/row/R42994.pdf>.

³² Damian Paletta & Matt Phillips, *S&P Strips U.S. of Top Credit Rating*, WALL ST. J. (Aug. 6, 2011), <http://online.wsj.com/news/articles/SB10001424053111903366504576490841235575386>.

³³ See *id.*

³⁴ See Jackie Calmes & Jonathan Weisman, *Obama and G.O.P. Issue Challenges on the Debt Limit*, N.Y. TIMES, Jan. 14, 2013, <http://www.nytimes.com/2013/01/15/us/politics/obama-to-press-house-gop-on-debt-limit.html>.

³⁵ *Id.*

³⁶ CNN/ORC Poll (Oct. 2, 2013), <http://i2.cdn.turner.com/cnn/2013/images/10/02/rel10e.pdf>. Some 38% of respondents said that failure to raise the debt ceiling would be a good thing, while another 5% had mixed feelings or were unsure. *Id.*

next Part explains why the crisis should never have materialized in the first place because, at its core, the debt ceiling is unconstitutional.

II. THE DEBT CEILING IS ILLEGAL

The Fourteenth Amendment commands that “[t]he validity of the public debt of the United States, authorized by law . . . shall not be questioned.”³⁷ In order to instill confidence into owners of public funds following the Civil War, one of the Amendment’s sponsors explained that this Clause “withdraw[s] from the power of a Congress to repudiate [the debt] and place[s it] under the guardianship of the Constitution.”³⁸ The Supreme Court in *Perry v. United States* reiterated the supra-political character of debt obligations, explaining that Congress pledges the credit of the United States when it borrows money—“the highest assurance the government can give.”³⁹ No Congress may later withdraw or ignore that pledge.⁴⁰ In *Perry*, an investor had purchased Liberty Bonds from the U.S. government with a provision promising repayment pursuant to the standard value of the gold dollar.⁴¹ After Congress reweighted the value of a gold dollar, it passed a resolution⁴² permitting repayment in any legal tender in circulation at the time of payment,⁴³ effectively nullifying the gold clause on the bond. The investor sued to invalidate the statute, and the Supreme Court struck it down.⁴⁴ From a policy perspective, *Perry* solved the credible-commitment problem in sovereign borrowing by preventing Congress from altering its own obligations.

So Congress must repay all the money it has borrowed—that much is clear. But how can it? As of this writing, our outstanding sovereign debt stood at more than \$17.5 trillion—105% of our gross domestic product.⁴⁵ Even if Congress were to confiscate every single dollar of output from our economy next year through taxes, it would still be short. The answer is that Congress is able to repay the debt by financing it over time. The Treasury—acting on behalf of the government—is constantly auctioning off new treasury bills to roll over the old debt once it comes due. It uses tax revenue to service the interest payments but often issues even more bonds to make up the difference.

Congress has little to do with these daily transactions. Rather, the Treasury issues the notes with Congress’s unconditional promise of repayment. This outsourcing of responsibility frees congressional resources to focus on higher-level policymaking in the short-term but also opens the door to a potential constitutional crisis. Specifically, the Treasury would find itself in a bind if Congress ordered it to spend money it doesn’t have on one hand, while preventing it from borrowing more on the other. Secretary Geithner explained: “Reaching the debt limit would

³⁷ U.S. CONST. amend. XIV, § 4.

³⁸ CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Benjamin Wade).

³⁹ 294 U.S. 330, 351 (1935).

⁴⁰ *See id.*

⁴¹ *Id.* at 346–47.

⁴² H.R.J. Res. 192, 73d Cong. (1933).

⁴³ *Perry*, 294 U.S. at 346–47.

⁴⁴ *See id.* at 354.

⁴⁵ US DEBT CLOCK, <http://www.usdebtclock.org> (last visited July 19, 2014).

mean the Treasury would be prevented by law from borrowing in order to pay obligations the Nation is legally required to pay, an event that has no precedent in American history.”⁴⁶

This is exactly what played out in 2011 and 2013. In 2011, Congress passed a \$3.8 trillion budget in April, knowing full well that revenues were only expected to reach approximately \$2.2 trillion. At that time, public debt stood at \$14.235 trillion,⁴⁷ already brushing against the statutory limit of \$14.294 trillion. Thus, Congress affirmatively acted to pass a law that would require borrowing \$1.6 trillion, while only actually authorizing the Treasury to borrow about \$60 billion. Only in Washington, D.C. is such math acceptable. VISA would never permit a borrower to impose a personal debt limit above which voluntarily incurred charges can be voided. The customer must repay the money he borrowed or the credit card company would stop lending him money.⁴⁸

The credit card example illustrates how irrational the debt-ceiling debate really is, because the debate is not about spending. Congress already spent the money. No one else is authorized to do so under the Constitution. It spent the money on federal employee salaries, wars in Afghanistan and Iraq, payroll tax refunds, roads and bridges, and interest on existing debt. If Congress wanted to exercise fiscal restraint, the budget negotiation was the time to do so. It could have raised taxes to pay for these expenditures or elected to forego the purchases altogether. And if the parties reached an impasse regarding what to buy and how to pay for it, the government would simply stop spending (by shutting down) until Congress could resolve it. That’s what happened last fall, when failure to pass a continuing resolution shuttered most agencies, closed the national parks, and sent all “nonessential” personnel home for more than two weeks in October.⁴⁹ A shutdown also has ugly consequences—the latest one cost taxpayers \$2 billion in back pay for furloughed workers, 6.6 million man-days of government work, and an estimated 120,000 private sector jobs across the economy⁵⁰—but is neither illegal nor unprecedented.⁵¹

The debt-ceiling debate boils down to a simple question: will Congress authorize *itself* to pay for the goods and services it has already purchased?⁵² To date, it has never failed to do so,⁵³ but

⁴⁶ Letter from Timothy F. Geithner, Secretary of the Treasury, to Senator Harry Reid, Majority Leader (Jan. 6, 2011) [hereinafter Letter to Senator Reid], available at <http://www.treasury.gov/connect/blog/Pages/letter.aspx>.

⁴⁷ *Monthly Statement of the Public Debt of the United States*, TREASURYDIRECT (Apr. 30, 2011), <http://www.treasurydirect.gov/govt/reports/pd/mspd/2011/opds042011.pdf>.

⁴⁸ Senator Grassley used the credit card analogy as well. Letter from Timothy F. Geithner, Secretary of the Treasury, to Senator Ron Johnson (June 29, 2011) [hereinafter Letter to Senator Johnson], available at <http://www.treasury.gov/initiatives/Documents/DLJohnsonLetter062911.pdf> (“Critics sometimes object to raising the debt limit on grounds that it will allow the Government to borrow more money, but refusing to raise the debt limit is akin to refusing to pay your individual credit card bill after you have already gone shopping and bought something.” (quoting Senator Chuck Grassley)).

⁴⁹ Annie Lowrey, *White House Puts Price on Government Shutdown*, N.Y. TIMES, Nov. 8, 2013,

<http://www.nytimes.com/2013/11/08/us/politics/white-house-puts-price-on-government-shutdown.html>.

⁵⁰ *Id.*

⁵¹ Congress previously shut the government down in 1995 under Newt Gingrich’s leadership. Neil King, Jr., *In Government Shutdown, Few Parallels with Most Recent One*, WALL ST. J. (Oct. 1, 2013), http://online.wsj.com/news/articles/SB10001424052702303643304579107963463147396?mod=wsj_streaming_the-fiscal-cliff&mg=reno64-wsj.

⁵² Senator Jim DeMint (R-SC), one of the outspoken critics of raising the debt ceiling in 2011, made this very point just a year earlier. See Letter to Senator Johnson, *supra* note 48 (“You don’t have much choice if you charge something on your credit card. You have to pay it, and that’s effectively what this debt limit is . . . we’ve already spent the money. The question is now . . . do we fund what we’ve already done?” (quoting Senator Jim DeMint)).

as the standoff last year demonstrated, it *could* so fail. A statute that forces us to even ponder that question is unconstitutional by nature, as Congress is barred from deliberately defaulting by the Fourteenth Amendment.⁵⁴ If, as the Court in *Perry* held, Congress cannot affirmatively vote to default on existing debt, then logically neither can it implement a combination of laws which would automatically induce the same default should Congress later do nothing.

Some commentators will inevitably argue that the debt limit is simply a prophylactic mechanism to restrain the real threat to the government's credit rating: national debt. When debt increases faster than GDP, the country becomes more highly leveraged,⁵⁵ endangering the government's *ability* to repay its debt. The loss of investor confidence causes a credit-rating downgrade, which occurred in 2011⁵⁶ and could also be unconstitutional when caused knowingly. The debt limit prevents this independent constitutional violation, the argument goes, and therefore must be permissible. This camp is only half right, however. It is true that out-of-control debt may be unconstitutional for the same reasons I advocate above—the holding of *Perry* could just as easily apply to a bondholder wiped out by inflation as to one harmed by revaluation under the gold standard. Still this argument's shortcoming lies in its remedy, as a constitutional violation cannot simply be cured by another one. If deficit spending is the problem, then the solution is a *deficit* ceiling not a debt ceiling. Deficit hawks could achieve the exact same objective they purportedly seek with the debt limit but without hamstringing the Treasury from making payments already authorized.

In the last three years, Congress has twice acted in the nick of time to prevent lasting damage, but the public debt has been established as a tool for partisan brinksmanship. This tool risks needless⁵⁷ pain for our country,⁵⁸ as the pain is entirely self-inflicted. Senator Chuck Grassley once asserted that in order “to preserve the full faith and credit of the United States of America,” the debt limit must be increased when we get too close.⁵⁹ I believe we must take Grassley's proposal a step further. To preserve full faith and credit, we must inextricably tie the debt ceiling to Congress's appropriations—rising automatically by the amount of projected budget deficit—or we must abolish it entirely.⁶⁰

⁵³ Letter to Senator Reid, *supra* note 46; *The Debt Ceiling and Default*, ECONOMIST (Jan. 13, 2011, 5:48PM), http://www.economist.com/blogs/freeexchange/2011/01/americas_debt.

⁵⁴ See *Perry v. United States*, 294 U.S. 330, 354 (1935).

⁵⁵ See *Debt/Equity Ratio*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/debtequityratio.asp> (last visited Mar. 2, 2014).

⁵⁶ John Detrixhe, *U.S. Loses AAA Credit Rating as S&P Slams Debt Levels, Political Process*, BLOOMBERG (Aug. 6, 2011), <http://www.bloomberg.com/news/2011-08-06/u-s-credit-rating-cut-by-s-p-for-first-time-on-deficit-reduction-accord.html>.

⁵⁷ Denmark is the only other country with a debt ceiling, and it is set so high that it is assumed it will never be breached. See Tom Risen, *Why Do Only US and Denmark Have a Debt Ceiling?*, U.S. NEWS & WORLD REP. (Oct. 11, 2013), <http://www.usnews.com/news/articles/2013/10/11/why-do-only-us-and-denmark-have-a-debt-ceiling>.

⁵⁸ Among the consequences cited by Secretary Geithner, we would suffer economic catastrophe possibly exceeding the damage of the financial crisis of 2008, a substantial and long-term tax on all Americans because all borrowing rates are benchmarked against treasuries, permanently higher borrowing costs, and inflation due to investors fleeing the dollar. Letter to Senator Reid, *supra* note 46.

⁵⁹ Letter to Senator Johnson, *supra* note 48.

⁶⁰ Lawmakers from both parties have suggested the debt limit is unconstitutional. Compare Nathan W. Tucker, *Grassley: Debt Ceiling Unconstitutional*, IOWA REPUBLICAN (July 10, 2011), <http://theiowarepublican.com/2011/grassley-debt-ceiling-unconstitutional/> (Senator Grassley), with Ryan Grim & Samuel Haass, *14th Amendment: Democratic Senators See Debt Ceiling as Unconstitutional*, HUFFINGTON POST

III. ALTERNATIVES

If Congress did nothing, the Treasury would have been faced with an impossible choice: it could take unilateral action either to pay for the government's expenses, or to slash spending, prioritizing interest payments on national debt to avoid defaulting on existing debt. As this Part explains, the former would be practically impossible, even if constitutionally plausible, while the latter is constitutionally dubious for a number of reasons.

A. UNILATERAL EXECUTIVE ACTION

As the Treasury dipped into the last of its funds, commentators began contemplating the ways the President could circumvent the debt ceiling to assuage investors. One professor conceived the idea of printing trillion-dollar coins to fund the shortfall,⁶¹ but the suggestion the President should simply disregard the debt ceiling altogether captured the media's attention. Dubbed the "nuclear option,"⁶² this proposal was advanced by people who also assert that the debt ceiling is unconstitutional under the Fourteenth Amendment.⁶³ Unsurprisingly, the proposal's reception varied wildly, from a ringing endorsement by former President Clinton⁶⁴ and former Speaker Pelosi⁶⁵ to threats of impeachment by angry House Republicans.⁶⁶

The reply to those calling for impeachment is that even the Founders acknowledged that the Constitution was incapable of addressing all exigencies, and in the *Federalist Papers*, Alexander Hamilton suggested a need for extra-constitutional power when circumstances render it necessary. He explained:

Nothing . . . can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There

(June 28, 2011, 9:21 PM), http://www.huffingtonpost.com/2011/06/28/14th-amendment-debt-ceiling-unconstitutional-democrats_n_886442.html (Senators Coons and Murray).

⁶¹ Professor Jack Balkin of Yale Law School identified an interesting loophole. Although statute limits the amount of paper currency in circulation at any one time, the law regulating coinage is silent on the issue. Therefore, Balkin proposed issuing two \$1 trillion coins, depositing them with the Federal Reserve, and writing checks on the proceeds. Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN (July 28, 2011), http://articles.cnn.com/2011-07-28/opinion/balkin.obama.options_1_debt-ceiling-congress-coins?_s=PM:OPINION.

⁶² See, e.g., Aaron Blake, *Obama Won't Find Safe Harbor in 14th Amendment*, WASH. POST (July 29, 2011, 12:44PM), http://www.washingtonpost.com/blogs/the-fix/post/why-the-14th-amendment-is-not-a-good-option-for-obama/2011/07/29/gIQAYnPOhI_blog.html.

⁶³ See Stephen Moore, *The Debt Ceiling and the Constitution*, WALL ST. J. (July 7, 2011, 12:54 PM), <http://online.wsj.com/article/SB10001424052702303365804576431891958150996.html> (describing proponents of the nuclear option as largely Democrats).

⁶⁴ Eyder Peralta, *Bill Clinton Says He'd Raise the Debt Ceiling Using 14th Amendment*, NPR (July 19, 2011), <http://www.npr.org/blogs/thetwo-way/2011/07/20/138511612/bill-clinton-says-hed-raise-the-debt-ceiling-using-14th-amendment>.

⁶⁵ Jennifer Bendery, *Pelosi 'Clearly' Backs 14th Amendment Option in Debt Standoff*, CONGRESSMAN REPORTS, HUFFINGTON POST (July 30, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/07/30/congressman-pelosi-clearly-backs-14th-amendment-in-debt-standoff_n_914137.html.

⁶⁶ Amanda Terkel, *Rep. Tim Scott Floats Impeachment if Obama Invokes 14th Amendment on Debt Limit*, HUFFINGTON POST (July 6, 2011, 5:12 PM), http://www.huffingtonpost.com/2011/07/06/tim-scott-impeachment-obama-14-amendment-debt_n_891521.html.

ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.⁶⁷

In a rare example of agreement with Hamilton, former Anti-Federalist Thomas Jefferson explained that “[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation” than “strict observance of the written laws.”⁶⁸

If the President agrees that the debt ceiling is unconstitutional, he could in theory order the Treasury to issue additional bonds in order to preserve the full faith and credit of the United States and avert a national emergency. The issue has never truly presented itself because Obama refused to brandish the Fourteenth Amendment at the negotiating table.⁶⁹ Perhaps this was wise, as his legal position would presumably be weakened because he personally signed the law setting the current debt limit. However, if the next President does brandish the Amendment, it is unclear who would stop him. Congress could challenge him through the courts, but an individual congressperson is unlikely to have standing to sue him, and any proposal to act collectively would probably not get past a vote for cloture in the Senate. Even if Congress were able to bring suit against the President, what would the recourse be? Would the Supreme Court invalidate the additional Treasury bonds issued pursuant to the President’s act? Would it subvert the Full Faith and Credit Clause to preserve the separation of powers by canceling sovereign debt where Congress cannot? The constitutional crisis could be ugly, which gives the Supreme Court all the more reason to avoid hearing the matter at all.

Still, although the Constitution may not preclude unilateral executive action, the markets may. Every bond the Treasury issues needs a buyer, and buyers might be hard to come by. After all, who would purchase a treasury security issued *without* the explicit promise of repayment by Congress? Investors would demand high interest rates due to the risk of default, or at least of prolonged constitutional litigation in order to secure repayment, making purely executive borrowing prohibitively expensive.

B. PRIORITIZING EXISTING BONDS

Throughout the debate in 2013, some Republicans insisted that characterizing the Treasury’s shortfall as a default was disingenuous.⁷⁰ Incoming revenues were still more than sufficient to service the interest payments on existing debt, and therefore the government could avoid defaulting on its debt obligations by prioritizing interest payments on existing bonds above all other expenditures. No other debt needed to be issued; it was merely a second chance to revise spending downward.

⁶⁷ THE FEDERALIST NO. 34 (Alexander Hamilton), available at <http://www.constitution.org/fed/federa34.htm>; see also Eric Posner, *Emergency Powers Let the President Borrow Beyond the Debt Limit*, N.Y. TIMES (Oct. 2, 2013), <http://www.nytimes.com/roomfordebate/2013/10/02/can-obama-ignore-the-debt-ceiling/emergency-powers-let-the-president-borrow-beyond-the-debt-limit>.

⁶⁸ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), available at <http://teachingamericanhistory.org/library/document/letter-to-john-b-colvin/>. This quote accompanied Jefferson’s assertion that the President could proceed to acquire “the Floridas for a reasonable sum” even though the purchase had not been appropriated by law because of the immense “public advantage.” *Id.*

⁶⁹ Jackie Calmes, *Obama Will Not Unilaterally Raise Debt Limit*, N.Y. TIMES (Oct. 3, 2013, 2:50PM), <http://www.nytimes.com/news/fiscal-crisis/2013/10/03/obama-will-not-unilaterally-raise-debt-limit/>.

⁷⁰ See Ailsa Chang, *Some Republicans Say Debt Limit Fuss is a Lot of Hype*, NPR (Oct. 10, 2013, 4:44AM), <http://www.npr.org/2013/10/10/231199878/gop-group-warns-debt-limit-fuss-is-a-lot-of-hype>.

Some commentators pointed out that

some statutes . . . suggest that non-interest obligations are not sacrosanct. Several laws explicitly consider the possibility of late payment; the Prompt Payment Act dictates the interest penalties the federal government must pay for late payment to commercial vendors while the Internal Revenue Code does the same for late tax refunds.⁷¹

Congressional Republicans bought hard into this idea. Proposed legislation like the Full Faith and Credit Act sought to codify the Treasury's obligation to prioritize bond interest.⁷² On the surface the proposition actually sounds reasonable, but in fact there are some fatal weaknesses.

First, it artificially attempts to distinguish between the sanctity of securitized debt obligations and other financial obligations. Upon passage of the 2010 budget, construction companies were contracted to build highways. Boeing was hired to build fighter jets. Doctors performed operations on Medicare recipients. Service men and women reenlisted for return tours in Iraq and Afghanistan. And college students accepted the terms of their federal student loans. Just because these obligations are not formally securitized for trading in the debt markets doesn't make them unimportant.

Imagine a consumer signs a contract for phone service. The phone company delivers the service but, at the end of the month, money is tight and the consumer can't pay his bill because he "prioritized" payments to his mortgage company. He can't escape the negative credit consequences of failing to pay a debt owed simply because he paid a more important debt instead, and neither can the United States. Failure to make any payments—whether interest payments to a bondholder or pension payments to a retired federal employee—would damage the government's credit. Indeed, in states like Illinois, "gaping credit-default-swap spreads suggest its inability to pay non-interest bills factors into the market's assessment of its ability to service bond debt."⁷³ The Prompt Payment Act establishes the penalties the government must pay in the event of *late* payment to a vendor.⁷⁴ No law anticipates *nonpayment*, however, because no law can. The *Perry* court explained that "[w]hen the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments."⁷⁵ The only difference is that the United States cannot be sued without its consent.⁷⁶ Likewise, in *The Sinking Fund Cases*, the Court stated that "[t]he United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been . . . a citizen."⁷⁷

Although the *Perry* court dealt with bonds specifically, it expressed a belief that the relevant language in the Fourteenth Amendment "indicates a broader connotation," including "embracing whatever concerns the integrity of the public obligations."⁷⁸ According to a major rating agency,

⁷¹ *The Debt Ceiling and Default*, *supra* note 53.

⁷² Joe Weisenthal, *Could This Law Prevent a US Debt Ceiling Catastrophe?*, BUS. INSIDER (Apr. 22, 2011, 4:56AM), http://articles.businessinsider.com/2011-04-22/news/30087680_1_debt-limit-section-obligations.

⁷³ *The Debt Ceiling and Default*, *supra* note 53.

⁷⁴ 31 U.S.C. § 3902 (2012).

⁷⁵ *Perry v. United States*, 294 U.S. 330, 352 (1935).

⁷⁶ *Id.* (citing *United States v. Bank of the Metropolis*, 40 U.S. (15 Pet.) 377, 392 (1841)).

⁷⁷ 99 U.S. 700, 719 (1878).

⁷⁸ *Perry*, 294 U.S. at 354.

failure to pay nondebt obligations “would signal severe financial distress and potentially imminent debt default.”⁷⁹ There is thus no reason to believe that Congress’s obligation to meet the terms of a procurement contract is substantially disparate from its obligation to make good on a loan under the Fourteenth Amendment.

Second, and just as important to the constitutionality of the debt ceiling, is *with whom* the responsibility would lie to cut spending in the event of a debt-ceiling breach. Though the latest continuing resolution might have included some gratuitous expenses that could be easily cut, mere belt-tightening would not have kept the United States below its debt limit in a budget that required the Treasury to borrow 40 cents of every dollar it spent.⁸⁰ The Congressional Research Service estimated that if the debt ceiling were reached, the Treasury would have to slash 70% of all domestic, mandatory spending programs or raise revenues immediately by a factor of two-thirds in order to avoid default.⁸¹ In fact, the magnitude of Congress’s deficit was so great, Secretary Geithner estimated that even if we followed Republican proposals to roll spending back to 2008 levels, we would delay the need to increase the debt limit by only two weeks.⁸² Had we reached the limit, somebody would have had to determine which outlays to “prioritize.” Other stop-gap measures such as asset sales could be employed to soften the blow, but those do not address the structural problem.

Article I, Section Nine of the Constitution says, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”⁸³ According to the Court in *Cincinnati Soap Co. v. United States*, this Section, commonly called the Appropriations Clause, “was intended as a restriction upon the disbursing authority of the Executive department.”⁸⁴ It is designed to ensure that “authority to dispose of public funds [is placed] firmly in the hands of Congress, rather than the Executive,”⁸⁵ and therefore that “[w]ithout congressional permission . . . no money may be paid by the Treasury.”⁸⁶ Perhaps most telling is Justice Kennedy’s analysis in *Office of Personnel Management v. Richmond*.⁸⁷ He wrote that a “fundamental and comprehensive purpose” of the Appropriations Clause “is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants.”⁸⁸

Congress reached its difficult judgments in April of 2011. That was its mandate to the Treasury. It offered no formal guidance thereafter, other than to prioritize interest payments above all others, yet Senator DeMint and his colleagues expected the Treasury to manage the

⁷⁹ Letter from Timothy F. Geithner, Secretary of the Treasury, to Senator Jim DeMint (June 28, 2011), *available at* <http://www.treasury.gov/initiatives/Documents/DLDeMint062811.pdf> (quoting unnamed report).

⁸⁰ Letter to Senator Johnson, *supra* note 48.

⁸¹ *Id.*

⁸² Rebecca Christie & Ian Katz, *Geithner Urges Debt Limit Increase, Warns of Default Risk if No Action*, BLOOMBERG (Jan. 6, 2011), <http://www.bloomberg.com/news/2011-01-06/geithner-urges-increase-in-debt-limit-warns-of-u-s-default-consequences.html>.

⁸³ U.S. CONST. art. I, § 9, cl. 7.

⁸⁴ 301 U.S. 308, 321 (1937).

⁸⁵ *Am. Fed’n of Gov’t Emps., Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 408–09 (3d Cir. 2004).

⁸⁶ *Id.* at 409.

⁸⁷ 496 U.S. 414 (1990).

⁸⁸ *Id.* at 427–28.

nation's finances⁸⁹ with 40% less money than needed to execute Congress's orders. Which outlays would it suspend or cut? Implicit in Senator DeMint's argument is that an officer of the Executive branch would effectively need to rewrite the federal budget for that fiscal year, substituting his judgment for Congress's. This violates the constitutional principle articulated by Justice Kennedy.

If one was to read *Richmond*, and *Cincinnati Soap Co.* narrowly, one might argue that the Appropriations Clause merely prohibits spending beyond what is authorized rather than withholding duly appropriated funds. However, this in itself is constitutionally problematic. An executive official unilaterally withholding funds is directly analogous to the line-item veto. The Line Item Veto Act permitted a president to cancel in whole "any dollar amount of discretionary budget authority," among other powers.⁹⁰ Although the President has an important role in the legislative process, the Supreme Court struck down the law in *Clinton v. City of New York* because the Constitution does not permit "unilateral Presidential action that either repeals or amends parts of duly enacted statutes."⁹¹ The Court explained:

Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.⁹²

Unilateral executive action stemming from a debt-ceiling crisis would suffer the same fate.

The Appropriations Clause exists to ensure that public funds will be spent according to the difficult judgments reached by Congress, rather than the executive or anybody else. But the debt limit does not protect appropriations from a meddling executive. It protects Congress from itself. After all, in voting for an appropriations bill, Congress has already reached those difficult judgments. The separate debt limit in practice would leave the "difficult judgments" to the President. For this reason, too, the debt limit is unconstitutional.

CONCLUSION

The entire notion of a debt ceiling, authorized by Congress to constrain Congress's borrowing, is redundant and destructive. When Congress appropriates funds, it implicitly authorizes an increase in the national debt to the extent the expenditures it has authorized exceeds the revenues it expects. That it must separately vote to raise the debt ceiling after authorizing the spending inherently calls into question our government's intent to pay its financial obligations. After all, if we are to pay for the expenditures Congress has authorized, there will not be enough money to service the interest on all of our existing debt obligations and also fund all the appropriations it has authorized. The result of a shortfall would be an unprecedented credit default.

⁸⁹ See Letter from Senator Jim DeMint to Timothy F. Geithner, Secretary of the Treasury (May 23, 2011), available at <http://blogs.wsj.com/economics/2011/06/29/full-text-geithner-letter-responding-to-republicans-on-debt-limit/>.

⁹⁰ Line Item Veto Act, Pub. L. No. 104-130, sec. 2, 110 Stat. 1200, 1200 (1996), *invalidated by* *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁹¹ 524 U.S. at 439.

⁹² *Id.* at 440 (footnote omitted).

Supporters of the current system contend that a second vote simply gives Congress a second chance to revise its spending downward. And even if it fails to do so, the stagnant debt ceiling will starve the beast of government by forcing the President to reduce spending elsewhere in order to stay current with interest payments. Thus, default is unnecessary. However, this position fails to recognize several realities of our political system. First, there is no guarantee that lawmakers will be able to come to a consensus about changes to the budget, as the 112th Congress has shown. Second, if they fail to do so, the President's authority to unilaterally cut spending where Congress has already approved it is constitutionally dubious. By signing a spending package, he has agreed to disperse the funds as Congress saw fit. He cannot then turn around and only spend part of it, any more than he can execute only part of a law through a line-item veto.

Thus, when Congress votes to appropriate funds, the debt ceiling should automatically rise to meet a shortfall if one exists. If Congress does not wish to increase the debt, it must choose to either increase revenues or decrease expenditures elsewhere to offset the new appropriations. Anything else calls our willingness to pay our debts into question—against the text of the Fourteenth Amendment.