

## Note

# **THE DEBT LIMIT AND THE CONSTITUTION: HOW THE FOURTEENTH AMENDMENT FORBIDS FISCAL OBSTRUCTIONISM**

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### ABSTRACT

*The statutory debt limit restricts the funds that can be borrowed to meet the government's financial obligations. On the other hand, the Fourteenth Amendment's Public Debt Clause mandates that all the government's financial obligations be met. This Note argues that the Public Debt Clause is violated when government actions create substantial doubt about the validity of the public debt, a standard that encompasses government actions that fall short of defaulting on or directly repudiating the public debt. The Note proposes a test to determine when substantial doubt is created. This substantial doubt test analyzes the political and economic environment at the time of the government's actions and the subjective apprehension exhibited by debt holders. Applying this test, this Note concludes that Congress's actions during the 1995–96 and 2011 debt-limit debates violated the Public Debt Clause, though Congress's conduct during the debate over the debt limit in 2002 did not. And under a departmentalist understanding of executive power, a conclusion of this nature would be the basis for the president to ignore the debt limit when congressional actions create unconstitutional doubt about the validity of the public debt.*

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## INTRODUCTION

Less than a year after Standard & Poor's historic downgrade of U.S. debt, Speaker of the House John Boehner declared that Republicans would never quietly acquiesce in another increase in the statutory debt limit.<sup>1</sup> Although the statutory debt limit,<sup>2</sup> sometimes called the "debt ceiling," has been increased under every president since its codification in 1939,<sup>3</sup> there has been a noticeable shift in recent decades that has caused debt-limit legislation to meet increasingly hostile opposition.<sup>4</sup> And there are signs that the opposition—and the ensuing debate—are becoming more contentious with each legislative proposal.<sup>5</sup> Yet one thing is clear: authorizing such increases is a fixture of American fiscal policy. Though the political landscape surrounding government debt has never been completely tranquil, recent debates have been especially combative. This Note presents a way to distinguish between constitutionally permissible political battles and those that cross the line established by the Public Debt Clause, by asking whether government action creates substantial doubt about the government's ability or willingness to meet its financial obligations.

Since the origin of the Republic, Congress has placed limits on the federal government's borrowing authority.<sup>6</sup> Before World War I, Congress gave the executive borrowing authority only for specific

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1. See Jackie Calmes, *As a Debt Battle Looms, Budget Veterans See No Option but To Raise Taxes*, N.Y. TIMES, May 19, 2012, at A12 (recounting Speaker Boehner's refusal to accept another increase in the debt ceiling without a decrease in spending).

2. See 31 U.S.C. § 3101(b) (Supp. IV 2011) (providing the statutory debt limit), *amended* by Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

3. See OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2011, at 136–39 (2012), *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/hist.pdf> (listing debt-limit legislation).

4. See Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 154–57 (2005) (discussing the vitriol of recent debates).

5. See Peter Grier, *Is Washington Careening Toward Another Debt Limit Crisis?*, CHRISTIAN SCI. MONITOR (May 16, 2012), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2012/0516/Is-Washington-careening-toward-another-debt-limit-crisis> (explaining the polarized debate on debt-limit increases).

6. See D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL 31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 6 (2012) ("Congress has always placed restrictions on federal debt."); *cf.* Krishnakumar, *supra* note 4, at 139–40 ("[W]hile Congress initially maintained significant control over the conditions under which national debt could be incurred, over time it increasingly has delegated even this authority to the Treasury Secretary.").

actions through targeted legislation.<sup>7</sup> The modern aggregated limit—which allows the Department of the Treasury (the Treasury) to incur debt on whatever terms necessary—traces back to 1939.<sup>8</sup> The current statute creates an overall ceiling on the aggregate amount of government indebtedness.<sup>9</sup>

The debt limit has always factored prominently in American fiscal policy, often as a source of controversy. From its very inception the debt limit required an increase during each year that the United States was involved in World War II.<sup>10</sup> And though “[c]ongressional-executive interactions with respect to the debt limit remained, for the most part, harmonious”<sup>11</sup> in the 1950s, even Republican members of Congress were not sanguine about the prospect of increasing the debt limit as often as President Eisenhower desired.<sup>12</sup> The administrations of Presidents Kennedy and Johnson faced strident opposition to debt-limit increases during what had been, in comparison, fairly routine votes under Eisenhower.<sup>13</sup> This conflict was partly a function of the increasing frequency of debt-limit increases<sup>14</sup> and partly a result of

7. *Id.* at 5; *see also, e.g.*, Act of June 28, 1902, ch. 1302, 32 Stat. 481 (repealed) (authorizing the incurrence of debt for construction of the Panama Canal). The first major statutory limit on debt was codified in the Second Liberty Bond Act of 1917, ch. 56, 40 Stat. 288 (codified as amended at 31 U.S.C. § 3101 (Supp. IV 2011)), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240, which placed different restrictions on different types of debt, *id.* §§ 1, 5, 40 Stat. at 288, 290–91.

8. *See* H.J. Cooke & M. Katzen, *The Public Debt Limit*, 9 J. FIN. 298, 300 (1954) (“[T]he . . . \$45 billion combined limit automatically became the first over-all limitation on the size of the public debt with a general application to all principal types of securities; only a relatively small amount of minor issues were excluded.”).

9. *See* 31 U.S.C. § 3101(b) (Supp. IV 2011), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (“The face amount of obligations issued under this chapter and the 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 \$14,294,000,000,000 outstanding at one time . . .”).

10. *See* Public Debt Act of 1944, ch. 240, 58 Stat. 272; Public Debt Act of 1943, ch. 52, 57 Stat. 63; Public Debt Act of 1942, ch. 205, 56 Stat. 189; Public Debt Act of 1941, ch. 7, 55 Stat. 7 (codified as amended at 31 U.S.C. § 3101 (Supp. IV 2011)), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240; *supra* note 3 and accompanying text.

11. Krishnakumar, *supra* note 4, at 150.

12. *See* Linda K. Kowalcky & Lance T. LeLoup, *Congress and the Politics of Statutory Debt Limitation*, 53 PUB. ADMIN. REV. 14, 16–17 (1993) (outlining mounting Republican disapproval over the course of several debt-limit votes).

13. *See* Krishnakumar, *supra* note 4, at 152 (noting that both Democrats and Republicans “began using votes on debt limit increase requests as occasions to attack the fiscal policy of the Kennedy and Johnson administrations”).

14. *See* AUSTIN & LEVIT, *supra* note 6, at 8 (“After 1954, the debt limit was reduced twice and increased seven times, until March 1962 . . . Since March 1962, Congress has enacted 76 separate measures that have altered the limit on federal debt.”). One reason debt-limit

disagreement over the ideological presuppositions of Keynesian economic theory, which heralded budget deficits as effective economic stimuli.<sup>15</sup>

In the 1970s, the debt limit began to be used as more than a mere ceiling on governmental borrowing authority. Throughout the Ford and Carter administrations, the trend of “us[ing] . . . the debt ceiling vote as a vehicle for other legislative matters” developed.<sup>16</sup> In particular, members of the minority party increasingly amended debt-limit legislation—often with entirely nongermane proposals—to ensure that they received something from their acquiescence.<sup>17</sup> This trend continued into the Reagan administration in the 1980s,<sup>18</sup> during which the executive-congressional relationship soured even further.<sup>19</sup> And after Reagan-era budget reforms turned out to be ineffective, spending under the first President Bush—necessitated by, among other things, the Gulf War and the savings-and-loan bailout—required more frequent increases.<sup>20</sup>

Comparatively few debt-limit increases were necessary during the next few decades,<sup>21</sup> though some of the increases that were required triggered intense debate. After four consecutive years of budget surpluses in his second term, President Clinton left office “grandly proclaim[ing] in 1999 that the entire \$5.6 trillion national debt could be paid off by 2015.”<sup>22</sup> Unfortunately, the external shocks during President George W. Bush’s administration<sup>23</sup> required that the

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increases have become more frequent is that the debt limit is not tied to inflation. Therefore, even if no deficits grew the debt for decades, the nominal dollar-denominated debt limit would still need to increase to keep pace with inflation. Ezra Klein, *Suspending the Debt Ceiling Is a Great Idea. Let's Do It Forever!*, WASH. POST WONKBLOG (Jan. 22, 2013, 1:52 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/22/suspending-the-debt-ceiling-is-a-great-idea-lets-do-it-forever/>.

15. See Kowalcky & LeLoup, *supra* note 12, at 17–18 (laying out the contours of Keynesian theory and its impact on debt-limit debates).

16. *Id.* at 18.

17. See *id.* at 19 (“Proposed amendments were not new to debt limit legislation; the difference was in their germaneness to the issue.”).

18. *Id.* at 18.

19. See Krishnakumar, *supra* note 4, at 154 (“The [1980s] also wrought noticeable shifts in Congress’s use of the debt limit statute.”).

20. ANDREW L. YARROW, FORGIVE US OUR DEBTS: THE INTERGENERATIONAL DANGERS OF FISCAL IRRESPONSIBILITY 44 (2008).

21. See *supra* note 3.

22. YARROW, *supra* note 20, at 46.

23. See *id.* at 47 (“[T]he dot.com boom turned into a stock-market collapse; the United States was attacked by terrorists, leading to wars in Afghanistan and Iraq; and a mild recession depressed incomes and federal revenues.”).

debt limit be increased three times in slightly more than two years.<sup>24</sup> Some of these debates at the outset of President Bush’s first term were acrimonious;<sup>25</sup> the increases that were passed during his second term “took a less dramatic path.”<sup>26</sup> In stark contrast, the increases under President Obama took the opposite route—uncontroversial at first and then involving fierce political struggles as his term wore on.<sup>27</sup>

This Note demonstrates the relevance of Section 4 of the Fourteenth Amendment (the Public Debt Clause)<sup>28</sup> to congressional conduct concerning the statutory debt limit. It argues that Congress has acted unconstitutionally during debates over raising the debt limit by causing the validity of the public debt to be questioned in violation of the Public Debt Clause. Two notable commentators who comprehensively examined the scope of the Public Debt Clause did not relate its broad commands to congressional inaction in the face of an unyielding debt limit.<sup>29</sup> Nor has the recent literature created a systematic method to determine when the Public Debt Clause is violated.<sup>30</sup> Filling that void, this Note develops, elaborates, and applies a test to decipher the boundaries of the Public Debt Clause—and concludes that Congress has violated the Public Debt Clause on at least two separate occasions.<sup>31</sup>

This Note proceeds in four parts. Part I examines the drafting history of the Public Debt Clause. Part II then analyzes its meaning, concluding that actions short of direct repudiation or actual default—

24. Act of Nov. 19, 2004, Pub. L. No. 108-415, 118 Stat. 2337; Act of May 27, 2003, Pub. L. No. 108-24, 117 Stat. 710; Act of June 28, 2002, Pub. L. No. 107-199, 116 Stat. 734 (codified as amended at 31 U.S.C. § 3101 (Supp. IV 2011)), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

25. See AUSTIN & LEVIT, *supra* note 6, at 14–16 (outlining the difficulty in passing debt-limit legislation between 2002 and 2006).

26. *Id.* at 16.

27. See *infra* Part IV.B.

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

29. See generally Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561 (1997) (discussing use of the Public Debt Clause to enforce a balanced budget); P.J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L.Q. 1 (1933) (arguing that the Public Debt Clause should forbid discarding the gold standard).

30. Cf. Neil H. Buchanan & Michael C. Dorf, *How To Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the 2011 Debt Ceiling Standoff*, 113 COLUM. L. REV. 1175, 1180–81, 1243 (2012) (assuming that the “realistic options were all unconstitutional,” and then arguing that the “least unconstitutional” option was for the president to ignore the debt limit).

31. See *infra* Parts III–IV.

actions that create *substantial doubt*—may constitute an unconstitutional questioning of the debt. Next, Part III proposes a legal standard to govern the Public Debt Clause, the *substantial doubt test*, which focuses on (1) the political and economic context in which certain congressional conduct occurs, and (2) the subjective debt-holder apprehension caused by the government's actions. Part IV then applies the test to several recent debt-limit debates, finding congressional actions during the 1995–96 and 2011 debates to be unconstitutional.

Assuming a departmentalist account of executive power, when the Public Debt Clause is violated by congressional actions that place the debt's validity in substantial doubt, the president can refuse to enforce—that is, refuse “to carry into effect”<sup>32</sup>—the debt limit and order the Treasury Secretary to continue borrowing funds to meet the government's obligations. This authority is not an imperial power, but a solemn duty—a requirement that the president refuse to allow Congress to violate the Constitution.<sup>33</sup> In the end, whether the departmentalist description of executive power is correct or not, there can be little doubt that at least some congressional actions have violated the Public Debt Clause.<sup>34</sup> And this should be troubling to all.

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32. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1284–85 (1996) (arguing that the executive is the sole branch able “to carry into effect federal statutes”).

33. The debate over executive disregard is beyond the scope of this Note, but the argument here is that if the president does have the authority to refuse to enforce unconstitutional laws, then the president could exercise this authority to ignore the debt limit when the limit is applied unconstitutionally. Compare, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 909–11, 913–14 (1990) (arguing that the executive branch can—and should—have its own constitutional interpretation), and Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008) (making textual, structural, and historical arguments for the president's power to disregard unconstitutional laws), with Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 381 (1986) (“In our constitutional system of government, such a refusal by the Executive to ‘take care that the Laws be faithfully executed’ cannot and must not be tolerated.” (quoting U.S. CONST. art. II, § 3)), and Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 997–98 (1994) (setting forth strict standards for determining when, if ever, a president can refuse to enforce a law).

34. See *infra* Part IV.

## I. THE DRAFTING AND LEGISLATIVE HISTORY OF THE PUBLIC DEBT CLAUSE

The Fourteenth Amendment has a long, complex, and controversial history.<sup>35</sup> It is clear, however, that a central goal of the amendment was to ensure that if and when Southerners were readmitted to the Union and to elected office, they could not undo the results of the Civil War.<sup>36</sup> This protection was necessary because as a consequence of emancipation and the passage of the Thirteenth Amendment, the South and its interests would receive increased representation in Congress, a fact that did not sit well with many loyal Unionists.<sup>37</sup>

Section 4 of the Fourteenth Amendment, the Public Debt Clause, proclaims that “[t]he validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”<sup>38</sup> In the drafting process, the Public Debt Clause underwent a noteworthy evolution that has been largely unexamined in the secondary literature.<sup>39</sup> Most of the floor debate about the proposed amendment focused, as one would expect, on more pressing matters, such as the contours of equal protection and the nature of the citizenship guarantee.<sup>40</sup> In fact, early versions of the Fourteenth Amendment did not include a public debt clause at all,<sup>41</sup> and little was said about the language in Congress when a debt clause was introduced.<sup>42</sup> The meager discussions that did take place,

35. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 1–12 (1988).

36. Charles E. Chadsey, *The Fourteenth Amendment*, 1 U. COLO. STUD. 197, 198 (1903) (“As the Constitution then stood, there would be nothing to prevent these states [in the South] from legally reversing all their actions . . . . Therefore good politics demanded that the Constitution be amended so as to prevent the most serious of the dangers which they believed threatened them.”).

37. See WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865–1877*, at 53–54 (1907) (“That the result of the war should be an accession of influence in Congress to the South, was a proposition which few northerners could contemplate with entire equanimity.”).

38. To simplify matters, this Note speaks of Section 4 *simpliciter* referring only to the first sentence—the Public Debt Clause.

39. Only three legal scholars discuss the Public Debt Clause in any appreciable depth. See *supra* notes 29–30 and accompanying text.

40. Eder, *supra* note 29, at 4.

41. NELSON, *supra* note 35, at 49.

42. See Abramowicz, *supra* note 29, at 582 (“The Public Debt Clause emerged not from a congressional debate about the dynamics of the Fiscal Constitution, but from a Thirty-Ninth Congress focused on reconstructing a war-ravaged nation. It is not surprising then that no

however, are best understood in the context of the Public Debt Clause's evolution.<sup>43</sup> Because the evolution of the Public Debt Clause is key to understanding its meaning, this Part explores the drafting history before turning in Part II to analyze the final text.<sup>44</sup>

The Joint Committee on Reconstruction was tasked with determining the conditions under which the rebel states could be readmitted to the Union and whether current representatives from these states would be recognized as full members of Congress.<sup>45</sup> Importantly, it also took responsibility for drafting the Fourteenth Amendment.<sup>46</sup> On April 30, 1866, the proposal adopted by the Joint Committee was reported to the full House and Senate.<sup>47</sup> In the fourth section, it read:

Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.<sup>48</sup>

After the House passed this version of Section 4 on May 10, the Senate began debate.<sup>49</sup>

Then, on May 23, Republican Senator Benjamin Wade offered a revision to this section, which 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 the law, shall be inviolable. But debts or obligations which have been or may hereafter be incurred in aid of insurrection or of war against the United States, and claims of

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member of the House or Senate commented for the record on the Clause's consequences for posterity." (footnotes omitted).

43. *See id.* (examining the legislative history).

44. This is not, of course, to say that the debates in Congress are more important to the meaning of the Public Debt Clause than its text. This Note treats the drafting history first merely because it is logically and temporally prior to the final enactment and itself informs the analysis of the text.

45. *See* DUNNING, *supra* note 37, at 51–53.

46. Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 934 (1984).

47. JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 115 (1956).

48. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Sen. John Bingham).

49. JAMES, *supra* note 47, at 129–31.



compensation for loss of involuntary service or labor, shall not be assumed or paid by any State nor by the United States.<sup>50</sup>

Though this revision took the further and substantial step of protecting the Union debt as well as repudiating the Confederate debt, it was uncontroversial.<sup>51</sup> Although it was ultimately withdrawn before it came to a vote,<sup>52</sup> the Wade amendment is significant for a number of reasons.<sup>53</sup> First, it made the initial suggestion that the debt of the United States should be protected in the Constitution.<sup>54</sup> Second, its language is so similar to the final version that it sheds light on the latter's meaning.<sup>55</sup> Third, it created the most discussion about the need for a provision protecting the national debt.<sup>56</sup> And finally, given Senator Wade's importance in the 39th Congress, his views represented what many congressional Republicans likely believed.<sup>57</sup>

When he proposed his amendment to the Public Debt Clause, Senator Wade spoke at length about the necessity of protecting the Union debt.<sup>58</sup> His proposal went, he argued, "to another branch of this business almost as essential" as repudiating the Confederate debt.<sup>59</sup> His revision would "put[] the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it."<sup>60</sup> Significantly, he thought it would "be of incalculable pecuniary benefit to the United

50. CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Benjamin Wade).

51. See Eder, *supra* note 29, at 5–6 (discussing widespread agreement on these principles).

52. See *infra* notes 72–73 and accompanying text.

53. See generally Jack M. Balkin, *More on the Original Meaning of Section Four of the Fourteenth Amendment*, BALKINIZATION (July 2, 2011, 9:55 AM), <http://balkin.blogspot.com/2011/07/more-on-original-meaning-of-section.html> (discussing the importance of Senator Wade).

54. See CONG. GLOBE, 39th Cong., 1st Sess. 2768–70 (1866) (statement of Sen. Benjamin Wade) (emphasizing the need for constitutional protection of the national debt).

55. See *id.* at 2768, 3040 (statements of Sen. Benjamin Wade and Sen. Daniel Clark) (listing both versions of the Public Debt Clause).

56. See *id.* at 2768–70 (statement of Sen. Benjamin Wade).

57. See Balkin, *supra* note 53 ("Ben Wade was not just any senator. He was a key Republican leader during this period—the leader of the Radical Republicans, in fact—and was soon to be elected President pro tempore of the Senate. . . . Thus, when Wade spoke, he was speaking as the leader of the Radical faction, and not simply as some nondescript backbencher.").

58. CONG. GLOBE, 39th Cong., 1st Sess. 2768–70 (1866) (statement of Sen. Benjamin Wade).

59. *Id.* at 2769 (statement of Sen. Benjamin Wade).

60. *Id.*

States.”<sup>61</sup> For Senator Wade, the reason it would benefit the United States was a simple matter of economics:

I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress.<sup>62</sup>

Necessity demanded that the debt be protected by the Constitution because, as Senator Wade noted, when the Southerners returned to Congress, it would be hard to “guaranty that the debts of the Government will be paid, or that your soldiers and the widows of your soldiers will not lose their pensions.”<sup>63</sup> Unfortunately, there is no recorded explanation for why Senator Wade’s language was altered in the next, and penultimate, draft.<sup>64</sup>

Nonetheless, Senator Wade’s comments illustrate the very vivid fear among congressional Republicans that Southern Democrats would return to Congress and repudiate the Union debt.<sup>65</sup> Indeed, there had been cries in the South to do just that.<sup>66</sup> For instance, on September 22, 1865—less than a year before ratification of the Fourteenth Amendment—the *Liberator* printed a speech by Senator Charles Sumner recounting the ominous words of an unnamed Virginian Democratic congressional candidate: “I am opposed to the Southern States being taxed for the redemption of this [Union] debt, either directly or indirectly.”<sup>67</sup> Not only was the quoted candidate ideologically opposed to the idea, but he also vowed to act on his opposition: “[I]f elected to Congress, I will oppose all such measures, and I will vote to repeal all laws that have heretofore been passed for that purpose; and, in doing so, I do not consider that I violate any obligation to which the South was a party.”<sup>68</sup> The candidate concluded

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61. *Id.*

62. *Id.*

63. *Id.*

64. See Eder, *supra* note 29, at 5–6 (indicating the limited discussion about the replacement of the Wade amendment).

65. Senator Charles Sumner, Speech at the Republican State Convention, *reprinted in The National Security and the National Faith: Guarantees Needed for the National Freedman and the National Creditor*, *LIBERATOR*, Sep. 22, 1865, at 35.

66. *Id.*

67. *Id.* (quoting the unnamed candidate).

68. *Id.* (emphasis omitted) (quoting the unnamed candidate).

that as far as he was concerned, the South “never plighted [its] faith for the redemption of the war debt.”<sup>69</sup> It is unsurprising, then, that Senate Republicans never questioned Senator Wade’s proposal.<sup>70</sup> Protecting the Union debt was the logical counterpart to the unquestioned repudiation of the Confederate debt.<sup>71</sup>

Senator Wade withdrew his proposed revision<sup>72</sup> after an alternative version was agreed to in the Senate Republican Caucus and introduced on May 29.<sup>73</sup> The new version read as follows:<sup>74</sup>

[Section 4:] The obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate. [Section 5:] Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection [or] rebellion against the United States, or any claim for compensation for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be forever held illegal and void.<sup>75</sup>

There was little discussion about this replacement to the Wade amendment because it was largely accomplished during a closed-door Republican Senate caucus.<sup>76</sup> Some Democrats, however, did question this section. “Who,” asked Senator Thomas Hendricks, “has asked us to change the Constitution for the benefit of the bond-holders?”<sup>77</sup> Rather than secure the national debt, Senator Hendricks feared that “[a] provision like this . . . would excite distrust, and cast a shade on

69. *Id.* (emphasis omitted) (quoting the unnamed candidate).

70. Eder, *supra* note 29, at 5–6.

71. Indeed, even President Andrew Johnson urged the Southern states to repudiate their own war debt. *See, e.g.,* Andrew Johnson, *The Rebel War Debts: Important Dispatch from President Johnson*, N.Y. TIMES, Oct. 22, 1865, at 1 (reporting President Johnson’s demand to North Carolina’s provisional governor that “[e]very dollar of the State debt created to aid the rebellion against the United States should be repudiated, finally and forever”).

72. CONG. GLOBE, 39th Cong., 1st Sess. 2869 (1866) (statement of Sen. Benjamin Wade).

73. JAMES, *supra* note 47, at 140–42.

74. The original proposal was to split the section and call the first sentence Section 4 and the second sentence Section 5. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2869 (1866) (statement of Sen. Jacob Howard).

75. *See id.* at 2869, 2941 (statement of Sen. Jacob Howard). This language was reconstructed from the *Congressional Globe*’s record of revisions suggested by Senator Howard, who made a series of proposals to modify the text, such as “strike out the word ‘already,’ in line thirty-four.” Later, “any claim for compensation for” was changed to “any claim on account of.” *Id.* at 2941 (statement of Sen. Jacob Howard) (internal quotation marks omitted).

76. JAMES, *supra* note 47, at 140–41 (discussing the caucus’s work).

77. CONG. GLOBE, 39th Cong., 1st Sess. 2938, 2940 (1866) (statement of Sen. Thomas Hendricks).

public credit.”<sup>78</sup> Recall, however, that the May 29 version only guaranteed “[t]he obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto.”<sup>79</sup> This version of Section 4 was not a blanket protection of national debt but a limited protection of Civil War debt only.

On June 4, Republican Senator William Fessenden worried that “[t]here is a little obscurity, or, at any rate, the expression in section four might be construed to go further than was intended, and I have rather come to the conclusion that it was best to put sections four and five in one single section.”<sup>80</sup> But he gave no further elaboration about the defects of the fourth section as it then stood.<sup>81</sup> In fact, the final revision of the clause that came to be the Public Debt Clause *broadened* the language of the previous proposal; it did not circumscribe it.<sup>82</sup> Though originally intent on offering an amendment to cure the defects that he perceived, Senator Fessenden did not offer one,<sup>83</sup> and it is unclear what exact revision he desired. There is no surviving record of his unoffered amendment, and no further discussion on the matter ensued until the day of the final Senate vote.<sup>84</sup>

Finally, on June 8, perhaps following Senator Fessenden’s criticism of the obscurity of the two debt sections, Senator Daniel Clark offered an amendment combining Sections 4 and 5 into the final version of the current Section 4.<sup>85</sup> Significantly, however, when questioned about whether his revision “changes at all the effect of the fourth and fifth sections,”<sup>86</sup> Senator Clark stated that “[t]he result is

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78. *Id.* at 2940 (statement of Sen. Thomas Hendricks).

79. *Id.* at 2869 (statement of Sen. Jacob Howard).

80. *Id.* at 2941 (statement of Sen. William Fessenden).

81. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2941 (1866) (demonstrating that Senator Fessenden chose to withhold his amendment at that time and did not suggest any further changes to Section 4).

82. For a comparison of the final text of the Public Debt Clause and the text of the previous proposal, see *supra* notes 28, 75 and accompanying text.

83. CONG. GLOBE, 39th Cong., 1st Sess. 2941 (1866) (statement of Sen. William Fessenden).

84. *See id.* (“I will omit offering my amendment . . . until the resolution is reported to the Senate.”).

85. *Id.* at 2869 (statement of Sen. Jacob Howard); *id.* at 2941, 3040, 3042 (statement of Sen. William Fessenden).

86. *Id.* at 3040 (statement of Sen. Reverdy Johnson).

the same” as that of the May 29 Caucus proposal.<sup>87</sup> The revision was then approved without another recorded word,<sup>88</sup> and the House concurred in the Senate’s revisions to the amendment.<sup>89</sup>

Despite Senator Clark’s comments, there are significant differences between the final three versions. Senator Wade’s May 23 proposal, like the final version, protected the national debt broadly and said that it “shall be inviolable.”<sup>90</sup> The subsequent version (the May 29 Caucus proposal), guaranteed only the debt that had been “incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto,”<sup>91</sup> and it declared that only this debt “shall remain inviolate.”<sup>92</sup> The final, adopted version harkened back to Senator Wade’s proposal by protecting the national debt broadly, but instead the revised text said that the public debt “shall not be questioned.”<sup>93</sup> It is curious, then, that Senator Clark could maintain that the final version changed nothing from the penultimate version.<sup>94</sup>

Whatever may be made of Senator Clark’s comment, the final version of the Public Debt Clause had more in common with the Wade proposal than with its immediate predecessor because it encompassed the general national debt within its purview. In less than six weeks, the Public Debt Clause went from simply repudiating the debt of the Southern States to protecting the debt of the United

87. *Id.* at 2869, 3040 (statement of Sen. Daniel Clark).

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

89. *Id.* at 3148–49.

90. *See id.* at 2768 (statement of Sen. Benjamin Wade) (containing the text of the amendment, which protects “[t]he public debt of the United States”).

91. *Id.* at 2869 (statement of Sen. Jacob Howard).

92. *Id.*

93. *Id.* at 2768, 3040 (1866) (statements of Sen. Benjamin Wade and Sen. James Doolittle) (demonstrating that both versions of the amendment protected “the public debt of the United States”).

94. *Id.* at 3040 (statement of Sen. Daniel Clark). For attempts to explain these comments, see, for example, Eder, *supra* note 29, at 8, which suggests that Senator Clark’s comment was “a mere passing remark, not fully weighed, and of little consequence as a guide to interpretation.” In addition, Professor Michael Abramowicz gives three reasons to disregard Senator Clark’s comment: (1) “stylistic changes in constitutional provisions are not generally assumed to be without substantive content,” so the change likely mattered; (2) the comment “may merely indicate that the [two] versions would have the same result for the purposes of Reconstruction”; and (3) “the Senate [later] rejected a subsequent proposal to revert” back to the previous language, so it seems logical to conclude that there was something about the change that the Senate preferred. *See* Abramowicz, *supra* note 29, at 584–85.

States as a whole.<sup>95</sup> Though important and consequential, these changes were little discussed.<sup>96</sup> There was near-unanimous agreement on the original language presented to the House by the Joint Committee.<sup>97</sup>

Though the legislative history can help illuminate the scope of the Public Debt Clause, this history is only one step in determining the extent of its application. Nevertheless, the legislative history suggests that the Public Debt Clause was meant to encompass the public debt of the United States generally, not only the debt incurred in the Civil War, and was, at least in part, designed to put the public debt above the vagaries of partisan politics.

## II. THE MEANING OF THE PUBLIC DEBT CLAUSE: DETERMINING THE NATURE OF UNCONSTITUTIONAL CONDUCT

Recall that the final text of the Public Debt Clause, adopted by both chambers of Congress and ratified by the states,<sup>98</sup> reads: “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”<sup>99</sup> Though hardly any of these terms are unambiguous, a general understanding of the Framers and their audience helps inform the debate about the Public Debt Clause’s continuing relevance.<sup>100</sup> Thus, in addition to the drafting history, this Note draws on the public meaning of the clause at the time of enactment and ratification.<sup>101</sup> Together with insights from modern commentators, the original public meaning sheds new light on the continued vitality of the Public Debt Clause. In particular, the text and historic understanding suggest that actions by the government that create

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95. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (statement of Sen. John Bingham) (1866); *id.* at 3148 (statement of Sen. Thaddeus Stevens) (listing the first and last versions of the section).

96. See *supra* note 40 and accompanying text.

97. See Eder, *supra* note 29, at 4–5 (“To this principle there was no opposition.”).

98. The Fourteenth Amendment was declared to be ratified on July 21, 1868. *Id.* at 12.

99. U.S. CONST. amend. XIV, § 4.

100. See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1130–31 (2003) (advocating for the use of originalism in interpreting the Constitution).

101. This approach suggests that constitutional inquiry involves “faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law.” *Id.* at 1131.

substantial doubt about the validity of the public debt—actions short of direct repudiation or outright default—are unconstitutional.

A. *Problems with Stopping at Repudiation or Default*

The central uncertainty with the Public Debt Clause is defining the nature of conduct that constitutes an impermissible questioning of the public debt.<sup>102</sup> At least three different levels of action could be prohibited by the Public Debt Clause’s proscription of questioning: (1) repudiation, (2) default, or (3) some actions short of default. If level (1) accurately describes the Public Debt Clause’s prohibition, then the only conduct that would trigger the Public Debt Clause is an outright official declaration of repudiation. Stated another way, only repudiating the debt would violate the demand that “the public debt . . . shall not be questioned.” On the other hand, if default—level (2)—is what the Public Debt Clause prohibits, then repudiation would still be unconstitutional because it is a more drastic disregard of financial obligations than default,<sup>103</sup> but so would the step prior to repudiation—a missed government payment on its debt (that is, default). Finally, if the correct reading of the Public Debt Clause encompasses some lesser conduct—level (3)—then both repudiation and default are also prohibited, but some government action that precedes both default and repudiation would also be unconstitutional. This lower level of government action includes conduct that creates pervasive lack of confidence in the government’s ability to meet its obligations by generating widespread doubt about the validity of the public debt.

This Note argues that both default and repudiation are inappropriate stopping points and that something lesser, something within level (3), accurately describes the scope of the Public Debt Clause’s prohibition. This Part argues that reading the Public Debt Clause to prohibit actions that create *substantial doubt* about the public debt’s validity—a level higher than reasonable doubt, simple doubt, or mere decreased confidence—best serves the language, history, and purposes of the Public Debt Clause and strikes the

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102. See Abramowicz, *supra* note 29, at 589–90 (discussing the importance of this inquiry); see also U.S. CONST. amend. XIV, § 4 (“The validity of the public debt of the United States . . . shall not be questioned.”).

103. See Shelagh A. Heffernan, *Country Risk Analysis: The Demand and Supply of Sovereign Loans*, 4 J. INT’L MONEY & FIN. 389, 405–06 (1985) (recognizing that the costs of repudiation are drastic).

proper balance between debtholder protection and the necessary political latitude for congressional policymaking.<sup>104</sup> Several considerations support a reading of “questioned” that equates it with actions that induce substantial doubt.

First, the logic of the Public Debt Clause supports a broader reading than repudiation—level (1). Interpreting the Public Debt Clause to only prohibit repudiation would disregard its broad language. Repudiation cannot cause any kind of questioning. If Congress repudiates the public debt, there is no validity left to question; there is nothing to doubt, for “[r]epudiation is a sovereign government declaration that its debt is *invalid*.”<sup>105</sup> In other words, if repudiation was all that the original Congress was concerned with, then a word like “questioned,” with graded shades of meaning, was surely ill chosen. It would be a straightforward inquiry in every case to discover if the debt is valid: simply ask whether Congress had repudiated it. The Public Debt Clause could have encompassed *this* idea more simply by stating that “the public debt is now and shall forever be valid.” But the validity of the debt is not questioned when the debt is repudiated, the validity of the debt is voided.<sup>106</sup>

Moreover, in speaking about the purpose of including a debt clause at all, Senator Wade declared his conviction “that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution.”<sup>107</sup> Though speaking expressly of repudiation, the reasoning behind Senator Wade’s comment applies equally to conduct short of repudiation—one who has invested in public funds would likely be just as dismayed to find that Congress will only occasionally pay him interest on time. The “guardianship of the Constitution” enables the debt holder to feel more secure “than he would feel if [the national debt] were left at loose ends and subject to the varying majorities

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104. If an even lower level more adequately and accurately represents the Public Debt Clause, it only buttresses the central argument of this Note. This Note’s argument only depends on a rejection of either repudiation or default as a point at which to stop the analysis.

105. BENJAMIN J. COHEN & FABIO BASAGNI, *BANKS AND THE BALANCE OF PAYMENTS: PRIVATE LENDING IN THE INTERNATIONAL ADJUSTMENT PROCESS* 104 (1981) (emphasis added) (quoting Henry Simon Bloch, *Foreign Risk Judgment for Commercial Banks*, 160 *BANKERS MAG.* 90, 93 (1977)) (internal quotation mark omitted).

106. *Id.*

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



which may arise in Congress.”<sup>108</sup> The “varying majorities” in Congress held enormous sway over the validity of the public debt prior to the Civil War,<sup>109</sup> and the Public Debt Clause was meant to dramatically reduce this power.<sup>110</sup> The prohibition on questioning the validity of the debt should, then, extend to actions short of repudiation.

The case of default presents a more difficult question. For any Treasury security, “[d]efault . . . occurs when payment on that bond is missed.”<sup>111</sup> As with repudiation, the inquiry for default is a simple process: check to see whether the government has missed any payments on its debt. Although the simplicity of this inquiry weighs against equating questioning with default (as it did for equating questioning with repudiation), default might nonetheless cause the requisite questioning of future debt payments. So, although default is quite likely impermissible under the Public Debt Clause, the issue is whether any conduct short of default can cause the relevant type of questioning. Default only occurs when the government has *missed* payment on one of its legal obligations.<sup>112</sup> A debtholder might surely question the payment of the government’s subsequent legal obligations once a payment is missed. But a host of government actions short of default might cause a widespread and pervasive lack of trust in the ability (or willingness) of the government to fulfill its obligations.<sup>113</sup> There are multiple indications that the Public Debt Clause was meant to prohibit these lower-level actions as well.

## B. *Reasons for Drawing the Line at the Level of Substantial Doubt*

1. *Textual Reasons To Prefer Substantial Doubt.* At the time of the drafting and ratification of the Fourteenth Amendment, “to question” meant “to doubt; to be uncertain of; to have no confidence

108. *Id.*

109. *Cf.* Krishnakumar, *supra* note 4, at 139 (“Congress initially maintained significant control over the conditions under which national debt could be incurred . . .”).

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

111. PHILIPPE JORION, FINANCIAL RISK MANAGER HANDBOOK 452 (5th ed. 2009); *see also* Neil H. Buchanan, *Some Further Thoughts About the Debt Limit*, DORF ON LAW (July 15, 2011), <http://www.dorfonlaw.org/2011/07/some-further-thoughts-about-debt-limit.html> (“Not making legally required payments is, under both common sense and the law, defaulting.”).

112. JORION, *supra* note 111, at 452.

113. For instance, rhetoric about the refusal to raise the debt limit could very well engender fears that the government may not continue to meet its obligations. *E.g.*, Simon Johnson, *The Debt Ceiling and Playing with Fire*, N.Y. TIMES ECONOMIX BLOG (Jan. 24, 2013, 5:00 A.M.), <http://economix.blogs.nytimes.com/2013/01/24/the-debt-ceiling-and-playing-with-fire>.

in; to mention as not to be trusted.”<sup>114</sup> To question meant that one could “doubt, . . . controvert, [or] dispute”<sup>115</sup> the validity of the debt. To have a question about the debt was to quite simply have a “doubt” about it.<sup>116</sup> Moreover, something with “validity” was said to have “legal force”<sup>117</sup> or the “force to convince; certainty; value.”<sup>118</sup> By preserving the validity of the debt, the Public Debt Clause protects the debt from actions that would cause the debt to lose “value”<sup>119</sup> or would cause debt holders to lose “certainty”<sup>120</sup> in the obligations of the United States. The Public Debt Clause does not simply protect the actual debt (from, for example, default or repudiation), but, by protecting the debt’s “validity,”<sup>121</sup> it guards against certain diminutions in the public debt’s value<sup>122</sup> or reductions in the certainty of its repayment<sup>123</sup> as well. These textual indicia support the argument that, by using the word “questioned,” Congress meant to do more than just guard against default or repudiation.

2. *Historical Reasons To Prefer Substantial Doubt.* There are also historical and contextual reasons to think that the Public Debt Clause forbids not just repudiation or default, but also the kind of actions that would cause debt holders to have substantial doubt about the validity of the debt. In his 1901 *Constitutional History of the United States*,<sup>124</sup> Professor Francis Newton Thorpe notes the breadth with which the Public Debt Clause was interpreted during the ratification process:

The national debt . . . was held chiefly at the North, and its repudiation, or *diminution in value*, or *any distrust of its obligation*,

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114. SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE 587 (1827).

115. SAMUEL FALLOWS, A COMPLETE DICTIONARY OF SYNONYMS AND ANTONYMS 212 (1898).

116. See NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 348 (1831) (defining “Quest’-ion” as “act of asking, interrogatory, inquiry, dispute, doubt”).

117. *Id.* at 488.

118. JOHNSON & WALKER, *supra* note 114, at 764.

119. *Id.*

120. *Id.*

121. See U.S. CONST. amend. XIV, § 4 (“The validity of the public debt of the United States . . . shall not be questioned.”).

122. See, e.g., 3 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 297 (1901) (recounting widespread views about the sanctity of the debt).

123. JOHNSON & WALKER, *supra* note 114, at 764.

124. THORPE, *supra* note 122.

would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its *validity* was essential to our prosperity, however great the burden of payment might prove to be.<sup>125</sup>

Professor Thorpe reports that “validity”—the aspect of the debt that “shall not be questioned”—was equated with “diminution of value” or “any distrust” of the government’s obligations. This kind of diminution and distrust could occur prior to, and apart from, default or repudiation.<sup>126</sup> Indeed, Professor Thorpe expressly declares that more than mere repudiation was contemplated by the drafters of the Public Debt Clause.<sup>127</sup> Diminution and distrust would be triggered by government conduct that caused debt holders “to doubt” or “to be uncertain of” the validity of the debt.<sup>128</sup>

This sentiment was widely held at the time.<sup>129</sup> The 1866 National Union Convention in Pennsylvania adopted a resolution declaring that the convention “h[e]ld the debt of the nation to be sacred and inviolable; and . . . proclaim[ed] [its] purpose in discharging this, as in performing all other national obligations, to maintain unimpaired and unimpeached the honor and the faith of the Republic.”<sup>130</sup> It was so important to protect the debt at this time that simply proscribing default or repudiation would not go far enough. In 1933, Professor P.J. Eder argued that the Public Debt Clause was designed “to lay down a constitutional canon for all time in order to protect and maintain the national honor and to strengthen the national credit” and was “clearly proposed also to establish a perpetual dike against *momentary waves of inflation and repudiation, total or partial.*”<sup>131</sup> The

125. *Id.* at 297 (emphasis added).

126. See Krishnakumar, *supra* note 4, at 175 (“[T]he debt limit has been criticized for creating situations that threaten the credit and financial standing of the United States government. . . . The threat of default, even absent actual default, is said to cause market uncertainty regarding the United States’ ability to honor its financial obligations and accordingly to cost (or threaten to cost) the nation in elevated premiums and yield rates.”).

127. THORPE, *supra* note 122, at 297 (stating that “repudiation *or* diminution in value, or any distrust of its obligation” would be detrimental to the Union (emphasis added)).

128. See JOHNSON & WALKER, *supra* note 114, at 587 (defining “to question” as, *inter alia*, “to doubt; to be uncertain of”).

129. Eder, *supra* note 29, at 10.

130. *Id.* (quoting the Resolution of the Philadelphia Fourteenth of August Convention) (internal quotation mark omitted).

131. *Id.* at 15 (emphasis added).

Public Debt Clause, in sum, was meant to be a bulwark against the vacillation of the political branches.<sup>132</sup>

3. *Precedential Reasons To Prefer Substantial Doubt.* In its only analysis of the Public Debt Clause, the Supreme Court confirmed the breadth of the sweeping language. In *Perry v. United States*,<sup>133</sup> the Court recognized that the Public Debt Clause provides robust protection for the government's obligations, stating that "[w]hile 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."<sup>134</sup> This broader connotation was for the Court "confirmatory of a fundamental principle"<sup>135</sup> that applied to all government bonds—including those issued before the ratification of the Fourteenth Amendment itself. Strikingly, the Court hinted that the Public Debt Clause may stretch even beyond formal Treasury securities: "Nor can we perceive any reason for not considering the expression 'the *validity* of the public debt' as embracing *whatever concerns the integrity of the public obligations*."<sup>136</sup>

The Supreme Court's broad pronouncements about the "fundamental principle"<sup>137</sup> enshrined in the Public Debt Clause and its application to "whatever concerns the integrity of the public obligations"<sup>138</sup> suggest that the Public Debt Clause should be read to prohibit some conduct that falls short of outright repudiation or actual default. Indeed, it should be read to proscribe action that puts the validity of the debt into substantial doubt. Some doubt—some loss of confidence—may be impossible to eradicate. But when the government's actions create *substantial* doubt, these actions cause an unconstitutional questioning of the validity of the national debt.<sup>139</sup>

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132. See Jack M. Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, BALKINIZATION (June 30, 2011, 1:59 PM), <http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html> (discussing the purpose of the Public Debt Clause).

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

134. *Id.* at 354.

135. *Id.*

136. *Id.* (second emphasis added).

137. *Id.*

138. *Id.*

139. See Abramowicz, *supra* note 29, at 592 ("[T]he literal interpretation of the Clause is that a governmental action making uncertain whether or not a debt will be honored is unconstitutional."); Buchanan & Dorf, *supra* note 30, at 1191–93 (stressing that the Public Debt

### III. VIOLATIONS OF THE PUBLIC DEBT CLAUSE: DEVELOPING THE SUBSTANTIAL DOUBT TEST

The Public Debt Clause, then, should be interpreted broadly to protect not just debt incurred during the Civil War, but all government debt obligations. Nor should the Public Debt Clause be read to simply preserve the public debt from repudiation or default alone. Properly read, it protects all legally authorized government obligations from actions that create substantial doubt about their validity. But recognizing that the Public Debt Clause prohibits actions that create substantial doubt is of limited value without a means to assess whether substantial doubt in fact exists.

To undertake the constitutional analysis, this Part creates a test—the substantial doubt test—to measure whether government actions have created substantial doubt about the validity of the public debt. Like the “reasonable expectation of privacy” test under the Fourth Amendment<sup>140</sup> and the “evolving standards of decency” component to Eighth Amendment review,<sup>141</sup> the substantial doubt test is a means internal to the textual provision to decipher the boundaries of the constitutional command. It is not analogous to tests like strict scrutiny or rational basis review, which apply in multiple constitutional settings, but instead emphasizes the unique nature of the specific guarantee under review. The test builds on the interpretive conclusions in Part II.

#### *A. Framework for the Substantial Doubt Test*

The substantial doubt test is an attempt to implement the Public Debt Clause’s prohibition on government actions that create substantial doubt by focusing on two factors: (1) economic and political indicators of macro-level instability, and (2) subjective debtholder apprehension. The test is a tool to determine the point at which otherwise-permissible government action becomes unconstitutional. But it differs from traditional standards of review in

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Clause should be read neither too narrowly, so as to eviscerate it, nor too broadly, so as to forbid all irresponsible congressional actions).

140. See *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (“Our later cases have . . . said that a violation occurs when government officers violate a person’s ‘reasonable expectation of privacy.’” (citation omitted) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))).

141. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (“The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

a number of important respects. In particular, the Public Debt Clause does not protect a fundamental right as conceptualized by the Supreme Court<sup>142</sup> and is therefore not amenable to the kind of review characterized by, for instance, the strict scrutiny test.<sup>143</sup> Furthermore, because no individual right is implicated,<sup>144</sup> the kind of balancing that is characteristic of intermediate scrutiny,<sup>145</sup> rational basis review,<sup>146</sup> or the undue burden test<sup>147</sup> is unhelpful.

Instead, this Note emphasizes the utility of the substantial doubt test not as a judicially imposed legal test—though it may have some merit in that context as well—but as a standard by which other constitutional decisionmakers, and the president in particular, can

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142. The standard for recognizing these rights is high. *See, e.g.,* *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that “fundamental rights” are rights that are “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’” (citation omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and *Palko v. Connecticut*, 302 U.S. 319, 320, 325 (1937))); *see also* *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) (“[I]dentifying a new fundamental right . . . is often an ‘uphill battle’ as the list of fundamental rights ‘is short.’” (citation omitted) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005); and *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000))). It would be hard to argue, for instance, that having constitutional protection for your investments is “implicit in the concept of ordered liberty.” *See Glucksberg*, 521 U.S. at 721 (quoting *Palko*, 302 U.S. at 325) (internal quotation marks omitted).

143. *See Glucksberg*, 521 U.S. at 721 (declining to apply the strict scrutiny test to rights not deemed fundamental).

144. The Public Debt Clause protects the rights of a class of people—holders of U.S. debt—in ways fundamentally different from other constitutional provisions. The right is a collective right, much like the Second Amendment right was considered to be before the Supreme Court declared otherwise in *Dist. of Columbia v. Heller*, 554 U.S. 570, 579 (2008); *see also* David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 613 (2000) (“The essence of modern Second Amendment doctrine is that the Amendment prohibits only statutes which interfere with the ‘preservation or efficiency’ of the states’ militia. Some courts, in applying this doctrine, have referred to the Amendment as creating a ‘collective right’; one court has even referred to the Second Amendment right as being ‘held by the States.’” (citations omitted) (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995); and *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996))).

145. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”).

146. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

147. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of [someone exercising a constitutional right].”).

determine the constitutionality of government action.<sup>148</sup> It is therefore immaterial for the purposes of this Note that no individual would likely have standing to sue for a violation of the Public Debt Clause<sup>149</sup> and that, furthermore, no private right of action would likely be

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148. It is beyond the scope of this Note to outline the process by which the president or other executive branch officials should determine whether the substantial doubt test is satisfied in any given instance, and then, if they determine that it is, what to do about it. *See supra* notes 32–33 and accompanying text. For an excellent treatment of this kind of question, see generally Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994).

149. For standing purposes, an individual must show that she has suffered an injury that has been caused by the party whom she is suing and that a ruling in her favor would remedy the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). All three elements—*injury*, *causation*, and *remedy*—appear to be problematic for a Public Debt Clause litigant. First, she would need to prove the existence of a legally cognizable injury that is “not ‘conjectural’ or ‘hypothetical.’” *Id.* at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Here, she could find it hard to prove that the value of her investment in public funds had actually decreased in an appreciable way in the absence of a default or repudiation. Second, the causal nexus between any specifiable government action and the loss to an individual plaintiff is likely to be insubstantial at best. A dynamic and reinforcing sequence of action and inaction would likely be responsible for the creation of substantial doubt, and it would be difficult to trace the causal link. Finally, a writ of mandamus ordering the Treasury Secretary to raise the debt ceiling is likely the only remedy that could effectively alleviate the complained-of harm. The judiciary is unlikely to use this remedy, if they would have the power to do so at all. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (referring to the writ of mandamus as “a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes’” and stating that “the writ is one of ‘the most potent weapons in the judicial arsenal’” (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947); and *Will v. United States*, 389 U.S. 90, 107 (1967))).

The more pressing justiciability issue is not standing but the political question doctrine. This doctrine is an especially potent restriction on the judiciary when important separation-of-powers concerns are involved. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) (“[I]n the Guaranty Clause cases and in the other ‘political question’ cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’”). *Baker* listed several conditions under which a political question may be found: when 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; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217. The ability to raise the debt limit is entrusted to Congress by the Constitution—both in giving Congress sole legislative authority and in giving it the power of the purse, *see* U.S. CONST. art. I, § 8; the decision to raise the debt limit involves a policy choice; and a mandamus from the Court would likely indicate disrespect for the coordinate branches. These are but three examples of reasons that the Public Debt Clause probably involves a nonjusticiable political question.

implied.<sup>150</sup> Nor is it problematic that by the very nature of the prohibition the Public Debt Clause might be declared nonjusticiable, much like most claims arising under the Guaranty Clause.<sup>151</sup>

The substantial doubt test is original, but is not fashioned from whole cloth. Rather, as Part II argues, the Public Debt Clause protects debt holders from precisely the kind of government actions that create substantial doubt about the debt's validity. The implementation of the substantial doubt test thus follows directly from the interpretation of the Public Debt Clause. And the two components of the test are inextricably linked to the meaning of the textual provisions. The test simply measures whether actions of the federal government have made the validity of the debt sufficiently uncertain to debt holders. If so, these actions are unconstitutional.

As psychologists and other researchers use the term, “[d]oubt—the opposite of confidence— . . . is usually . . . understood to refer to internal feelings of high uncertainty.”<sup>152</sup> Doubt has been aptly described as a kind of “emotional incoherence” in which an emotional reaction is provoked by the lack of coherence between some proposition and the rest of one's beliefs.<sup>153</sup> Thus, one would doubt the proposition “the government is never going to miss a payment on its debt” when that proposition is inconsistent with background beliefs about the functioning of the economy, the nature of political discourse, and other similar factors. Accordingly, “[a]n increase in doubt increases consumers' perceived risk” surrounding the value of investments.<sup>154</sup> Because doubt refers to “internal feelings

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150. See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (noting that in recent decades the Court has “consistently refused to extend [liability under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971),] to any new context or new category of defendants”). Successful actions for damages for constitutional rights violations, when those causes of action have not already been established, are therefore highly unlikely. A Public Debt Clause litigant would thus have trouble receiving a financial remedy.

151. *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) (“[S]ome questions raised under the Guaranty Clause are nonjusticiable, where ‘political’ in nature and where there is a clear absence of judicially manageable standards.” (quoting *Baker*, 369 U.S. at 209)).

152. Caroline J. Wesson & Briony D. Pulford, *Verbal Expressions of Confidence and Doubt*, 105 PSYCHOL. REP. 151, 152 (2009).

153. Paul Thagard, *What Is Doubt and When Is It Reasonable?*, 30 CAN. J. PHIL. 391, 393–94 (2004) (describing doubt as “emotional incoherence” as “people encounter[ing] a proposition or set of propositions that d[oes] not fit with what they already believe[], and . . . react[ing] emotionally as well as cognitively”).

154. Andrew B. Abel, *An Exploration of the Effects of Pessimism and Doubt on Asset Returns*, 26 J. ECON. DYNAMICS & CONTROL 1075, 1082 (2002).



of high uncertainty,<sup>155</sup> it is an appropriate barometer to use. After all, the Public Debt Clause was designed to protect recipients of the government's obligations from precisely this uncertainty.<sup>156</sup> Because the Public Debt Clause prohibits conduct that falls short of repudiation or default, calculating the substantiality of the doubt caused to debt holders is the best way to determine the constitutionality of government action.

*B. Factors in the Substantial Doubt Test*

There are two critical indicia bearing on the question of substantial doubt: (1) indications of the strength of the national economy and the health of the political environment, and (2) indications of apprehension felt by debt holders. The first component is objective, focusing on data and statistics. The second is subjective, emphasizing the “internal feelings”<sup>157</sup> that debt holders experience vis-à-vis the validity of the debt. These two factors are consistent with the central purpose of the Public Debt Clause. The possibility of the debt's validity being questioned only materializes under certain economic and political circumstances.<sup>158</sup> In a period of strong economic performance, a debtor nation has little reason to default, and therefore there is little reason to think that anyone would question the validity of the debt. It is when countries face difficult economic times or unworkable political machinery that debt holders fear not receiving timely payment.

The first component of this analysis looks to the economic and political factors surrounding government action. Only when the economic or political outlook is sufficiently negative is there a plausible threat to the validity of the debt.<sup>159</sup> Economic and political research into sovereign debt explains several signals for default. Though concerning conditions for *default*, this research is useful because the substantial doubt with which the Public Debt Clause is

155. Wesson & Pulford, *supra* note 152, at 152.

156. CONG. GLOBE, 39th Cong., 1st Sess. 2768–70 (1866) (statements of Sen. Benjamin Wade).

157. Wesson & Pulford, *supra* note 152, at 152.

158. See generally Jonathan Eaton & Mark Gersovitz, *Debt with Potential Repudiation: Theoretical and Empirical Analysis*, 48 REV. ECON. STUD. 289 (1981) (emphasizing that default becomes a plausible strategy as economic indicators worsen).

159. *Id.* But see generally Michael Tomz & Mark L.J. Wright, *Do Countries Default in “Bad Times”?*, 5 J. EUR. ECON. ASS'N 352 (2007) (arguing that defaulting countries do not always have bad economic conditions).

concerned is precisely doubt *about* the possibility of government default, even though the doubt occurs before the default.<sup>160</sup> The presence of a significant number of these signals, although not determinative, certainly strengthens an argument that the validity of the debt has been placed in substantial doubt. Indeed, an analysis of the political and economic context is appropriately considered a threshold inquiry.

The analysis undertaken by credit-rating agencies sheds light on the kinds of economic and political factors that are important to this determination. Because “[s]overeign credit ratings are a condensed assessment of a government’s ability and *willingness* to repay its public debt on time,” these ratings are extremely important in analyses of sovereign-default probabilities.<sup>161</sup> The credit-rating agency Standard & Poor’s relies on five different factors when rating sovereign debt: (1) “[i]nstitutional effectiveness and political risks,” (2) “[e]conomic structure and growth prospects,” (3) “[e]xternal liquidity and international investment position,” (4) “[f]iscal performance and flexibility,” and (5) “[m]onetary flexibility.”<sup>162</sup> These factors can be distilled into several main lines of inquiry, focusing on: the political climate, including institutional design; the domestic economic climate; and the domestic economy’s relation to the international economy.

Like credit-rating agencies, economists also rely on institutional effectiveness and political risk to predict default.<sup>163</sup> Economists

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160. The kind of doubt that the Public Debt Clause is concerned with is doubt about whether the government will continue to meet its obligations. This is the kind of doubt that Senator Wade spoke about in his description of the Public Debt Clause. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Benjamin Wade) (“[My amendment] puts the debt incurred in the civil war on our [the Union’s] part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it. I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States . . .”). Professor Jack Balkin outlined a similar kind of uncertainty in his analysis of the Public Debt Clause’s legislative history. *See* Balkin, *supra* note 132 (“What do we learn from this history? If Wade’s speech offers the central rationale for Section Four, the goal was to remove threats of default on federal debts from partisan struggle.”).

161. António Afonso, Pedro Gomes & Philipp Rother, *Short- and Long-Run Determinants of Sovereign Debt Credit Ratings*, 16 INT’L J. FIN. & ECON. 1, 1 (2011) (emphasis added).

162. STANDARD & POOR’S, SOVEREIGN GOVERNMENT RATING METHODOLOGY AND ASSUMPTIONS 4 (2011), available at <http://www.standardandpoors.com/ratings/articles/en/us/?articleType=PDF&assetID=1245310252210>.

163. Juan Carlos Hatchondo & Leonardo Martinez, *The Politics of Sovereign Defaults*, 96 FED. RES. BANK RICH. ECON. Q. 291, 308 (2010). *See generally* Jennifer M. Oetzel, Richard A. Bettis & Marc Zenner, *Country Risk Measures: How Risky Are They?*, 36 J. WORLD BUS. 128 (2001) (discussing the use of the political-risk measure in analyzing country risk).

characterize political risk as “the risk that arises from the potential actions of governments and other influential domestic forces, which threaten expected returns on investment.”<sup>164</sup> Thus, when there is contentious political infighting, or an indication that the machinery of government is grinding to a halt, political risk is high.<sup>165</sup> For instance, the United States’ political risk would seem to be higher under a divided government than under a united government.<sup>166</sup> It would also be higher when procedural impediments and political posturing, caused by, for instance, intense interest group pressure, make compromise difficult.<sup>167</sup> Sustained and persistent gridlock can, likewise, create higher political risk.<sup>168</sup>

The other types of default predictors used by economists concern factors within the domestic economy and in the international context: domestic economic performance and the country’s terms of trade and borrowing costs.<sup>169</sup> On the domestic front, countries that are about to default have higher debt to gross domestic product (GDP) ratios.<sup>170</sup> Importantly, however, “what matters is whether a country’s debt to GDP [ratio] is high relative to its own mean, not whether it is high relative to other countries.”<sup>171</sup> If a country has a greater-than-typical debt-to-GDP ratio, it is more likely that the country will default than under alternative circumstances. On the international front, countries

164. Christopher M. Bilson, Timothy J. Brailsford & Vincent C. Hooper, *The Explanatory Power of Political Risk in Emerging Markets*, 11 INT’L REV. FIN. ANALYSIS 1, 2 (2002).

165. See Afonso et al., *supra* note 161, at 2 (“Indicators of how the government conducts its fiscal policy, in particular budget balance and government debt, can also be relevant, as well as variables that assess political risk, such as corruption or social indexes.”).

166. See Gabriel Cuadra & Horacio Sapriza, *Sovereign Default, Interest Rates and Political Uncertainty in Emerging Markets*, 76 J. INT’L ECON. 78, 88 (2008) (stating that “[c]ountries that are subject to larger political uncertainty and stronger domestic disagreement” are seen as more likely to default).

167. See, e.g., *id.* (“A body of empirical literature points out that high turnover rates/length of tenure of policymakers and the degree of conflict within a country affect sovereign debt, country spreads and default rates.”).

168. See *id.* at 79 (discussing how a higher “degree of polarization or disagreement among different domestic groups” can increase the likelihood of default).

169. See, e.g., Hatchondo & Martinez, *supra* note 163, at 300 (summarizing literature that establishes various relationships between political stability, macroeconomic conditions, borrowing costs, and default risks).

170. Jens Hilscher & Yves Nosbusch, *Determinants of Sovereign Risk* 14 (Nov. 2004) (unpublished manuscript) (on file with the *Duke Law Journal*).

171. *Id.* at 21.

susceptible to default have higher volatility of terms of trade and higher borrowing costs.<sup>172</sup>

The preceding measures of economic uncertainty can be usefully employed in the first component of the substantial doubt test. This is not, of course, to say that a technical economic analysis needs to be undertaken when analyzing the Public Debt Clause. It is only to say that a questioning of the debt is more likely to happen, perhaps only likely to happen, under conditions of economic and political uncertainty. When those conditions are present, certain governmental actions that may be permissible at other times are more likely to cause substantial doubt and therefore violate the Public Debt Clause. In assessing whether government actions are unconstitutional, then, a decisionmaker, such as the president, must broadly assess the economic and political context in which those actions take place. Importantly, *either* a sufficiently poor economic condition *or* a sufficiently negative political environment could at times provide the right conditions for substantial doubt. When both occur simultaneously, the likelihood that subjective apprehension will occur is much greater.

The second component of the substantial doubt test focuses on context-specific indications of debtholder apprehension.<sup>173</sup> This inquiry is integral to the accuracy of overall determinations about the constitutionality of government actions,<sup>174</sup> but, because of its subjective nature, requires the use of reliable proxies for debtholder uncertainty. One proxy is “whether any rating service ha[s] downgraded the debt.”<sup>175</sup> Also relevant is whether any of the credit-rating agencies have issued a warning about the debt.<sup>176</sup> Certainly the right political and economic preconditions are relevant, and perhaps necessary, but they will likely never be sufficient. What really matters is whether debt holders question the validity of the debt. By looking

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172. Jens Hilscher & Yves Nosbusch, *Determinants of Sovereign Risk: Macroeconomic Fundamentals and the Pricing of Sovereign Debt*, 14 REV. FIN. 235, 258 (2010).

173. See Abramowicz, *supra* note 29, at 569 (“[C]ourt[s] 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.”).

174. See generally Lars Peter Hansen, *Beliefs, Doubts and Learning: Valuing Macroeconomic Risk*, 97 AM. ECON. REV. 1 (2007) (explaining the importance of identifying subjective uncertainty and doubt in undertaking economic analysis).

175. Abramowicz, *supra* note 29, at 569.

176. See *id.* at 570 n.33 (highlighting the issuance of debt warnings as an objective standard).

to these proxies, a decisionmaker can tell whether the market envisions the government's action to be such a substantial variation from prior practice that there is a credible possibility that the government will fail to meet its obligations. Absent an actual downgrade or a warning from a rating agency, other indicators can be relevant to debt holders' states of mind, such as press commentary, historical indices, statistical studies, reactions of world markets, interest rates, and anything else that offers evidence of debt holders' subjective doubts about the validity of the public debt.<sup>177</sup>

Therefore, in weighing whether some action generates substantial doubt, a decisionmaker would need to ask a number of questions under the two-pronged substantial doubt test. First, do the economic and political indicators suggest that the atmosphere is ripe for default? Second, has a rating agency issued a warning or downgraded the nation's credit rating, *or* are there other indications that debt holders substantially doubt whether the government will meet its obligations? These factors are no more abstruse or difficult to apply than determining, for instance, whether the government has a sufficiently "compelling interest" to take some action.<sup>178</sup> In the same way that it would be difficult to apply the strict scrutiny test in the abstract, however, a fuller analysis of the merits of the substantial doubt test can be seen in its application to scenarios of potential questioning surrounding the increased hostility during in debt-limit debates.

#### IV. VIOLATIONS OF THE PUBLIC DEBT CLAUSE: APPLYING THE SUBSTANTIAL DOUBT TEST

The substantial doubt test determines how close to the edge of default congressional obstructionism must be for the conduct to be unconstitutional.<sup>179</sup> There is no bright line or dollar amount commanded by the substantial doubt test, so historical scenarios best illustrate the implementation of the test. To show how the substantial doubt test can be applied, this Part first analyzes the 1995–96 and

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177. *See id.* ("The subjective standard . . . 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.").

178. *See, e.g.,* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988) (discussing the difficulty of deciding what state interests qualify as "compelling").

179. *See supra* Part III.

2011 debt-limit debates and concludes that Congress's actions violated the Public Debt Clause by creating substantial doubt about the validity of the debt. Next, it examines the 2002 debt-limit debate and shows how even contentious political infighting can be constitutionally permissible under the Public Debt Clause.

Because most debt debates will not involve an unconstitutional creation of substantial doubt, the 2002 debate is representative of these contentious yet constitutionally acceptable debates. And, for just that reason, this Part also singles out the results of two debates to illustrate the variety of unconstitutional conduct. This Part analyzes the two unconstitutional episodes side-by-side both to show the similarities between types of unconstitutional doubt creation and to more easily contrast the context of these debates with the factors characteristic of actions taken during constitutionally permissible policy disputes.

#### A. *Unconstitutional Obstructionism: The 1995–96 Showdown*

One of the most memorable debt-limit clashes was President Clinton's 1995–96 showdown with a hostile Congress.<sup>180</sup> Unafraid to “waive the Gephardt Rule[, which was] designed to provide political cover on debt limit votes,” congressional Republicans confronted the administration's request for an increase in the debt limit head-on.<sup>181</sup> The extended debate—which lasted almost six months<sup>182</sup>—was precipitated by the rise of the Newt Gingrich-led Republican House majority and its staunch fiscal conservatism.<sup>183</sup> When analysts determined that the Treasury would reach the statutory limit by the end of October 1995, Republicans in Congress were adamant about refusing to increase the limit without serious concessions from the president.<sup>184</sup> The administration, on the other hand, was not willing to

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180. See Krishnakumar, *supra* note 4, at 156 (“[I]n 1995, the Gingrich-led 104th Congress openly and brazenly sought to use legislation increasing the debt ceiling to force President Clinton to accept sweeping reforms, including a seven-year plan to balance the budget . . .”).

181. *Id.*

182. U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-96-130, DEBT CEILING: ANALYSIS OF ACTIONS DURING THE 1995–1996 CRISIS 19 (1996), available at <http://www.gao.gov/archive/1996/ai96130.pdf>.

183. See Patrice Hill, *Default on National Debt Payment Looms with Gingrich Budget Threat*, WASH. TIMES, Sept. 28, 1995, at A8 (“House Speaker Newt Gingrich, with backing from freshman Republicans and GOP deficit hawks intent on balancing the budget, has said he will not allow Congress to pass an increase in the Treasury's debt limit unless President Clinton signs a budget that will balance by 2002.”).

184. See *supra* note 183.

accept the massive spending reductions and the requirement of a balanced budget that Republicans were demanding.<sup>185</sup> After two separate government shutdowns in late 1995 and early 1996,<sup>186</sup> the debt-limit crisis “was resolved on March 29, 1996, when Congress raised the debt ceiling to \$5.5 trillion.”<sup>187</sup>

Applying the substantial doubt test, this Section argues that the shutdown-producing congressional actions during the 1995–96 debates were unconstitutional under the Public Debt Clause. First, the political climate was extremely divisive. In the 1994 election, “[t]he Republican Party won a majority of the votes cast for Congress for the first time since 1946.”<sup>188</sup> After the election, Republicans controlled both houses of Congress and faced a hostile chief executive in President Clinton.<sup>189</sup> The two branches were set to collide over disagreements on the debt, with “Gingrich and his budget-cutting revolutionaries steaming in from one direction, [and] Clinton and his veto rolling in from the other.”<sup>190</sup> Although the political context portended interminable conflict, the economy was in good shape—and its prospects were brightening as “the high-tech-driven economic boom of the late 1990s”<sup>191</sup> promised to bring further financial prosperity. Even though the economic outlook was positive, this intense political conflict was sufficiently acrimonious to open the door for substantial doubt from debt holders. And the subjective indicators of debt-holder apprehension demonstrate that this was precisely their reaction.

The second factor in the substantial doubt test, the debt-holder-subjectivity element, indicates that the 1995–96 debate created substantial doubt about the debt’s validity. During the closing months of 1995, “Republicans freely dispensed threats to shut down the

185. See David E. Sanger, *G.O.P. Gives Dual Message on Debt Limit*, N.Y. TIMES, Oct. 31, 1995, at A22 (“Mr. Clinton has vowed to veto that budget . . .”).

186. See Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget “Train Wreck,”* 35 HARV. J. ON LEGIS. 589, 607–09 (1998) (recounting the government shutdowns).

187. U.S. GEN. ACCOUNTING OFFICE, *supra* note 182, at 19.

188. Curtis Gans, *1994 Congressional Elections: An Analysis*, FAIRVOTE, <http://archive.fairvote.org/reports/1995/chp3/gans.html> (last visited Feb. 19, 2013).

189. *Id.*

190. Krishnakumar, *supra* note 186, at 589 (quoting DAVID MARANISS & MICHAEL WEISSKOPF, “TELL NEWT TO SHUT UP!” 149 (1996)).

191. YARROW, *supra* note 20, at 46.

government and throw it into default.”<sup>192</sup> These threats were taken seriously enough for the public in general, and debt holders in particular, to be worried about default.<sup>193</sup> In fact, because the credit-rating agency was “[a]larmed that the budget negotiations in Washington might lead to an unprecedented default on the \$4.9 trillion national debt, Moody’s issued an unusually severe warning to the U.S. government.”<sup>194</sup> Additionally, Standard & Poor’s “warned that ‘the global capital market’s unquestioned faith in the United States government’s willingness to honor its financial obligations has, to some degree, been diminished by the failure of the government to act in a timely fashion.’”<sup>195</sup> These warnings by top credit-rating agencies indicated the degree to which debt holders feared that the government might miss payments on its obligations. There was a general awareness that the divisiveness created by the stalemate was qualitatively different from other debates and that congressional wielding of this potent “weapon” might harm future economic interests of the debt holders.<sup>196</sup>

Added to these downgrade warnings was a noticeable market reaction to the debt-limit gridlock. After an extensive analysis of bond prices throughout the crisis, economists Srinivas Nippani, Pu Liu, and Craig T. Schulman concluded that “a potential Treasury default occurred in 1995–1996 when the U.S. President and Congress disagreed on passing a balanced budget bill.”<sup>197</sup> Their conclusion was based on the fact that the market charged a “default premium” on Treasury securities during the period in which the conflict was occurring.<sup>198</sup> These default premiums are only charged when there is

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192. *Budget Showdown Looms; U.S. Borrowing Authority Extended Until March 29*, RICH. TIMES-DISPATCH, Mar. 8, 1996, at A8.

193. See Hill, *supra* note 183 (recording the fear and potential effects of default and stating that “[t]he hostile reaction in the financial markets last week to Mr. Gingrich’s threat to permit a default suggests that the price of default would indeed be higher interest rates,” because “[w]ithin a day, the interest rates on 30-year Treasury bond had risen from 6.46 percent to 6.62 percent”).

194. *Deadlock Spurs Warning on Debt*, REC.-J., Jan. 28, 1996, at E1.

195. Clay Chandler, *S&P Worried by Budget Impasse; Credit Rating Agency Says Global Faith in U.S. Is Diminished*, WASH. POST, Nov. 11, 1995, at D1 (quoting Standard & Poor’s credit warning).

196. Cf., e.g., Adam Clymer, *G.O.P. Lawmakers Offer To Abandon Debt-Limit Threat*, N.Y. TIMES, Jan. 25, 1996, at A1 (discussing the contentious months of debate about raising the debt limit).

197. Srinivas Nippani, Pu Liu & Craig T. Schulman, *Are Treasury Securities Free of Default?*, 36 J. FIN. & QUANTITATIVE ANALYSIS 251, 263 (2001).

198. *Id.*



enough evidence for the market to reasonably infer that there is a credible possibility of default.<sup>199</sup> The market thus envisioned the 1995–96 debate as sufficiently hostile to produce substantial doubt about the validity of the U.S. debt.

The bitterly divided political environment, coupled with ample indications of substantial doubt among debt holders, leads to the conclusion that the 1995–96 debate caused an unconstitutional questioning of the public debt. As Professor Anita Krishnakumar has noted, “This extraordinary breakdown in budget-making, while unprecedented in scope and degree, was not the first, nor is it likely to be the last ‘train wreck’ of its kind.”<sup>200</sup> Indeed, this Note argues that the unconstitutional 1995–96 “train wreck” was paralleled—and in fact surpassed—by the 2011 debt debate.

### *B. Unconstitutional Brinkmanship: The 2011 Debt-Limit Debate*

The 2011 debt-limit debate began in January 2011 after Treasury Secretary Timothy Geithner sent a letter to Senate Majority Leader Harry Reid requesting an increase in the debt limit.<sup>201</sup> This letter expressed Geithner’s belief that the debt would reach the limit at some time between March 31 and May 16, 2011,<sup>202</sup> though his later, final estimate indicated that August 2 was the absolute latest date that the limit could be reached.<sup>203</sup> Until this date, the Treasury entered a debt-issuance suspension period and engaged in a number of extraordinary measures<sup>204</sup>—similar to those undertaken in years

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199. *Id.*

200. Krishnakumar, *supra* note 186, at 590.

201. Letter from Timothy Geithner, Sec’y, U.S. Dep’t of Treasury, to Harry Reid, Majority Leader, U.S. Senate 1 (Jan. 6, 2011), *available at* <http://www.treasury.gov/connect/blog/Documents/Letter.pdf>; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-701, DEBT LIMIT: ANALYSIS OF 2011–2012 ACTIONS TAKEN AND EFFECT OF DELAYED INCREASE ON BORROWING COSTS 9 tbl.2 (2012), *available at* <http://www.gao.gov/assets/600/592832.pdf> (listing Geithner’s letter as the first event in the debt-crisis chronology).

202. Letter from Timothy Geithner to Harry Reid, *supra* note 201, at 1.

203. Letter from Timothy Geithner, Sec’y, U.S. Dep’t of Treasury, to Harry Reid, Majority Leader, U.S. Senate 1 (May 16, 2011), *available at* <http://www.treasury.gov/connect/blog/Documents/20110516Letter%20to%20Congress.pdf>.

204. During a debt-issuance suspension period, defined as “any period for which the Secretary of the Treasury determines for purposes of this subsection that the issuance of obligations of the United States may not be made without exceeding the public debt limit,” 5 U.S.C. § 8348(j)(5)(B) (2006), the Treasury Secretary can engage in technical accounting measures to keep the debt below the limit, *id.* § 8348(k); *see also* AUSTIN & LEVIT, *supra* note 6, at 5 n.26 (“After a debt issuance suspension period ends, the Treasury Secretary must report to

past—to keep the debt below the statutory limit.<sup>205</sup> With the government on the brink of default, the House and Senate passed a compromise measure that was signed into law on August 2, 2011,<sup>206</sup> the very day that the Treasury estimated it would be unable to continue meeting its fiscal obligations.<sup>207</sup>

Though this debt debate shared many facial similarities with previous, routine debates, application of the substantial doubt test suggests that it was different for a number of reasons. First, the macroeconomic indicators signified a substantially weaker climate than in prior years. The public debt was an estimated 94.3 percent of GDP at the end of the 2010 fiscal year and would eventually reach 99 percent of GDP by September 30, 2011, the end of the 2011 fiscal year.<sup>208</sup> To provide context, before the end of the 2009 fiscal year, the public debt had not even reached 70 percent of GDP *for the preceding fifty-five years*.<sup>209</sup> Furthermore, in 2011 the U.S. economy had seen one of the largest GDP shrinkages in decades—negative economic growth of 2.6 percent in 2009 due to a recession from which the country was still recovering.<sup>210</sup> Total GDP shrinkage stood at “4.1%, marking the deepest recession since 1947.”<sup>211</sup>

These macroeconomic indicators were not the only harbingers of substantial doubt. The U.S. political situation was also deeply divided following the 2010 midterm elections. Republicans controlled the House of Representatives, while Democrats held the Senate and the presidency.<sup>212</sup> The rising “Tea Party” movement sought to introduce intense fiscal conservatism into debt-limit debates.<sup>213</sup> Many of these

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Congress as soon as possible regarding fund balances and any extraordinary actions taken.”); 5 U.S.C. § 8348(j)–(k) (specifying the actions to be taken by the Treasury Secretary).

205. See AUSTIN & LEVIT, *supra* note 6, at 18–21 (describing serial increases in the debt limit).

206. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (to be codified as amended at 2 U.S.C. § 901a, 31 U.S.C. §§ 3101–3101A).

207. Letter from Timothy Geithner to Harry Reid, *supra* note 203, at 1.

208. OFFICE OF MGMT. & BUDGET, *supra* note 3, at 134 tbl.7.1.

209. *Id.* at 133–34 tbl.7.1.

210. See Hibah Yousuf, *U.S. Recovery Sputters*, CNN MONEY (July 30, 2010, 12:35 AM), <http://money.cnn.com/2010/07/30/news/economy/gdp> (describing the 2007 economic downturn and slow recovery).

211. *Id.*

212. *Campaign 2010*, CBS NEWS, <http://www.cbsnews.com/election2010/?tag=contentMain;contentBody> (last visited Feb. 19, 2013).

213. See Kate Zernike & Megan Thee-Brenan, *Poll Finds Tea Party Backers Wealthier and More Educated*, N.Y. TIMES, Apr. 14, 2010, at A1 (remarking that most Tea Party members desired a smaller government above all else).

newly elected Tea Party Republicans took a hard line during debates on the debt limit.<sup>214</sup> Even more alarming, in early June, some Republicans were starting to call for a “technical default”<sup>215</sup> as the price to pay for compromise.<sup>216</sup>

Layered on top of these poor macroeconomic and political factors, “[a] surprise warning about U.S. debt by credit-rating agency Standard & Poor’s [on April 18] sent stocks plunging . . . and crystallized the threat that mounting federal budget deficits and national debt pose to the U.S. financial system and the American way of life.”<sup>217</sup> In its warning about U.S. debt, Standard & Poor’s indicated its shock that “more than two years after the beginning of the recent crisis, U.S. policymakers have still not agreed on a strategy to reverse recent fiscal deterioration or address longer-term fiscal pressures.”<sup>218</sup> On July 13, 2011, Moody’s Investor Services, another major credit-rating agency, also warned the U.S. that its debt could be subject to downgrade if systemic changes were not made.<sup>219</sup> And Fitch Ratings, the third major credit-rating agency, followed suit with a similar warning on July 17.<sup>220</sup>

The degree of intractable political debate, fear among debt holders, and overall depressed economic conditions caused credit-

214. Huma Kahn, *Debt Ceiling Debate Heats Up, Tea Party Says “Hell No” to Raising Limit*, ABC NEWS (May 16, 2011), <http://abcnews.go.com/Politics/debt-ceiling-debate-heats-tea-party-hell-raising/story?id=13597695> (“Many of these [Republican] members, buoyed by the Tea Party, argue they will not agree to raising the debt limit if their demands of major spending reductions are not met. Members of the Tea Party argue that claims about the repercussions of not raising the limit are over-hyped and simply ‘fear mongering.’”).

215. Froma Harrop, *GOP Plays Chicken with Debt Default*, PROVIDENCE J., May 25, 2011, at B7.

216. See Tim Reid & Steven C. Johnson, *Republican Mainstream Flirts with Brief Default*, REUTERS (June 7, 2011, 11:01 PM EDT), <http://www.reuters.com/article/2011/06/08/us-usa-debt-skepticism-idUSTRE75700720110608> (“An idea once confined to the fringe of the Republican party is seeping into its mainstream—that a brief default might be an acceptable price to pay if it forces the White House to deal with runaway spending.”).

217. Kevin G. Hall, *Why S&P’s Warning on U.S. Debt Matters*, MCCLATCHY (Apr. 18, 2011), <http://www.mcclatchydc.com/2011/04/18/112369/why-sps-warning-on-us-debt-matters.html#ixzz1crNqJf5r>.

218. STANDARD & POOR’S, UNITED STATES OF AMERICA ‘AAA/A-1+’ RATING AFFIRMED; OUTLOOK REVISED TO NEGATIVE 3 (2011), available at [www.ft.com/cms/6503e6fe-69c0-11e0-826b-00144feab49a.pdf](http://www.ft.com/cms/6503e6fe-69c0-11e0-826b-00144feab49a.pdf).

219. John Detrixhe & Daniel Kruger, *Moody’s Downgrade Warning Adds Pressure on U.S. Debt Deal*, BLOOMBERG (July 14, 2011, 10:44 AM ET), <http://www.bloomberg.com/news/2011-07-13/u-s-debt-rating-placed-on-review-for-downgrade-by-moody-s-as-talks-stall.html>.

220. Jennifer Epstein, *Fitch: AAA Rating in Jeopardy*, POLITICO (July 18, 2011, 1:43 PM EDT), <http://www.politico.com/news/stories/0711/59273.html>.

rating agency Standard & Poor's to downgrade the U.S. debt for the first time in history—and this occurred even after a compromise had been reached.<sup>221</sup> The agency said that it downgraded U.S. debt “because [it] believe[d] that the prolonged controversy over raising the statutory debt ceiling and the related fiscal policy debate indicate that further near-term progress . . . is less likely than we previously assumed and will remain a contentious and fitful process.”<sup>222</sup>

These same factors—a bitterly divided political environment, coupled with the numerous indications of substantial uncertainty among debt holders in an overall abysmal financial atmosphere—indicate that Congress's actions during the 2011 debt-limit debate created substantial doubt about the validity of the public debt. Under the first prong of the substantial doubt test, the economic and political contexts sufficiently elevated the possibility of default. And under the second prong, as illustrated by the reaction of the rating agencies, debt holders suffered great doubt about the validity of the national debt. Congressional actions—including posturing, rhetoric, and a failure to more expeditiously resolve the debt-limit impasse—during the 2011 debate were, in other words, unconstitutional under the Public Debt Clause. But this kind of unconstitutional conduct, though certainly a cause for concern, is not the norm for debt-limit increases.

### C. *A Constitutional Policy Dispute: The 2002 Debt-Limit Debate*

In late 2001, toward the end of President George W. Bush's first year in office, the national debt was approaching the statutory limit.<sup>223</sup> This was in spite of the four years of budget surpluses from fiscal year 1998 through fiscal year 2001.<sup>224</sup> Though the debt was within a mere \$25 million of the limit at the beginning of 2002, the Treasury used technical accounting measures to keep the debt below the limit until

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221. See generally STANDARD & POOR'S, UNITED STATES OF AMERICA LONG-TERM RATING LOWERED TO 'AA+' ON POLITICAL RISKS AND RISING DEBT BURDEN; OUTLOOK NEGATIVE (2011), available at <http://www.ft.com/cms/af2c4fac-bfc2-11e0-90d5-00144feabd0.pdf> (detailing the rationales for the downgrade).

222. *Id.* at 3.

223. See AUSTIN & LEVIT, *supra* note 6, at 13 (“In the fall of 2001, the Administration recognized that a deteriorating budget outlook and continued growth in debt held by government accounts were likely to lead to the debt limit soon being reached.”).

224. See PHILLIP D. WINTERS, CONG. RESEARCH SERV., RS21111, THE DEBT LIMIT: THE NEED TO RAISE IT AFTER FOUR YEARS OF SURPLUSES 1 (2003) (“The surpluses over the four fiscal years (1998–2001) reduced debt held by the public by \$448 billion.”).

the April 15 tax revenues came in.<sup>225</sup> By mid-May 2002, however, the debt had climbed back to within \$15 million of the debt limit.<sup>226</sup> The Treasury was again forced to use extraordinary measures to keep the debt below the limit, and it estimated that the government could not meet its obligations—without an increase—after June 28, 2002.<sup>227</sup> The Senate then passed legislation increasing the debt limit on June 11 without any debate.<sup>228</sup> The House, on the brink of default, passed the debt limit increase by a single vote on June 27.<sup>229</sup> The legislation was signed into law on June 28, the day the Treasury had estimated that the government would be unable to meet its obligations.<sup>230</sup>

Though the national debt was extremely close to the debt limit, it does not appear that any of Congress's actions put the debt into substantial doubt. First, under the substantial doubt test, macroeconomic factors indicated that the nation's economy was not conducive to default. For example, debt as a percentage of GDP was only 56.4 percent on September 30, 2001, and 58.8 percent on September 30, 2002.<sup>231</sup> Comparatively, this ratio was similar to what it had been for the previous decade; indeed, it was slightly lower.<sup>232</sup> Second, economic growth, as measured by annual GDP percentage increase, was approximately 2.45 percent from 2001 to 2002—an increase within the normal range of GDP increases.<sup>233</sup> The macroeconomic indicators therefore did not give cause for concern.

Similarly, the political environment was not conducive to default. As a result of the 2000 elections, the Republicans had control of the House of Representatives and possessed the tie-breaking vote in the

225. AUSTIN & LEVIT, *supra* note 6, at 13.

226. *Id.* at 14.

227. See U.S. GEN. ACCOUNTING OFFICE, GAO-03-134, DEBT CEILING: ANALYSIS OF ACTIONS DURING THE 2002 DEBT ISSUANCE SUSPENSION PERIODS 8 (2002) (reporting that on May 14, 2002, “[t]he Secretary of the Treasury declared a debt issuance suspension period” and that on June 18, 2002, the Treasury Secretary “announced that by June 28, 2002, the U.S. government would not have sufficient money to pay its bills unless the debt ceiling was increased”).

228. AUSTIN & LEVIT, *supra* note 6, at 14.

229. *Id.*

230. Act of June 28, 2002, Pub. L. No. 107-199, 116 Stat. 734 (codified as amended at 31 U.S.C. § 3101(b) (Supp. IV 2011)) (increasing the public debt limit to \$6.4 trillion), *amended by* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

231. OFFICE OF MGMT. & BUDGET, *supra* note 3, at 134.

232. See, e.g., *id.* at 133–34 (reporting that debt as a percentage of GDP remained above 60 percent for most of the 1990s).

233. *Historical Data Graphs per Year*, INDEX MUNDI, <http://www.indexmundi.com/g/g.aspx?c=us&v=66> (last visited Feb. 19, 2013).

Senate, which, after the election, was split 50–50.<sup>234</sup> They also, of course, controlled the presidency.<sup>235</sup> Under a united government, the odds of default are certainly less than otherwise.<sup>236</sup>

Finally, other subjective indications were likewise not emblematic of debt-holder concern. No major credit-rating agency issued a warning or downgraded the nation's credit rating, and all signs indicated that “[n]o one believed a federal default would actually occur.”<sup>237</sup> Indeed, the debate itself was more a political calculation on the part of Democrats to extract extraneous favors by withholding votes rather than a principled stand against increased government indebtedness of the kind that creates debtholder uncertainty.<sup>238</sup>

These factors indicate that the 2002 debt-limit debate, though fierce, did not generate substantial doubt about the validity of the public debt and was, therefore, not unconstitutional. Congress did not violate the Public Debt Clause even though it waited until the last minute to raise the debt limit. The macroeconomic indicators suggested a sufficiently strong economy, the political division was not partisan enough to create the conditions for a plausible default, and the subjective factors showed that debt holders did not realistically fear a government default. That the vote was so close and Congress waited until the last minute to raise the limit—and yet no one questioned the debt—shows the futility of trying to make a bright-line test for violations of the Public Debt Clause. In 2002, the debt was within \$15 million dollars of the ceiling—an amount that “equaled about *five minutes* of federal outlays.”<sup>239</sup> Yet because no substantial

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234. JEFF TRANDAHL, CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 7, 2000, at 79 (2001), available at [clerk.house.gov/member\\_info/electionInfo/2000election.pdf](http://clerk.house.gov/member_info/electionInfo/2000election.pdf). Republicans controlled the House by a margin of 221–212. *Id.*

235. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (ending recount efforts in the state of Florida, effectively declaring George W. Bush president).

236. See Cuadra & Sapriza, *supra* note 166, at 88 (explaining that “[c]ountries that are subject to larger political uncertainty and stronger domestic disagreement” are seen as more likely to default).

237. *GOP Pushes \$450 Billion Debt Limit Increase Through*, USA TODAY (June 27, 2002, 11:14 PM ET), <http://www.usatoday.com/news/washdc/2002/06/28/debtlimit.htm>.

238. See *id.* (“As House GOP leaders spent weeks hunting fruitlessly for votes [to increase the debt limit], Democrats offered to supply them. But as a trade-off, they were demanding higher spending on the anti-terrorism bill and in next year’s budget, plus overall budget talks that Republicans feared could have resulted in revisiting next year’s tax cut.”).

239. AUSTIN & LEVIT, *supra* note 6, at 14 (emphasis added).

doubt was created concerning government payment, there was no constitutional violation.

The substantial doubt test—at least no more than any other constitutional test—is not an arbitrary test that can be manipulated based on the policy preferences of the decisionmaker. It can be applied in a principled way by analyzing observable and objective data surrounding debt-limit debates and by determining whether debt holders have experienced substantial doubt about the continuing validity of the obligations that are owed to them. When this substantial doubt occurs, the Public Debt Clause has been violated.

### CONCLUSION

With the national debt spiraling out of control<sup>240</sup> and the economic recovery stagnant,<sup>241</sup> greater hostility and contention will likely accompany future debt-limit increases.<sup>242</sup> The combination of unavoidable increases<sup>243</sup>—caused by deepening budget deficits<sup>244</sup>—and consolidated opposition—caused by the revitalization of intense fiscal conservatism<sup>245</sup>—makes the Public Debt Clause more relevant today than ever before.

Every indication suggests that the increasing vehemence surrounding debt-limit legislation will continue indefinitely.<sup>246</sup> Some

240. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-521SP, *THE FEDERAL GOVERNMENT'S LONG-TERM FISCAL OUTLOOK, SPRING 2012 UPDATE 1* (2012), available at <http://www.gao.gov/assets/590/589835.pdf> (“A continuing increase in debt as a share of GDP means the federal government is on an unsustainable long-term fiscal path and underscores the need for policymakers to act to change the path.”).

241. CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022*, at xi (2012), available at [http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-31-2012\\_Outlook.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-31-2012_Outlook.pdf) (projecting that “[a]lthough . . . growth will pick up after 2013, the agency expects that the economy’s output will remain below its potential until 2018”).

242. Richard Cowan & Rachele Younglai, *U.S. Congress May Face Another Debt-Limit Showdown in 2013*, REUTERS (Oct. 28, 2012, 2:39 PM EDT), <http://www.reuters.com/article/2012/10/28/us-usa-congress-debtceiling-idUSBRE89R0G520121028> (“A U.S. debt-ceiling increase could be headed for a Wall Street-rattling showdown in 2013 if Congress, as expected, shuns a quick and easy fix at the end of this year in favor of another round of last-minute brinksmanship.”).

243. See AUSTIN & LEVIT, *supra* note 6, at 25 (“Unless federal policies change, Congress w[ill] repeatedly face demands to raise the debt limit to accommodate the growing federal debt in order to provide the government with the means to meet its financial obligations.”).

244. See U.S. GOV'T SPENDING, [http://www.usgovernmentspending.com/federal\\_deficit\\_chart.html](http://www.usgovernmentspending.com/federal_deficit_chart.html) (last visited Feb. 19, 2013) (recording the increasing budget deficits from the 2007 fiscal year through the 2013 fiscal year).

245. See Harrop, *supra* note 215 (discussing calls for default among Republicans).

246. See *id.* (noting increasing Republican opposition to future increases to the debt limit).

of these debates will be contentious, even hostile, but still constitutional.<sup>247</sup> Others, those that create substantial doubt about the validity of the debt, will be unconstitutional.<sup>248</sup> Directed by well-defined constitutional guideposts, the president should disregard the debt limit when congressional obstructionism rises to the level of creating substantial doubt about the continuing validity of the public debt.

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247. *See supra* Part IV.C.

248. *See supra* Part IV.A–B.