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# The Fourteenth Amendment Is No Blank Check for Debt Increases

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**Abstract:** *A clause of the Fourteenth Amendment to the United States Constitution provides, "The validity of the public debt of the United States…shall not be questioned." Far from authorizing the President to incur more debt—a power vested solely in Congress—this clause bars Congress from repudiating debt that it has already incurred. Whether a default would amount to repudiation is an open question, but one that need not be answered at a time when tax revenues are sufficient to service current debt. Not only is the debt limit consistent with the Constitution's separation of powers, but there is a colorable argument that it, or something like it, is constitutionally mandated.*

Liberal legalists and pundits are abuzz with the idea that an obscure constitutional clause empowers the President to burst through the debt limit if Congress declines to raise it. While their focus on the constitutional text is welcome, their theory as to what it means would be merely laughable if some politicians had not begun to embrace it as a way out of a difficult negotiation.

The President has no more unilateral power to issue new debt on the credit of the United States than he has to collect taxes or make expenditures that have not been enacted by Congress. To claim such a power would be unprecedented, unconstitutional, and absurd. Moreover, the affront to the Congress's rightful prerogatives would be serious, even for those seeking to avoid the hard work of putting the federal budget in order.

## Talking Points

- The Fourteenth Amendment bars the federal government from reneging on debt. It was intended to provide security to lenders, ease borrowing, and ensure that the nation met its moral obligation to repay its debts.
- The power "to borrow money on the credit of the United States" is vested in Congress. In the past, Congress authorized each issuance of bonds, and today it fulfills its responsibility to oversee borrowing by setting a debt limit and allowing Treasury to work out the details of issuances. That delegation, however, casts no doubt on the principle that the borrowing power is Congress's alone.
- Unilateral borrowing by the President would be both unconstitutional and unnecessary. Such action would impermissibly intrude on Congress's powers, risking major legal and political consequences. Even if the Fourteenth Amendment bars temporary default—which is not at all clear—tax revenues are more than sufficient to service the debt.

This paper, in its entirety, can be found at:
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## Section Four

Section four of the Fourteenth Amendment provides, "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." It also declares "illegal and void" "any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave."

This clause simply means that Congress and the President cannot question the validity of debt that is already incurred, but it in no way requires the nation to incur more debt. Even if it precludes temporary default—which is far from clear—it could not authorize the President to incur additional debt.

The Fourteenth Amendment was among those proposed and ratified during Reconstruction, and section four was its least-debated provision. During the Civil War, the Union had taken on massive debt to fund the war effort and had promised pensions to wounded soldiers and soldiers' widows and orphans. The Confederate states had done about the same. Members of the 39th Congress, which excluded representatives of the Confederate states, feared that a future Congress dominated by Southern Democrats would wipe out Union debt and possibly seek to have the federal government guarantee the Confederate debt—an appalling possibility that would reward those who had financed an insurrection and risk political disruption for years to come.[1]

Their solution was to amend the Constitution to declare Confederate debt unenforceable while barring subsequent Congresses from "question[ing]" "the public debt of the United States." This formulation was somewhat narrower than that of earlier proposals, which stated that federal "obligations"—potentially a more expansive category than debts—would be "inviolable."[2] But it was also broader than the specific question at hand: the vitality of Civil War debts. This was deliberate. Senator Benjamin Wade, a proponent of the amendment, set forth the rationale:

> I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution….[3]

***Even if section four of the Fourteenth Amendment precludes temporary default—which is far from clear—it could not authorize the President to incur additional debt.***

The Supreme Court's sole opportunity to interpret and apply section four was in a 1935 case, *Perry v. United States*, which challenged Congress's attempt to pay off bonds subject to a gold clause in devalued legal tender. The Court stated:

> In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "on the credit of the United States," the Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest assurance the government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise…. This Court has given no sanction to such a conception of the obligations of our government.[4]

1. Senator Jacob Howard of Michigan memorably declaimed: "I do not believe in paying traitors, nor do I believe in indemnifying men abroad who, with their eyes open and a malignity in their heart beyond all parallel, gave them aid and comfort. Nor do I see the propriety of keeping this question open before the country, and enabling the foreign holders of cotton bonds to keep the political atmosphere of this country in a turmoil for the future with a view ultimately of getting their pay from somebody. It is time for us to put our hands upon this whole thing and to extinguish all hope." Cong. Globe, 39th Cong., 1st Sess. 2768 (May 23, 1866) (statement of Senator Jacob Howard).
2. *See id.* at 2769 (statement of Senator Benjamin Wade).
3. *Id.*

This principle, said the Court, "applies [] to the government bonds in question, and to others duly authorized by the Congress."[5]

## Constitutionality of the Statutory Debt Limit

Article I of the Constitution vests the power in Congress "to borrow money on the credit of the United States" and the power "to pay the debts and provide for the common defense and general welfare of the United States." From 1789–1917, Congress authorized nearly all federal debt directly by approving specific loans or issuances of debt instruments to finance specific projects or activities.

***The Constitution vests exclusive power in Congress to raise revenue to fund the government's obligations, whether by taxes or loans. Congress could not entirely delegate that power to the President, even if it wanted to do so.***

That changed with the nation's entry into World War I, which immediately strained the federal budget and led Congress to take a different approach: authorizing the Treasury to issue debt of varying terms in response to market conditions and need while capping aggregate debt.[6] This is, in its essential features, the system in place today.

In this way, the federal government could incur debt at a lower cost without Congress abdicating its constitutionally assigned power and responsibility to authorize and oversee the amount. The debt limit also serves to force Congress "to consider the interests of the general public and future generations… to step back and consider the consequences of its deficit-spending decisions."[7]

The Constitution vests exclusive power in Congress to raise revenue to fund the government's obligations, whether by taxes or loans.[8] Congress could not entirely delegate that power to the President, even if it wanted to do so.

Thus, not only is the debt limit consistent with the Constitution's separation of powers, but there is a colorable argument that it, or something like it, is constitutionally mandated.

## An Unconstitutional Usurpation

The Constitution vests in Congress, and withholds from the Executive, the power to commit to spending, to raise revenue by enacting taxes, and to incur public debt. The Fourteenth Amendment does not alter this. Congressional control of borrowing, through the debt limit, and section four of the amendment are in unison, not tension.

*First,* debt limits do not repudiate existing debt. To "question" "the validity" of a debt is to cast doubt on the obligation itself, not other factors involving repayment. This is true as a matter of common law as well. Insolvency, in itself, does not impugn the validity of a debt, but only the debtor's present ability to pay. Under federal bankruptcy law, repudiation occurs only with discharge of the bankruptcy petition—the "clean start" that bankruptcy promises. Indeed, a debtor may "affirm" a debt and commit to paying it despite a bankruptcy discharge; in that case, even where payments have lapsed for a time, the debt's validity has never been questioned.

*Second,* the Fourteenth Amendment has no bearing at all on most federal spending, because most federal spending is not in service of a debt obligation and is not necessary to pay back existing debt. The Supreme Court has held specifically that Congress can alter government promises, as opposed

4. 294 U.S. 330, 351 (1935).
5. *Id.* at 354. *See also* Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 55 (1986) (section four applies only to property rights and vested contractual rights).
6. D. Andrew Austin and Mindy Levit, *The Debt Limit: History and Recent Increases*, Congressional Research Service Report No. RL31967, Jan. 6, 2011, at 4–5.
7. Anita Kirshnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 137 (2005). For a period, however, Congress did turn its back on this power through a procedural mechanism known as the "Gephardt Rule" that purported to allow the House of Representatives to raise the debt limit without having to vote directly on the issue. While politically expedient, this procedure was irresponsible and constitutionally dubious.
8. U.S. Const. art. I, § 7, cl. 1.

to vested rights, at any time.[9] It has also held that even "entitlement" programs such as Social Security do not establish property or other rights that the government is constitutionally obliged to observe.[10] While the federal government is obliged to make good on its debts and contractual obligations that it has already incurred, it is not constitutionally committed to carry out other spending.

Even if additional borrowing were curtailed, the government's revenues are more than sufficient to satisfy current debt payments and avoid a default. At present, debt repayment comprises only a small proportion of total federal spending. Less than 10 percent of total federal spending in the President's 2012 budget would go to satisfying net interest on the national debt, and some additional percentage would go to satisfying other accrued debts.[11] Looked at another way, deficit spending constitutes about 43 cents of every dollar of federal spending. Thus, even with no deal to raise the debt ceiling, 57 cents of spending on the dollar could continue unimpeded—including all debt payments.[12]

*Third,* the Fourteenth Amendment does not specify any particular manner by which the obligation to honor the nation's debt may be met. Congress may, for example, raise taxes, cut spending, or redirect funds to satisfy "public debt." There is no constitutional requirement that it borrow. So if the President had the unilateral power to issue debt, why would he not also possess the power to raise taxes unilaterally or to sell off government assets?

The answer, as with borrowing, is that these powers are vested in Congress, not the President. No one seriously contends that the drafters of the Fourteenth Amendment intended to place the taxing or selling powers in the President's hands, which would be a fundamental reorganization of the branches of government and demolish essential checks and balances. So it is with the power to borrow money on the credit of the United States.

***The Fourteenth Amendment has no bearing at all on most federal spending, because most federal spending is not in service of a debt obligation and is not necessary to pay back existing debt.***

## Constitutional and Unconstitutional Options

Even if Congress and the President are unable to reach agreement on raising the debt ceiling, the result need not, and probably would not, be default. Revenues are more than sufficient to service the national debt, and history suggests that, even in a revenue-constrained environment, the Treasury would act to avoid default and thereby preserve the full faith and credit of the U.S. government.[13]

In no case does either the Constitution or statutory law afford the President discretion to borrow sums unauthorized by Congress—a point belatedly conceded by the General Counsel of the Treasury Department.[14] To do so would be an unconstitutional usurpation of the legislative power and upend the separation of powers. The result would be a serious separation-of-powers violation by the President, with either Congress taking steps to correct and the courts being asked to resolve on behalf of third parties affected by the impasse. (Whether the courts would or even could act is uncertain, but it is predictable that litigation would cause uncertainty for months or even years.)

9. "[C]ontractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign." *Id.*
10. *Flemming v. Nestor*, 363 U.S. 603 (1960).
11. Heritage calculations using Congressional Budget Office, "The Budget and Economic Outlook: Fiscal Years 2011 to 2021," January 2011, at *http://cbo.gov/ftpdocs/120xx/doc12039/01-26_FY2011Outlook.pdf* (July 8, 2011).
12. J. D. Foster, Ph.D., "Congress Has Time and Options on Debt Limit," Heritage Foundation *Backgrounder* No. 2511, January 27, 2011, at http://www.heritage.org/Research/Reports/2011/01/Congress-Has-Time-and-Options-on-Debt-Limit.
13. *See id.*
14. Letter from George Madison, General Counsel, U.S. Department of the Treasury, to the New York Times, July 8, 2011, *available at* http://www.treasury.gov/connect/blog/Pages/FACT-CHECK-Treasury-General-Counsel-George-Madison-Responds-to-New-York-Times-Op-Ed-on-14th-Amendment.aspx.

## No Blank Check

Section four of the Fourteenth Amendment is a limit on Congress's power to repudiate the nation's debt and not (almost literally) a blank check for the President. Fair-weather constitutionalists take note: The Constitution was not made for political expedience but to make and keep a Republic.

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