THE DEBT CEILING IS CONSTITUTIONAL

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Pursuant to its power to borrow money on the credit of the United States, Congress has periodically permitted the Executive Branch to incur debt subject to a steadily-increasing statutory limit—the so-called "debt ceiling." As the national debt climbs, bitter debate over whether the statutory ceiling should be raised, with the specter of default looming, has become a recurring phenomenon.

Many scholars of constitutional law think their field of study offers an escape from the debt ceiling, though their proposed solutions vary. There is, at present, no published legal scholarship that defends the constitutionality of the debt ceiling, which could lead policymakers to overestimate the debt ceiling's legal vulnerability. This Article, in contrast, contends that the legal theories for negating the debt ceiling are unconvincing. It proceeds in four parts.

Part I discusses the Fourteenth Amendment's Public Debt Clause. Though that Clause likely prohibits default on the national debt, it requires no more that the President pay the costs of debt service while reducing or halting other spending once the government hits the debt ceiling. Much of the government may shut down, but prioritizing spending on debt service avoids the only thing forbidden by the Public Debt Clause—default. Part II discusses the claim that the President may breach the debt ceiling when necessary to fund appropriations. The President, however, is under a constitutional obligation to faithfully execute the laws. This requires the President to respect, rather than breach, the debt ceiling. It is, after all, one of the "laws" that the President is obligated to faithfully execute. This can be done by treating appropriations laws as contingent on compliance with the debt ceiling, consistent with ordinary rules for statutory interpretation. Part III addresses the exotic options. Issuing a trillion-dollar platinum coin or novel bonds are likely unlawful breaches of the statutory debt ceiling, but, even if not, this gambit would be of no use if Congress and the President cannot reach an agreement on the annual federal budget. At that point, appropriations lapse, and the government must shut down anyway. The exotic options come with considerable legal and financial risk; they buy, at best, a few months to negotiate a budget and ultimately solve nothing. Part IV discusses the implications of the conclusion that the Constitution offers no way around the debt ceiling. What seems like bad news actually is not. Although default is both unconstitutional and unlikely, the quite realistic threat of a government shutdown when the government approaches the debt ceiling usefully forces competing factions to negotiate or face a threat of retribution from the voters at the next election.

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This Article concludes with a discussion of a question of constitutional theory which lurks behind the scholarly dispute over the debt ceiling. Any constitutional theory must be able to answer perhaps the most fundamental question in constitutional law—why should policy debate be removed from the realm of ordinary politics and be resolved instead as a matter of constitutional law? The scholarly attacks on the constitutionality of the debt ceiling, however, fail to even consider this question. Debate over whether a statutory debt ceiling should be used to restrain government spending is precisely the sort of debate that belongs in the realm of ordinary politics, not constitutional law.

Introduction 770
I. The Public Debt Clause 774
A. The Public Debt Clause Requires Only Payments to Bondholders and Other Creditors 779
B. Unexpended Appropriations Are Not a "Public Debt" Protected by the Public Debt Clause 784
C. Annual Appropriations Annually Vanish 792
II. The President's Obligation to Execute the Laws 795
A. Why Not Spending Cuts Rather than Breaching the Debt Ceiling? 796
B. Why Not A Government Shutdown Rather than Breaching the Debt Ceiling? 802
C. The Problem of Prioritization Annually Vanishes . . . 804
III. The Exotic Options 805
A. Evading the Debt Ceiling 805
B. The Inescapable Government Shutdown 808
IV. The Debt Ceiling and Constitutional Theory 809
Conclusion 815

Introduction

Pursuant to its power to borrow money on the credit of the United States,[1] Congress has periodically permitted the Executive Branch to incur debt subject to a steadily-increasing statutory limit—the so-called "debt ceiling."[2]

As the national debt climbs, bitter debate over whether the statutory ceiling should be raised, with the specter of default looming, has become a recurring phenomenon.[3] The latest confrontation occurred in

1. *See* U.S. Const. art. I, § 8, cl. 2 ("The Congress shall have the Power . . . To borrow money on the credit of the United States.").

2. For helpful accounts of the history of the statutory debt ceiling, see D. Andrew Austin, Cong. Rsch. Serv., RL31967, The Debt Limit: History and Recent Increases (2015); and Conor Clarke, The Debt Limit, 101 Wash. U. L. Rev. (forthcoming 2024) (manuscript at 17–31) (on file with author).

3. For an account of the disputes in recent decades over the debt ceiling, see Cong. Rsch. Serv., R4501, Clearing the Air on the Debt Limit 12–14 (2021).

the spring of 2023, when the potential for default if the ceiling were not raised threatened great economic harm, at least according to the Secretary of the Treasury.[4] Eventually, an agreement was reached, producing legislation that suspended the debt ceiling until 2025, while imposing caps on discretionary spending and mandating other programmatic initiatives, estimated to produce $1.3 trillion in savings over the succeeding decade.[5] Confrontations over whether the debt ceiling should be raised are likely to recur; threatening to refuse to raise the debt ceiling provides factions in Congress with unusually powerful leverage to pursue their preferred policies.[6]

Just as for those who only have hammers, all problems seem like nails, many scholars of constitutional law think their field of study offers an escape from the debt ceiling, though their proposed solutions vary. One school of thought relies on the Fourteenth Amendment's Public Debt Clause,[7] which is said to prohibit a statutory debt ceiling that could

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4. *See* Letter from Janet L. Yellen, U.S. Sec'y of the Treasury, to Hon. Kevin McCarthy, Speaker of the U.S. House of Reps. (May 1, 2023), https://home.treasury.gov/system/files/136/Debt_Limit_Letter_Congress_Members_05012023.pdf [https://perma.cc/EES9-ZGJ3] ("[W]aiting until the last minute to suspend or increase the debt limit can cause serious harm to business and consumer confidence, raise short-term borrowing costs for taxpayers, and negatively impact the credit rating of the United States. If Congress fails to increase the debt limit, it would cause severe hardship to American families, harm our global leadership position, and raise questions about our ability to defend our national security interests.").

5. For the text of the legislation, see Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023). For the Congressional Budget Office's analysis of the legislation, see Letter from Phillip L. Swagel, Dir. of the Cong. Budget Off., to Hon. Kevin McCarthy, Speaker of the U.S. House of Reps. (May 30, 2023), [hereinafter CBO Letter], https://www.cbo.gov/system/files/2023-05/hr3746_Letter_McCarthy.pdf [https://perma.cc/XQ2G-LN4X].

6. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1188 (2012) [hereinafter Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*] ("Congress (or, under certain circumstances, a blocking minority of the Senate) might in the future refuse to increase the debt limit, engaging in political brinksmanship to extract concessions on policy from the other party's leadership. Such maneuvers differ from the brinksmanship in normal budget negotiations, where members of Congress can block the government from agreeing to future obligations, because a refusal to increase the debt ceiling makes it impossible for the government to honor its current obligations . . . ."); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 916, 961 (2018) ("[L]arge blocs of Republican legislators have flirted with defaulting on the national debt, with potentially severe economic and geostrategic consequences, by failing to raise Congress's self-imposed 'debt ceiling.' . . . [T]hese tactics seek to gain political leverage through behaviors that risk hobbling the government.") (footnote omitted).

7. *See* 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.").

prevent the federal government from meeting its financial obligations and thereby unconstitutionally impair the validity of the public debt.[8] Another argues that when Congress places inconsistent obligations on the President by appropriating funds without raising revenue sufficient to fund those appropriations, the President's constitutional obligation to spend appropriated funds permits a breach of the debt ceiling when necessary to fund appropriations.[9] Others embrace more exotic options, contending that the President can circumvent the debt ceiling by large-denomination coins or using unconventional bonds or other financing devices that the advocates of this view assert are not subject to the debt ceiling, either because they do not involve issuance of new debt or involve debt instruments not subject to the statutory ceiling.[10]

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8. *See, e.g.*, Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1194 ("[D]espite a legitimate range of disagreement over the meaning of Section 4, we think it is best read as obligating the federal government to pay all of its obligations but not limiting federal borrowing. Thus, during an impasse . . . Section 4 would require the president to refuse to honor the debt ceiling if doing so would cause the government to fail to meet any of its financial obligations in a timely manner."); Robert Hockett, *'Not a Thing': Seven Reasons the Federal 'Debt Ceiling' is Null & Void,* 66 CHALLENGE 123, 123 (2023) ("The 14th Amendment is, to be sure, one of the grounds upon which the 'debt ceiling' must be declared null and void."); Zachary K. Ostro, *In the Debt We Trust: The Unconstitutionality of Defaulting on American Financial Obligations, and the Political Implications of Their Perpetual Validity*, 51 HARV. J. LEGIS. 241, 244 (2014) ("[T]he Public Debt Clause of the Fourteenth Amendment prevents the government from defaulting on its debt—making any law that would allow default thereby unconstitutional.").

9. *See, e.g.*, Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1196–97 ("The interaction of the spending law, the tax law, and the debt ceiling potentially creates an unsolvable problem. For example, if Congress were to authorize spending that exceeds tax collections by one trillion dollars in a year, at a time when the existing federal debt is only one-half trillion dollars below its statutory ceiling, then the president could not execute all three laws as written . . . . [F]aced with the trilemma, the president should set aside the debt ceiling law."); Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of* Youngstown Steel, 47 CONN. L. REV. 395, 418 (2014) ("Congress, by issuing contradictory commands, tacitly afforded the president the discretion to take . . . corrective actions."); Lawrence H. Tribe, Opinion, *Why I Changed My Mind on the Debt Limit*, N.Y. TIMES (May 7, 2023), https://www.nytimes.com/2023/05/07/opinion/debt-limit.html [https://perma.cc/6LFF-4MFW] ("The right question is whether Congress — after passing the spending bills that created these debts in the first place — can invoke an arbitrary dollar limit to force the president and his administration to do its bidding. There is only one right answer to that question, and it is no."); Victor Williams, *Raze the Debt Ceiling: A Test Case for State-Sovereign and Institutional Bondholder Litigation to Void the Debt Limit Statute*, 72 WASH. & LEE L. REV. 96, 111–12 (2015) ("On its face, and as it is arbitrarily applied, the debt limit statute violates . . . the Fourteenth Amendment's Public Debt Clause.").

10. *See, e.g.*, Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L.J. 229, 232 (2020-21) ("[A] better solution for resolving recurring debt ceiling crises is for the Treasury Secretary to issue a 'trillion-dollar coin' under an obscure provision of the Coinage Act, which authorizes minting of

The possibility of a legal strategy that could avoid the threat of default when federal debt approaches the statutory ceiling is of continuing interest; even as the agreement to end the 2023 confrontation was reached, many argued that the President should declare the debt ceiling unconstitutional to preclude use of the threat of default as a means of extracting concessions in future negotiations over the federal budget.[11]

Aside from a handful of brief and largely undeveloped commentaries for lay audiences in non-scholarly fora, there is, at present, no published legal scholarship that defends the constitutionality of the debt ceiling, which could lead policymakers to overestimate its legal vulnerability. This Article, in contrast to prior scholarship, contends that the legal theories for negating the debt ceiling amount to a road to nowhere—they are wrong on the law, and, in any event, offer no route around the political deadlocks that produce government shutdowns. It proceeds in four parts.

Part I discusses the Public Debt Clause. Though that Clause likely prohibits default on the national debt, once the government hits the debt ceiling, the Public Debt Clause requires no more than that the President avoid default by paying the costs of debt service while reducing, or perhaps even halting altogether, other spending. Much of the government may shut down, but prioritizing spending on debt service avoids the only thing forbidden by the Public Debt Clause—default on the national debt.

Part II discusses the claim that the President may breach the debt ceiling when necessary to fund appropriations. The President, however, is under a constitutional obligation to faithfully execute the laws.[12] This requires the President to respect, rather than breach, the debt ceiling. It is, after all, one of the "laws" that the President is obligated to faithfully execute. This can be done by treating appropriations laws as contingent

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platinum coins of any denomination, and use the generated funds to finance the deficit in lieu of public debt issuance.") (footnote omitted); Matthew Yglesias, *A New Plan To Get Around the Debt Ceiling Hostage*, SLOW BORING (Jan. 11, 2023), https://www.slowboring.com/p/a-new-plan-to-get-around-the-debt [https://perma.cc/22QS-375C] ("[S]ince the debt ceiling caps the *face value* of the debt, it suggests that the Treasury should continue to meet the nation's financial obligations by changing the way it sells bonds to prevent the face value of the debt from growing too high.").

11. *E.g.*, Alan Rappeport, *14th Amendment Questions Linger Despite Debt Limit Deal*, N.Y. TIMES (May 31, 2023), https://www.nytimes.com/2023/05/31/us/politics/14th-amendment-debt-ceiling.html [https://perma.cc/3LLY-C7ZB]; Jeff Stein, *Biden Suggests Using 14th Amendment To Stop Future Debt Ceiling Standoffs*, WASH. POST (May 31, 2023), https://www.washingtonpost.com/business/2023/05/31/biden-debt-ceiling-14th-amendment/ [https://perma.cc/5NZA-DKZG].

12. *See* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

on compliance with the debt ceiling, consistent with ordinary rules for statutory interpretation. When the debt ceiling is reached, non-debt-related spending must be reduced to avoid incurring unlawful debt, but no more is required.

Part III addresses the exotic options. Issuing a trillion-dollar platinum coin or novel bonds are likely unlawful breaches of the statutory debt ceiling, but, even if not, this gambit would be of no use if Congress and the President cannot reach an agreement on the annual federal budget. At that point, appropriations lapse, and the government must shut down anyway. The exotic options come with considerable legal and financial risk; they buy, at best, a few months to negotiate a budget; and ultimately solve nothing.

Part IV discusses the implications of the conclusion that the Constitution offers no way around the debt ceiling. What seems like bad news actually is not; although the default is both unconstitutional and unlikely, the quite realistic threat of a government shutdown when the government approaches the debt ceiling usefully forces competing factions to negotiate or face a threat of retribution from the voters at the next election. Indeed, lurking behind the scholarly dispute over the debt ceiling is a larger question for constitutional jurisprudence. Any constitutional theory must be able to answer perhaps the most fundamental question in constitutional law—why should policy debate be removed from the realm of ordinary politics and be resolved instead as a matter of constitutional law? The scholarly attacks on the constitutionality of the debt ceiling, however, fail to even consider this question. Debate over whether a statutory debt ceiling should be used to restrain government spending is precisely the sort of debate that belongs in the realm of ordinary politics, not constitutional law.

I. The Public Debt Clause

The statutory debt ceiling caps the "face amount" of the debt issued or guaranteed by the federal government.[13] The Fourteenth Amendment's Public Debt Clause, in turn, provides 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

13. At the time of the 2023 confrontation over the debt ceiling, the statute provided: "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, subject to changes periodically made in that amount as provided by law through the congressional budget process . . . ." 31 U.S.C. § 3101(b) (2022).

insurrection or rebellion, shall not be questioned."[14] This is a strange formulation; it requires that the "public debt" be treated as "valid," but, at least in terms, does not command the timely payment of creditors or, indeed, that Congress, the President, or the judiciary take any particular action when it comes to the "public debt of the United States." Perhaps the Clause does no more than prohibit an express repudiation of the obligation to pay off the public debt but does not prevent the federal government from suspending payments due and owing to creditors during a budgetary impasse. As Professor Michael McConnell put it: "When borrowers fail to make payments on lawfully incurred debt, this does not question the validity of those debts; their debts are just as valid as before. The borrowers are just in default."[15] This argument, however, withers under scrutiny.

Start with the text. The passive construction of the Public Debt Clause is striking. It is framed as a blanket prohibition on anything that brings into question the validity of the public debt, rather than imposing specific obligations on Congress or the President. The passive construction suggests that the Clause is framed as an assurance to creditors that their rights will be respected. Any type of threat to treat creditors' rights as less than "valid" seemingly violates this prohibition.[16]

The historical evidence sheds a bit of additional, if limited, light. The meaning of the phrase "shall not be questioned" when the Public Debt Clause was crafted is unclear; it could have been limited to a prohibition on actual repudiation of the national debt, or a broader guarantee against anything that might cast a cloud over the scope of obligations to creditors.[17] Statements illuminating the meaning of the Clause as it was

14. U.S. Const. amend. XIV, § 4.

15. Michael W. McConnell, Opinion, *The Case for Violating the Debt Limit Is Dangerous Nonsense*, N.Y. Times (May 14, 2023), https://www.nytimes.com/2023/05/14/opinion/debt-limit-constitution.html [https://perma.cc/QB9N-5MQL]. To similar effect, see, for example, Edmund W. Kitch & Julia D. Mahoney, *Restructuring the United States Government's Debt: Private Rights, Public Values, and the Constitution*, 2019 Mich. St. L. Rev. 1283, 1317 (2019) ("[F]ailing to pay a debt in full and on time is not at all the same thing as questioning that debt's validity.").

16. *Cf.* Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 Tulsa L.J. 562, 593 (1997) [hereinafter Abramowicz, *Beyond Balanced Budgets*] ("The passive construction thus allows for a reading of the Clause as containing a reassuring promised from the Framers to bondholders . . . . It would be inconsistent with this promissory announcement and the word 'questioned' if a statute could cause bondholders to believe that their debt will not be paid as promised and that they will need to seek redress in the courts to recover belated payment.") (footnote omitted).

17. *Compare* Stuart McCommas, Note, *Forgotten But Not Lost: The Original Public Meaning of Section 4 of the Fourteenth Amendment*, 99 Va. L. Rev. 1291, 1300–02 (2013) (arguing that the original meaning of the phrase "the validity of the public debt . . . shall not be questioned" was to "forbid[ ] Congress, the President, and federal

considered in Congress are sparse; it was added late in the process of crafting the Fourteenth Amendment and little-discussed.[18] The handful of statements in Congress purporting to explicate the Clause do little more than indicate, in general terms, that the Clause assures payment of the national debt.[19]

The historical context against which the Clause was framed offers some additional insight. Among those who have studied the matter, there is consensus that in the face of concerns that the congressional representatives of the Southern states might balk at honoring the Union's debt arising from the Civil War, what became Section 4 of the Fourteenth Amendment was crafted to prevent a future Congress from refusing to pay Union war debts, or holding it hostage unless payment of the Confederate debt or compensation for the emancipation of the enslaved was also made.[20] This concern is evidenced in the text of Section 4; the Clause immediately following the Public Debt Clause conjoins its prohibition on questioning the validity of the public debt with correlative prohibitions on paying the Confederate debt and paying compensation to enslavers.[21] Still, the Public Debt Clause is framed in broad

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courts from taking legal action to repudiate federal debt . . . . [T]he Public Debt Clause does not forbid congressional action that merely jeopardizes the validity of the federal debt."), *with* Daniel Strickland, Note, *The Public Debt Clause Debate: Who Controls This Lost Section of the Fourteenth Amendment?*, 6 Charleston L. Rev. 775, 784 (2012) (arguing that the original meaning of the phrase "the validity of the public debt . . . shall not be questioned" was to erect a "continuous duty not to question the public debt or even cause uncertainty regarding its future payments.").

18. For a description of the drafting and ratification process of the Clause, see Phanor G. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 Cornell L.Q. 1, 4–15 (1933).

19. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2769 (1866) (remarks of Sen. Wade) ("[M]y amendment prohibits and renders null and void all obligations incurred in rebellion . . . but then my amendment goes to another branch of this business almost as essential as that. It puts 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."); *id.* at 3148 (remarks of Rep. Stevens) ("The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors.").

20. For helpful discussions of the historical evidence, see Abramowicz, *Beyond Balanced Budgets*, *supra* note 16, at 583–87; Jack M. Balkin, *The Legislative History of Section 4 of the Fourteenth Amendment*, Balkinization (June 30, 2011, 1:59 PM), https//balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html [https://perma.cc/9T3D-3XMQ]; Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 Duke L.J. 1227, 1233–40 (2013); and McCommas, *supra* note 17, at 1305–23.

21. *See* 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. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for

terms applicable not just to Civil War-related debts, but to the entire "public debt of the United States, authorized by law," which "shall not be questioned."[22]

This contextual evidence suggests that the Clause was originally understood to prevent political factions from using the national debt as leverage to extract concessions on other policy objectives. The Clause was thereby crafted to prevent use of the national debt as a political bargaining chip. A threat to produce widespread economic damage as a consequence of a default on or indefinite suspension of debt-service payments, made by congressional factions intent on achieving some policy or political objective, constitutes the kind of political leverage that the Clause was framed to preclude.

Perhaps most important to this constitutional inquiry, however, is that a default on the national debt denies the validity of the fundamental obligation that any debtor owes to its creditors. The obligation that inheres in a debt, after all, is inextricable from the obligation to pay that debt on the terms on which money was loaned. When a debtor promises to pay a debt on an agreed schedule, any failure to make timely payment is a repudiation of the terms on which funds were lent. Repudiating the obligation to pay a debt on the date promised is treating as valid only part of the obligation that inheres in the debt. When the federal government fails to repay its debts when due, surely it has "questioned" the validity of the obligation inhering in the debt—indeed, it has entirely repudiated its obligation of timely payment.[23]

The breadth of the Public Debt Clause is reflected in the decision of the United States Supreme Court in *Perry v. United States*,[24] the Court's only decision to offer meaningful consideration of the Clause. In the course of holding that a bondholder had established a breach of contract, though not actual damages, when the government refused to

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the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.").

22. *Id.*

23. For other scholarly arguments in support of the view that the Public Debt Clause prohibits more than express repudiation of the national debt, see Michael B. Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* 21–32 (Geo. Wash. Univ. Legal Studies, Working Paper No. 575, 2011) [hereinafter Abramowicz, *Train Wrecks*] (arguing that federal budgeting that makes repayment uncertain or that raises genuine concerns about repayment violates the Clause); Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1188–94 (arguing that the Clause requires the federal government to timely meet its financial obligations); Ostro, *supra* note 8, at 254–56 (arguing that any genuine threat of default violates the Clause); Adam Rosenzweig, *The Article II Fiscal Power*, 29 CONST. COMM. 127, 134–39 (2014) (same).

24. 294 U.S. 330 (1935).

repay bondholders with gold-backed dollars even though, at the time the bonds were purchased, the dollar had been denominated in terms of a quantity of gold,[25] the Court wrote of the Public Debt Clause:

> While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader construction. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others authorized by Congress, as to those issued before the Amendment was adopted. 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.[26]

Some caution about the precedential force of this passage is warranted; the decisive vote in *Perry* was cast by Justice Stone, who noted that no question of default was before the Court, and who refused to join the opinion of the Court to the extent that it discussed matters beyond the scope of the government's power to regulate currency.[27] Even if the critical discussion in *Perry* is nonbinding dicta, however, likely the better view is that the Public Debt Clause forbids the government from defaulting on the national debt even if it purports not to altogether repudiate the debt—if the national debt is of unquestioned "validity," then the validity of the government's promise that payments will be made on the dates specified in a bond or other instrument memorializing its obligation must be treated as equally valid. It is not as if the promise to pay a debt stands apart from the promise to pay on the terms on which the money was loaned—including the term governing the date on which payments are to be made.[28]

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25. *Id.* at 352–58.
26. *Id.* at 354.
27. *Id.* at 359, 361 (Stone, J., concurring).
28. Although the United States ordinarily enjoys sovereign immunity from suit, the Public Debt Clause might well abrogate that immunity to the extent that a creditor seeks to enforce a "public debt" within the meaning of the Clause. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976) (holding that Section 5 of the Fourteenth Amendment authorizes Congress to abrogate state sovereign immunity when necessary to enforce the Fourteenth Amendment). Even apart the from the Public Debt Clause, it may well be that the Tucker Act's waiver of sovereign immunity, if not the contracts providing for the sale of federal securities themselves, would constitute waivers of sovereign immunity. *See* Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. REV. 1, 22–23 (2014) ("To the extent that U.S. debt does not include an express contractual waiver of sovereign immunity, creditors might turn to the Tucker Act, which grants jurisdiction in certain courts and waives sovereign immunity for non-tort monetary claims. The waiver applies to the federal government's violations of federal statutes, executive regulations, and contracts. Because U.S. debt securities are arguably a form

But, even if the Public Debt Clause is a constitutional bar on default, and not merely a prohibition on express repudiation of any obligation to pay the national debt, it does not follow that a statutory debt ceiling violates the Public Debt Clause. The Clause expressly provides that Congress retains its prerogative to determine when and whether debt may be incurred; the Public Debt Clause secures only "the validity of the public debt of the United States*, authorized by law*."[29] A ceiling on the amount of debt that can be incurred does not raise any "question" about the "validity" of the debt that has been incurred within the ceiling; it only suggests that once the federal government hits the ceiling, it must stop incurring additional debt. If it does, that debt is not "authorized by law," and hence without constitutional protection.

Accordingly, to assess the scope of the protections offered by the Public Debt Clause, it is critical to undertake an exercise that, remarkably, does not appear in the scholarly attacks on the debt ceiling—an inquiry into which government expenditures are required by the Public Debt Clause, and which are not.[30] It turns out that a great deal of the money the government spends enjoys no protection whatsoever from the Clause. All the Clause requires is that the government pay the costs of servicing the national debt. At least in the foreseeable future, that can readily be done without any need to breach the debt ceiling.

A. The Public Debt Clause Requires Only Payments to Bondholders and Other Creditors

The Public Debt Clause obliges the government to honor "the public debt of the United States," but which of the government's financial obligations fall into that category?

Money borrowed to finance government expenditures through bonds or otherwise is the paradigmatic example of "the public debt of the United States." Indeed, the definition of the federal government's "debt" employed by the Congressional Budget Office ("CBO") is the amount of "debt held by the public, which consists mostly of securities that the Treasury issues to raise cash to fund the federal government's

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of debt contract, violating their payment terms by defaulting would likely qualify as a contract violation under the Tucker Act.") (footnotes omitted).

29. U.S. CONST. amend. XIV, § 4 (emphasis added).

30. The scholarly attacks on the debt ceiling under the Public Debt Clause uniformly fail to address this question. *See, e.g.*, Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1188–94 (arguing that the Public Debt Clause prohibits an express repudiation of the debt but not identifying which expenditures must be made because they represent payments on "the public debt of the United States"); Ostro, *supra* note 8, at 253–59 (same); Rosenzweig, *supra* note 23, at 137–38 (same).

activities and to pay off its maturing liabilities."[31] Holders of this debt include the Social Security Trust funds, since their assets must be invested in interest-bearing obligations of the United States or other obligations guaranteed by the United States.[32]

Though the Public Debt Clause prohibits the government from failing to repay the holders of federal securities, that would not warrant invalidation of the debt ceiling. As a matter of simple arithmetic, there is no need to breach the debt ceiling to meet these obligations.

At the outset of the 2023 debt-ceiling confrontation, the CBO estimated that in light of rising interest rates, the costs of servicing the federal debt "are projected to increase by 35 percent again this year, from $475 billion in 2022 to $640 billion."[33] Nevertheless, "[f]ederal revenues in 2022 totaled $4.9 trillion. Under current law, revenues will fall by 2 percent in 2023, to $4.8 trillion, CBO estimates."[34] Thus, revenues in 2023 were estimated to be more than five times the cost of debt service.

According to CBO estimates, this pattern will persist in the foreseeable future. Total debt-service costs are estimated to rise by 2033 to $1.4 trillion, yet total revenue in 2033 is estimated to be nearly $7.1 trillion.[35] Thus, in 2033, total revenue is again estimated to be more than five times the size of cost of debt service.

To be sure, at the time of the 2023 debt-ceiling confrontation, the CBO estimated that the federal government's budgetary deficit was large and will continue to rise: "CBO projects a federal budget deficit of $1.4 trillion for 2023. In the agency's projections, deficits generally

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31. Cong. Budget Off., The Budget and Economic Outlook: 2023 to 2033 at 8 (2023) [hereinafter The Budget and Economic Outlook]. This amount also includes "[a] small amount of debt . . . issued by other agencies, mainly the Tennessee Valley Authority." *Id.* at n.2. Debt subject to the debt ceiling, in turn, "differs from gross federal debt mainly in that it excludes debt issued by the Federal Financing Bank and includes certain other adjustments that are excluded from gross debt." *Id.* at 9 (footnote omitted).

32. *See* 42 U.S.C. § 401(d) (2022) ("It shall be the duty of the Managing Trustee to invest such portion of the Trust Funds as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States.").

33. The Budget and Economic Outlook, *supra* note 31, at 18. The term used by the Congressional Budget Office to capture the cost of debt service is "net interest outlays": "In the budget, net outlays for interest consist of the government's interest payments on federal debt, offset by interest income that the government receives. Net interest outlays are dominated by the interest paid to holders of the debt that the Treasury issues to the public." *Id.* at 16–18.

34. *Id.* at 20.

35. *Id.* at second unnumbered page following cover page (chart entitled "Budget Outlook, by Fiscal Year").

increase over the coming years; the shortfall in 2033 is $2.7 trillion."[36] Yet, although deficits will continue to rise, current revenues will be much more than sufficient to pay the costs of debt service, even if they will not cover all of the other costs that the government incurs.[37]

Accordingly, even though the Public Debt Clause likely prohibits default on the national debt, at least in the reasonably foreseeable future, the statutory debt ceiling will not necessitate an unconstitutional default because current revenues will be amply sufficient to service the debt. The debt ceiling might require the federal government to reduce other, non-debt-service-related expenditures once it reaches the debt ceiling in order to avoid an unconstitutional default, but its effect would not go beyond that. That is, unless the Public Debt Clause protects obligations other than the repayment of money borrowed to finance federal spending.

Perhaps the Public Debt Clause protects more than the sums owed to creditors that have loaned the Government money. Its prohibition on questioning the validity of "the Public Debt," for example, "include[s] debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion."[38] This formulation was deliberate; the historical evidence surrounding the framing of the Clause demonstrates that the Clause was intended to secure pensions or bounties arising from service to the Union during the Civil War.[39]

Yet, the Clause's protection for "pensions or bounties" is expressly limited to those arising from suppressing insurrection or rebellion, while its protection for the validity of "the public debt of the United States" is not subject to a parallel limitation. If the Clause had been crafted to offer protection for all pensions, bounties, and similar obligations, the textual limitation to those arising from insurrection or rebellion would have been unnecessary, or, at a minimum, the "public debt of the United States" is defined to include bounties and pensions arising from the Civil War, "but not limited to" bounties and pensions arising from that conflict. The Public Debt Clause's formulation is an awfully strange way to protect all pensions, bounties, and similar benefits, even if not arising from the suppression of insurrection or rebellion. Unless the Public Debt Clause's reference to insurrection or rebellion is to be

36. *Id.* at unnumbered page following cover page (entitled "At a Glance").

37. For a helpful elaboration on the practicability of using current revenues to cover the costs of debt service, see Clarke, *supra* note 2, at 51–53.

38. U.S. Const. amend. XIV, § 4.

39. *See, e.g.*, Abramowicz, *Beyond Balanced Budgets*, *supra* note 16, at 588 ("The Framers sought . . . to clarify that the Civil War origins of 'pensions and bounties' would not keep them out of the 'public debt.'").

treated as surplusage, contemporary pensions and similar obligations should be regarded as outside the scope of the Public Debt Clause.

That said, the question of whether the Public Debt Clause protects pensions and similar benefits beyond those arising from insurrection or rebellion is not free from doubt. The term "debt," both today and when the Fourteenth Amendment was framed, connotes any enforceable claim or obligation to make a payment.[40] Such an obligation exists not only to those who have loaned a debtor money, but also who have performed their obligations under contracts and are now entitled to payment if the debtor's contractual obligation is to be honored.[41] For example, in common parlance, the United States owes a "debt" to those who have performed their obligations to it under binding contracts but who have yet to be paid.[42] Accordingly, Professor Michael Abramowicz has suggested that the Public Debt Clause likely obliges the government to disburse funds when the government has entered a contract or similar agreement to make payments to a creditor.[43] That approach might protect quasi-contractual employment benefits as well, such as fully vested pensions.

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40. *See, e.g.*, *Debt*, Black's Law Dictionary (11th ed. 2019) (defining "debt" as "(1) Liability on a claim; a specific sum of money due by agreement or otherwise . . . (2) The aggregate of all existing claims against a person, entity, or state . . . ."); *Debt*, Noah Webster, An American Dictionary of the English Language (New York, S. Converse 1828) (defining "debt" as "[t]hat which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another; as the debts of a bankrupt; the debts of a nobleman").

41. *See, e.g.*, Restatement (Second) of Contracts § 235 (Am. L. Inst. 1981) ("When performance of a contract is due any non-performance is a breach.").

42. *Cf.* Lynch v. United States, 292 U.S. 571, 579–80 (1934) ("The Solicitor General does not suggest either in brief or argument that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power . . . . Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."). Notably, the Prompt Payment Act requires the federal government to pay contractors who present invoices documenting work that they have performed upon presentation of the invoice. *See* 31 U.S.C. §§ 3901–07 (2022) (requiring vendors who submit proper invoices to be paid by the due date or receive an "interest penalty" for nonpayment). It characterizes the amount due and owing on invoices as a "debt." *See id.* § 3902(e) ("An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accrues thereafter on the added amount.").

43. *See* Abramowicz, *Train Wrecks*, *supra* note 23, at 20–21 ("[T]he United States incurs a public debt only if a statute embodies an agreement, or, more restrictively, only if the government issues a written agreement. Since a gratuitous promise does not ordinarily constitute a legally enforceable agreement, the Clause could be further limited to governmental promises made in exchange for good consideration. The requirement of an agreement honors § 4's distinction among debts, obligations and claims.") (footnotes omitted).

There is, however, considerable doubt about whether the federal government's contractual liabilities amount to an enforceable obligation to make payments when the statutory debt ceiling prevents the government from raising the money necessary to do so. Government contracts are not ordinarily understood to negate the terms of generally applicable legislation, even when that legislation limits the rights of those who have contracted with the government. As the Supreme Court put it, describing what has come to be known as the "sovereign acts doctrine": "Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."[44]

Thus, the federal government's obligations under its contracts might well be conditioned on its ability to raise the necessary funds to make contractual payments under the debt ceiling.[45] Indeed, it is settled law that those who deal with the government are chargeable with notice of the limitations on the ability of the government to spend public funds, even when they act in reliance on the assurances of individual government officials to the contrary.[46] One of those limitations, of course, is the statutory debt ceiling. Accordingly, the federal government is likely under no legal obligation to disburse funds pursuant to a contract when the debt ceiling prevents it from raising the necessary funds.[47] And, if there is no legal obligation to disburse funds, there is no "debt" within the meaning of the Public Debt Clause that must be treated as valid.

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44. United States v. Winstar Corp., 518 U.S. 839, 891 (1996) (plurality opinion) (quoting Horowitz v. United States, 267 U.S. 458, 461 (1925)).

45. *Cf.* Restatement (Second) of Contracts § 224 (Am. L. Inst. 1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract is due."); *id.* § 225(1) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.").

46. *See, e.g.*, Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 428 (1990) ("If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive."); Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 63 (1984) ("Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.") (footnote omitted).

47. For an argument along these lines, see Asher Eng, *No Faith and No Credit: Is There Legal Recourse Against the Federal Government Should a Default on Treasury Debt Occur?*, 28 Widener L. Rev. 187, 196–99 (2022).

In any event, even if the Public Debt Clause's protections extend to all contractually obligated payments, and even to quasi-contractual retirement benefits and the like, it is remains far from clear the current revenues are ever likely to be insufficient to service these this "debt" since, as we have seen, current revenues are much greater than the costs of debt service.[48] Even if there comes a time in which the costs of servicing the federal debt exceed current revenues, an invocation of the Fourteenth Amendment would do no more than permit the federal government, in order to avoid an unconstitutional default, to issue debt necessary to cover the costs of paying bondholders and, perhaps, other contractual obligations to its creditors. The debt ceiling would still prohibit the government from issuing any new debt beyond what is necessary to pay creditors. There would still be no constitutional basis to breach the debt ceiling if necessary to cover other governmental costs unrelated to the payment of creditors. The Public Debt Clause, at most, would invalidate the debt ceiling only to the extent that incurring new debt might be necessary to service the costs of existing debt. It would not, however, permit the government to issue new debt to finance other government expenditures.

In sum, the Public Debt Clause may well require the federal government to do whatever is necessary to pay bondholders, and, perhaps, those contractually due payments for services rendered, but in the foreseeable future, this "public debt" can be serviced without risk of default from current revenues, even if other areas of spending must be reduced.

This is the central flaw in the claim that a presidential invocation of the Public Debt Clause can somehow make the debt ceiling disappear. The debt ceiling is not, at least in the foreseeable future, an obstacle to making all payments that are required on "the public debt of the United States." Unless, that is, "the public debt of the United States" includes other types of expenditures.

B. Unexpended Appropriations Are Not a "Public Debt" Protected by the Public Debt Clause

As we have seen, advocates of the Fourteenth Amendment attack on the statutory debt ceiling claim that the Fourteenth Amendment requires that the government "pay all of its obligations."[49] It is one thing to conclude that the Public Debt Clause protects holders of federal securities, and perhaps even those who have performed their obligations

48. *See supra* text accompanying notes 31–37.

49. *E.g.*, Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1194.

under contracts with the United States. It is quite another, however, to conclude that everyone who expects to receive funds appropriated by Congress is protected by the Public Debt Clause as a holder of the "public debt of the United States." There are at least four reasons why the Public Debt Clause does not permit the government to breach the debt ceiling when necessary to disburse appropriated funds other than funds appropriate to service existing debt.

1. Appropriations are not debts

The view that anyone who expects to receive appropriated funds is a creditor of the United States protected by the Public Debt Clause is textually indefensible. The Fourteenth Amendment, in the Clause immediately following the Public Debt Clause, draws a distinction between the "public debt" and a mere "claim" to government funds, or a government "obligation" to pay them out.[50] The text thereby powerfully suggests that something beyond a "claim" or even an "obligation" is required before the United States incurs a "debt."[51]

Congress's past lawmaking practice confirms this conclusion. If Congress remains free to reduce or rescind an appropriation prior to the time the appropriated funds are expended, then an appropriation could hardly constitute a "debt" which the government must treat as "valid" and therefore pay under the Public Debt Clause. That is because, as we have seen, a "debt," within the meaning of the Public Debt Clause, requires an enforceable obligation to make a payment to a creditor.[52] If every appropriation created a "debt" the validity of which could not be questioned under the Public Debt Clause, appropriations could never be reduced, much less rescinded, by amendment because any reduction in the amount of an appropriation would deny the validity of "the public debt" created by the appropriation. Yet, appropriation laws have never been regarded as immune from any amendment that might reduce an appropriation. Congress itself frequently reduces appropriations; the legislation that resolved the 2023 debt-ceiling confrontation, for

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50. *See* U.S. CONST. amend. XIV, § 4 "[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.").

51. *Cf.* Abramowicz, *Train Wrecks*, *supra* note 23, at 21 ("While the Public Debt Clause itself uses only the word 'debt,' the second sentence of § 4 uses the terms 'debt or obligation' and the phrase 'claim for the loss or emancipation of any slave.' By including only the first of these within the public debt, the Public Debt Clause excludes money that the United States ought to pay by virtue merely of a moral obligation.") (footnote omitted).

52. *See supra* text accompanying notes 40–43.

example, rescinded a variety of earlier appropriations.[53] The Impoundment Control Act, moreover, expressly authorizes the President to seek reductions or recissions in appropriations.[54]

To be sure, appropriation laws are often interpreted to impose a legal obligation on the President to disburse the appropriated funds.[55] The Impoundment Control Act, moreover, requires the President to spend appropriated funds, even when the President believes the appropriations should be rescinded, unless Congress agrees to defer or rescind appropriations.[56] Within those parameters, however, Congress remains free to reduce appropriations as it sees fit. Appropriations are not understood to create debts of the United States that must be honored under the Public Debt Clause.

2. *Appropriations do not repeal the debt ceiling*

An appropriation could eliminate the legal force of the statutory debt ceiling only if it impliedly repealed the debt ceiling to the extent necessary to enable the Executive Branch to raise the money needed to execute the appropriation. If that were the case, however, Congress accomplishes nothing by enacting a debt ceiling: Whenever the total

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53. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, tit. I, div. B, tit. II, § 251, 137 Stat, 10, 23–31 (2023) (rescinding funds appropriated but not yet obligated in earlier legislation); CBO Letter, *supra* note 5, at 5, 8 (describing recission of unobligated funds in the legislation).

54. *See* 2 U.S.C. § 683(a) (2022) ("Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons . . . , the President shall transmit to both Houses of Congress a special message specifying—(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved; (2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved; (3) the reasons why the budget authority should be rescinded or is to be so reserved; (4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and (5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation . . . .").

55. *See, e.g.*, Train v. City of New York, 420 U.S. 35, 43–44 (1975) ("Section 207 authorized appropriation of 'not to exceed' a specified sum for each of the three fiscal years . . . . If a sum of money is 'authorized' to be appropriated in the future by § 207, then § 205(a) directs that an amount equal to that sum be allotted. Section 207 speaks of sums authorized to be appropriated, not of sums that are required to be appropriated; and as far as § 205(a)'s requirement to allot is concerned, we see no difference between the $2 billion the President directed to be allotted for fiscal year 1973 and the $3 billion he ordered withheld. The latter sum is as much authorized to be appropriated by § 207 as is the former. Both must be allotted.").

56. *See* 2 U.S.C. §§ 681–88 (2022) (describing procedure for presidential proposals to defer or rescind authority to spend appropriated funds and authorizing suits by the Comptroller General to enforce these requirements).

amount appropriated by Congress is in deficit by an amount that exceeds the debt ceiling, the debt-ceiling statute would be repealed for that budgetary cycle; and whenever the budget is in surplus or the deficit smaller that the space left under the debt ceiling, the debt ceiling would be unnecessary. The view that annual appropriations supersede the debt ceiling, in short, renders the debt ceiling statute meaningless, in violation of the rule of statutory interpretation that rejects reading statutes as meaningless or ineffective.[57]

Moreover, interpreting annual appropriations to render the debt-ceiling inoperative runs afoul of the rule that implied repeals of statutes should be rejected when it is possible to harmonize a newly-enacted statute with an earlier one.[58] Indeed, the presumption against repeal by implication "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act."[59]

Appropriations legislation can readily be harmonized with the debt ceiling. Precisely because the statutory debt ceiling represents a limitation on the government's ability to raise the money necessary to pay out appropriations, appropriations can be harmonized with the

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57. *See, e.g.*, Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 128 (2018) ("Absent clear evidence that Congress intended this surplusage, the Court rejects an interpretation of the statute that would render an entire subparagraph meaningless."); Advoc. Health Care Network v. Stapleton, 581 U.S. 468, 477 (2017) ("[T]he employees' construction runs aground on the so-called surplusage canon—the presumption that each word Congress uses is there for a reason."); TRW Inc., v. Andrews, 543 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations and citations omitted). Notably, Professors Buchanan and Dorf, though critics of the debt ceiling, concede this point: "If the enactment of a budget in which spending will eventually exceed revenues by an amount greater than the room remaining under the debt ceiling acts as a tacit repeal of the debt ceiling, then the debt ceiling will have been read to do literally nothing." Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1202.

58. *See, e.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) ("[W]e come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.") (internal quotations, brackets and citations omitted); Traynor v. Turnage, 485 U.S. 535, 547–48 (1988) ("[R]epeals by implication are not favored . . . . [A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that the words of the later statute shall have any meaning at all.") (citations, internal quotations, and brackets omitted) (last ellipsis in original).

59. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978); *accord*, *e.g.*, Me. Cmty. Health Options v. United States, 140 S. Ct. 1308, 1323 (2020) ("This Court's aversion to implied repeals is especially strong in the appropriations context.") (citation and internal quotations omitted).

debt ceiling by construing them as imposing a conditional obligation. Appropriations create an obligation to disburse the appropriated funds conditioned on the Executive Branch's ability to raise the funds necessary to execute the appropriations, given the legal restrictions Congress has imposed on the Executive's ability to incur debt under the debt ceiling. In this fashion, appropriations are properly harmonized with the limitations that Congress has imposed on the Executive's ability to fund those appropriations.

3. *Appropriations are contingent on the availability of funds under the debt ceiling*

Annual appropriation statutes are, by their terms, contingent on the availability of the appropriated funds in the Federal Treasury. For example, the omnibus appropriations statute in effect at the time of the 2023 debt-ceiling confrontation provided, in its introductory "Statement of Appropriations," that the funds appropriated by that legislation must be available to the Treasury: "The following sums in this Act are appropriated, *out of any money in the Treasury* not otherwise appropriated, for the fiscal year ending September 30, 2023."[60] Thus, these appropriations are contingent on the necessary funds being in the Treasury. If, because current revenues have been exhausted and the debt-ceiling statute forbids the Treasury from generating additional funds, the legal obligation to disburse appropriated funds created by the appropriation statute is no more.[61]

Even putting the qualified phraseology of annual appropriations aside, interpreting appropriations laws as subject to Congress's willingness to raise the debt ceiling when necessary to execute the appropriations is dictated by the longstanding rule that Congress may attach whatever additional conditions it deems appropriate on the right of individuals to receive public funds.

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60. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 5, 136 Stat. 4459, 4462 (Dec. 29, 2022) (emphasis added).

61. Professors Buchanan and Dorf resist this conclusion, arguing that this language simply identifies the source from which appropriated funds are paid since reading the language to incorporate the government's ability to raise funds within the debt ceiling "would create a bizarre prioritization rule. That is because *other* statutes do not contain the 'money in the Treasury language." Neil H. Buchanan & Michael C. Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating Over Spending and Taxes, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, 113 COLUM. L. REV. SIDEBAR 32, 43 (2013) [hereinafter Buchanan & Dorf, *Bargaining in the Shadow of the Debt Ceiling*]. They do not explain, however, why it would be "bizarre" to privilege spending sufficiently important to Congress that it is not made expressly dependent on the availability of funds in the Treasury. Beyond that, it would be equally, if not more "bizarre" to read the statute to require the Treasury to pay out funds that it does not have.

Consider the Commissioner of Social Security, who, when administering social security benefits, is not dependent on annual appropriations, and has a statutory obligation to pay benefits, as defined by statute, to eligible individuals.[62] The Medicare program operates on a similar structure.[63] Nevertheless, the Supreme Court has rejected the claim that this statutory scheme creates a legal right to receive benefits that Congress is not free to qualify:

> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to everchanging conditions which it demands. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act. That provision makes express what is implicit in the institutional needs of the program.[64]

Similarly, when discussing the Food Stamp program, the Court has explained: "Congress ha[s] plenary power to define the scope and the duration of the entitlement to food-stamp benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program."[65]

Thus, the duty to pay out federal funds is qualified by the conditions Congress chooses to place on the duty to pay out funds, such as

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62. *See* 42 U.S.C. § 402 (2022) (defining individuals eligible for benefits); *id.* § 415 (detailing the statutory formula for setting benefit levels).

63. *See, e.g.*, *id.* § 1395*i*(a) ("There are hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1966, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of—(1) the taxes imposed by sections 3101(b) and 3111(b) of the Internal Revenue Code of 1986 . . . (2) the taxes imposed by section 1401(b) of the Internal Revenue Code of 1986 . . . ."); *id.* § 1395*l* (2022) ("Except as provided in section 1395mm of this title, and subject to the succeeding provisions of this section, there shall be paid from the Federal Supplementary Medical Insurance Trust Fund, in the case of each individual who is covered under the insurance program established by this part and incurs expenses for services with respect to which benefits are payable under this part, amounts equal to . . . ."). For a helpful explanation of Medicare's financing which explicates the manner in which financing is insufficient to cover statutory appropriations and other costs, see Matthew B. Lawrence, *Medicare "Bankruptcy"*, 62 B.C. L. Rev. 1657, 1667–77 (2022).

64. Flemming v. Nestor, 363 U.S. 603, 610–11 (1960) (citations omitted); *accord, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980) ("There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time.") (citations omitted).

65. Atkins v. Parker, 472 U.S. 115, 129 (1985).

the Executive Branch's ability to incur debt when necessary to raise the money needed to fund an appropriation.[66]

4. Appropriations and the "major questions doctrine"

Finally, interpreting appropriations laws to nullify the statutory debt ceiling likely runs afoul of the "major questions doctrine,"[67] which provides, at least in the context of an assertion of authority by an administrative agency, that when considering "the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion," "something more than a merely plausible textual basis . . . is necessary."[68] In such cases, "[t]he agency must instead point to 'clear congressional authorization' for the power it claims."[69] As the Court has summarized the doctrine:

> Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme . . . . We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.[70]

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66. Professors Buchanan and Dorf address this point in a footnote that, while ignoring *Atkins*, speculates that *Flemming* "may have been at least partly undermined" by the subsequent decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "which treated Social Security benefits as protected property interests for procedural due process purposes," and noting that "*Flemming* did not decide any issue under Section 4 of the Fourteenth Amendment, of which *Perry* remains the case that comes closest to providing an authoritative construction." Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1191 n.74. These objections amount to rather weak tea. On the first point, as Professors Buchanan and Dorf acknowledge, "due process does not invariably protect against legislative abolition of the underlying property interest." *Id.* Indeed, in *Atkins*, the Court cited to both *Flemming* and *Mathews* to explain that while statutory "entitlements are appropriately treated as a form of 'property'" protected by the Due Process Clause, when it comes to "a legislatively mandated substantive change in the scope of the entire program," nevertheless, "'the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.'" *Atkins*, 472 U.S. at 128, 129 (quoting *Richardson v. Belcher,* 404 U.S. 78, 81 (1971)). Even aside from *Atkins,* the Court has consistently followed *Flemming* after *Mathews* when it comes to Congress's ability to attach limitations to the right to receive public funds. *E.g.*, Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 51–52 (1986); Bowen v. Owens, 476 U.S. 340, 345 (1986); *Fritz*, 449 U.S. at 174. As for *Perry*, it does not remotely address the question whether anyone enjoys protection under the Public Debt Clause merely because they expect to receive appropriated funds.

67. W. Va. v. Env't Prot. Agency, 597 U.S. 697, 723 (2022).

68. *Id.* at 721, 723 (brackets in original) (internal quotations and citations omitted).

69. *Id.* at 724 (internal quotations and citations omitted).

70. *Id.* at 723 (internal quotations, citations and brackets omitted); *accord*, *e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2372–75 (2023); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

There is, of course, nothing in appropriation laws that expressly direct the Executive Branch to ignore the debt ceiling when executing those appropriations.

Though the major questions doctrine is controversial, and there is uncertainty about its scope, commentators agree that it has transformed statutory interpretation when it comes to the scope of the Executive Branch's authority.[71] Still, it is hardly a radical approach to statutory interpretation to express skepticism that statutes granting the Executive Branch authority, in general terms, to disburse appropriated funds, should properly be understood to grant the President authority to ignore not only the debt ceiling, but also Congress's constitutional prerogative to authorize debt incurred by the United States.[72]

For all these reasons, the debt ceiling represents a limitation on the ability of the Executive Branch to raise and thereafter spend appropriated funds. When the debt ceiling makes it impossible to raise the necessary funds, those who expect to receive appropriated funds have no legal right to do so that makes them creditors of the United States entitled to the protections of the Public Debt Clause.

The Public Debt Clause does not offer a plausible constitutional basis for invalidating the debt ceiling. At most, it might require that, once the debt ceiling is reached, current revenues be prioritized to the payment of the "public debt"—that is, the funds owed to bondholders, and, perhaps, others with contractual rights to payment from the United States, but current revenues are amply sufficient to make those payments.[73] Even if they were not, the Public Debt Clause might require a breach of the debt ceiling to the extent necessary to pay the cost of servicing the national debt, but no more.

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71. For helpful discussions of the doctrine, see, for example, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. REV. 37 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1; and Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

72. *Cf. Biden v. Nebraska*, 143 S. Ct. at 2380–81 (Barrett, J., concurring) ("[I]n a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on important subjects while delegating away only the details . . . . In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.") (citation and internal quotations omitted).

73. The claim that other provisions of the Constitution aside from the Public Debt Clause prevent the President from prioritizing payments once the debt ceiling is reached is considered in Part II.A below.

C. Annual Appropriations Annually Vanish

Assume, however, that the argument set out above is wrong. Assume instead the Public Debt Clause renders the debt ceiling invalid to the extent that it prevents the government from raising the funds necessary to spend all appropriated funds. Even on this quite generous assumption, invalidating the debt ceiling turns out to be a road to nowhere.

Annual appropriations expire annually; Congress limited appropriations in place at the time of the 2023 debt ceiling confrontation to the fiscal year ending on September 30, 2023.[74] At that point, even if the Public Debt Clause requires the government to continue to pay the costs of debt service, and perhaps expenditures that do not depend on annual appropriations, such as Social Security,[75] the Constitution requires a complete halt to non-debt-service-related spending dependent on the expired annual appropriations, since the Constitution forbids any expenditure of public funds absent an appropriation.[76] That would result in the closure of a great deal of the federal government; at the time of the 2023 confrontation, for example, annual appropriations authorized spending for agriculture, the Departments of Commerce and Justice, the military, and veterans' affairs, among many other government functions.[77] Even Social Security and Medicare benefits could be vulnerable since the administrative costs of operating these programs are dependent on annual appropriations.[78]

74. *See supra* text accompanying note 60.

75. *See supra* text accompanying note 62.

76. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). For an explication of the Appropriations Clause, see Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424–28 (1990).

77. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 2, 136 Stat. 4459, 4449–61 (Dec. 29, 2022) (table of contents describing subjects of annual appropriations).

78. *See* CONG. RSCH. SERV., SOCIAL SECURITY ADMINISTRATION (SSA) FY2022 ANNUAL LIMITATION ON ADMINISTRATIVE EXPENSES (LAE) APPROPRIATION: IN BRIEF 1 (May 13, 2022) ("Benefit payments for SSA's [the Social Security Administration's] programs are considered mandatory spending, which is not controlled by annual appropriations acts. However, the resources needed to carry out SSA's programs, as well as to support the administration of Medicare and other priorities, are generally considered discretionary spending and thus are controlled by appropriations acts. Nearly all of SSA's administrative expenses are funded by appropriations to its LAE [Limitation on Administrative Expenses] account, and almost all of the funding for the LAE account is provided each year as part of the annual appropriations process."). Moreover, because Social Security benefits are paid out of general funds which may be exhausted upon reaching the debt ceiling, that program could be vulnerable for that reason as well. *See* CONG. RSCH. SERV., REACHING THE DEBT LIMIT: BACKGROUND AND POTENTIAL EFFECTS ON GOVERNMENT OPERATIONS 5 n.16 (March 27, 2015) [hereinafter REACHING THE DEBT LIMIT] ("[U]nder normal procedures Treasury pays Social Security benefits from the General Fund and offsets this by redeeming

Accordingly, an invocation of the Public Debt Clause does no more than postpone a government shutdown until annual appropriations expire. In the case of the 2023 debt-ceiling confrontation, when the Secretary of Treasury estimated that the government would reach the debt ceiling on June 5,[79] an invocation of the Public Debt Clause would have only delayed the date at which the government could shut down for roughly four months.

Thus, the utility of the Public Debt Clause, even assuming that it protects all appropriated funds, is limited to buying a modest amount of time for negotiations, until annual appropriations expire. Even if it buys a few months to negotiate, however, an invocation of the Public Debt Clause to breach the debt ceiling comes with considerable costs that may offset its limited benefits. For one thing, if the President breaches the debt ceiling, that is likely to outrage members of Congress who are endeavoring to use that statute to force reductions in government spending, or who take seriously Congress's constitutional prerogative to decide how much debt to authorize. Thus, a breach of the debt ceiling could well poison the atmosphere for the ensuing and inescapable negotiations over annual appropriations.

Perhaps more important is the legal risk that would attach to debt instruments issued by the President in breach of the debt ceiling. As we have seen, there is serious doubt about the legal soundness of the claim that the Public Debt Clause permits the President to breach the debt ceiling.[80] Thus, those who buy such presidentially-issued bonds run a risk that they will be declared invalid and unenforceable. It is unclear whether the issuance of legally dubious bonds would, at that moment, threaten sufficiently particularized harm to permit an aggrieved party to bring suit challenging their issuance, but some legal risk of an adverse adjudication likely exists.[81] At a minimum, purchasers would

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an equivalent amount of the trust funds' holdings of government debt. In order to pay Social Security benefits, and depending on the government's cash position at the time, Treasury may need to issue new public debt to raise the cash needed to pay benefits. Treasury may be unable to issue new public debt, however, because of the debt limit. Social Security benefit payments may be delayed or jeopardized if the Treasury does not have enough cash on hand to pay benefits.").

79. *See* Letter from Janet L. Yellen, U.S. Sec'y of the Treasury, to Hon. Kevin McCarthy, Speaker of the U.S. House of Reps. (May 26, 2023), https://home.treasury.gov/system/files/136/Debt-Limit-Letter-to-Congress-Members-20230526-McCarthy.pdf [https://perma.cc/2PWR-RQBW] ("Based on the most recent available data, we now estimate that Treasury will have insufficient resources to satisfy the government's obligations if Congress has not raised or suspended the debt ceiling by June 5.").

80. *See supra* Part I.B.

81. The question whether the issuance of bonds or other instruments that could be used to evade the debt ceiling could give rise to a justiciable controversy is beyond the scope of this Article, though it is worth noting that the risk of an adverse adjudication is

have reason to worry that if they are ever forced to bring suit to enforce their rights under the presidentially-issued bonds if, for example, a subsequent President refused to honor or defend the validity of debt issued by a predecessor, the bonds might be held invalid.

Given the legal uncertainty that would accompany the issuance of debt without congressional authorization, even scholarly critics of the debt ceiling acknowledge that the President's issuance of bonds in violation of the debt ceiling would produce "damage to the economy from the government having to pay higher rates of interest on Presidential bonds."[82] Such uncertainty would be heightened if members of Congress or those considering running for Congress or the presidency announced that they intend, if elected, to repudiate the Presidential bonds.

This may understate the problem; the legality of Presidential bonds might turn on whether appropriations have lapsed. The statutory debt ceiling places a cap on the amount of debt that can be guaranteed by the United States.[83] Even if funds yet to be disbursed under appropriations laws are part of "the public debt of the United States" that must be paid regardless of the debt ceiling, on that view, the debt ceiling is unenforceable only until those appropriations are honored. Once those appropriations have lapsed, there is no longer a justification for a constitutional suspension of the debt ceiling. Instead, the debt ceiling, zombie-like, springs back into existence, with a cap that would not accommodate residentially-issued bonds in excess of the ceiling. Perhaps that means that presidential bonds issued in excess of the debt ceiling

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far from imaginary. For example, holders of credit default swaps who stand to receive substantial payouts if the United States defaults on its debt might be able to sue if the President breaches the debt ceiling to avoid a default that would trigger a payout. *See* Joe Rennison, *What Would Happen if the U.S Defaulted on Its Debt*, N.Y. Times (May 18, 2023), https://www.nytimes.com/2023/05/18/business/default-debt-what-happens-next.html [https://perma.cc/HBB3-HDNL] ("[A] few investors could be in for a major windfall. After a three-day grace period, some $12 billion of credit default swaps, a type of protection against a bond default, may be triggered."). *But cf.* Ostro, *supra* note 8, at 272–75 (arguing that presidential actions that merely affect the value of credit default swaps might not confer standing to sue). Beyond that, perhaps a state could establish that the President's issuance of bonds in excess of the debt ceiling, offered at a premium over market rates to attract investors, are sufficiently likely to increase the interest rates that the state must pay to sell its own bonds to confer standing to sue on the state. *Cf.* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 342, 345 (1977) (holding that Washington state commission could challenge North Carolina statute regulating advertising of Washington apples because "[i]n the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities.").

82. Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1230.

83. *See supra* note 13.

are no longer "authorized by law" within the meaning of the Public Debt Clause, and are no longer lawfully guaranteed by full faith and credit of the United States. This legal risk would surely increase the interest rates that would need to be paid to induce purchasers to buy the bonds. Even if the President issued bonds that matured quickly to minimize this problem, when current appropriations are soon to lapse and the debt ceiling likely to come back into existence, interest rates on the bonds would likely spike, and the utility of these "presidential bonds" would dissipate.[84]

In short, it is highly doubtful the Public Debt Clause can be used to breach the debt ceiling. It guarantees no more than payment of "the public debt of the United States," and that can readily be done without need to breach the debt ceiling, even if other expenditures must be cut. Even if the Clause could justify a breach of the debt ceiling, it would, at most, postpone a government shutdown by only a matter of months, while courting a wide variety of legal and political risks.

II. The President's Obligation to Execute the Laws

Aside from the Public Debt Clause, the scholarly opponents of the debt ceiling offer another route to setting it at naught. When the debt ceiling is reached, the argument goes, the President cannot comply with the obligation to disburse appropriated funds without either unlawfully raising revenue, unlawfully incurring debt, or breaching the debt ceiling, and, for that reason, the Constitution vests discretion in the President to breach the debt ceiling as the most prudent course of action available when the President's legal obligations are in conflict.[85] As a

84. Beyond that, if the debt ceiling returns once current appropriations are exhausted, public officials who have paid out on these presidential bonds with public funds, as well as those who receive the funds, could court criminal liability. *See* 18 U.S.C. § 641 (2022) ("Whoever . . . without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . or Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—Shall be fined under this title or imprisoned not more than ten years, or both . . . ."). Although the Administration of the President that issued these bonds would hardly be likely to prosecute those who dealt in them, within the limitations period a new President hostile to the bonds could take office, willing to prosecute those who used them to evade the debt ceiling.

85. See, e.g., Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and For All: Why the President Should Embrace the Least Unconstitutional Option*, 112 Colum. L. Rev. Sidebar 237, 240 (2012) ("[T]he president's choice must be to honor Congress's wishes regarding spending and taxes by setting aside its purported limitation on gross national debt."); DeVeaux, *supra* note 9, at 418 ("[I]rreconcilably conflicting legislative commands necessarily invest the executive

kind of precedent, Professors Neil H. Buchanan and Michael C. Dorf invoke President Lincoln's justification for suspending the privilege of habeas corpus at the outset of the Civil War: "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[86]

One central flaw inheres in this line of attack. The claim that, when the debt ceiling is reached, the President has no option other than to breach one of the laws that governs federal budgeting, turns out to be quite wrong. The President can readily comply with the Constitution and laws by cutting spending, rather than raising revenue by breaching the debt ceiling.

A. Why Not Spending Cuts Rather than Breaching the Debt Ceiling?

Upon reaching the debt ceiling, rather than breaching the ceiling to generate additional revenues, the President has another option—the President can cut government spending. That course of action is forbidden by neither the Constitution nor the laws of the United States. It is, therefore, the route that the President's constitutional obligation to faithfully execute the laws requires adherence to, rather than breach of the statutory debt ceiling.[87]

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with a measure of discretion that resembles lawmaking."); Hockett, *supra* note 8, at 4 ("Article II, Section 3 of our Constitution requires that the President 'take Care that the Laws be faithfully executed.' President Nixon effectively violated this provision by not spending as Congress, through that law which is the federal budget, mandated that he spend. President Biden would be doing the same were he not to spend as the last federal budget requires that he spend . . . ."); Ostro, *supra* note 8, at 262 ("[A] unilateral action to raise the debt ceiling [is] an implicit power granted to the President because the appropriated levels exceed current revenues." (footnote omitted)); Tribe, *supra* note 9 ("[T]he president should say with clarity, 'My duty faithfully to execute the laws extends to *all* the spending laws Congress has enacted, laws that bind whoever sits in this office — laws that Congress enacted without worrying about the statute capping the amount we can borrow.'"). *Cf.* Rosenzweig, *supra* note 23, at 135 ("[T]he President faces three duly enacted and valid federal laws: (1) mandated spending such as interest due on public debt, entitlement programs like Social Security and Medicare, and discretionary spending such as military and Health and Human Services, (2) insufficient revenue raised from duly enacted taxes, and (3) a prohibition on issuing new debt. Thus, the President has only three choices: (1) fail to undertake duly authorized spending, (2) raise revenue not authorized by Congress, or (3) issue new debt in excess of the limit on public debt. All three are unconstitutional.").

86. Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1219 (quoting Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430–31 (Roy P. Basler ed., 1953)) [hereinafter "COLLECTED WORKS"].

87. *See* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed.").

As we have seen, appropriations laws do not somehow impliedly repeal or invalidate the debt ceiling. Instead, the debt ceiling and appropriations laws are properly harmonized by treating the President's duty to disburse appropriated funds as contingent on compliance with the debt ceiling, both under ordinary rules of statutory interpretation and the major-questions doctrine.[88] Harmonizing appropriations and the debt ceiling in this fashion, in turn, means that the President does not fail to faithfully execute appropriations laws when the debt ceiling prevents the President from raising the funds necessary to do so. Instead, the President is under a legal duty to refrain from raising the revenue needed to pay out appropriated funds if the President must breach the debt ceiling to do so.

Indeed, both the congressional and executive agencies that have considered the matter agree that the President has authority to reduce spending when necessary to comply with the debt ceiling, though they have disagreed on how that should be accomplished; the Department of the Treasury has taken the position that the government should make payments on a first-in, first-out basis because "each law obligating funds and authorizing expenditures stands on an equal footing," meaning that "would have to make payments on obligations as they come due," while the General Accounting Office (now the Government Accountability Office) has taken the position that "Treasury is free to liquidate obligations in any order it finds will best serve the interests of the United States."[89]

To be sure, the President has no authority to unilaterally alter appropriations laws enacted by Congress.[90] When the President reduces spending to comply with the debt ceiling, however, the President is not asserting unilateral authority to alter appropriations laws enacted by Congress. Instead, the President is complying with the limitation on the obligation to disburse appropriated funds that Congress itself has imposed through the statutory debt ceiling.

Professors Buchanan and Dorf nevertheless deny that the President could reduce spending to comply with the debt ceiling. They invoke both the Impoundment Control Act, which they claim forbids the

88. *See supra* Part I.B.

89. Reaching the Debt Limit, *supra* note 78, at 9–10 (footnote, internal quotations and citation omitted).

90. *Cf.* Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating statute giving the President the power to "cancel" an "item of direct new spending" or a "limited tax benefit" because appropriations laws must be approved by both Houses and signed by the President or enacted over veto).

President from failing to spend appropriated funds,[91] and the nondelegation doctrine, arguing that "a tacit instruction to the President to cut federal spending across the entire federal budget with literally no guidance about how to set priorities surely violates the doctrine."[92]

As for the Impoundment Control Act, it provides that the President can propose a "recission of budgetary authority" to Congress.[93] Legislation acting on a proposed recission may be discharged from committee after 25 days if the motion is supported by one-fifth of the Members, and then must receive expedited consideration on the floor.[94] If Congress fails to enact legislation approving the recission within 45 calendar days in which it is in session, "[a]ny amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation . . . ."[95]

It is far from clear that the Impoundment Control Act applies to reductions in spending required when the debt ceiling makes it impossible for the President to raise the funds necessary to disburse appropriations. The Act provides that the President may propose a "recission of budgetary authority" when budgetary authority is either unnecessary or should be rescinded for "fiscal policy or other reasons."[96] The President must

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91. *See* Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1200 ("Congress . . . has made a strong statement of principle, affirming its power under the Constitution to set the exact sums of money to be spent on each program, not merely the upper limits."); *accord* Rosenzweig, *supra* note 23, at 139 ("[I]n 1974 Congress enacted the Congressional Budget and Impoundment Control Act, which forbade Presidents from impounding funds absent approval by Congress within 45 days. Presumably this would itself prevent the President from unilaterally choosing to service the public debt and default on other authorized spending without approval from Congress.") (footnotes omitted).

92. Buchanan & Dorf, *Bargaining in the Shadow of the Debt Ceiling*, *supra* note 61, at 45.

93. *See* 2 U.S.C. § 683(a) (2022) ("Whenever the President determines that all or any part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons . . . the President shall transmit to both Houses of Congress a special message specifying—(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved . . . . ").

94. *See id.* § 688 (detailing procedures governing recission bills).

95. *Id.* § 683(b).

96. *See id.* § 683(a) ("Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons . . . the President shall transmit to both Houses of Congress a special message specifying—(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved . . . and (5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.").

notify Congress of a "deferral of budget authority,"[97] in which spending is delayed rather than rescinded, only when necessary to provide for a contingency, achieve savings, or when specifically authorized by law.[98] When the debt ceiling prevents the President from raising the funds necessary to pay out appropriations, however, appropriated funds cannot be disbursed not because the appropriations should be rescinded or deferred, but, instead, because the Executive Branch cannot lawfully obtain the funds necessary to pay out the appropriations. That is very different from the circumstances contemplated in the Impoundment Control Act. Indeed, the Government Accountability Office has characterized circumstances in which the Executive Branch is prevented from spending appropriated funds as "programmatic delays" rather than a "recission" or a "deferral" subject to the Impoundment Control Act.[99]

In any event, the Impoundment Control Act did not somehow repeal the debt ceiling by implication or otherwise; the Act dates to 1974,[100] while the statutory debt ceiling in effect at the time of the 2023 confrontation had been reenacted (though temporarily suspended) in 2013.[101] Beyond that, as we have seen, statutes should be harmonized if possible.[102] It is readily possible to harmonize the debt ceiling and the Impoundment Control Act by interpreting the latter statute as inapplicable to spending cuts necessitated by the former.

Even if the Impoundment Control Act governs spending reductions necessitated by the debt ceiling, however, surely the President cannot claim that the Executive Branch has been forced to breach the debt ceiling if the President has not asked Congress for authority to reduce spending pursuant to the Impoundment Control Act, which the

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97. *See id.* § 682(1) ("'deferral of budget authority' includes—(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.").

98. *See id.* § 684(b) ("Deferrals shall be permissible only—(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law.").

99. *See* U.S. Gov. Accountability Off., GAO-04-261SP, Principles of Federal Appropriations Law (2017) ("There is also a distinction between deferrals, which must be reported, and 'programmatic' delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program.").

100. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974).

101. *See* No Budget, No Pay Act of 2013, Pub. L. No. 113-3, § 2, 127 Stat. 51, 51 (2013).

102. *See supra* text accompanying notes 58–59.

President may request when the President determines "that such budget authority should be rescinded for fiscal policy or other reasons . . . ."[103] The Act does not permit the President to breach the debt ceiling; instead, it permits the President to propose spending cuts. At most, the Impoundment Control Act imposes a duty on the President to propose cuts, rather than carte blanche to ignore the debt ceiling. Indeed, if the Impoundment Control Act negated the debt ceiling, the latter statute would become meaningless—an interpretation that is to be resisted.[104]

That said, perhaps a focus on the Impoundment Control Act obscures the importance of Congress's constitutional prerogative to direct the President to spend appropriated funds. Professors Buchanan and Dorf have suggested that the President's failure to spend appropriated funds violates not only the Impoundment Control Act, but the Constitution itself.[105] To be sure, if Congress imposes a statutory duty on the President to spend specified sums pursuant to appropriations, unilateral reductions in spending would violate the President's constitutional obligation to faithfully execute the laws, which in this case would be appropriations laws. But appropriations laws are not properly understood to repeal or somehow set at naught the debt ceiling; instead, the President's obligation to spend appropriated funds is properly understood as contingent on the availability of sufficient revenues to fund the spending.[106] If appropriation laws do not repeal the debt ceiling—and Professors Buchanan and Dorf concede this is the case[107]—it follows that the

103. 2 U.S.C. § 683(a) (2022). *See also* Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 156 n.405 (2021) ("Given the President's authority to defer and to seek rescission under the Impoundment Control Act (ICA), . . . it is not apparent how this 'required' rationale [for permitting the President to breach the debt ceiling] could apply to spending that is not expressly made mandatory by statute. Expenditures for most programs could be delayed for weeks or months, depending on the timing of the debt-ceiling impasse, before the ICA's prohibition on recissions forced obligation or expenditure.") (citation omitted).

104. 2 U.S.C. § 683(a) (2022).

105. *See, e.g.* Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1200 ("Arguably, moreover, the Impoundment Control Act was unnecessary to affirm Congress's powers . . . . [T]he fundamental idea that the power to spend implies the power to spend in *exact amounts* is persuasive . . . .") (emphasis in original).

106. *See supra* Part I.B.

107. *See* Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1202–03 ("[W]e do not think that Congress's adoption of a budget in 2011 can plausibly be read as having impliedly repealed the debt ceiling. If the enactment of a budget in which spending will eventually exceed revenues by an amount greater than the room remaining under the debt ceiling acts as a tacit repeal of the debt ceiling, then the debt ceiling will have been read to do literally nothing . . . . [R]eading the budget law to repeal the debt ceiling law would avoid a constitutional question only by violating the canon of statutory construction that instructs courts to 'disfavor interpretations

President's "take Care" obligation requires him to respect, rather than breach, the debt ceiling, and therefore reduce spending as required.

As for the nondelegation doctrine, it provides that the Executive Branch can exercise what is regarded as a legislative power only when "Congress has supplied an intelligible principle to guide the delegee's use of discretion."[108] The claim that Congress must validly delegate to the President the power to prioritize spending once the debt ceiling is reached, at the outset, fails to consider the Public Debt Clause.

The Public Debt Clause requires that payments be made to service the national debt.[109] The Clause accordingly provides the President with a constitutional obligation to prioritize debt-service payments over other expenditures not subject to a similar constitutional mandate.[110] This involves no problem of impermissible delegation—the Public Debt Clause is framed as an obligation on the entire government, rather than a legislative power that resides in Congress unless validly delegated to the Executive Branch.[111] The Clause's prohibition on default involves no delegation of legislative power subject to review under nondelegation principles; the prohibition is a delegation of authority to avoid default made by the Constitution itself.

Beyond payments for debt service required by the Public Debt Clause, Congress has provided the President with additional legal benchmarks for prioritizing government spending consistent with the nondelegation doctrine. In the Prompt Payment Act, for example, Congress has instructed the Executive Branch to make payments to vendors through the first-in, first-out accounting system detailed in that statute, in which payments are considered due on the date that a proper invoice is submitted by contractors representing when an agency has "acquire[d] property or service from a business concern."[112] That surely

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of statutes that render language superfluous.'" (footnote omitted) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

108. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

109. *See supra* Part I.A.

110. For a discussion of the process by which the Treasury would be likely to prioritize payments on the public debt, see Charles Tiefer, *Confronting Chaos: The Fiscal Constitution Faces Federal Shutdowns and (Almost) Debt Defaults*, 43 HOFSTRA L. REV. 511, 533–38 (2014).

111. *Cf.* Abramowicz, *Beyond Balanced Budgets*, *supra* note 16, at 592 ("The passive construction of the phrase 'shall not be questioned' provides additional evidence about how the Framers conceptualized the Public Debt Clause . . . . Passive sentences are useful for authors who do not wish to restrict a verb to a particular subject.").

112. 31 U.S.C. § 3902(a) (2020). Payment is due upon the receipt of a "proper invoice", defined as "an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget may require by regulation and the head of the appropriate agency may require by regulation or contract," *id.* § 3901(a)(4), which occurs "(A) on the later of—(i) the date on which the place or

amounts to an "intelligible principle" for prioritizing outstanding obligations subject to the Prompt Payment Act.[113]

Thus, when the debt ceiling is reached, the Public Debt Clause, at most, requires that the government pay the costs of servicing the national debt, and the nondelegation doctrine would obligate the President to comply with other congressional mandates for prioritizing spending, such as the Prompt Payment Act.

B. Why Not a Government Shutdown Rather than Breaching the Debt Ceiling?

Even if the Public Debt Clause, the Prompt Payment Act, the Impoundment Control Act, and other applicable legislation are regarded as inadequate legal grounds for permitting the President to decide which types of government spending should be reduced when the debt ceiling is reached, that hardly supplies a constitutional basis for breaching the debt ceiling. If the President has no lawful basis for prioritizing payments, and no ability to lawfully raise the revenue necessary to fund

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person designated by the agency to first receive such invoice actually receives a proper invoice; or (ii) on the 7th day after the date on which, in accordance with the terms and conditions of the contract, the property is actually delivered or performance of the services is actually completed, as the case may be, unless—(I) the agency has actually accepted such property or services before such 7th day; or (II) the contract (except in the case of a contract for the procurement of a brand-name commercial product for authorized resale) specifies a longer acceptance period, as determined by the contracting officer to be required to afford the agency a practicable opportunity to inspect and test the property furnished or evaluate the services performed; or (B) on the date of the invoice, if the agency has failed to annotate the invoice with the date of receipt at the time of actual receipt by the place or person designated by the agency to first receive such invoice." *Id.*

113. One commentator has argued that past practice involving unforeseen funding shortfalls that prevent the Executive Branch from spending appropriated funds suggests the existence of presidential authority to make reasonable reductions in spending in the face of a cap imposed by the debt ceiling. *See* Clarke, *supra* note 2, at 40 ("Structurally, the banal circumstance of a funding shortfall has much in common with the conflict between the debt limit and a statutory command to spend: Congress has legislated in a self-frustrating way—requiring that a certain result be achieved, but failing to appropriate sufficient funds to achieve it. Yet this familiar circumstance has been encountered and discussed by all three branches without a hint that it raises constitutional peril."). This view, however, places more weight on historical practice than it will bear. None of the precedents for presidentially-imposed reductions in spending involved a lack of revenue imposed by a debt ceiling, and none take account of the nondelegation doctrine. *See id.* at 42–50. A history of modest programmatic adjustments in spending when unforeseeable shortfalls occur offers little support for the type of massive system of prioritized spending of appropriated funds that would be required upon reaching the debt ceiling. For additional critique of Professor Clarke's view, see Neil H. Buchanan & Michael C. Dorf, *There Is No Historical Precedent for Prioritization in a Debt Ceiling Crisis*, DORF ON LAW (May 25, 2023, 1:22 P.M.), http://www.dorfonlaw.org/2023/05/there-is-no-historical-precedent-for.html#more [https://perma.cc/QW68-CN92].

appropriations in light of the debt ceiling, then the President's obligation is to halt all payments, other than payments on the national debt required by the Public Debt Clause. The government must, in other words, shut down until Congress and the President can reach an agreement on the federal budget.

A government shutdown is not an appealing option, but it is a constitutional one. The Appropriations Clause suggests that this is precisely how the government must function under the Constitution in the face of political deadlock—if both Houses of Congress and the President cannot enact appropriations that are signed into law by the President, then the government cannot spend money.[114] The Anti-Deficiency Act, moreover, prevents government officials from working without pay when funds are not available to pay them except for employees necessary to protect safety or property, who may work but without compensation.[115] Thus, Congress itself, far from prohibiting the President from shutting down the government, has anticipated and provided for just that course of action. Indeed, in recent decades, there have been a number of government shutdowns when there had been no timely agreement on appropriations.[116] Just as the government must shut down in the absence of appropriations, in the absence of an appropriation law that can be executed consistent with the debt ceiling, the government must shut down.

If the President halts all payments not required by the Public Debt Clause, the President respects all applicable provisions of the Constitution, even on the view that the Constitution prohibits the President from prioritizing spending. By halting non-debt-service-related spending, the President would preserve Congress's constitutional prerogatives over both taxes and authorizing borrowing on the credit of the United States, honor the Public Debt Clause, and refrain from spending for non-debt-service-related purposes because Congress has provided the Executive Branch with no constitutionally acceptable means for deciding which expenditures should be prioritized upon reaching the debt ceiling.

114. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

115. *See* 31 U.S.C. § 1342 (2022) ("An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property . . . . [T]he term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.").

116. For an account of government shutdowns from 1977 to 2018, see CLINTON T. BRASS, ET AL., CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS (2018).

Moreover, since appropriations laws should be harmonized with the statutory debt ceiling by treating them as contingent on compliance with the debt ceiling, the President does not violate the constitutional duty to comply with appropriations laws by refraining from spending appropriated funds when the debt ceiling prevents the President from doing so.

In short, upon reaching the debt ceiling, the President need not break the law, much less assume taxing, debt-incurring, or spending powers assigned to Congress by the Constitution. The President is empowered, instead, to reduce spending and, to the extent that he cannot accomplish that task by virtue of the Impoundment Control Act, the Prompt Payment Act, the nondelegation doctrine, or otherwise, the President's constitutional obligation is to halt spending altogether.[117]

C. The Problem of Prioritization Annually Vanishes

Even if it were true that when the federal government's annual budget is in deficit and the debt ceiling is reached, the President is empowered to execute appropriations laws despite the debt ceiling, that justification does not last very long. Annual appropriations run out annually. At that point, as we have seen in Part I.C above, the President no longer has statutory or constitutional authority to spend money or incur debt—in other words, the government must shut down. At most, the President could continue to make expenditures not dependent on annual

117. Professors Buchanan and Dorf have argued that when the President fails to spend appropriated funds to comply with the debt ceiling, the President still breaches the ceiling because in these circumstances, the President "would assure the disappointed obligees that the money would be coming as soon as possible," thereby "denying payment to the very people who have the most right to expect payment on a specific date." Neil H. Buchanan & Michael C. Dorf, *Borrowing by Any Other Name: Why Presidential "Spending Cuts" Would Still Exceed the Debt Ceiling*, 114 COLUM. L. REV. SIDEBAR 26, 39 (2014). There are multiple confusions embedded in this claim. First, because, as we have seen, the debt ceiling is not repealed by implication by appropriations (as Professors Buchanan and Dorf concede), it limits the legal obligation of the government to pay out appropriated funds. Hence, the individuals they describe as "obligees" are in fact not creditors entitled to receive payments since the government may not lawfully make those payments by virtue of the debt ceiling. Second, whatever the political resonance of presidential assurances of payment, the debt ceiling limits "obligations whose principal and interest are guaranteed by the United States Government . . . ." 31 U.S.C. § 3101(b) (2022). The President's political assurances, precisely because they cannot lawfully be guaranteed by the United States under the debt ceiling, would not legally bind Congress to make payments that are unlawful by virtue of the debt ceiling. Officials of the Executive Branch have no power to bind the government to make payments not authorized by Congress. *See supra* text accompanying note 46. Political assurances accordingly should not be conflated with "obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government . . . ." 31 U.S.C. § 3101(b) (2022).

appropriations, such as Social Security, as well as the cost of debt service required by the Public Debt Clause, but the President could do no more.

Thus, even for those who believe that the President can breach the debt ceiling when required by appropriation laws, this purported justification lasts only until the end the fiscal year, when annual appropriations expire. At that point, the debt ceiling would spring back into effect, perhaps even jeopardizing the lawfulness of bonds or other debt instruments issued by the Executive Branch during the period in which it had breached the debt ceiling—bonds that would in any event necessarily bear high rates of interest in light of the market's likely concern about their lawfulness and the risk of subsequent repudiation.[118]

The benefits of breaching the debt ceiling are limited, and the costs and legal risks of doing so are substantial. There is no real substitute for reaching a political agreement that results in the enactment of new appropriations laws, with the debt ceiling revised as needed to execute that agreement.

III. The Exotic Options

One line of attack on the debt ceiling is to attack its constitutionality. Another involves circumventing it.

A. Evading the Debt Ceiling

The easiest way to evade the debt ceiling is to find a way to generate the funds necessary to disburse all appropriated amounts without incurring additional debt subject to the statutory ceiling. There is no lack of proposals along these lines.

One suggestion is to mint new money and use it to pay out appropriated funds. The Secretary of the Treasury has authority to mint platinum coins in any denomination.[119] The statute was apparently intended, according to its author, "to enable the Treasury to put out collectable platinum coins of a variety of sizes. At the time, collectors had complained that the smallest platinum coins available were too expensive . . . ."[120] If high-denomination coins were minted, they could then be transferred to the Federal Reserve, with instructions that the coins be

118. *See supra* Part I.C.
119. *See* 31 U.S.C. § 5112(k) (2022) ("The Secretary may mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary's discretion, may prescribe from time to time.").
120. Dylan Matthews, *Michael Castle: Unsuspecting Godfather of the $1 Trillion Coin*, Wash. Post (Jan. 4, 2013), https://www.washingtonpost.com/news/wonk/

deposited in the Mint's account, then, the Secretary of the Treasury, exercising authority delegated by statute, could direct that funds in the Mint's account be transferred to the Treasury.[121] Although the pertinent statute does not in terms obligate the Federal Reserve to accept a jumbo coin for deposit,[122] the Federal Reserve could well be required to accept the coins, given its statutory duty to act as the government's fiscal agent,[123] and to take direction from the Secretary of the Treasury.[124] In this fashion, the Treasury could generate the funds necessary to pay out appropriations.[125] And, because this would involve no issuance of debt, it obviates the need to breach the debt ceiling.[126]

Other proposals seek to create debt instruments not subject to the statutory ceiling. The debt-ceiling statute is framed as a limitation on the "face amount" of the debt instruments issued by the Treasury.[127] The Secretary of the Treasury, however, has broad authority to issue debt instruments, with no requirement that such instruments have a "face amount."[128] Accordingly, to avoid the statutory cap, some have

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wp/2013/01/04/michael-castle-unsuspecting-godfather-of-the-1-trillion-coin-solution/ [https://perma.cc/7W9B-TZWY] (quoting former Rep. Michael Castle).

121. *See* 31 U.S.C. § 5136 (2022) ("[A]t such times as the Secretary of the Treasury determines appropriate, but not less than annually, any amount in the [Mint's Federal Reserve] Fund that is determined to be in excess of the amount required by the Fund shall be transferred to the Treasury for deposit as miscellaneous receipts.").

122. *See* 12 U.S.C. § 342 ("Any Federal reserve bank may receive from any of its member banks, or other depository institutions, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts . . . .").

123. *See id.* § 391 ("The moneys held in the general fund of the Treasury, except the 5 per centum fund for the redemption of outstanding national-bank notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits.").

124. *See id.* § 246 ("[W]herever any power vested by this chapter in the Board of Governors of the Federal Reserve System . . . appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.").

125. For a helpful explication of the legal basis for the proposal and its mechanics, see Grey, *supra* note 10, at 260–73.

126. *But see* Neil H. Buchanan, *Big Coins, Political Credibility, and Hatred of Lawyers*, DORF ON LAW (Jan. 10, 2013, 10:07 A.M), https://www.dorfonlaw.org/2013/01/big-coins-political-credibility-and.html [https://perma.cc/A9GS-Z6FE] (arguing that a coin represents an "obligation" on the part of the government).

127. *See supra* note 13.

128. *See* 31 U.S.C. § 3102(a) (2022) ("With the approval of the President, the Secretary of the Treasury may borrow on the credit of the United States Government amounts necessary for expenditures authorized by law and may issue bonds of the Government for the amounts borrowed and may buy, redeem, and make refunds . . . . The Secretary may issue bonds authorized by this section to the public and to Government accounts at any annual interest rate and prescribe conditions . . . .").

proposed the issuance of specialized bonds that would pay attractive rates of interest but that have no or little face value.[129]

Even more exotic options exist, such as utilizing newly-created special-purpose entities to issue debt not backed by the credit of the United States, or directing the Federal Reserve to create additional funds available to the federal government or those who expected to receive disbursements.[130]

Putting policy debate over the prudence of the proposals for circumventing the debt ceiling aside, these options are replete with legal risk.

For one thing, relying on statutes with broad, textually uncabined delegations of authority to create new forms of money or debt instruments threatens to run afoul of the nondelegation doctrine, which requires some sort of limiting principle that cabins executive discretion.[131] When the President asserts the power to set a statutory ceiling at naught, there is a serious argument that the President has assumed an essentially legislative power inconsistent with the nondelegation doctrine.[132] After all, the Constitution expressly vests the power to authorize debt backed by the credit of the United States in Congress.[133] The Constitution also vests the power to pay the debts of the United States in Congress.[134]

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129. *See, e.g.*, Joseph Fishkin, *The Fourteenth Amendment Option(s) on the Debt Ceiling: A Quick Primer*, BALKINIZATION (May 20, 2023, 9:30 A.M.), https://balkin.blogspot.com/2023/05/fourteenth-amendment-options-primer.html [https://perma.cc/6EAT-XV9W] ("[T]he Treasury can issue what are called consol bonds. These are bonds with no face value, just a stream of specified interest payments indefinitely into the future . . . . [T]he Treasury can [also] issue what are called premium bonds, which are just bonds that pay an extra-high rate of interest, and that therefore investors are willing to buy for much more than their face value."). The legal efficacy of this proposal is uncertain, however, because the definition of "face value" in the statutory debt ceiling includes, for "any obligation issued on a discount basis that is not redeemable before maturity[,]" the original "issue price" of the instrument. *See* 31 U.S.C. § 3101(c)(1) (2022) ("For purposes of this section, the face amount, for any month, of any obligation issued on a discount basis that is not redeemable before maturity at the option of the holder of the obligation is an amount equal to the sum of—(1) the original issue price of the obligation . . . .").

130. For discussion of options along these lines, see, for example, Schwarcz, *supra* note 28, at 9–18 and Tiefer, *supra* note 110, at 545–59.

131. *See supra* text accompanying note 118.

132. Professor Grey resists this conclusion, arguing that the Secretary of Treasury's discretion, at least when it comes to minting coins, is limited by "the Congressionally determined appropriations process itself." Grey, *supra* note 10, at 273 (footnote omitted). Yet, as we have seen, the statute that confers authority to mint coins does not limit that authority to the amount of outstanding appropriations. If other statutes are to be read into that authority as an implicit limitation, it seems equally plausible to read the debt ceiling as an implicit limitation on the scope of executive authority.

133. *See* U.S. CONST. art. I, § 8, cl. 2 ("The Congress shall have Power . . . To borrow Money on the credit of the United States.").

134. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

For the President to assume such powers seems to be a pure example of the Executive unconstitutionally arrogating legislative power to itself.[135] Nor do any of the statutes that authorize these exotic options contain the kind of "intelligible principle" to cabin executive discretion that is required by the nondelegation doctrine.[136]

Then there is the major questions doctrine which provides that grants of statutory authority should not be interpreted to confer authority to undertake initiatives of major economic or policy significance absent clear statutory authorization.[137] Although the scope of the doctrine is uncertain, surely it warrants doubt about whether statutes that authorize in general terms the coining of money or the issuance of bonds should be interpreted as granting the Executive Branch authority to set the debt ceiling at naught.

Finally, there are the prudential objections. For example, because the markets might fear that jumbo coins or exotic bonds would produce inflation, interest rates might spike.[138] Exotic bonds would likely present serious legal risks, as well as the risk of repudiation by Congress or a subsequent President, and for that reason buyers might demand high rates of interest. Again, it is unclear that the benefit of these proposals exceed their costs.

B. The Inescapable Government Shutdown

Even if the President could direct the production of money, exotic bonds, or other measures that could circumvent the debt ceiling, the problem of lapsing annual appropriations remains. The authority to issue bonds, for example, exists only in "amounts necessary for expenditures authorized by law."[139] When annual appropriations expire, accordingly, the authority to issue bonds necessary to finance government operations that require annual appropriations expires as well. The authority to coin money or undertake other exotic options is not similarly limited, but when annual appropriations expire, the Appropriations Clause prohibits the Executive Branch from spending

135. *Cf.* Clinton v. City of New York, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases.").

136. *See supra* text accompanying note 108.

137. *See supra* text accompanying notes 67–72.

138. *See, e.g.*, Buchanan & Dorf, *How to Choose the Least Unconstitutional Option*, *supra* note 6, at 1231 ("[T]he jumbo coins proposal would likely spook the markets, leading lenders to demand a very high rate of interest.").

139. 31 U.S.C. § 3102(a) (2022).

money to fund government operations that lack appropriations.[140] Once again, when appropriations expire, we are left with no option but a government shutdown, at least for government functions dependent on annual appropriations. The exotic options, like all others, at best buy time until annual appropriations expire, while courting serious legal and prudential risks.

IV. The Debt Ceiling and Constitutional Theory

It might seem like this Article delivers nothing but bad news: there is no real alternative to a government shutdown, though perhaps not default, when Congress and the President cannot reach agreement on the debt ceiling. What seems like bad news, however, may turn out to be a sheep in wolf's clothing.

When Congress and the President are at a standoff about whether to increase the debt ceiling, the specter of default is often invoked, with the threat of ensuing economic chaos.[141] Yet, default is quite unlikely; current revenues are sufficient to cover the costs of debt service,[142] and the Public Debt Clause likely prohibits default.[143] Indeed, the executive branch might be well advised to announce that, in its view, the Public Debt Clause prohibits default, in order to prevent the risk of credit downgrades if the markets become concerned about the possibility of default.[144] Most important, given the drastic economic consequences of default, regardless of constitutional considerations, prudence will surely dictate that any President would prioritize spending to avoid it. A more

140. *See supra* text accompanying note 114.

141. *See, e.g.*, Cecelia Rouse et al., Council of Economic Advisers, *Life After Default*, White House Blog (Oct. 6, 2021), https://www.whitehouse.gov/cea/written-materials/2021/ 10/06/life-after-default/ [https://perma.cc/JG2W-LAPV] ("[D]efault would have serious and protracted financial and economic effects. Financial markets would lose faith in the United States, the dollar would weaken, and stocks would fall. The U.S. credit rating would almost certainly be downgraded, and interest rates would broadly rise for many consumer loans, making products like auto loans and mortgages more expensive for families who are subject to interest rate changes or taking out new loans. These and other consequences could trigger a recession and a credit market freeze that could hurt the ability of American companies to operate.").

142. *See supra* text accompanying notes 31–37.

143. *See supra* Part I.A.

144. In the wake of the 2023 debt-ceiling confrontation, despite its successful resolution, one prominent credit-rating agency downgraded the federal government's debt, in part because of concerns over the debt ceiling. *See* Alan Rappeport & Joe Rennison, *Fitch Downgrades U.S. Credit Rating*, N.Y. Times (Aug. 1, 2023), https://www.nytimes.com/2023/08/01/business/fitch-downgrade-us-credit-rating.html [https://perma.cc/BX7Q-UP3U] ("The long-term credit rating of the United States was downgraded on Tuesday by the Fitch Ratings agency, which said the nation's high and growing debt burden and penchant for brinkmanship over America's authority to borrow money had eroded confidence in its fiscal management.").

realistic scenario is that upon reaching the debt ceiling, if no agreement can be reached to raise it, the government would adopt a scheme of prioritization to reduce spending for non-debt-service-related purposes.

Even if the government continued to operate while reducing spending to stay within the debt ceiling, however, the adverse effects would be substantial. One analysis of the risks in the 2023 confrontation, for example, concluded that "the Treasury would have no choice but to eliminate a cash deficit of approximately $350 billion by slashing government spending," adding that "[a]s these cuts work through the economy, the hit to growth would be overwhelming."[145] If, however, prioritization is effectively impracticable, or unconstitutional under the nondelegation doctrine or otherwise, the effects would be even more dramatic—all government spending would stop except for the costs of debt service that are constitutionally privileged by virtue of the Public Debt Clause. Government contractors delivering food to troops in the field, prisons, the postal service, aid for health care and food assistance, and perhaps even Social Security and Medicare, would lose all funding.

Even if the President had the constitutional authority to breach the debt ceiling, that would only buy limited time, until annual appropriations expire. At that point, the effects of a government shutdown following the expiration of annual appropriations would also be dramatic. Recall that annual appropriations authorize spending for agriculture, the Departments of Commerce and Justice, the military, and veterans' affairs, and even the administrative expenses of Social Security and Medicare, among many other government functions.[146] The political

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145. MOODY'S ANALYTICS, GOING DOWN THE DEBT LIMIT RABBIT HOLE 9 (March 2023), https://www.moodysanalytics.com/-/media/article/2023/going-down-the-debt-limit-rabbit-hole.pdf [https://perma.cc/JB8T-77WZ]. The report elaborated:

> The economic downturn that would ensue would be comparable to that suffered during the global financial crisis. That means real GDP would decline beginning late this year and through much of 2024, falling more than 4% peak to trough, costing the economy more than 7 million jobs, and pushing the unemployment rate above 8%. Stock prices would fall by almost a fifth at the worst of the selloff, wiping out $10 trillion in household wealth. Treasury yields, mortgage rates, and other consumer and corporate borrowing rates would initially spike, until the debt limit is resolved, decline during the subsequent deep recession, but ultimately remain elevated as investors demand compensation for the risk of a future breach (see Chart 7). The economy's long-term growth prospects are also weakened. A decade from now, real GDP is almost 1 percentage point lower than in the Clean Debt Limit Increase scenario, there are 900,000 fewer jobs, and the full-employment, or structural, unemployment rate is 0.1 percentage point higher.

Id. at 10.

146. *See supra* text accompanying notes 77–78.

impact of a government shutdown of this magnitude would therefore be substantial. Public employees ranging from soldiers to prison guards would be left without pay. Those dependent on public benefits, such as veterans, would be similarly left in destitution. The government would largely go out of business, with only essential employees even permitted to remain at their stations, though without pay.[147]

Even though the Public Debt Clause would compel the federal government to continue to pay creditors, the resulting scenario, in which wealthy bondholders are paid while other federal servants are left without pay, would be a political bombshell.[148] Voters would put enormous pressure on elected officials to come to an agreement to reopen the government, and would threaten the political faction seen as most culpable with potent retaliation at the next election. The threat of a government shutdown, in short, is likely useful as a means of pressuring competing factions to negotiate an agreement that might otherwise prove elusive. The very magnitude of the harm threatened by a government shutdown provides the political pressure necessary to force otherwise recalcitrant political factions to compromise.[149]

Accordingly, there is no real alternative to reaching a political agreement that funds the government. An assertion of presidential authority to breach the debt ceiling is legally dubious, of uncertain efficacy in avoiding financial disruption, and, in any event, only buys a bit of time until annual appropriations expire. Even worse, a congressional faction that has been ignored by the President who decides to breach the debt ceiling rather than negotiate is hardly likely to be amenable to negotiating the next round of annual appropriations. Yet, negotiation is inescapable when it comes to financing the government.

Constitutional law, in short, offers no good alternative to ordinary politics when it comes to debates over government budgeting and finance. And that reality, in turn, raises a larger question for constitutional law.

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147. *See supra* text accompanying note 115.

148. *Cf.* Kitch & Mahoney, *supra* note 15, at 1287 ("The United States, after all, is a democracy, and voters may see more pressing needs for government expenditures than interest and principal payments on the national debt. In particular, we suspect that if push comes to shove voters will balk if told that holders of United States debt securities enjoy ironclad priority over Social Security claimants and others with well-settled expectations of government benefits.").

149. *Cf.* David Kamin, *Legislating Crisis*, *in* THE TIMING OF LAWMAKING 34, 56 (Frank Fagan & Saul Levmore eds., 2017) ("There is not a clear-cut case for replacing shutdowns with something like an automatic continuing resolution. Congress already has difficulty coordinating its negotiations over appropriations. Getting rid of a forcing mechanism entirely seems likely to leave matters worse off in this regard, especially in a polarized political environment . . . .").

One approach to constitutional interpretation, of course, is to confine the Constitution to its original meaning in the Framing era, though that approach draws many objections.[150] Even aside from the virtues and vices of originalism, original meaning is often difficult to apply to contemporary controversies unknown in the Framing era.[151] For example, the original meaning of the Public Debt Clause and its application to contemporary debates over the debt ceiling is not easily ascertained.[152]

To be sure, the Constitution operates to place boundaries on the domain of ordinary politics. As Justice Robert Jackson famously put it: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts."[153] Although this observation was made in the context of the Bill of Rights, it is generalizable. At least when the text of the Constitution is not clear, it is difficult to grasp why constitutional law should displace ordinary politics when it comes to disputes over public policy. As the Court has observed: "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[154] Alexander Bickel famously made this point in terms of a "countermajoritarian" difficulty inherent in judicial review of the actions of the political branches of government:

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150. For the views of one leading critic of originalism, see RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 48-102 (2018); and Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1453–76 (2021).

151. The only empirical study to examine the utility of originalism in contemporary constitutional adjudication, canvassing Fourth Amendment cases during the tenure of Justice Scalia, found that in vast majority of cases, even justices professing adherence to originalism concluded that it provided no basis to resolve the question before the Court, and for that reason based their votes on nonoriginalist grounds. *See* Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 80 (2018) ("[O]riginalism played a small role in Fourth Amendment jurisprudence: less than 14% of the opinions of the Court during Justice Scalia's service were originalist. A Justice's methodological commitments made little apparent difference; despite Justice Scalia's professed commitment to originalism, he voted on originalist grounds in only 18.63% of cases addressing disputed questions of Fourth Amendment law. The Court's other professed originalist, Justice Clarence Thomas, voted on originalist grounds in only 15.71% of cases. Voting patterns were not markedly different for Justices with different methodological commitments . . . . [T]hese results . . . reflect neither a lack of commitment to originalism nor the influence of nonoriginalist precedent, but instead the difficulties in applying original meaning in contemporary constitutional adjudication.").

152. *See supra* text accompanying notes 17–19.

153. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

154. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it . . . . [I]t is the reason the charge can be made that judicial review is undemocratic.[155]

One can readily grasp why the Public Debt Clause should be understood to place the threat of defaulting on the public debt beyond the realm of ordinary politics. The threat of default might seem expedient to transient political factions seeking to reduce government spending, taxes, or to extort other kinds of policy concessions, but the long-term costs of compromising the credit of the United States are sufficiently profound and long-lasting that the Public Debt Clause is properly understood to place the threat of default out of the bounds of ordinary politics, even if that threat offers short-term benefits to particular political factions.[156]

The real threat when the federal government approaches the debt ceiling is that of a government shutdown. There is, however, no coherent reason to prevent the ordinary legislative process from addressing debates over how much the government should tax and spend, even if their inability to reach agreement results in a government shutdown.

To be sure, many object to the debt ceiling on the ground that it imprudently separates questions of borrowing authority from the annual budgeting process.[157] Defenders of the debt ceiling, in contrast, argue that the annual appropriation process is poorly positioned to restrain government spending because influential interest groups are often well-positioned to lobby for increased appropriations.[158] Debate over whether a statutory debt ceiling has utility in promoting fiscal responsibility, however, is itself a classic example of a policy dispute that properly belongs in the realm of ordinary politics. The voters are fully able

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155. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1962).

156. *See supra* text accompanying notes 20–23.

157. *See, e.g.*, Cong. Budget Off., The Economic and Budget Outlook: An Update 48 (1995) ("Through its regular budget process, the Congress already has ample opportunity to vote on overall revenues, outlays, and deficits. Voting separately on the debt is ineffective as a means of controlling deficits because the decisions that necessitate borrowing are made elsewhere. By the time the debt ceiling comes up for a vote, it is too late to balk at paying the government's bills without incurring drastic consequences.").

158. *See, e.g.*, Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 Harv. J. Legis. 135, 161 (2005) ("[G]overnment spending and the national debt will have a tendency to spiral out of control as a result of excessive congressional acquiescence to requests from organized, well-funded interest groups. The diffuse public interest in controlling spending and minimizing national borrowing and debt, meanwhile, will lack advocates and thus will have little effect on fiscal policymaking.").

to hold elected officials responsible for their actions when it comes to the federal government's taxing and spending, especially when those actions produce a government shutdown and all of its attendant costs.

There are plenty of constitutional theories that articulate a boundary between ordinary politics and constitutional law in an effort to address the countermajoritarian dilemma. Justice Stone, for example, famously suggested that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[159] When it comes to a breach of the debt ceiling, however, the scholarly critics of the debt ceiling do not even attempt to explain why ordinary politics cannot address the policy debates that lead to debt-ceiling confrontations, nor why a government shutdown is unlikely to be a fully adequate political spur to ending the gridlock that produces these confrontations.[160] That ought to be a sufficient reason to view the scholarly attack on the debt ceiling with an enormously wary eye.

Thus, even in terms of constitutional theory, the attacks on the debt ceiling come up short. Debates over public finance are inescapably political, and constitutional law may offer something when there is a principled argument for countermajoritarian judicial review, but there is nothing countermajoritarian about the problems caused when expenses exceed revenues.

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159. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

160. Notably, Professors Buchanan and Dorf invoke President Lincoln's rationale for suspending the privilege of habeas corpus in support of their view of presidential power, *see supra* text accompanying note 86, but President Lincoln took care to explain that he had not left the matter to the political process precisely because he could not wait for Congress to be assembled, while acknowledging that once Congress came into session, the matter would be left to its judgment:

> Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.
>
> No more extended argument is now offered, as an opinion at some length will probably be presented by the Attorney-General. Whether there shall be any legislation upon the subject, and, if any, what, is submitted entirely to the better judgment of Congress.

COLLECTED WORKS, *supra* note 86, at 431.

Conclusion

The Public Debt Clause ensures that political factions cannot get their way by threatening default on the national debt, but in the foreseeable future, revenues are amply sufficient to avoid default. The debates over taxing and spending that produce budgetary deadlock are political to their core, and while the Constitution prohibits a default, it does not prohibit government shutdowns; indeed, the Constitution itself, in the Appropriations Clause, contemplates shutdowns when political factions cannot agree on how public funds should be spent. Politics produce the deadlocks that lead to budgetary impasse, and only politics can offer a way forward.