

ARTICLE

IN THE DEBT WE TRUST: THE UNCONSTITUTIONALITY OF DEFAULTING ON AMERICAN FINANCIAL OBLIGATIONS, AND THE POLITICAL IMPLICATIONS OF THEIR PERPETUAL VALIDITY

ZACHARY K. OSTRO*

Starting in August 2011, America has undergone a series of fiscal and political crises surrounding the threat of defaulting on the national debt and the need to raise the debt ceiling. These crises have caused tremendous stress and irreparable harm to our financial markets and political system, causing a downgrade in United States debt for the first time in history, forcing drastic budget cuts, and contributing to a sixteen-day government shutdown this past October. What is most unfortunate, however, is that all of this was preventable for the simple reason that, as a matter of constitutional law, defaulting on the national debt is impossible.

This article argues that, because actually defaulting on the national debt is constitutionally impossible, Congress should take this impossibility as axiomatic. Thus, Congress should either: 1) reinstate the “Gephardt Rule” (a procedural rule that was used in prior Congresses to avoid a floor vote to raise the debt ceiling); 2) make the “McConnell Mechanism” permanent; or, ideally, 3) remove the debt ceiling altogether. Doing this would eliminate all future fiscal crises and help restore comity and bipartisan discourse in Congress, while allowing for economic growth and national financial stability.

I. INTRODUCTION

The summer of 2011 was a tumultuous time in American politics.¹ A Congress inspired by the Tea-Party movement and dedicated to a limited federal government with minimal public expenditures, came within hours of

* J.D. *cum laude*, University of Maryland Francis King Carey School of Law; B.A. History, Political Science *magna cum laude*, The George Washington University. The author is a member of Congresswoman Robin L. Kelly’s (IL–2) legislative team, providing legal and policy counsel on, among other issues, financial services legislation. Nevertheless, the views expressed herein are the author’s alone and not the opinions of Congresswoman Kelly, the Democratic Party, or the United States Congress. The author would like to thank Professor Mark Graber for editing early drafts, Professor Michelle Harner for her continued guidance and encouragement, and as always, special thanks is reserved to David Ostro, Hermine Krasny Ostro, Stuart Ostro, and Caroline Fields for their continued support.

¹ See, e.g., Matt Bai, *Obama v. Boehner: Who Killed the Debt Deal?*, N.Y. TIMES (Mar. 28, 2012), available at <http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html?pagewanted=all>, archived at <http://perma.cc/F44X-RMRB> (discussing the contentious debates between the Republican-led House and the Democratic-led Senate and White House over the debt ceiling and deficit reduction measures).

having the United States of America default on its debts for the first time in the modern era and all in the name of fiscal responsibility.² In the denouement of this story, opponents of this movement—ranging from liberals supporting large government spending to economists, and business and market analysts—recognized the disastrous cross-market implications of a default on U.S. debt obligations.³ This led many to consider the notion that, as a matter of constitutional law, it might actually be impossible for the United States to default on its debts, and the President has the constitutional authority to unilaterally raise the debt ceiling.⁴ This notion had wide support in Democratic circles and was expressly endorsed by Congressional leaders such as Senators Charles Schumer (D–NY)⁵ and then-Democratic Senatorial Campaign Committee Chairwoman (now Budget Committee Chairwoman) Patty Murray (D–WA),⁶ as well as former President William J. Clinton.⁷ Legal scholars also analyzed the constitutionality of default under the Public Debt Clause of the Fourteenth Amendment, as well as the ability of the President to take unilateral action to raise the debt ceiling himself, with varying conclusions.⁸ President Obama balked at the notion,⁹ and fortunately, this

² Catherine Rampell, *The U.S. Has Defaulted Before*, N.Y. TIMES ECONOMIX (Oct. 4, 2013), 3:00 PM, http://economix.blogs.nytimes.com/2013/10/04/the-u-s-has-defaulted-before/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1, archived at <http://perma.cc/H4HP-KWZ3>. As Carmen Reinhart's research illustrates, the United States has potentially defaulted twice in its history, first in 1790 and again in 1933 in the context of the gold clause case of *Perry v. United States*. The first incident of default in 1790 is irrelevant to the analysis of this article, as it preceded enactment of the Public Debt Clause of the Fourteenth Amendment. And, as discussed below, the Court's holding in *Perry* required the United States to honor its obligation—causing the nation to not enter into default. Therefore, the debt crisis of 2011 was an unprecedented moment in Congressional history.

³ See, e.g., Jonathan Masters, *U.S. Debt Ceiling: Costs and Consequences*, COUNCIL ON FOREIGN RELATIONS (Aug. 2, 2001), <http://www.cfr.org/international-finance/us-debt-ceiling-costs-consequences/p24751>, archived at <http://perma.cc/YLF6-NPQF> (stating that a default on U.S. debt would cause an “acute fiscal crisis”).

⁴ See, e.g., Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out*, N.Y. TIMES, July 24, 2011, at A10, available at <http://www.nytimes.com/2011/07/25/us/politics/25legal.html>, archived at <http://perma.cc/8PRR-PWYR>.

⁵ See *Schumer: Using 14th Amendment To Raise Debt Limit Should Be “Explored”*, REAL CLEAR POLITICS (July 7, 2011), http://www.realclearpolitics.com/video/2011/07/07/schumer_using_14th_amendment_to_raise_debt_limit_should_be_explored_by_obama.html, archived at <http://perma.cc/CS87-RKKY>.

⁶ Ryan Grimm & Samuel Hass, *14th Amendment: Democratic Senators See Debt Ceiling As Unconstitutional*, THE HUFFINGTON POST (Aug. 28, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/06/28/14th-amendment-debt-ceiling-unconstitutional-democrats_n_886442.html, archived at <http://perma.cc/9GCV-DS9D>.

⁷ James Oliphant, *Bill Clinton would raise debt ceiling, bypass Congress*, L.A. TIMES (July 19, 2011), <http://articles.latimes.com/2011/jul/19/news/la-pn-clinton-debt-ceiling-20110719>, archived at <http://perma.cc/BL4R-UMJF>.

⁸ Compare, e.g., Jeffrey Rosen, *How Would the Supreme Court Rule on Obama Raising the Debt Ceiling Himself?*, THE NEW REPUBLIC (July 29, 2011), <http://www.ntr.com/article/politics/92884/supreme-court-obama-debt-ceiling>, archived at <http://perma.cc/D273-3UPP> (finding it likely the Supreme Court would hold default impossible, and the President's unilateral action to be constitutionally permissible) with Laurence H. Tribe, *A Ceiling We Can't Wish Away*, N.Y. TIMES, July 8, 2011, at A23, available at <http://www.nytimes.com/2011/07/08/>

unwillingness did not prove fatal as a compromise was eventually reached.¹⁰ However, this came at the cost of a downgrade of the United States credit worthiness for the first time in history.¹¹ Unfortunately, however, the resolution of the August 2011 debt crisis cut short the constitutional debate concerning the President's authority to unilaterally raise the debt ceiling.¹² Despite the political and financial consternation, and debt downgrade, following this initial crisis, Congress has undergone additional debt ceiling crises—most recently with the Concurrent Resolution that re-opened the government following a sixteen-day shutdown and suspended the debt ceiling through February 2014.¹³ This past February, however, Congress successfully suspended the debt ceiling until 2015 with limited fanfare; this was due primarily to internal divides within the Republican Party in the weeks prior to default that forced Speaker Boehner to rely on Democratic votes to approve the debt ceiling suspension.¹⁴ In order to prevent any future debt crises or political gamesmanship associated with raising the debt ceiling, a more thorough understanding of the Public Debt Clause of the Fourteenth Amendment, and the constitutional impossibility of default, is necessary.

This article begins with an analysis of the history of the development of the debt ceiling and how its use in the legislative process has caused contentious political discourse—culminating in the Debt Ceiling Debate of summer

opinion/08tribe.html, *archived at* <http://perma.cc/HL7K-E77G> (stating the arguments for the constitutionality of a unilateral action by the President to raise the debt ceiling are unsound).

⁹ David Jackson, *Obama says he can't raise debt ceiling on his own*, USA TODAY (July 22, 2011, 5:30 PM), http://content.usatoday.com/communities/theoval/post/2011/07/obama-speaks-at-university-of-maryland/1#.T7Og_L8eDyA, *archived at* <http://perma.cc/ZJS6-GSML> (“[Obama] said, ‘I have talked to my lawyers . . . [t]hey’re not persuaded that [the constitutionality of the President unilaterally raising the debt ceiling] is a winning argument.’”).

¹⁰ Jennifer Steinhauer, *Debt Bill Signed, Ending Crisis and Fractious Battle*, N.Y. TIMES, Aug. 3, 2011, at A1, *available at* <http://www.nytimes.com/2011/08/03/us/politics/03fiscal.html?pagewanted=all>, *archived at* <http://perma.cc/T4LH-3C2Y>. The crisis was averted with the passage of the Budget Control Act of 2011, which President Obama signed into law on August 2, 2011. *Id.*; Pub. L. No. 112–25, 125 Stat. 240 (codified in scattered sections of the U.S.C.). *See also infra* Part II.

¹¹ Binyamin Appelbaum & Eric Dash, *S.&P. Downgrades Debt Rating of U.S. For The First Time*, N.Y. TIMES, Aug. 6, 2011, at A1, *available at* <http://www.nytimes.com/2011/08/06/business/us-debt-downgraded-by-sp.html>, *archived at* <http://perma.cc/5ZWG-J24U>.

¹² A search on the Social Science Research Network has returned only a handful of working papers on the unconstitutionality of the debt ceiling, and the Public Debt Clause more generally, since enactment of the Budget Control Act of 2011. *See, e.g.*, Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* (The George Washington University Law School Public Law and Legal Theory Paper No. 575, 2011), *available at* <http://ssrn.com/abstract=1874746>, *archived at* <http://perma.cc/99M4-PCN3>; *see also* Jacob Charles, *The Debt Limit and The Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L. J. 1227 (2012).

¹³ Jonathan Weisman & Ashley Parker, *Shutdown is Over*, N.Y. TIMES, Oct. 17, 2013, at A1, *available at* http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html?_r=0, *archived at* <http://perma.cc/X3AS-EGW3>.

¹⁴ Burgess Everett & Manu Raju, *Senate passes debt ceiling bill*, POLITICO (Feb. 12, 2014, 11:13 AM), <http://www.politico.com/story/2014/02/senate-debt-ceiling-vote-103437.html?hp=t1>, *archived at* <http://perma.cc/F8T5-YSTL>.

2011 which established the current structure of debt ceiling legislation.¹⁵ This current system—the “McConnell Mechanism”—as discussed below, creates a system where default is theoretically possible following a Congressional veto override.¹⁶ However, this article illustrates that default is in fact constitutionally impossible for three distinct reasons: (1) the Public Debt Clause of the Fourteenth Amendment prevents the government from defaulting on its debt—making any law that would allow default thereby unconstitutional; (2) even if the Public Debt Clause allows default, the President’s Article II powers would authorize a unilateral action increasing the debt ceiling to avoid default following a veto override; and (3) Congress suing as an institution is both politically infeasible and unconstitutional absent a private litigant, and any individual, either a Member of Congress or private litigant, would lack standing to sue the President.¹⁷ Therefore, with default being constitutionally impossible, in order to improve future budget negotiations, Congress should accept this fact as axiomatic.¹⁸ As discussed below, to remove any constitutionally impossible threat of default, Congress should either: (1) de-politicize raising the debt ceiling by reinstating the Gephardt Rule; (2) delegate the power to raise the debt ceiling to the President by making the “McConnell Mechanism” permanent law; or (3) ideally, repeal the debt ceiling indefinitely. Doing so would be in line with the Constitution, and would improve future political discourse.

II. HISTORY OF THE DEBT CEILING STATUTE

The Constitution gives Congress the power to spend federal dollars to “provide for the common Defense and general Welfare of the United States” and to “borrow Money on the credit of the United States” as a means of funding.¹⁹ However, the Constitution does not provide specific guidance to Congress as to how it should borrow, nor does it impose any regulations or limitations upon its borrowing measures.²⁰ As such, pursuant to the constitutional decree that each body shall set their own rules of conduct,²¹ Congress has developed various means of exercising this power.²² Initial Congressional philosophy towards incurring debt was driven by a desire to promote sound financial principles, and the debt ceiling was originally intended to emphasize fiscal restraint while ensuring the validity of the national debt.²³ However, partisanship and Congresses politically and philosophically divided on the proper size and scope of the federal government have turned the

¹⁵ See *infra* Part II–III.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part IV–V.

¹⁹ U.S. CONST. art. I, § 8, cl. 1–2.

²⁰ See *id.*

²¹ U.S. CONST. art. I, § 5, cl. 2.

²² See *infra* Part II.B–E.

²³ See *infra* Part II.B.

debt ceiling into a political tool, contrary to its original purpose.²⁴ At various times however, through alterations to House rules, or passage of deficit reduction legislation, Congress has been able to minimize the impact partisan politics has had on the debt ceiling and questions of national default and in fact reduce the national deficit.²⁵ However, none of these measures address the core problem of the national debt—that defaulting on it is constitutionally impossible.²⁶

A. *In the Early Years of the Republic, Issuing Federal Debt was Limited and Well Regulated*

The United States incurred a heavy debt fighting the Revolutionary War.²⁷ In 1789, the young nation had incurred a debt of \$78 million—\$18 million of which came from federal assumption of state bonds, and the remaining \$60 million from the existing national debt.²⁸ This indebtedness was naturally exacerbated by the inability of the federal government to raise revenue under the Articles of Confederation.²⁹ Saddled with this initial debt, the United States conscientiously set out on a course to raise revenues through various taxes and tariffs and limited its use of issuing debt to times of absolute necessity, such as times of war.³⁰ When such occurrences would arise, Congress passed individual pieces of legislation authorizing new taxes, or granted the Secretary of the Treasury short-term powers to issue debt via various bonds or other financial instruments.³¹ Once the necessity ceased, Congress would again continue on a course of deficit reduction and work

²⁴ See *infra* Part II.C–E.

²⁵ See *infra* Part II.D–E.

²⁶ See *infra* Part IV.

²⁷ Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 140 (2005).

²⁸ *Id.* at 140 n.23.

²⁹ See, e.g., THE FEDERALIST NO. 30, at 184 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the failures of the Articles of Confederation, stating “that there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another”).

³⁰ See Krishnakumar, *supra* note 27, at 140–42 (discussing how, once Congress retired the Revolutionary War debt, it did not incur another debt until the War of 1812, and debts only incurred at times of national crisis such as the 1836 National Bank crisis, the Mexican American War of 1847, the Civil War, and World War One in 1917). However, it should be noted that Federalist, and Treasury Secretary, Alexander Hamilton was an early supporter of having the nation incur a national debt to fund its spending programs. See ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791), reprinted in 2 THE FOUNDERS’ CONSTITUTION 446–47 (Philip B. Kurland & Ralph Lerner eds. 1987). (“But though a funded debt is not in the first instance, an absolute increase of [c]apital, or an augmentation of real wealth; yet by serving as a [n]ew power in the operation of industry, it has within certain bounds a tendency to increase the real wealth of a [c]ommunity, in like manner as money borrowed by a thrifty farmer, to be laid out in the improvement of his farm may, in the end, add to his [s]tock of real riches”). Nevertheless, Hamilton’s support for use of the debt was tempered by a desire to not let the debt get too high. *Id.* (“The debt too may be swelled to such a size, as that the greatest part of it may cease to be useful as a [c]apital.”).

³¹ Krishnakumar, *supra* note 27, at 143.

towards pairing down the national debt—driven largely by high Republican tariffs.³² These new taxes and spending cuts were so successful that from the end of the Civil War to the turn of the century, the United States ran a fiscal year surplus almost half of the time.³³ However, with the growth of industry and the nation itself, and U.S. involvement in World War One, a change from this ad hoc approach to debt legislation became necessary so as to allow continued funding of ever growing public expenditures without the need of continually passing legislation authorizing the issuance of more and different debt instruments.³⁴

*B. In 1917 Congress Passed the Second Liberty Bond Act
which Created the Debt Ceiling*

The rise of national industry, heavy U.S. involvement in World War One, and other growing financial obligations caused Congress in 1917 to alter the structure of debt legislation.³⁵ Instead of authorizing individual spending provisions, or passing certain bond measures on an ad hoc basis, Congress, in the Second Liberty Bond Act of 1917,³⁶ delegated the power to issue federal debt instruments to the Secretary of the Treasury to take any measures necessary to finance national obligations up to a certain limit—hence the creation of the “debt ceiling.”³⁷ The operative language of the Act states:

[T]he Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States for the purposes of this Act, and to meet expenditures authorized for the national security and defense and other public purposes authorized by law, not exceeding in the aggregate \$7,538,945,460 and to issue therefore bonds of the United States.³⁸

Thus, the Act completely altered the structure of how Congress funded its operations. As opposed to continuously keeping track of every dollar spent, Congress was now free to focus on passing legislation to provide for the nation’s growing needs without concern for specifically how it would be funded. Instead, the obligation to keep track of the nation’s finances was henceforth delegated to the Secretary of the Treasury, under defined con-

³² *Id.* at 142–43.

³³ *Id.* at 142 (stating how “from 1866 to 1894, Congress ran eighteen straight surpluses”) (citing U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 1118 (1976)).

³⁴ See *infra* Part II.B.

³⁵ Krishnakumar, *supra* note 27, at 143–44.

³⁶ Second Liberty Bond Act, Pub. L. No. 65–43, § 1, 40 Stat. 288, 288 (1917).

³⁷ *Id.*

³⁸ *Id.*

straints.³⁹ The Secretary of the Treasury's borrowing authority was limited by a requirement that annual reports be submitted to Congress on the expenditures made in the immediately prior Fiscal Year.⁴⁰ In subsequent years, Congress began a tradition that continues to this day—amending the maximum limit the Secretary of the Treasury can borrow, or “raising the debt ceiling,” so as to continue to meet the nation's growing financial obligations.⁴¹

In the interim period between World War One and the Great Depression, while the Second Liberty Bond Act of 1917 remained in full force, the nation returned to the tradition of limited use of federal borrowing and an emphasis on paring down the deficit.⁴² These efforts were aided by the passage of the Budget and Accounting Act of 1921,⁴³ which requires the executive branch to submit a proposed annual budget to Congress via the Bureau of the Budget (now the Office of Management and Budget) and the General Accounting Office (now the Government Accountability Office).⁴⁴ Prospectively, while Congress had the ability to pay for any new government program by raising the debt ceiling, it was henceforth theoretically limited to spending guidelines set forth in a holistic annual budget presented by the President, as well as an institution dedicated to the oversight and administration of Congressional expenditures.⁴⁵

However, with the onset and continuation of the Great Depression, followed immediately by the outbreak of World War Two, there was a natural rise in popular support for Keynesian economic theory, which calls for increased public spending, New Deal social programs, and increased military spending. Collectively, this legislative agenda made it implausible for the nation to maintain a balanced budget.⁴⁶ In order to ensure continued funding for the various new federal programs, in 1941 Congress amended the debt ceiling statute to create one uniform, aggregated limit for all forms of U.S. debt, instead of having limits on each individual type of obligation issued by the Treasury Department.⁴⁷ This uniform approach allowed Congress to more easily administer the multitude of new federal programs without concern for how to fund each individual program, or which specific debt obligations could be sold to the public.⁴⁸

³⁹ *Id.*

⁴⁰ *Id.* at § 10.

⁴¹ *See infra* Part II.B.1–E. *See also* Krishnakumar, *supra* note 27, at 145–46 (discussing later statutes passed by Congress which amended the Second Liberty Bond Act of 1917 by increasing the debt limit).

⁴² *Id.*

⁴³ Budget and Accounting Act of 1921, Pub. L. No. 67–13, 42 Stat. 20 (1921).

⁴⁴ *Id.* at §§ 201, 207, 301.

⁴⁵ *See id.*

⁴⁶ Krishnakumar, *supra* note 27, at 147.

⁴⁷ Public Debt Act of 1941, Pub. L. No. 77–7, § 2, 55 Stat. 7 (1941).

⁴⁸ *Id.*

C. *Debt Legislation and Congressional (Lack of) Oversight From World War Two to the Modern Era*

Following World War Two, a reduction in military spending limited the rate at which the national debt grew. However, continued support for expensive New Deal and Great Society programs has limited Congress's ability, or desire, to maintain a balanced budget or budget surplus.⁴⁹ Instead, Congress, while diligent to not let the federal debt become too high, has historically been willing to rely on borrowing as a means of funding its various programs.⁵⁰

This willingness, however, has not been without its limitations. High spending throughout the 1960's due to Cold War military arms spending, the space program, a rising population, and the implementation of Medicare and Medicaid, led to fiscal policy debates in Congress.⁵¹ During this time, Republicans and their conservative counterparts amongst the Southern members of the Democratic Party would frequently threaten non-extension of the debt ceiling as a means of curbing high spending and expansive government programs.⁵² Thus, in order to restrain spending while also funding federal programs, Congress took two measures to ensure a more uniform approach to federal budgeting and debt issuance. First, Congress passed the Congressional Budget and Impoundment Control Act of 1974. Second, Congress adopted the "Gephardt Rule" as a standing rule of the House of Representatives.⁵³

D. *Congress Passed the Congressional Budget and Impoundment Control Act of 1974 and the "Gephardt Rule" to Minimize Debt Debate*

The Congressional Budget and Impoundment Control Act of 1974 (the "Budget Act of 1974") established the Congressional Budget Office, a Committee on the Budget in both chambers, and focused the appropriations process.⁵⁴ Collectively, this centralization of the budget process allowed Congress to address spending measures more holistically—preventing duplicative and highly leveraged federal programs, while limiting the role of the

⁴⁹ Krishnakumar, *supra* note 27 at 148–49.

⁵⁰ *Id.*

⁵¹ See CONGRESS AND THE NATION: 1969–1972 64 (Robert A. Diamond ed., 3d ed. 1973).

⁵² *Id.*

⁵³ Bill Heniff, Jr., *Developing Debt-Limit Legislation: The House's "Gephardt Rule"*, in HOUSE OF REPRESENTATIVES OF THE U.S.: COMMITTEES, RULES AND PROCEDURES, 1 (Helen K. Larsson & Alonzo P. Vessler, eds., 2009).

⁵⁴ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

debt ceiling in legislative debate.⁵⁵ While opponents of the Budget Act of 1974 criticize it as a means of increasing the emphasis on party politics in Congress, and limiting robust floor debate,⁵⁶ the Act, coupled with the adoption of the “Gephardt Rule,” which changed the procedure for raising the debt ceiling, properly altered the mindset of members of Congress. By amending Congressional procedures, the budgeting process became a “necessary . . . evil” and not a catalyst for a floor fight.⁵⁷

The “Gephardt Rule” allows for the debt ceiling to be raised without a vote on the measure and considers the House to have approved an increase (and thereby to have sent it to the Senate for approval) if the House passes a budget resolution requiring a higher debt limit than the one currently in effect.⁵⁸ Thus, for example, suppose the debt ceiling has been reached, and the House were to pass a \$2 trillion budget—\$1 trillion of which coming from tax revenues. Under the Gephardt Rule, the House would not need to take a separate vote raising the debt by \$1 trillion.⁵⁹ This allowed raising the debt ceiling to be a secondary issue and not an opportunity for contentious floor debate.⁶⁰ The Gephardt Rule, named after former Democratic Majority Leader Dick Gephardt from Missouri, was initially implemented in 1979 and was a standing rule of the House until 1995 when Republicans gained the majority.⁶¹

To complement the streamlined budget process, in 1983, Congress made all increases to the debt ceiling permanent—Congress could no longer raise the debt ceiling for a temporary period of time to accommodate short-term spending.⁶² This action further limited partisan gridlock and threats of default.⁶³ However, even though these various measures were designed to focus Congress’s attention on responsibly reducing spending, and not fighting over debt generally, Congressional spending continued to increase—leading to a return to, and exacerbation of, a conservative emphasis on fiscal responsibility in American political discourse for the last thirty years.⁶⁴

⁵⁵ See Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7, 36–37 (2000) (discussing the intent of the drafters of the Budget Act of 1974 to encourage a responsible budget process).

⁵⁶ See Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-In-Government*, 100 COLUM. L. REV. 702, 715–18 (2000) (stating how the Budget Act of 1974 has politicized the budget process).

⁵⁷ Krishnakumar, *supra* note 27, at 153.

⁵⁸ Heniff, Jr. *supra* note 53.

⁵⁹ *See id.*

⁶⁰ *See id.* and accompanying text.

⁶¹ Kevin Mahnken, *Dick Gephardt, Where Art Thou?*, THE NEW REPUBLIC (Oct. 9, 2013), <http://www.newrepublic.com/article/115084/dick-gephardt-rule-how-he-could-have-avoided-debt-crisis>, archived at <http://perma.cc/7TEZ-K2GG>.

⁶² Act of May 26, 1983, Pub. L. No. 98–34, 97 Stat. 196 (1983).

⁶³ *See* Krishnakumar, *supra* note 27, at 154 (“Elimination of the temporary ceiling was designed to ease political pressures associated with the debt limit by reducing the number and frequency of debt limit votes.”).

⁶⁴ *Id.* at 154–57.

E. Debt Debate in the Age of Polarized Parties

By the mid-1980's Congress was unable to limit the perpetual growth of the federal debt; continued spending on entitlement programs and tax cuts resulted in the need to raise the debt ceiling. In fact, the national debt increased threefold from 1981 to 1990—going from \$994.8 billion to \$3.21 trillion.⁶⁵ To try and limit the need to continually increase the debt ceiling (indirectly under the Gephardt Rule in the House) and to take on a large debt, in 1985 Congress passed the Gramm-Rudman-Hollings Deficit Reduction Act (GRH).⁶⁶ A bi-partisan measure, GRH attempted to alter Congressional culture in order to promote fiscal restraint and balanced budgets by preemptively setting borrowing limits for the next five fiscal years.⁶⁷

Although GRH allowed for long-term financial planning, allowing for a government surplus during the Clinton administration from 1998 to 2000, the national debt continued to increase during this time.⁶⁸ Furthermore, this was not without the Republican-led House ignoring the Gephardt Rule and requiring a floor debate on raising the debt ceiling. Doing this, and thereby threatening default, forced President Clinton into accepting large spending cuts⁶⁹—culminating in the shutdown of the federal government, and continued animosity between the parties.⁷⁰ With the start of the 21st Century, partisanship, and the national debt, have only increased.⁷¹ Continued spending on various entitlements, coupled with drastic increases in military and defense spending, various stimulus packages, and lower taxes have driven the country into even deeper debt—placing current CBO national debt estimates at over \$17 trillion.⁷² In 2011 (and subsequently in 2013) the House Republican majority again did not adopt the Gephardt Rule as a standing rule of the House—making the debt ceiling a substantive political debate on the national debt.⁷³ This debate culminated in the debt ceiling crisis of summer

⁶⁵ See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 322 (2003).

⁶⁶ See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as amended in scattered sections of 2, 31 & 42 U.S.C.).

⁶⁷ *Id.*

⁶⁸ Krishnakumar *supra* note 27, at 155.

⁶⁹ See e.g., Stephen Gettinger, *The Budget: The Debt Ceiling “Hammer,”* C.Q. WEEKLY ONLINE 1400 (May 23, 1995), available at <http://library.cqpress.com/cqweekly/WR407905>, archived at <http://perma.cc/H6QS-34LK> (stating how Speaker Gingrich intended to use the debt ceiling as a “hammer” forcing President Clinton to accept spending reform).

⁷⁰ See Krishnakumar, *supra* note 27, at 156.

⁷¹ See e.g., *supra* notes 1–3 (discussing how Congress is deeply divided on issues of federal spending).

⁷² CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK 2014-2024, 17 (2014), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/45010-breakout-Chapter1.pdf>, archived at <http://perma.cc/N9YD-KZGJ>.

⁷³ See e.g., Ezra Klein, *House eliminated debt ceiling votes in 1979*, THE WASHINGTON POST (April 11, 2011), available at http://www.washingtonpost.com/blogs/ezra-klein/post/house-eliminated-debt-ceiling-votes-in-1979/2011/04/13/AFLcQxOE_blog.html, archived at <http://perma.cc/YT22-4JMH>.

2011⁷⁴—leading to the passage of the Budget Control Act,⁷⁵ which limits debate on the debt ceiling,⁷⁶ as well as initial discussion of the potential unconstitutionality of defaulting on debt obligations.⁷⁷ While the various statutes discussed above—beginning with the Second Liberty Bond Act of 1917 and ending with the Budget Control Act of 2011—all streamline the budget process and minimize the role of the debt ceiling in Congressional debate, none address the fact that default is constitutionally impossible (either due to the Public Debt Clause, the President’s executive powers, or the lack of any individual with standing to sue). A constitutional analysis of the impossibility of default is necessary in order to fully implement the goals of these measures, while ensuring America’s financial security and promoting bi-partisan budget negotiations.⁷⁸

III. OUTLINE OF DEBT CEILING PROCEDURES UNDER THE BUDGET CONTROL ACT OF 2011

The Budget Control Act of 2011 (“BCA” or “the Act”)⁷⁹ was a “last-choice option” of House Republicans to avoid default and reach a compromise with the Democratic Senate and White House.⁸⁰ In exchange for a future vote on a Balanced Budget Amendment to the Constitution, Republicans agreed to debt ceiling increases so long as it is the President, and not Congress, who causes the country to incur more debt.⁸¹ Thus, Congress now has the authority to disapprove an increase in the debt ceiling executed by the President—not the authority to raise it itself.⁸² This inversion of traditional debt ceiling procedure, or the “McConnell Mechanism,” was proposed by Republican Senator, and Minority Leader, Mitch McConnell of Kentucky.⁸³

Specifically, the BCA established a two-step approach to raising the debt ceiling.⁸⁴ Although the original “McConnell Mechanism” expired in 2012 per the BCA, in the “No Budget, No Pay Act” of May 2013,⁸⁵ the Continuing Resolution which reopened the government in October 2013,⁸⁶

⁷⁴ See *supra* notes 1–3 and accompanying text; see also, *infra* Part III.

⁷⁵ Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240 (2011) (codified as amended in scattered sections of 2 & 31 of U.S.C.).

⁷⁶ See *infra* Part III.

⁷⁷ See *supra* notes 3–8 and accompanying text.

⁷⁸ See *infra* Part IV–V.

⁷⁹ Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240 (2011) (codified as amended in scattered sections of 2 & 31 of U.S.C.).

⁸⁰ Recent Legislation, *Congress Delegates Power to Raise the Debt Ceiling*, 125 HARV. L. REV. 867, 869 (2012) [hereinafter *Recent Legislation*].

⁸¹ *Id.*

⁸² Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240 (2011) (codified as amended in scattered sections of 2 & 31 of U.S.C.).

⁸³ See *Recent Legislation*, *supra* note 80, at 869.

⁸⁴ Budget Control Act § 301(a).

⁸⁵ No Budget, No Pay Act, Pub. L. No. 113–3, 127 Stat. 51 (2013).

⁸⁶ Appropriations Act, Pub. L. 113–46, 127 Stat. 558 (2014).

and the “Temporary Debt Limit Extension Act” of February 2014,⁸⁷ Congress extended the “McConnell Mechanism” for prescribed periods of time as a means of raising the debt ceiling. Specifically, the McConnell Mechanism stipulates that when the federal debt is within a certain amount, the President is authorized to submit a certification to Congress calling for the Treasury Secretary to authorize an increase in the debt ceiling.⁸⁸ Following this action by the President, the debt limit is immediately increased, and, if Congress fails to respond within fifty calendar days asserting its disapproval, then the Secretary of the Treasury is authorized to issue additional debt.⁸⁹ Then, should the national debt again come within a set amount of the new ceiling, the President can call for a second certification raising the debt limit.⁹⁰ If Congress fails to respond within fifteen calendar days, this increase is effectuated.⁹¹ As with the first certification, Congress is authorized to assert its disapproval of the increase in the debt ceiling in the second round.⁹² In both the first and second round, Congress would vote against an increase by passing a “joint resolution of disapproval.”⁹³ To become law—therefore preventing an increase in the debt ceiling—the resolution requires the President’s signature, and is subject to a Presidential veto, and a Congressional veto override.⁹⁴

⁸⁷ Temporary Debt Limit Extension Act, Pub. L. 113–83, 127 Stat. 540 (2014).

⁸⁸ Budget Control Act § 301(a).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* The House of Representatives approved such a joint resolution of disapproval, H.R.J. Res. 99, 103d Cong. (2013) by a vote of 222 to 191 on October 30, 2013.

⁹⁴ *Id.*; see also U.S. CONST. Art. I, § 7, cl. 2 (allowing an override of a Presidential veto if two-thirds of both houses of Congress vote to do so). Scholars have suggested that the inversion of power created by the McConnell Mechanism is a violation of horizontal separation of powers between the branches of the federal government, and the non-delegation doctrine of Congressional power as established in *Clinton v. New York*. See *Recent Legislation*, *supra* note 80, at 870–74. In *Clinton v. New York* the Supreme Court held that the Line Item Veto Act was unconstitutional because it gave the President legislative powers by authorizing the President to strike down individual spending measures within a larger bill. 524 U.S. 417, 438 (1998). The court found presidential striking of specific measures an unconstitutional delegation of legislative power to the President because allowing the President to unilaterally cut spending measures without Congress voting on them violated the requirement per Art. I, § 7, cl. 2 that for all bills to become law, they must be presented to the President following passage of both the House and Senate. *Id.* Thus, these scholars suggest that allowing the President to unilaterally raise the debt ceiling, like the Line Item Veto, is an unconstitutional delegation of legislative power by Congress to the President. *Recent Legislation*, *supra* note 80, at 870–74. However, this discussion on the form of the BCA is irrelevant. As discussed below, defaulting on U.S. debt is unconstitutional—or in the alternative: the President would be authorized to unilaterally raise the debt through his (or her) exercise of executive powers, and no one individual has standing on the issue (practically making it a non-justiciable question). See *infra* Part IV. Therefore, potential faults with a measure that seeks to prevent default do not need to be given extensive attention. Rather, energies should be devoted to substantive efforts to reduce the deficit itself.

IV. WHAT IF CONGRESS OVERRODE A PRESIDENTIAL VETO
UNDER THE MCCONNELL MECHANISM?

Under the current scheme established in the BCA, the United States would ostensibly go into default following four steps. First, the President orders the Secretary of the Treasury to issue more debt. Second, a majority of Congress votes to disapprove the measure. Third, the President vetoes the legislation asserting Congressional disapproval. Fourth, Congress overrides the veto with the requisite two-thirds majority vote (thereby assuming defeat of a Senate filibuster).⁹⁵ However, as discussed below, default actually occurring is constitutionally impossible for three distinct reasons: (1) a proper reading of the Public Debt Clause makes defaulting on the national debt unconstitutional;⁹⁶ (2) even if default were held to be constitutionally permissible, the President would be authorized under Article II to use his executive powers to unilaterally raise the debt ceiling despite a Congressional veto override;⁹⁷ and (3) as a procedural matter, were the President to unilaterally raise the debt ceiling (even if the Court were to hold the President's action to be unconstitutional), there would be no individual, or set thereof, that would have standing to bring suit against the President.⁹⁸ For these reasons, use of the debt ceiling as a means of obtaining political favor, or as a means of kidnapping the legislative agenda, should not be used as doing so would be a constitutionally fruitless exercise. Instead, members of Congress should take the nation's inability to default as axiomatic and in that mindset work towards responsibly reducing the deficit and promoting the general welfare without discussion of potentially letting the nation default. Focusing on debt and deficit reductions would restore American credit and market confidence in federal debt obligations, which in turn would allow for a greater sense of comity and decorum in our political discourse.⁹⁹

A. *A Proper Reading of § 4 of the Fourteenth Amendment Requires a Broad Interpretation of the Clause, with Perpetual Future Application*

Written in simple, and broad-sweeping, language, § 4 of the Fourteenth Amendment, the Public Debt Clause, states: "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."¹⁰⁰ Adopted in the wake of the Civil War, the Framers of the Amendment were focused not only on the short-term

⁹⁵ See Budget Control Act § 301(a).

⁹⁶ See *infra* Part IV.A.1.

⁹⁷ See *infra* Part IV.B.1.

⁹⁸ See *infra* Part IV.C.1.

⁹⁹ See *infra* Part V.

¹⁰⁰ U.S. CONST. amend. XIV, § 4.

difficulties of Reconstruction, but also on their long-term responsibility to ensure the nation's future political and financial stability.¹⁰¹ The Supreme Court of the United States has only considered the Clause once, in *Perry v. United States*.¹⁰² However, the Court's reading of the Public Debt Clause's broad language suggests support for an expansive interpretation.¹⁰³ For these reasons, should the Supreme Court again consider the Public Debt Clause in the context of a suit brought against the President for unilaterally raising the debt ceiling despite a Congressional veto override, provided the Court even reaches the merits of the case,¹⁰⁴ the Court would hold the action to be valid because the Public Debt Clause prevents the United States from defaulting on its debt.¹⁰⁵

1. *Understanding the Clause's Plain Meaning and Historical Context*

Given its plain meaning, the Public Debt Clause would not only make default impermissible, but also any measure or action which "question[s]" or undermines its "validity" as well.¹⁰⁶ The term "validity," furthermore, given its plain meaning, is when something is "legally sufficient" or "binding."¹⁰⁷ Therefore, even if the nation were to not default on its debt, if a law would make it possible for a default, the debt would not be "legally sufficient," and, as such, would violate the Public Debt Clause.¹⁰⁸ As suggested by Michael Abramowicz, the Clause's passive construction—reading "the validity of the public debt shall not be questioned"¹⁰⁹—instead of an active sentence structure such as "the public debt's validity shall not be questioned"—suggests it was the intent of the Framers to not limit the actor who "question[s]" the public debt to Congress, or an agent of the federal government, but rather, any individual—thereby ensuring that private individuals honor the validity of U.S. debt when it is traded in the secondary market.¹¹⁰ Such a sentence structure illustrates that it was the Framers' intent not merely to set a "technical rule barring failure to make debt payments," but rather to announce, "a general principle of debt validity" as a means of ensuring the public of the nation's financial strength, as well as the security of investing in federal bonds.¹¹¹

¹⁰¹ See *infra* Part IV.A.1.

¹⁰² *Perry v. United States*, 294 U.S. 330 (1935).

¹⁰³ See *infra* Part IV.A.2.

¹⁰⁴ See *infra* Part IV.C.

¹⁰⁵ See *infra* Part IV.A.1–2.

¹⁰⁶ U.S. CONST. amend. XIV, § 4.

¹⁰⁷ BLACK'S LAW DICTIONARY 1690 (9th ed. 2009).

¹⁰⁸ See Abramowicz, *supra* note 12, at 24–25.

¹⁰⁹ U.S. CONST. amend. XIV, § 4.

¹¹⁰ See Abramowicz, *supra* note 12, at 24–25.

¹¹¹ *Id.* at 25.

The Framers were not only concerned, however, with ensuring “a general principle of debt validity,”¹¹² but rather, a greater commitment to future political stability. Following the politically destabilizing Civil War, the Reconstruction Congress was fully committed to ensuring the Union was secure, both economically and politically. Some have argued the Clause applies only to the war debt it explicitly mentions, which can be supported by the limited legislative history of the Clause.¹¹³ However, if the Reconstruction Congress was only concerned with protecting the validity of the Civil War debt, it would have been much easier to pass a statute with limited language explicitly addressing war debts, as opposed to amending the Constitution to address a debt that would inevitably be retired before the demise of the nation itself.¹¹⁴ Therefore, the Public Debt Clause’s placement in the Fourteenth Amendment—which has long been read broadly, so as to secure the fundamental rights the Union sought to protect—illustrates a greater commitment to ensuring long-term political, as well as financial, stability.¹¹⁵ The Civil War left the nation, which at the time was dedicated to conservative fiscal principles, with a large national debt—making the nation’s future financial stability (and its political implications) a primary concern of the Reconstruction Congress.¹¹⁶ As Phanor J. Eder stated, it was the “intention [of the Framers] to lay down a constitutional canon for all time in order to protect and maintain the national honor [while] strengthen[ing] the national credit.”¹¹⁷ To the Framers of the Fourteenth Amendment, protecting the national debt was not an end itself; it was a means of protecting political stability as well.

A debt ceiling is not necessarily *prima facie* unconstitutional because it can be used, as it was originally intended, as a means of ensuring debt validity by imposing fiscal restraints.¹¹⁸ Furthermore, it does not necessarily cause

¹¹² *Id.*

¹¹³ *Id.* at 7. No member of either the House of Representatives or the Senate entered any official comment into the Congressional Record during consideration of the Public Debt Clause. *Id.* This limited history caused Arthur Nussbaum to suggest that the Clause “does not seem to proclaim a principal [sic] of legal philosophy” but simply a solution to “a particular situation existing at the time of its enactment.” Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 *YALE L.J.* 53, 85 (1934). No supporting citations on that point, however, were provided. *Id.*

¹¹⁴ Amending the Constitution requires a proposal by either two-thirds of all Senators and Representatives, or two-thirds of all state legislators calling for a “Convention for proposing amendments,” as well as ratification of the proposed amendment by three-fourths of the States. U.S. CONST. art. V. This process is clearly more time consuming, and difficult, than simply having a majority of Congress approve a bill and having the President sign it. As such, had the Reconstruction Congress only been concerned with protecting the Civil War debt, using language to explicitly limit the Clause’s application to war debt would have been the much simpler solution.

¹¹⁵ See *infra* Part IV.A.3.

¹¹⁶ See *supra* Part II (discussing how, following the Civil War, Congress worked diligently to reduce the debt).

¹¹⁷ Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 *CORNELL L.Q.* 1, 15 (1933).

¹¹⁸ See *e.g.*, Abramowicz, *supra* note 12, at 38.

default provided tax revenues in both the short-term and long-term exceed liabilities, and Congress's fiscal policies are committed to servicing its debt prior to making new expenditures.¹¹⁹ However, a debt ceiling is contrary to the spirit of the Fourteenth Amendment as it creates the opportunity for individuals to undermine the nation's political, as well as its financial, stability by allowing the debt to be "questioned"¹²⁰ when the debt ceiling is used as a political bargaining chip.¹²¹ The broad language, passive structure, and plain meaning of the words of the Public Debt Clause all suggest that a proper reading requires its application for debts of the United States both existing at the time of enactment and all future debts. However, such a reading also demands that its application is not only limited to an actual default, but also a threat thereof so as to ensure both financial and political stability. This reading is further supported in the context of the Supreme Court's holding in the 1935 Gold Clause case *Perry v. United States*¹²²—the one and only time the Court has analyzed the Public Debt Clause—where the Court held the government could not unilaterally alter the terms of its bonds after issuance.¹²³

2. *The Supreme Court's Public Debt Clause Jurisprudence in Perry v. United States*

Perry v. United States is the first, and so far, the only, case concerning the Public Debt Clause heard by the Supreme Court.¹²⁴ The plaintiff in *Perry* purchased a security issued by the federal government that stipulated the bondholder, upon maturation, would be paid the stated principal and interest in United States gold coin.¹²⁵ However, during the Great Depression Congress declared payment in gold or other specie to be against public policy because of the rapid appreciation of the price of gold. Therefore, Congress altered the initial terms of the bond instrument *Perry* purchased, and stated that holders would be paid in fiat currency instead of gold coin.¹²⁶ *Perry* sued claiming he was entitled to receive the promised amount of gold coin, or, in the alternative, an amount of fiat currency equivalent to the then value of the dollar based off of "the change in the weight of the dollar"—roughly \$1.69 for every \$1.00 of the face value of the bond.¹²⁷ The Supreme Court held for *Perry*—stating it was unconstitutional for Congress to unilaterally alter the

¹¹⁹ *Id.*

¹²⁰ See *supra* Part II.B–E (discussing how the debt ceiling, and threats of non-extension, have been used by Republicans to force spending cuts).

¹²¹ U.S. CONST. amend. XIV, § 4.

¹²² *Perry v. United States*, 294 U.S. 330 (1935).

¹²³ See *infra* Part IV.A.2.

¹²⁴ See *e.g.*, Rosen, *supra* note 8.

¹²⁵ *Perry*, 294 U.S. at 347.

¹²⁶ *Id.*

¹²⁷ *Id.* at 358.

terms of its debt obligations.¹²⁸ In so holding that Congress could not alter the terms of its bonds after issuance, the Court relied on the Public Debt Clause, stating:

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 indicated a broader connotation. We regard [the Public Debt Clause] as confirmatory of a fundamental principle, which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the Amendment was adopted.¹²⁹

The Court was clear in its holding that while Congress certainly has “an unqualified power” to issue debt on its own terms, once a “contractual obligation” is made, like any private contract, it is “binding upon the conscience of the sovereign”—making it impossible for the United States to alter the terms of its obligations by paying less (or none) of the previously promised amount of money.¹³⁰

As the Court illustrated in *Perry*, it is a “fundamental principle” that the United States will not default on any of its debt obligations in order to ensure the nation remains financially, and therefore politically, stable.¹³¹ To the Court in *Perry*, the Clause’s phrasing “‘the *validity* of the public debt’ as embracing whatever concerns the integrity of . . . public obligation” illustrates its expansive application and purpose of maintaining long-term national fiscal stability.¹³² This is necessary because allowing Congress to alter the terms of its debt obligations after the fact would equate the constitutional authority of Congress to “borrow money *on the credit of the United States* . . . [to] a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor” and not an assurance of the ability to actually repay.¹³³ For these reasons, “Congress [cannot] alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers” because doing so would prevent U.S. debt instruments from having any market value, hamper U.S. creditworthiness, limit Congress’s future ability to borrow, and create, in every way, an unstable regime.¹³⁴ This sweeping language used by the Court, in dictum, suggests that it would apply this same logic to any question of the nation’s debt obligations, or “whatever concerns the integrity of . . . public obligations.”¹³⁵ Lower courts have declined to apply the Public Debt Clause

¹²⁸ *Id.* at 354.

¹²⁹ *Id.*

¹³⁰ *Id.* at 353–54.

¹³¹ *Id.* at 354.

¹³² *Id.* (emphasis in original).

¹³³ *Id.* at 351 (emphasis in original) (internal quotations omitted).

¹³⁴ *Id.* at 351.

¹³⁵ *Id.* at 354.

in a narrow series of cases when the Department of Education, as authorized by statute, withheld payments to third parties following their non-compliance with grant requirements;¹³⁶ in two of these cases the courts asserted the Clause should apply only to bond debt.¹³⁷ Because these cases involved a situation where private actors failed to comply with their contractual obligations, and not a situation where the government did not honor its debt obligations, these cases did not overturn *Perry*—“suggesting that it remains good law.”¹³⁸

Ultimately, however, the Court did not award damages to *Perry*—not because he did not suffer a constitutional injury, but rather, because his precise injuries were incalculable.¹³⁹ In *Perry*, the Court held that it was impossible to determine the plaintiff’s injuries, as there was no longer a market for gold coin—the payment demanded.¹⁴⁰ This is not to suggest, however, that if the United States were to not honor one of its debt obligations, the individual in question would not have standing to sue. Courts have long held the authority to issue a mandamus to require federal officials to honor contracts and obligations previously negotiated by the government, as held in *Kendall v. U.S. ex rel. Stokes*.¹⁴¹ Thus, if the Treasury Department withheld payment on bonds and a bondholder of a \$100 bond sued, they would be able to recover the \$100 because the government must honor its debt obligations, and the bondholder’s injuries are clearly calculable.¹⁴² Therefore, should the Court grant certiorari to hear another Public Debt Clause case, it should and could sustain, and expand, its holding in *Perry* to apply to all debt obligations.¹⁴³

The spirit of *Perry* is that the nation’s debt obligations are sacrosanct, and any action cannot alter existing obligations.¹⁴⁴ Therefore, the nation cannot go into default if the debt ceiling is lower than the nation’s debt obligations—making a Congressional veto override under the BCA

¹³⁶ See *Great Lakes Higher Educ. Corp v. Cavazos*, 911 F.2d 10, 12 n.1, 17 (7th Cir. 1990) (finding the Clause applies “when some state or federal government agency questions a debt” but denied application because the Secretary of Education was given the statutory authority to deny payment if the recipient was non-compliant); see generally *Ohio Student Loan Comm’n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990); *Colorado v. Cavazos*, Civ. A. No. 88-C-207, 1990 WL 367621 at *5 (D. Colo. Aug. 21, 1990); *Delaware v. Cavazos*, 723 F. Supp. 234 (D. Del. 1989), *aff’d*, 919 F.2d 137 (3d Cir. 1990).

¹³⁷ *Colorado v. Cavazos*, Civ. A. No. 88-C-207, 1990 WL 367621 at *5 (D. Colo. Aug. 21, 1990); *Delaware v. Cavazos*, 723 F. Supp. 234, 245 (D. Del. 1989), *aff’d*, 919 F.2d 137 (3d Cir. 1990).

¹³⁸ *Abramowicz*, *supra* note 12, at 14.

¹³⁹ *Id.* at 358.

¹⁴⁰ *Perry v. United States*, 294 U.S. 330, 357 (1935) (“The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which all forms of money of the United States were to be maintained at a parity had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.”) (internal quotation marks omitted).

¹⁴¹ 37 U.S. 524, 532–33 (1838).

¹⁴² See *id.*

¹⁴³ See *supra* Part IV.A.1–2.

¹⁴⁴ See *supra* notes 125–135 and accompanying text.

unconstitutional because it would necessarily “question[]”¹⁴⁵ the nation’s debt, and cause the nation to alter the terms of its payment obligations.¹⁴⁶ This reading of the Public Debt Clause is further strengthened when it is read in the context of the entire Fourteenth Amendment, and the Court’s jurisprudence on the Amendment.¹⁴⁷

3. *A Broad Reading of the Public Debt Clause Complies with the Court’s Broad Reading of Other Sections of the Fourteenth Amendment*

In the *Slaughter-House Cases*¹⁴⁸ the Court initially limited the Fourteenth Amendment to its context of the Civil War, which was primarily concerned with protecting the rights of former slaves.¹⁴⁹ However, over time, the Court has read § 1 of the Amendment broadly by applying it to all American citizens—much like the broad reading of § 4 in *Perry*. The Equal Protection Clause was held to not just apply to African-Americans in *Santa Clara County v. Southern Pacific R.R.*,¹⁵⁰ and it has later been used to secure the rights of women,¹⁵¹ homosexuals,¹⁵² voting rights,¹⁵³ as well as the assurance of desegregated public schools.¹⁵⁴ Similarly, the Due Process Clause has been vital to securing the fundamental rights of all citizens—including rights guaranteeing access to an abortion without an “undue burden,”¹⁵⁵ refusal of medical care,¹⁵⁶ and intimate association¹⁵⁷ as rooted in the essential right to privacy in the Constitution.¹⁵⁸

¹⁴⁵ U.S. CONST. amend. XIV, § 4.

¹⁴⁶ See *supra* notes 125–135 and accompanying text.

¹⁴⁷ See *infra* Part IV.A.3.

¹⁴⁸ 83 U.S. 36 (1873).

¹⁴⁹ *Id.* at 37 (“[T]he main purpose of [the Fourteenth Amendment] was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery.”).

¹⁵⁰ 118 U.S. 394, 396 (1886).

¹⁵¹ *United States v. Virginia*, 518 U.S. 515, 558 (1996) (holding that a male-only, state-run, higher education facility violated the Equal Protection Clause of the Fourteenth Amendment).

¹⁵² *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a state constitutional amendment in Colorado which would have disallowed a municipality from passing a measure making homosexuals a protected class to be a violation of the Equal Protection Clause).

¹⁵³ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (finding that legislative districts had to be equal, or nearly equal, in population in order to ensure each citizen’s vote was given equal weight to allow for equal protection of the laws).

¹⁵⁴ *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that separate educational facilities based on race are necessarily unequal, and therefore a violation of the Equal Protection Clause).

¹⁵⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 834 (1992).

¹⁵⁶ *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 286 (1990) (finding that a competent individual has a constitutional right to refuse medical care).

¹⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that a Texas law criminalizing private homosexual conduct violated the Due Process Clause of the Fourteenth Amendment because the right to privacy within the home is the spirit of the Fourth Amendment).

¹⁵⁸ See *supra* notes 155–157.

With the Court applying a broad reading of the more visible provisions of the Fourteenth Amendment, it is only logical that it would apply the same expansive understanding to the Public Debt Clause—a clause intended to ensure the rights of citizens against the government.¹⁵⁹ It is incongruous to suggest that § 1 of the Fourteenth Amendment should be read to secure the rights and equal protection of the laws to all citizens (and not just the newly freed slaves the Reconstruction Congress was primarily concerned with) while the remainder of the Amendment—including the Public Debt Clause of § 4—should be limited in scope and apply only to the Civil War debt.¹⁶⁰ In writing the Equal Protection and Due Process Clauses, the Framers wanted to protect individual rights of American citizens, and with the Public Debt Clause, they wanted to protect their financial rights by guaranteeing the nation’s creditworthiness.¹⁶¹ A narrow reading of § 4 would be incongruous with the Court’s reading of the remainder of the Amendment. Courts, Congress, and legal scholars have long held the Fourteenth Amendment to represent the policy of protecting liberties and legal protections for all citizens.¹⁶² Reading the Public Debt Clause expansively is both a proper form of statutory interpretation¹⁶³ and a necessary means of protecting America’s perpetual financial security. Therefore, a proper reading of the Public Debt Clause makes defaulting on the national debt unconstitutional. However, as discussed in the next section, even if the Court were to overturn *Perry*, limit its holding, or take any other reading of the Clause which would allow for default, the President would still likely be authorized to unilaterally raise the debt ceiling—despite a Congressional veto override of the veto of the vote of disapproval under the BCA—given his executive powers under Article II.¹⁶⁴

¹⁵⁹ See *supra* Part IV.B.

¹⁶⁰ *Cf.* *United Savings Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .”).

¹⁶¹ Although it may be argued that the often forgotten § 3 of the Amendment, which denies the right of former rebels to serve in a public post, is limited to ex-Confederates, such a reading is not compliant with the spirit of the Amendment and the Court’s general jurisprudence on it. While the Framers were primarily concerned with the internal conflict of the Civil War, they did not simply pass individual statutes limiting the rights of Confederates. Instead, they amended the Constitution—illustrating their desire that the Fourteenth Amendment should be read broadly so as to prevent all future conflicts as well. *Cf. supra* Part IV.A.

¹⁶² See *supra* notes 151–157.

¹⁶³ See *United States v. Boisdoré’s Heirs*, 49 U.S. 113, 122 (1850) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”); see also *FCC v. NextWave Personal Commc’ns, Inc.*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting) (“It is dangerous . . . in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute’s words divorced from consideration of the statute’s purpose.”).

¹⁶⁴ See *infra* Part IV.B.

B. The President's Executive Powers—as Established in Youngstown and Dames & Moore—Suggest that a Unilateral Action Raising the Debt Ceiling Would be Authorized as an Implied Power of the President

Should Congress override the President's veto of the vote of disapproval to raise the debt ceiling, the President would face a set of conflicting laws. The law under the BCA would prevent an increase in the debt ceiling; however, without issuing more debt, the nation would not be able to meet its current financial obligations, as previously appropriated. The President would need to reconcile this conflict with the constitutional duty that the President "take Care that the Laws be faithfully executed."¹⁶⁵ Therefore, should the President unilaterally raise the debt ceiling and ignore the veto override, he would be acting against the "express[] . . . will of Congress" regarding the debt ceiling. However, by unilaterally raising the debt ceiling, he would ensure federal programs are properly funded—thereby acting within the "implied authority" of the President¹⁶⁶ to "take Care that the [previously enacted Congressional appropriations and spending] Laws are faithfully executed" so as to avoid a national crisis—therefore making the unilateral debt ceiling increase "authorized by law."¹⁶⁷ This argument is strengthened when viewed in the international context of securities trading and the pervasiveness of U.S. debt as an investment in both foreign and domestic markets.¹⁶⁸

1. Analyzing a Unilateral Increase in the Debt Ceiling in the Context of the Court's Domestic Executive Powers Jurisprudence in Youngstown

In *Youngstown Sheet & Tube v. Sawyer* the Court held that President Truman violated constitutional separation of powers when he seized the steel mills to prevent a strike in order to ensure full support for the Korean War effort.¹⁶⁹ In the now seminal concurrence by Justice Jackson,¹⁷⁰ Jackson established three broad categories for analyzing the constitutionality of a Presidential action: (1) Presidential power is strongest when the President is acting in accordance with the (either express or implied) authority granted

¹⁶⁵ U.S. CONST., art. II, § 3.

¹⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁶⁷ U.S. CONST., art. II, § 3.

¹⁶⁸ See *infra* Part IV.B.2.

¹⁶⁹ See 343 U.S. 579 (1952).

¹⁷⁰ See, e.g., Harold Hongju Koh, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power Essays*, 115 YALE L.J. 2350, 2354 (2006) (stating that Justice Jackson's "canonical concurrence" in *Youngstown* solidified the notion "that executive power operates within a constitutional framework of checks and balances, resting on the vision of shared institutional powers").

by Congress; (2) Presidential power is unclear when the President acts absent a clear grant or denial of power; and (3) Presidential power is weakest when he acts against Congress's (express or implied) grant of authority.¹⁷¹ Under this spectrum, a unilateral action by the President to raise the debt ceiling following a Congressional veto override would be an act by the President when his power is "at its lowest ebb" because it is incompatible with the "express[] . . . will of Congress" in passing the BCA.¹⁷² However, raising the debt ceiling in this scenario would be necessary to make sure that the authority previously granted by Congress to the Treasury Department to make expenditures for the appropriated monies is carried out—making a unilateral action to raise the debt ceiling an implicit power granted to the President because the appropriated levels exceed current revenues.¹⁷³

Raising the debt ceiling does not increase federal spending, nor is it a means of conditioning current or future spending. Congress creates, and establishes budgets for, federal programs as well as other expenditures such as interest payments on debt. These expenditures receive their operating funds from the United States Treasury, as appropriated by Congress. Funding for federal appropriations comes from taxation. However, because tax revenues may be lower than anticipated, or payments are due prior to receipt of tax revenues, in order to make payments absent available tax dollars, the Treasury Department must issue federal debt to meet this shortfall.¹⁷⁴ As such, strictly speaking, the need to raise the debt ceiling is a question of cash flows, and not a question of excessive spending. President Clinton in 2011 properly stated that raising the debt ceiling is not a vote "to keep [increasing] deficit spending"; rather, it is a vote "to honor obligations already incurred."¹⁷⁵ Certainly, extensive or excessive borrowing is unsustainable. However, the proper solution to this is to reduce spending or increase taxation—not to threaten the nation's creditworthiness over previously appropriated funds. This is because, as Secretary Geithner warned Congress in 2011, "reductions in future spending commitments cannot supply the short-term cash needed" to fund current obligations.¹⁷⁶

¹⁷¹ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁷² *Id.*

¹⁷³ See *id.* (discussing how a unilateral action by the President to execute a law—even if the power to do so is not expressly permitted by Congress—may be a valid exercise of Presidential powers).

¹⁷⁴ Kasia Klimasinska, *Lew Says U.S. Borrowing Power May Not Last Past Feb. 27*, BLOOMBERG NEWS (Feb. 7, 2014, 3:52 PM), <http://www.bloomberg.com/news/2014-02-07/lew-says-u-s-borrowing-power-may-not-last-past-feb-27.html>, archived at <http://perma.cc/6FDX-3979> (discussing how filings for tax refunds will deplete the Treasury and limit the cash balance available—forcing the issuance of more debt to fund the nation's financial obligations).

¹⁷⁵ Jennifer Epstein, *Bill Clinton: I'd Use the 14th Amendment*, POLITICO (July 19, 2011, 6:25 AM), <http://www.politico.com/news/stories/0711/59331.html>, archived at <http://perma.cc/N8UQ-AFWL>.

¹⁷⁶ Letter from Timothy Geithner, Sec'y of the Treasury, to Senator Harry Reid (D-NV) (Apr. 4, 2011), available at <http://www.treasury.gov/connect/blog/Documents/FINAL%20Letter%2004-04-2011%20Reid%20Debt%20Limit.pdf>, archived at <http://perma.cc/5PE4-2V2F>.

Therefore, because one law expressly denies Presidential power, and the other implicitly authorizes it, authority from Congress is unclear—likely causing the Court to place the action in Justice Jackson’s second category.¹⁷⁷ When in this zone, the President would have to choose which law to “faithfully execute[],”¹⁷⁸ and the constitutionality of the President’s power would “depend on the imperatives of events and contemporary imponderables rather than abstract theories of law.”¹⁷⁹ Given the catastrophic effect defaulting on U.S. national debt would cause in the global financial markets, any President would likely choose to raise the debt ceiling unilaterally to ensure continued funding for current public spending programs, as well as the stability of global financial markets—that being a necessary component of securing the safety and stability of the United States.¹⁸⁰ Therefore, because Congress previously authorized expenditures in excess of current revenues and debt limits, and the exigencies would call for a prevention of default, a unilateral action by the President to raise the debt ceiling and fund these measures would be a constitutional execution of the laws, and not unconstitutional Presidential lawmaking under Justice Jackson’s framework.¹⁸¹

Furthermore, given the importance of U.S. debt in financial markets, a unilateral increase of the debt ceiling is not only potentially constitutional under Jackson’s second category, but rather, would be imperative in order to avoid a national crisis—allowing for Justice Vinson’s dissenting opinion in *Youngstown* to provide a relevant point of analysis.¹⁸² Justice Vinson argued that the “leadership contemplated by the Framers” requires the President to

¹⁷⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”).

¹⁷⁸ U.S. CONST., art. II, § 3.

¹⁷⁹ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

¹⁸⁰ See *supra* note 3 and accompanying text (discussing the financial crisis a default on American debt would cause across various markets).

¹⁸¹ See *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring); see also Rosen, *supra* note 8.

¹⁸² See *id.* at 683 (Vinson, J., dissenting) (discussing the importance, and historic understanding, of unilateral action by the President in times of national crisis to be constitutionally permissible); see also Michael P. Van Alstine, *Constitutional Necessity and Presidential Prerogative: Does Presidential Discretion Undergird or Undermine the Constitution?*, 45 TULSA L. REV. 631, 638 (2010) (discussing how scholars have found the “required space for extralegal executive discretion in time of true national crisis.”) (internal quotation marks omitted). Certainly, other scholars have, in the light of broad exercises of executive powers in the George W. Bush administration, called for a return to the strict checks and balances envisioned by James Madison. *Youngstown*, 343 U.S. at 632 (Jackson, J., concurring). However, the Madisonian desire to require the President to get authorization in times of crises in the modern era—given the immediacy of many conflicts—can be properly administered when the President explains why the measures taken were necessary to avoid national crisis, and therefore an implied Presidential power. See *id.* at 641–42; see also Eric A. Posner and Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES, July 22, 2011, available at http://www.nytimes.com/2011/07/22/opinion/22posner.html?_r=1, archived at <http://perma.cc/B9Y3-V8WZ> (“[T]he president would derive authority [to unilaterally raise the debt ceiling following a Congressional veto override] from his paramount duty to ward off serious threats to the constitutional and economic system.”).

“act promptly and resolutely to enforce legislative programs, at least to save those programs until Congress [can] act” so as to avoid a national crisis.¹⁸³ While closure of the steel mills would have only impacted the steel market—and indirectly slow the war efforts—a default on American debt would necessarily impact global markets generally, and could cause a global financial crisis.¹⁸⁴ Due to the potential to default, the imperative for the President to act unilaterally is greater in the context of the national debt when compared to closure of the steel mills. Additionally, unlike in *Youngstown* where the Congress could have theoretically acted to ensure continued steel production, Congress would not act to save the nation from default because that would have been its intention in overriding the President’s veto. Therefore, because Congress would not act to avoid default and ensure continued funding of current appropriations, the only way “to enforce [the] legislative programs” would be a unilateral action by the President.¹⁸⁵

Outside of taxes, fees, or other regularly scheduled revenues, there are three hypothetical ways in which the Treasury Department can receive funds. First, as discussed, the President can unilaterally raise the debt ceiling. Second, it can sell federal land, buildings, or gold. And third, the Treasury Department could mint a coin and declare it to be valued at the desired level of the debt ceiling increase (such as \$1 trillion). Selling federal lands and properties would take too long,¹⁸⁶ and selling gold in a “fire sale” would cause panic in the financial markets and place the value of gold, as well as countless other public and private assets, at risk of drastic losses.¹⁸⁷ Minting a \$1 trillion coin is technically legal under a statute that authorizes the Secretary of the Treasury to mint platinum coins and determine their value.¹⁸⁸ This statute, however, was intended for the production of commemorative coins¹⁸⁹—causing this option to both violate Congressional intention in passing that statute, while also disrupting horizontal separation of powers by allowing the President to usurp the Coinage clause. Unilaterally raising the debt ceiling, however, while arguably against Congress’s will in failing to raise the debt ceiling, would be in line with Congress’s will in previously appropriating money, the President’s Constitutional duty to execute existing laws, and the proper reading of the Public Debt Clause. For these reasons, unilaterally raising the debt ceiling by the President would be the

¹⁸³ *Youngstown*, 343 U.S. at 683 (Vinson, J., dissenting).

¹⁸⁴ See *supra* note 3 and accompanying text (discussing the financial crisis a default on American debt would cause across various markets).

¹⁸⁵ *Youngstown*, 343 U.S. at 683 (Vinson, J., dissenting).

¹⁸⁶ Terry Pristin, *Government, Too, Has Trouble Selling Buildings*, N.Y. TIMES, April 27, 2011, at B7.

¹⁸⁷ *Supra* note 176.

¹⁸⁸ 31 U.S.C. § 5112 (2012).

¹⁸⁹ Leigh Ann Caldwell, *What’s up with the \$1 trillion coin?*, CBS NEWS (Jan. 11, 2013, 6:00 AM), <http://www.cbsnews.com/news/whats-up-with-the-1-trillion-coin/>, archived at <http://perma.cc/4T8E-8S9N>.

“prompt[] and resolute[] [leadership] to enforce [not only current] legislative programs” but also our entire Constitutional order.¹⁹⁰

Lastly, this understanding of implied Presidential power to unilaterally raise the debt ceiling is supported both by the importance of U.S. debt in matters of foreign affairs and by the history of Congress continually granting more and more power to the executive branch to unilaterally issue debt.¹⁹¹ Thus, as the Court held in *Dames & Moore v. Regan* with regard to Presidential powers in foreign affairs, with a long history of Congress granting the President broad powers to unilaterally issue more debt, “there is congressional acquiescence in the conduct of the sort engaged in by the President” and it should therefore be authorized as a constitutional exercise of Presidential power.¹⁹² Therefore, given this history, and the international implications of a national default, the constitutionality of a unilateral action by the President raising the debt ceiling is further strengthened by the Court’s analysis in *Dames & Moore*.¹⁹³

2. *Analyzing the President’s Broad Powers in Foreign Affairs in the International Context of Federal Spending and Global Financial Markets*

Unlike the threatened mill closures in *Youngstown*, which would disrupt the national economy and slow the war effort, defaulting on the federal debt would have severe economic implications outside domestic borders.¹⁹⁴ United States Treasury bonds are a valuable security, and are held by American citizens, as well as foreign nationals, and even foreign governments.¹⁹⁵ They likewise are crucial because U.S. government bonds “serve as benchmarks for quoting and pricing yields on private (credit-risky) securities” in both domestic and foreign markets.¹⁹⁶ Furthermore, U.S. currency serves as the base international reserve currency for transactions amongst all nations; making the U.S. dollar, and U.S. debt instruments, a vital component of international trade and finance.¹⁹⁷ As such, a default on American

¹⁹⁰ *Youngstown*, 343 U.S. at 683 (Vinson, J., dissenting).

¹⁹¹ *See supra* Part II.

¹⁹² *Dames & Moore v. Regan*, 453 U.S. 654, 678–79, 688 (1981).

¹⁹³ *See infra* Part IV.B.2.

¹⁹⁴ *See supra* note 3 (discussing the international implications of a default on American debt).

¹⁹⁵ *See, e.g.*, Louis Charbonneau, *Scrap dollar as sole reserve currency: U.N. report*, REUTERS (June 29, 2010, 4:56 PM), <http://www.reuters.com/article/2010/06/29/us-dollar-reserves-un-idUSTRE65S40620100629>, archived at <http://perma.cc/SCS2-TEFM> (noting that many nations currently use the American dollar as a reserve currency, but are beginning in recent years to invest in other currencies, following the declining value of the dollar).

¹⁹⁶ Garry J. Schinasi, Charles F. Kramer & R. Todd Smith, *Financial Implications of the Shrinking Supply of U.S. Treasury Securities*, INT’L MONETARY FUND (Mar. 20, 2001), http://www1.american.edu/academic.depts/ksb/finance_realestate/mrobe/Library/IMF.pdf, archived at <http://perma.cc/MY9A-7LES>.

¹⁹⁷ *See, e.g.*, Ruth Judson, *Crisis and Calm: Demand for U.S. Currency at Home and Abroad from the Fall of the Berlin Wall to 2010*, FED. RESERVE (Nov. 2012), <http://www>

debt would be a matter of foreign affairs—an area the Constitution, and the Court, has long granted even broader powers to the President than in domestic affairs.¹⁹⁸

Certainly, the steel mill closure in *Youngstown* necessarily implicated foreign affairs because decreased steel production hampered the Korean War effort. However, the economic and political consequences of seizing the mills were primarily felt domestically—making a grant of extensive powers to the President an unconstitutional exercise of his role as Commander in Chief. As Justice Jackson stated: “[no] doctrine that the Court could promulgate would seem to [b]e more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment to the Nation’s armed forces.”¹⁹⁹

In matters having a greater, and more direct, impact on foreign affairs, however, the Court has been willing to grant the President greater unilateral powers. For instance, in *United States v. Curtiss-Wright Export Corporation* the Supreme Court held that the non-delegation doctrine was not violated when President Franklin D. Roosevelt issued an Executive Order, pursuant to a Joint Resolution of Congress, banning the sale of arms to parties involved in a Latin American border dispute.²⁰⁰ In so holding, the Court stated that because the nation requires uniform application of foreign policy, and the President, as one individual, is better positioned to understand foreign affairs than Congress, “there [was] sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute [would] have a beneficial effect upon the re-establishment of peace in the affected countries.”²⁰¹

A post hoc application of Justice Jackson’s categories to *Curtiss-Wright* clearly illustrates the Court would have placed President Roosevelt’s Executive Order in the first category because it was issued in pursuance to a Joint Resolution of Congress.²⁰² However, this is not to suggest that the President is only given broad executive powers in matters of foreign affairs when he is acting at the express direction of Congress.²⁰³ Nor does it suggest that the President’s broad authority is limited to questions solely of military conflict and overt national security.²⁰⁴ In *Dames & Moore v. Regan*, the Court held that President Carter did not violate constitutional separation of powers

.federalreserve.gov/pubs/ifdp/2012/1058/ifdp1058.pdf, archived at <http://perma.cc/96BZ-7D> GK (stating that “U.S. currency has long been a desirable store of value and medium of exchange” in other nations, and that “a substantial share of U.S. currency circulates outside the United States”).

¹⁹⁸ See *supra* notes 190–197 and accompanying text.

¹⁹⁹ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

²⁰⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936).

²⁰¹ *Id.* at 329.

²⁰² *Youngstown*, 343 U.S. at 637 (1952) (Jackson, J., concurring).

²⁰³ See *supra* note 198 and accompanying text.

²⁰⁴ See *supra* note 198 and accompanying text.

when he unilaterally froze Iranian assets in the United States and suspended American business dealings in Iran, without express Congressional approval, following the seizure of American personnel at the Embassy in Tehran.²⁰⁵ There the Court held that although there were pieces of legislation that “invited” Presidential power, there was no clear direction from Congress—essentially placing President Carter’s actions on the border of Justice Jackson’s first and second categories.²⁰⁶ And, in order for the nation’s foreign policy to be properly executed, it was deemed necessary for the President to have broad powers to negotiate with foreign leaders, and take quick and decisive actions to best promote America’s national security and interests in external affairs.²⁰⁷ As such, because the influence of American debt instruments is pervasive in all foreign financial markets, making national default a matter of foreign affairs with the potential to cause international conflict,²⁰⁸ a Presidential action to raise the debt ceiling is akin to *Dames & Moore*.

President Truman seized the steel mills as Commander in Chief; however, this action had its greatest consequences in the civilian domestic economy—forcing the Court to draw limitations on unilateral powers of the President in order to maintain the power of the legislature to control domestic affairs.²⁰⁹ President Carter’s actions, however, were needed to maintain a single voice in America’s relations with foreign nations, and had their most significant impact abroad. Similarly, a unilateral increase in the debt ceiling would be necessary to avoid an international financial crisis, while also ensuring that the President is able to carry out his duties to execute the appropriations law. This action would have both a greater impact on foreign affairs, and a lesser impact on domestic matters, than *Youngstown*—making a unilateral increase in the debt ceiling to be a constitutional exercise of Presidential powers.

Much like a freeze on Iranian assets located in the United States was held to be implicitly authorized by the broad powers in foreign affairs Congress and the Constitution grant to the President, so too would the President’s raising the debt ceiling be held to be implicitly authorized to see that the nation’s interests are protected abroad. Raising the debt level would be necessary to see that foreign policy is properly executed by ensuring funding to foreign programs through the Department of State (e.g.: U.S. AID or the Peace Corps.), as well as funding for ongoing military conflicts via appropri-

²⁰⁵ *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (“[W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims.”).

²⁰⁶ *Id.* at 678–80.

²⁰⁷ *Id.* at 688.

²⁰⁸ See *supra* notes 194–195 and accompanying text.

²⁰⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1981) (Jackson, J., concurring) (“[M]ilitary powers of the Commander in Chief [are] not to supersede representative government of internal affairs.”).

ations to the Department of Defense.²¹⁰ Furthermore, because foreign nationals also hold American debt, the pricing of debt instruments across global markets depends on predictable pricing associated with U.S. debt, and the role of the U.S. dollar as the recognized primary reserve currency, there is the potential for new threats to national security arising from the ruinous global cross-market implications of default.²¹¹

Decreased steel production inhibited one component of the military's war efforts. Iranian financial assets in America, however, implicated both America's position with the Iranian government, as well as its greater role in the global community. Similarly, a default on U.S. debt would have expansive and severe implications across the globe, while simultaneously hurting domestic concerns and inhibit the President's ability to execute the appropriations laws. Therefore a unilateral action by the President to raise the debt ceiling, and avoid international conflict, would likely be held to be constitutional. However, even if the Court were to theoretically hold otherwise, it would likely not even be able to reach the merits of the case because it is a constitutional impossibility for the issue to be justiciable because no one has standing to challenge the unconstitutionality of the President's action to unilaterally raise the debt ceiling, as discussed below.²¹²

*C. Regardless of the Court's Ruling on the Constitutionality of Default,
or a Unilateral Action by the President, the Matter is Non-Justiciable
Because No Party Has Standing, nor Would the Court
Find the Injuries Redressable*

A third and final reason why defaulting on American debt obligations is constitutionally impossible is a question of procedure, and not a substantive analysis. To bring suit, a party must have standing under Article III of the Constitution—the ability to demonstrate they personally and individually have been injured by the defendant's actions.²¹³ The Court established a three-part test for determining standing in *Sierra Club v. Morton*. A plaintiff must: (1) suffer “injury in fact” by a material change in her life; (2) there must be a causal connection between the plaintiff's injury, and the action(s) of the defendant(s); and (3) a likelihood that a favorable decision for the plaintiff will redress the injury in question.²¹⁴ Under these requirements, there are only two potential individuals, or sets thereof, that would have standing to sue the President for unilaterally raising the debt ceiling: (1) Congress may have “institutional standing” to sue the administration if the

²¹⁰ Thereby making the unilateral action increasing the debt ceiling a proper execution of the laws, and not unconstitutional lawmaking. *See supra* Part IV.B.1.

²¹¹ *See supra* note 194 and accompanying text.

²¹² *See infra* Part IV.C.

²¹³ U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.”).

²¹⁴ *Sierra Club v. Morton*, 405 U.S. 727, 736–38 (1972).

Court extends its prior holdings, and finds this to be a possibility without a private litigant;²¹⁵ or, (2) an individual who purchased a credit default swap (CDS) against U.S. securities may have standing to sue the President because without the unilateral action to raise the debt ceiling, the nation would go into default, and the holder would profit.²¹⁶ However, a Congressional lawsuit is politically infeasible,²¹⁷ and the purchaser of a CDS would not suffer an injury, or alternatively, if the Court were to find a valid injury, it would neither be clearly caused by the President's actions, nor would it be redressable by holding said actions unconstitutional.²¹⁸

1. Question of "Institutional Standing"

In the 1997 case of *Raines v. Byrd* the Supreme Court held that a set of individual members of Congress lacked Article III standing to challenge the constitutionality of the Line Item Veto Act.²¹⁹ The Court did not address the merits of the case, and held, in a 7-2 decision, that the six members lacked standing because the injury was to Congress as an institution and not to individual members of Congress.²²⁰ The Court stated that if it were to ever find a member has institutional standing to sue the President, their injury would need to amount to "vote nullification"—all of plaintiffs' votes "would [need to] be[] sufficient to pass or defeat a specific bill."²²¹ Based on this precedent, the only way for members of Congress, as agents of the public and not private citizens, to have standing, would be if the institution of Congress itself were to sue as one entity; without at least two-thirds of Congress suing following a veto override, the votes of the plaintiffs would

²¹⁵ See *infra* Part IV.C.2; see also Matthew Zeitlin, *The Debt Ceiling: Why Obama Should Just Ignore It*, NEW REPUBLIC (June 24, 2011), <http://www.tnr.com/article/politics/90659/debt-ceiling-obama-congress>, archived at <http://perma.cc/W2NX-TV3N> ("A joint resolution from Congress could try to get an injunction from the D.C. District Court to stop the Treasury from issuing new debt."). Although there is a history of courts allowing the legislature to be party to a lawsuit against another branch of the government, those cases involved private litigants, suggesting the Court may hold that, absent a private litigant with standing, Congress alone, as a single entity, may not be able to sue the executive branch. See Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 910–11 (1991).

²¹⁶ See *infra* Part IV.C.2. Exclusive of Establishment Clause cases, the Court has long held that status alone as a taxpayer is insufficient to establish standing. See *Flast v. Cohen*, 392 U.S. 83, 88 (1968).

²¹⁷ See *infra* Part IV.C.2.

²¹⁸ See *infra* Part IV.C.2.

²¹⁹ *Raines v. Byrd*, 521 U.S. 811, 830 (1997) ("We therefore hold that these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.").

²²⁰ *Id.* For a discussion of the merits of the case, and how the Court ultimately held the Line Item Veto Act to violate the Presentment Clause of the Constitution and the non-delegation doctrine, see *Clinton v. New York*, 524 U.S. 417, 438 (1998).

²²¹ *Raines*, 521 U.S. at 822–23; see also JAY R. SHAMPANSKY, CONG. RESEARCH SERV., RL30280, CONGRESSIONAL STANDING TO SUE: AN OVERVIEW (2001), available at <http://congressionalresearch.com/RL30280/document.php?study=Congressional+Standing+to+Sue+An+Overview>, archived at <http://perma.cc/XG23-QA9C>.

be insufficient for injury to amount to “vote nullification.”²²² Furthermore, even if a valid suit were brought against the President by two-thirds of all legislators in both chambers, in order to hear the merits of the case, the Court would have to extend institutional standing absent a private litigant.²²³

In the current Congress, even if the Joint Resolution were to pass the House, it likely would not pass in the Democratic-led Senate.²²⁴ Furthermore, even if the BCA were to be extended permanently to establish the McConnell Mechanism as the norm for raising the debt ceiling permanently, and both houses were controlled by the President’s opposition, a vote on overturning the veto or a Joint Resolution to sue the President would never be passed (absent reform of Senate rules) because a member of the President’s party in the Senate would filibuster the bill—thereby preventing cloture, and not allowing a final vote.²²⁵

In both consideration of the veto override and the Joint Resolution, the minority party would filibuster every step of the process. First the procedural vote on the motion to proceed would be filibustered. Then, if cloture were reached on the motion to proceed, the minority party would filibuster the vote on final passage. Following a cloture vote on that filibuster which would set a final vote on the Joint Resolution, the minority party could then indefinitely delay the vote, as well as all other Senate activity, by simply not showing up to work. Under Senate Rules, no Senate business can be done in the absence of a quorum, defined as a majority of the Senate (51 Senators).²²⁶ However, even if every single member of the majority party arrived to establish a quorum, in order to invoke cloture, the majority party would need 60 members, and to approve the Joint Resolution, it would need 67 members.²²⁷ The political dynamics of the modern era make such a supermajority a practical impossibility.²²⁸ As such, because political realities prevent the majority party from ever holding 67 seats, and therefore unilaterally

²²² See *Raines*, 521 U.S. at 822–23; see also U.S. CONST. art. I, § 7, cl. 2.

²²³ See Herz, *supra* note 215, at 910–11.

²²⁴ Zeitlin, *supra* note 215.

²²⁵ See *id.*

²²⁶ RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL22188, FILIBUSTERS AND CLOTURE IN THE SENATE 7 (2013), available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E,*PLW%3D%22P++%0A, archived at <http://perma.cc/N7XL-W9RZ> pg. 9.

²²⁷ *Id.* at 1.

²²⁸ Since Alaska and Hawaii joined the union, giving the Senate its current 100 seats, only in one Congress did the majority party have more than 67 seats; from 1965 to 1967, it had 68. Dynamics of the time, however, caused parties to not be as partisan-focused as they are today. Following passage of the Civil Rights Act of 1968, conservative Southern Democrats joined the Republican party, and our nation’s political parties became much more partisan. Following this exodus, the majority party in the Senate has never had more than 61 members. See *Party Division in the Senate, 1789–Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Mar. 5, 2014), archived at <http://perma.cc/3LH2-WL5A>.

controlling the Senate, Senate rules practically prevent passage of either a veto override or passage of a Joint Resolution to sue the President.²²⁹

For these reasons, assuming the Court were to extend *Raines* and allow for institutional standing absent a private litigant, such a case would remain impractical given modern political dynamics and Senate rules.²³⁰ It is highly unlikely that the Court would allow only the House of Representatives, whose rules prevent a filibuster and would force an up-or-down vote on the Joint Resolution,²³¹ to sue the President.²³² Doing so would violate the constitutional requirements of bicameralism; *Raines* was concerned with the whole of Congress—not either body individually²³³—and the Court’s holdings in other cases suggest that both chambers must act in concert so to best effectuate the Framers’ intent in requiring a bill to pass both the House and Senate prior to presentment to the President.²³⁴ Therefore, while Congress as an institution may theoretically have standing to sue the President provided the Court extends its prior holdings, party politics, Senate rules, and the requirements of bicameralism, make it an improbability for Congress, or one house individually, to bring suit—making a private citizen who purchased a CDS against government debt to be the only practical and potential plaintiff.²³⁵

²²⁹ Since 1968 Congress has successfully overridden 29.0% of all Presidential vetoes. See *Summary of Bills Vetoed, 1789-present*, U.S. SENATE, <http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm> (last visited Mar. 5, 2014), archived at <http://perma.cc/5DQR-JV GZ>. None of the measures in which Congress successfully overrode the President’s veto implicated significant issues of America’s financial security. The closest types of measures that were overridden were appropriations bills; successful overrides of appropriations bills in the modern era are significantly less common than they were earlier in American history, at 11.6%. See KEVIN R. KOSAR, CONG. RESEARCH SERV., RL22188, *Regular Vetoes and Pocket Vetoes* (2013), available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP,_3+P++%0A, archived at <http://perma.cc/9TD9-UZ9N>. Although a veto override of appropriations bills carries with it the threat of a government shutdown, it does not implicate a default on U.S. financial obligations, making a veto override significantly less likely. Lastly, as has been seen with continued votes to raise the debt ceiling in a Republican-led House with a Democratic President during and after a government shutdown, a vote implicating default of the U.S. government is not palatable, even to very conservative Members of Congress. See *supra* Part II.

²³⁰ See Kosar, *supra* note 229.

²³¹ RULES OF THE HOUSE OF REPRESENTATIVES EFFECTIVE FOR ONE HUNDRED AND TENTH CONGRESS (Jan. 3, 2007) (House Rule XX).

²³² See *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

²³³ *Raines*, 521 U.S. at 812 (“[T]he Act causes a type of institutional injury which damages all Members of Congress equally.”).

²³⁴ Cf. *INS v. Chadha*, 462 U.S. 919, 922 (1983) (“When the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action in the Constitution.”).

²³⁵ See *supra* notes 213–18 and accompanying text; see also *infra* Part IV.C.2.

2. Question of Standing of a Holder of a CDS against U.S. Debt

A credit default swap is a derivative financial instrument where the owner gains in an instance of default of the underlying security.²³⁶ Thus, an individual who purchased a CDS against U.S. debt would receive a payout if the nation were to default—thereby potentially giving the owner standing to sue the President were the President to unilaterally raise the debt ceiling. The CDS holder would arguably have standing because the President's action to prevent default would deny the CDS holder's instrument from having market value.²³⁷ However, following a unilateral increase of the debt ceiling by the President, the CDS holder would not suffer an "injury in fact." And even if it is determined that the owner of the instrument suffered a clear and identifiable injury caused by the President's action, the investor would still lack standing because there is no direct causation of the injury from the President's actions, nor would an affirmative ruling redress his injuries.

First, while a Presidential action unilaterally raising the debt ceiling would prevent the holder of a CDS on U.S. debt from receiving a payout, it would not cause them an injury. A CDS by nature does not guarantee a payout because the default of the underlying security may never occur. As such, while the holder of a CDS would not receive a potential benefit, they would not suffer any loss. Not receiving a payout after the President's action to avoid default denies the CDS holder's ability to materially improve their life, but it would not cause their life to be materially worse; they would remain at their status quo. This, as discussed in *Lujan*, causes the CDS holder's injury to be mere conjecture and not "concrete and particularized."²³⁸

Following the President's unilateral increase of the debt ceiling, the market value of the CDS on U.S. debt would certainly fluctuate; an avoidance of default would decrease the likelihood of a payout on the CDS, which would decrease its market value. This fluctuation of the market value of the CDS, however, is not an injury to the holder. The holder would only feel any gain or loss associated with the CDS when he or she sold the security. Absent a sale, the holder would not realize the decreased market value of the CDS. As such, there would be no concrete established injury suffered. Although in securities fraud litigation a plaintiff does not need to sell the security to establish sufficient injury, in this situation, the President's actions do not constitute fraud or tortious interference with the CDS contract—causing

²³⁶ See *Credit Default Swap*, INVESTOPEDIA, <http://www.investopedia.com/terms/c/creditdefaultswap.asp#axzz1v5wMKebh> (last visited Mar. 5, 2014), archived at <http://perma.cc/QG8H-UBWD>.

²³⁷ See Zeitlin, *supra* note 215.

²³⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

an unrealized loss caused by market fluctuations to be an insufficient injury for the CDS holder to have standing to sue the President.²³⁹

Assuming, however, that a mere fluctuation in market value of the CDS is sufficient injury, the CDS holder would still lack standing because her injury would not be clearly caused by the President, nor would a court order reversing the President's actions redress the holder's injury. For purposes of standing, the defendant's actions must clearly cause the injury suffered by the plaintiff. Here, there is an insufficient nexus between the President's unilateral increase of the debt ceiling and the decline or fluctuation in the CDS. While the President's action would "encourage[]" the decrease in market value of the CDS, the injury was caused by market participants responding to several external factors.²⁴⁰ Raising the debt ceiling does not necessarily and directly cause a decline in market value of the CDS. For a decline to occur, market participants must interpret the President's action as decreasing the likelihood of the nation defaulting on its debt, and respond by decreasing their demand for the CDS. For these reasons, the causal link between the President's actions and the decline in market value of the CDS is too attenuated to satisfy standing requirements. In *Clapper v. Amnesty International* the Court held that N.S.A. wiretapping programs did not impose a clear and definite injury to attorneys whose privileged communications with clients would be interrupted by the program.²⁴¹ Much like the Court's determination that the government's breach of attorney-client privilege is too uncertain to actually occur, a decrease in market value of a CDS depends on several factors outside the purview of the President. And, much like the Court deferred to government activity in *Clapper* as a means of protecting national security,²⁴² so too would the Court grant deference to the rights of the President over a CDS holder as a means of ensuring America's financial stability and protecting its role as the leader in international finance.²⁴³

Nevertheless, even if the Court were to consider the nexus between a unilateral action by the President to raise the debt ceiling and the decreased market value of the CDS holder's security to be sufficiently close, the holder

²³⁹ See *Gibson v. Credit Suisse AG*, 787 F.Supp.2d 1123, 1129 (D. Idaho 2011) (holding that a "loss[] in value to property [is] too conjectural and unascertainable to satisfy the injury in fact requirement"). *But see* *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 164 (2d Cir. 2012) (suggesting market value decrease does establish injury in fact). However, the court in *NECA-IBEW* was deciding the issue of standing in a lawsuit brought by purchasers of mortgage backed securities against Goldman Sachs, the underwriter. *Id.* This is a much more direct contractual relationship than a situation where the holder of a CDS of Treasury securities brings suit against the President.

²⁴⁰ See *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

²⁴¹ See *Clapper v. Amnesty Int'l*, 33 S.Ct. 1138, 1148 (2013).

²⁴² See *id.* at 1148–49 (discussing the multitude of surveillance options available to the government and, instead of holding all to be unlawful, asserting the secretive nature of these programs makes directly tracing any alleged injury to be insufficient for establishing standing under Article III—thereby implicitly deferring to the need and existence of the programs at all).

²⁴³ See *supra* Part IV.B.

would still lack standing because their injury would not be redressable by a court order reversing the President's action. Should a court consider the President's action to be unconstitutional, ostensibly the United States would enter default. This alone, however, would not remedy the holder's injury. First, the CDS is a private contract between the holder and issuer, neither of which is the President or the federal government. As such, a separate injunction requiring the issuer of the CDS to pay the holder would likely be needed. Second, even if a separate injunction were unnecessary under the presumption that market fluctuations in the value of the CDS are a sufficient injury, it is not a certainty that this alone would remedy the holder's injuries. If the court order were made by a lower court, the government would most certainly appeal the decision—making it unclear if the nation actually defaulted until a final ruling. Similarly, even if the decision were to come from the Supreme Court, any action or attempted action by Congress to remedy default, or decisions made by the Secretary of the Treasury to prioritize debt payments, would postpone actual default. Therefore, CDS counterparties, and market participants generally, would likely be uncertain as to how to respond to these diverging signals from the government, which in turn would limit or deny the ability of the Court declaring the President's actions to be unconstitutional to properly remedy the injuries of the CDS holder. A restoration of a higher market value of the CDS would depend on a positive response from investors, which would not be certain following the court order. As such, much like the lack of a gold market in *Perry* denied a remedy to the bondholder,²⁴⁴ uncertainty as to the specific terms of the CDS contract in question, as well as how investors will react, would prevent the CDS holder's injury from being properly redressed. For these reasons, a CDS holder would lack standing to sue the President—making a lawsuit challenging a Presidential action unilaterally raising the debt ceiling to be nonjusticiable, and actual default a constitutional impossibility.

Lastly, even if the courts were to determine that the CDS holder does have standing to sue the President, as a matter of public policy the Court would likely bar the holder from seeking remedy. A declaration that a CDS holder has standing to sue the President necessarily means that the United States has defaulted on its debt obligations. This, in turn, would cause every single holder of U.S. Treasury bonds to have standing under *Perry* to seek remedy against the government. Allowing this to occur would cause bondholders from around the world to seek remedy against the federal government—drowning our courts in litigation, halting daily operations in every economic sector, and placing America's economic and political security at risk. As such, in order to prevent this from occurring, as a matter of public

²⁴⁴ *Perry v. United States*, 294 U.S. 330, 357 (1935) (“The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which all forms of money of the United States were to be maintained at a parity had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.”) (internal quotation marks omitted).

policy, the Court should deny the rights of a single CDS holder in order to protect the stability of our nation, and avoid an exacerbation and expansion of the negative reverberations of national default. For these reasons, both procedurally and practically, no plaintiff is or should be able to sue the President and defaulting on the national debt is constitutionally impossible.

IV. CONCLUSION

Throughout America's history, use of debt to fund government expenditures has been a rather contentious issue in American politics—especially with rising debts and polarization of the political parties in recent history allowing the threat of default to be used as a political bargaining chip.²⁴⁵ The Framers of the Public Debt Clause, however, were concerned with ensuring the nation's financial stability in order to secure its greater political stability.²⁴⁶ Therefore, to remedy this, Congress has taken various actions over the years to promote political stability and control the use of debt to fund public spending programs—starting with the creation of the debt ceiling, continuing with a series of both procedural and substantive legislation dedicated to streamlining a bi-partisan budgeting process, and culminating in the passage of the BCA in 2011.²⁴⁷ These measures have fallen short, however, from eliminating threats of default from political discourse entirely because they disregard the fact that defaulting on American debt obligations is constitutionally impossible. Specifically: (1) a proper reading of the Public Debt Clause makes default unconstitutional;²⁴⁸ (2) the President's Article II powers allow him to unilaterally raise the debt ceiling even if default were possible;²⁴⁹ and (3) the issue is practically non-justiciable because there is no one with standing to bring suit.²⁵⁰ As such, Congressional leaders should adopt an approach to budget negotiations with the mindset that default is impossible. To do this properly and sufficiently, Congress can: (1) reinstate the Gephardt Rule; (2) make the McConnell Mechanism permanent; or ideally (3) repeal the debt ceiling altogether. Only then will threats of default be eliminated from political discourse entirely—allowing Congress to work in a bi-partisan manner on consensus-based public spending and deficit reduction measures with a guarantee of financial stability.²⁵¹ Accepting the impossibility of default is vital to our nation's financial health, and will help secure our political stability as well.²⁵²

²⁴⁵ See *supra* Part II.C–E.

²⁴⁶ See *supra* Part IV.A.

²⁴⁷ See *supra* Part II–III.

²⁴⁸ See *supra* Part IV.A.

²⁴⁹ See *supra* Part IV.B.

²⁵⁰ See *supra* Part IV.C.

²⁵¹ See *supra* Part II (discussing how legislative measures that minimized the role of the debt ceiling in the budget process helped improve budget negotiations and minimized the negative effects of partisan discourse).

²⁵² See, e.g., *supra* notes 3–8, 125 and accompanying text.

