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Legal Sidebar

Debating the Public Debt Clause

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As early as June 5, 2023, according to Secretary of the Treasury Janet Yellen, the federal government could face a "binding" statutory debt limit. If the debt limit were to bind, the Secretary would be unable to issue further debt beyond the $31.38 trillion that would then be outstanding, a figure that encompasses virtually all federal debt. Without additional borrowing authority, the federal government may be unable to pay all obligations as they come due. Congress is thus considering the Fiscal Responsibility Act of 2023 (FRA), legislation that, among other things, would suspend the debt limit through 2024.

Though legislation like the FRA would address the debt limit in the near term, on its own it would not prevent the recurrence of future debt limit episodes. As a result, debates over the legal implications of a binding debt limit remain. Some have argued as part of these debates that the prospect of the federal government being unable to pay all obligations as they come due raises questions under a provision of the Fourteenth Amendment commonly known as the Public Debt Clause. The Clause states, in part, that 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."

In early May 2023, President Joseph Biden stated that he had been "considering the 14th Amendment" in connection with the debt limit. On May 28, after agreeing to the FRA's debt limit suspension framework, President Biden reiterated he was "exploring the idea that we would at a later date, a year or two from now," decide how the Clause would affect the need for further action to suspend or raise the debt limit.

Much about the Clause remains unclear. The Clause's drafters confronted specific concerns as to Civil War-era debts, yet drafted the Clause using language amenable to a broader application. Moreover, the Supreme Court's 1935 decision in *Perry v. United States* stands as the only examination of the Clause's text by the Justices, but from the time the opinion was issued commentators have characterized its holdings as "baffling." Commentators have sought to address this uncertainty by crafting arguments describing the Clause's effect, if any, on a statutory debt limit. This Sidebar surveys these aspects of the Public Debt Clause: its history, judicial interpretation, and contemporary debates over its relevance to a binding debt limit.

Clause History

December 1865 saw the opening of the first session of the 39th Congress, the first meeting of that body after the Civil War's end. In mid-December, the House and Senate established a Joint Committee on

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Reconstruction (Joint Committee) to probe the condition of the former Confederate states. At the time, those states lacked representation in Congress. The Joint Committee's canvas of public opinion in southern states yielded two general concerns that informed drafting of the Public Debt Clause, and other Members not part of the Joint Committee raised similar concerns.

First, the Joint Committee reported that "almost all" of the witnesses it examined believed that "the people of the rebellious states would, if they should see a prospect of success, repudiate the national debt." After all, the federal government had incurred this debt to suppress their attempted secession.

Second, the Joint Committee relayed findings about the willingness of politicians and citizens in the southern states to assume "rebel debt," allegedly incurred by the Confederate States of America or its constituent states, though the opinions seemed more divided than on the national debt. A newspaper correspondent interviewed by the Joint Committee stated that "a majority of the politicians" in these states "seemed to be in favor of paying" rebel debt. The Joint Committee also reported that "to a considerable extent," there was an "expectation that compensation will be made for slaves emancipated and property destroyed during the war." Some Members of Congress worried that a policy of paying those who "had sacrificed their treasure and their blood" to support the rebel war cause would attract popular support in these states. Other Members thought it improbable that southerners would favor paying any such claims because of the higher federal tax burden that would come with them.

Many Members of the 39th Congress appeared to worry that once southern states were again allowed representation in Congress, their delegations would attempt to translate these public sentiments into legislative action. Thus, the Joint Committee reported constitutional amendment text that would have prohibited the United States or any state from paying either debts incurred in aid of war against the United States or claims seeking compensation for the loss of involuntary labor. During floor debate, Senator Benjamin Wade proposed broadening this proposal to expressly put debt incurred on the Union's part "under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it." Though the Clause's text changed from the particular wording that Senator Wade offered, it maintained a dual aspect through ratification in 1868. It both affirms the validity of the public debt and declares illegal and void certain alleged debts and claims incurred in the southern states.

Supreme Court Interpretation

One Supreme Court decision discusses the Clause's text. That case, *Perry v. United States*, arose from congressional action in the early days of President Franklin D. Roosevelt's New Deal. John Perry held a $10,000 Liberty Bond that carried a "gold clause" entitling its holder to payment in gold coin, or its equivalent, at the standard of value the coin carried in 1918 when the bond issued. In 1933, though, Congress enacted a joint resolution declaring such gold clauses "against public policy." At the time, the dollar amount of public and private debts thus payable far exceeded the nation's gold supply. Thus, the joint resolution specified payment of the bond's $10,000 face amount, dollar for dollar, in the coin or currency that was legal tender at the time. Perry argued that this mode of payment was worth much less than payment under the gold clause given changes to the weight of the dollar made in 1934.

In the Court's controlling opinion, Chief Justice Charles Evans Hughes first described the obligation the federal government undertook when it issued the bond with a gold clause. By stipulating payment in gold coin "of the present standard of value," the United States had assured those who lent it money that they would not suffer loss through depreciation.

The Chief Justice then considered the joint resolution in light of this obligation, asking whether Congress could use its power to regulate the value of money to invalidate the terms of existing obligations issued under its separate power under the Borrowing Clause to borrow money on the credit of the United States. If Congress had power under the Coinage Clause to modify contract terms, then it would "inevitably" follow that Congress could repudiate its obligation to repay any sums. The Chief Justice refused to construe the Constitution to grant Congress such power. When the United States "with constitutional authority, makes contracts," the Chief Justice explained, "it has rights and incurs responsibilities similar to those of individuals who are parties" to contracts, except that the federal government may be sued only with its consent. Likewise, the power to borrow did not entail authority to "alter or destroy" commitments made during such borrowing.

Following these references to the Coinage Clause, the Borrowing Clause, and the capacity of sovereigns to enter binding contracts, Chief Justice Hughes offered the only discussion of the Public Debt Clause in a plurality opinion:

> While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. We regard it 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. Nor can we perceive any reason for not considering the expression 'the *validity* of the public debt' as embracing whatever concerns the integrity of the public obligations.

For these reasons, Chief Justice Hughes concluded, the joint resolution "went beyond the congressional power." Nevertheless, the Court denied Perry any relief because he could not show damages resulting from Congress's attempted abrogation of gold clauses.

A majority of Justices did not agree with Chief Justice Hughes's discussion of Congress's authority to affect gold clauses. Writing separately, Justice Harlan Fiske Stone agreed that Perry could not prove damages on account of any abrogation. He thought it unnecessary, therefore, to opine on the gold clause's inviolability. It did not benefit Perry, Justice Stone stated, for the Court to assure him that "he has an inviolable right to performance of the gold clause" while denying him any remedy. Thus, Justice Stone expressly did not join "so much of" the Chief Justice's "opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit" may "nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money." Four other Justices dissented.

Beyond not producing a majority opinion construing the Public Debt Clause, *Perry* also arose from congressional action that, at least as a descriptive matter, differs from political-branch inaction that results in a binding debt limit. By enacting the joint resolution at issue in *Perry*, Congress attempted to expressly abrogate clauses in government contracts to its benefit. By contrast, inaction leading to a binding debt limit—such as the failure to enact legislation that raises or suspends a binding debt limit or that reduces or prioritizes spending—could prevent payment of existing obligations. However, those obligations would remain legally binding. They would be payable when Congress enacts legislation that alleviates a binding debt limit.

Contemporary Debate

Much of the debate on the Public Debt Clause's relevance to the debt limit dates from around the time of the 2011 debt limit episode. The different theories that have emerged from this debate vary. (Debt limit episodes have also given rise to theories that do not depend on the Clause itself, such as the contention that a binding debt limit could lead to a constitutional trilemma that requires the President to disregard statutes directing spending or raise more revenue than statutes allow through either taxes or borrowing.) One way to survey these theories is to consider how they address key phrases of the Clause as well as the implications that flow from actual or threatened violations of the Clause.

Most scholars appear to agree that, although the Clause's drafters most immediately faced the prospect of abrogation or assumption of Civil War-era debts, "the text and history generally support a wider application of the Clause," not one limited to only "public debt" incurred in that period.

While commentators seem to agree that the Clause extends to contemporary "public debt," no such agreement exists on the question of what sorts of commitments, in particular, this phrase encompasses. Some scholars view this phrase relatively narrowly. One commentator has argued that the Clause is only implicated by borrowing from the public (e.g., debts arising from instruments such as Treasury bills, notes, and bonds). Others would add pensions to such borrowing. In describing a potential view of the Clause, another commentator has stated that a line might be drawn between, on the one hand, "unambiguous obligations that the government owes because of past agreements in which the debt-holders have already fulfilled their part of the bargains" and, on the other hand, payments as to which third parties only "have an expectation of continued receipt" of payment. Still other commentators describe broader coverage, positing the enactment of "spending bills" gives rise to "debt" under the Clause. In other words, "Congress's appropriation of funds for subsequent expenditure is equivalent to authorizing debt that would finance the expenditure."

Commentators' opinions also span a spectrum as to what actions or inactions would question the validity of debt. Certain scholars contend that a debt's validity is questioned only if legal action is taken to repudiate the debt. On this general view, the Clause "doesn't address default or other failures to honor terms of a debt contract." Others disagree, arguing that under the Public Debt Clause, the United States has a constitutional duty to "pay all its bills as they come due." So, for example, one scholar contends that the United States could violate the Clause if it failed to make payments on the "public debt" for a substantial time period.

Debates on the Clause extend to the Clause's implications for the service of existing public debt. The Constitution assigns fiscal powers to Congress, including the powers to "lay and collect Taxes," to "pay the Debts and provide for the common Defence and general Welfare," and to "borrow Money on the credit of the United States." Given this assignment of powers, one general camp argues that the Clause does not augment the President's powers in the event of a binding debt limit. If more money is needed to avoid a Clause violation, these individuals argue, then "Congress must act." Another general faction sees things differently. Under this view, when the Clause renders the statutory debt limit unenforceable, the Secretary should continue to exercise other statutory authorities to "borrow on the credit of the United States Government amounts necessary for expenditures authorized by law."

These disputes about the relevance, scope, and implications of the Public Debt Clause are likely to persist so long as current law continues to both authorize spending that exceeds non-borrowing revenue and impose a limit on the Department of the Treasury's authority to borrow from the public to make up for this revenue shortfall. To date, though, Congress has resolved disputes over the debt limit by periodically enacting legislation to raise or suspend the limit. No President has employed the Public Debt Clause to borrow in excess of the debt limit, nor has a court examined the merits of a suit alleging that the debt limit violates the Clause.

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