Forgotten but Not Lost: The Original Public Meaning of Section Four of the Fourteenth Amendment

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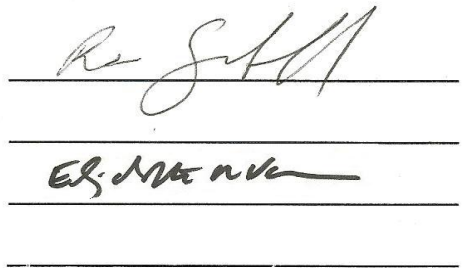

In the summer of 2011, an intransigent Republican Congress refused to raise the statutory debt ceiling without budget cuts from President Barack Obama.[1] Several noted academics called for the President to raise the debt ceiling unilaterally.[2] In support of such action, these professors cited the first sentence of Section 4 of the Fourteenth Amendment to the United States Constitution. The first sentence reads, "The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned."[3]

Those advocating for a presidential power to raise the debt ceiling argued that the first sentence of Section 4, also known as the Public Debt Clause, should be read broadly.[4] One of the few scholarly articles with a primary focus on interpreting the first sentence of Section 4, authored by Michael Abramowicz in 1997, also proposed a broad reading of the Public Debt Clause.[5] Specifically, Abramowicz argued that one should read the phrase "the validity of the public debt . . . shall not be questioned" broadly to prohibit any governmental action that "jeopardizes" the validity of the public debt.[6] This

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[1] *See* Paul Davidson, *A Primer on the Debt-Ceiling Debate*, USA TODAY, July 7, 2011, at 4A.
[2] *See generally* Garrett Epps, *The Speech Obama Could Give: 'The Constitution Forbids Default'*, THE ATLANTIC (Apr. 28, 2011, 3:56 PM), http://www.theatlantic.com/politics/archive/2011/04/the-speech-obama-could-give-the-constitution-forbids-default/237977/; Doug Mataconis, *Is the Debt Ceiling Unconstitutional?*, OUTSIDE THE BELTWAY (June 29, 2011), http://www.outsidethebeltway.com/is-the-debt-ceiling-unconstitutional/.
[3] U.S. CONST. amend. XIV, § 4.
[4] Garrett Epps writes that the Public Debt Clause "establishes a complete firewall against the misuse of governmental power by one political faction to get its way by wrecking the public credit." Epps, *supra* note 2, at 1. Doug Mataconis writes that the Public Debt Clause "means that the United States cannot, constitutionally, default on its debt and that the President would be authorized to take action to prevent that." Mataconis, *supra* note 2, at 1.
[5] 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), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874746.
[6] *Id.* at 24–32.

Note strongly disputes such a broad reading of that phrase by offering an alternative interpretation grounded in its original public meaning.

In the last several years, a consensus has emerged among constitutional scholars that the original public meaning of a phrase should be the starting point in constitutional interpretation. University of Virginia School of Law Professor James Ryan writes, "Many, including prominent scholars like Professors Akhil Amar and Jack Balkin of Yale Law School, also agree that the original public meaning of the constitutional text must be the starting point in constitutional interpretation."[7] While some, including Judge Richard Posner, still object to the use of original meaning in constitutional interpretation, most constitutional scholars, in addition to several members of the Supreme Court, now agree that original public meaning has at least some relevance in interpreting the Constitution.[8]

An extensive search found no published article that locates the original public meaning of the Public Debt Clause. Abramowicz's article fails to mention original public meaning or a similar concept.[9] He cites no contemporary dictionaries or legal treatises

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[7] James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1525 (2011).

[8] Recently Judge Posner criticized the use of original public meaning in a review of Justice Antonin Scalia's newest book. *See* Richard Posner, *The Incoherence of Scalia*, THE NEW REPUBLIC (Aug. 24, 2012, 12:00 PM), http://www.tnr.com/ article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#. Posner argues that attempting to discern the original meaning of vague phrases in the Constitution is essentially impossible. Justice Scalia provides several able counter-arguments to such critiques in Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989). Judge Posner advocates a pragmatic approach to interpretation that places much less emphasis on the text of the Constitution. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003). Notwithstanding Judge Posner's critique, many scholars agree that original meaning is the starting point for constitutional interpretation. *See* Ryan, *supra* note 7.

[9] Abramowicz, *supra* note 5. Several articles on the meaning of the Public Debt Clause fail to mention original public meaning. *See* Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L.Q. 1 (1933); Neil H. Buchanan and Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012); Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*,

that support a broad interpretation of the phrase "the validity of the public debt . . . shall not be questioned."[10] He also fails to explore the historical context of Section 4 in any detail outside of a brief examination of the legislative history of that section.[11] The only Supreme Court case addressing the meaning of the Public Debt Clause does not explore the original meaning of the clause.[12] Finally, two recent student Notes dealing with the meaning of the Public Debt Clause do not mention original public meaning or a similar concept.[13] This Note rectifies these omissions by providing the first account of the original public meaning of the Public Debt Clause.[14]

The original public meaning of the phrase "the validity of the public debt . . . shall not be questioned" in the Public Debt Clause was narrow.[15] The phrase was understood at the time of ratification to be technical language prohibiting direct governmental debt

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64 FLA. L. REV. 1243 (2012); Kelleigh Irwin Fagan, Note, *The Best Choice out of Poor Options: What the Government Should Do (Or Not Do) If Congress Fails to Raise the Debt Ceiling*, 46 IND. L. J. 205 (2013); Daniel Strickland, Note, *The Public Debt Clause Debate: Who Controls this Lost Section of the Fourteenth Amendment?*, 6 CHARLESTON L. REV. 775 (2012).

[10] U.S. CONST. amend. XIV, § 4.

[11] *See generally* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996) (discussing the importance of scholarship about the historical realities surrounding the adoption of constitutional amendments).

[12] Perry v. United States, 294 U.S. 330 (1935). *Perry* extended the scope of the Public Debt Clause to protect debts created after the Civil War. *Id.* at 354. This Note does not dispute the Court's interpretation of this aspect of the scope of the Public Debt clause, articulated and defended ably in Abramowicz's article. Abramowicz, *supra* note 5, at 6–12. In *Perry* the Court also stated: "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." *Perry*, 294 U.S. at 354. This Note disagrees with this aspect of the Court's opinion. As a primary matter, the Court's statement is arguably dicta because the court decided the case on other grounds. *Id.* at 353. The Court also provided no historical support for this interpretation.

[13] Strickland, *supra* note 9; Fagan, *supra* note 9.

[14] In determining the original meaning of a phrase in the Constitution, the starting point should always be the text of that phrase. *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 352 (2005). By consulting contemporary dictionaries, newspapers, legal treatises and other contemporary sources, one can deduce the meaning of the words and phrases in the Constitution as they were originally understood. *See* Ryan, *supra* note 7, at 1548. In addition, the historical realities addressed by a particular phrase can make the meaning of that phrase more concrete. Finally, the sentences and phrases surrounding a particular constitutional provision, also known as semantic context, can shed light on the original meaning of that provision. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006). The D.C. Circuit recently issued an opinion employing this methodology to interpret a constitutional provision. *See* Canning v. NLRB, No. 12-1115, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).

[15] U.S. CONST. amend. XIV, § 4.

repudiation only. Contemporary legal sources confirm that "questioning" the validity of a debt during that time meant the attempted legal repudiation of that debt. Further, there is very little contemporary evidence suggesting that acting to jeopardize indirectly the validity of a debt was equivalent to "questioning" the validity of that debt, as Abramowicz contends.

The historical context of Section 4 also supports the assertion that the original meaning of the Public Debt Clause was precise.[16] It does so in three ways. First, the threat of federal debt repudiation at the time of the ratification of the Fourteenth Amendment was particularized and well defined. Specifically, Republicans feared that Southern Democrats would join forces with Northern moderates in Congress to repudiate the federal debt. They wrote the first sentence to address this threat; they understood the meaning of the sentence as prohibiting the federal government from direct federal debt repudiation.

Second, the meaning of the first sentence of Section 4 must be understood in light of the historical realities addressed by both sentences in Section 4. Notably absent from the recent discussions of the meaning of the first sentence of Section 4 is any reference to the second sentence of that section. The second sentence of Section 4 reads, "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

[16] In determining the original public meaning of a phrase, semantic context is also critical. *See* Manning, *supra* note 14. Taking words or phrases out of context can lead to confusion about the original meaning of those words or phrases. To interpret the first sentence in a vacuum, then, without reference to the second sentence of Section 4, leads to misinterpretation.

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."[17]

The framers of the Fourteenth Amendment would have found the modern emphasis on and isolation of the first sentence of Section 4 surprising.[18] This is because they understood that the threat of federal debt repudiation was relatively small, while the twin threats of state compensation for emancipated slaves and honoring Confederate war debt were very serious. This Note provides the most thorough research on the threats addressed in Section 4 of the Fourteenth Amendment to date. It highlights the extensive, organized nature of the threats to repay the rebel war debt and to obtain compensation for emancipated slaves in the Southern states. The research also confirms that there was no organized threat by those in the South to repudiate the federal debt. These historical realities support a specific and more judicious interpretation of the first sentence of Section 4. One of the few historians to write about Section 4 of the Fourteenth Amendment argued, "The second part of the section . . . is of historic interest only."[19] One of the purposes of this Note is to rebut that assertion because of the light the second sentence sheds on the meaning of the first sentence.

Finally, history surrounding the Fourteenth Amendment indicates that the framers of that amendment inserted the first sentence of Section 4 late in the drafting process for

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[17] U.S. CONST. amend. XIV, § 4.

[18] For examples of scholarship isolating the first sentence, see Jacob Charles, *Protecting the Government's Obligations: The Public Debt Clause and the President's Duty to Disregard the Statutory Debt Limit* (Mar. 8, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018706; Jack Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, BALKINIZATION (June 30, 2011), http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html. Charles goes so far as to assert that the President has the power to ignore the statutory debt ceiling because it is unconstitutional. His article provides little historical evidence for a broad reading of the Public Debt Clause besides a limited rehashing of the legislative history of that clause.

[19] Eder, *supra* note 9, at 1.

primarily political purposes. In fact, pressure from several special interest groups led to the insertion of the first sentence of Section 4. Consequently, one should read that sentence as highly political and as having a very specific original meaning tailored to pacify certain constituencies' fears.

This Note is divided into two Parts. Part I argues that the original public meaning of the phrase "the validity of the public debt . . . shall not be questioned" in the first sentence of Section 4 was narrow. Specifically, the phrase prohibited all legal action by the federal government directly repudiating the federal debt. Contemporary legal sources, dictionaries, and treatises confirm this understanding of the phrase.

Part II then argues for a specific interpretation of the Public Debt Clause based on the history surrounding Section 4. Section II.A fleshes out the three threats addressed in Section 4. Exploring these threats buttresses the assertions that the threat of federal debt repudiation was narrow and small and that one cannot interpret the first sentence of Section 4 without reference to the second sentence of that section. Section II.B provides historical evidence indicating that Congress inserted the first sentence of Section 4 late in the drafting process for primarily political purposes. This reality further confirms that the original meaning of the first sentence is narrow.

I. Original Public Meaning and the Public Debt Clause

In Michael Abramowicz's article on the Public Debt Clause, he relates an anecdote about a protestor holding a sign in Lafayette Park.[20] The sign read: "Arrest me. I Question the Validity of the Public Debt. Repeal Section 4, Fourteenth Amendment to the

[20] Abramowicz, *supra* note 5, at 3.

U.S. Constitution."[21] This anecdote serves to underline the point that a word, in this instance "question," can have multiple meanings. The broadest and most basic meaning of the verb "to question" is "to ask a question of or about."[22] The protestor, on the other hand, apparently employed the verb in a different sense to mean "to express doubt about."[23] It seems obvious that the meaning of the word "questioned" in the Public Debt Clause does not encompass "asking a question of" the public debt. Nor does the meaning encompass an individual who "expresses doubt about" the public debt.[24] In order to discern what exactly the Public Debt Clause prohibits, one must understand what the clause meant at the time of ratification. What, then, did it mean to question the validity of a debt when the Fourteenth Amendment was ratified?

This Part argues that the text of the phrase "the validity of the public debt . . . shall not be questioned" in Section 4 has a precise original public meaning.[25] The text prohibits all governmental action directly repudiating the federal debt. Contemporary legal sources confirm that to "question the validity of a debt" meant to take legal action to repudiate that debt. In addition, dictionaries from the time of the ratification of the Fourteenth Amendment provide evidence that "to question" the validity of a debt meant to repudiate, or to deny the validity of, that debt. Both of these pieces of evidence suggest that the Public Debt Clause only prohibits direct legal action by all three branches of the

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[21] *Id.*
[22] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1864 (1976).
[23] *Id.*
[24] No scholar has explored the First Amendment implications of the language "shall not be questioned," most likely because it has none. The authors of this language did not discuss whether or not it was an exclusion to the free speech provision of the First Amendment.
[25] For more on original public meaning, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996); Ryan, *supra* note 7.

federal government to repudiate the federal debt. The clause forbids congressional statutes repudiating federal debt, court judgments invalidating federal debt, and executive action declaring federal debt to be invalid. The clause, however, does not prohibit congressional action that merely jeopardizes the validity of the public debt.

A. Contemporary Legal Sources and the Public Debt Clause

At the time of the ratification of the Fourteenth Amendment, the phrase "the validity of the public debt . . . shall not be questioned" was understood to be legal language prohibiting only direct federal debt repudiation. As University of Virginia School of Law Professor Caleb Nelson argues, legal documents sometimes "include technical terms of art, which laymen and lawyers alike can grasp only after doing considerable research."[26] In the mid-1800s, to "question the validity" of something had a unique legal meaning. Specifically, parties to legal transactions "questioned the validity" of a legal instrument or legal action involved in that transaction by bringing a legal claim in a lawsuit. For example, in a treatise on mortgage law published in 1864, an assignee of a mortgage from a mortgagor "stands in place of the mortgagor, with the same rights which he had; and, like an assignee in bankruptcy, or an executor, or administrator, may question the validity of the debt outstanding against the estate."[27] The act of questioning in this instance meant that the assignee of the mortgage could bring a legal challenge to invalidate the debt.[28]

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[26] Nelson, *supra* note 14, at 367.
[27] FRANCIS HILLIARD, THE LAW OF MORTGAGES OF REAL AND PERSONAL PROPERTY 600 (1864).
[28] *Id.*

John Bouvier's legal dictionary from 1864 provides further insight into the legal meaning of the verb "to question."[29] Bouvier's dictionary first labels "question" as a legal "practice."[30] This indicates that the verb can have a more precise legal definition than the common definition ascribed to it. The dictionary defines "question" as, "A point on which the parties are not agreed, and which is submitted to the decision of a judge or jury."[31] Questioning the validity of a legal instrument meant making a legal claim in a lawsuit so that a judge or jury could rule on its validity.

Section 25 of the Judiciary Act of 1789 provides an example of the legal meaning of "question."[32] Section 25 was valid federal law in 1866, when Congress authored the Fourteenth Amendment.[33] Those in Congress likely would have known about the language in the section.[34] Section 25 reads:

> And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity. . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.[35]

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[29] JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION: WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW, VOL. II, 415 (11th ed. 1864).
[30] *Id.*
[31] *Id.*
[32] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.
[33] *See* Michael G. Collins, *Reconstructing Murdock v. Memphis*, 98 VA. L. REV. 1441, 1486–88 (2012). Collins notes that Congress amended a different provision of Section 25 in 1867, one year after drafting Section 4. *Id.*
[34] *Id.*
[35] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

In this usage, a litigant or judge "question[ed]" the validity of a legal instrument or authority in the context of a formal legal proceeding, and he did so by denying that the instrument or authority had legal effect.[36]

A law passed in 1861 in Illinois further illustrates the legal use of the verb "to question." The law, dealing with payment of taxes and revenue via land deeds, states: "[T]he validity of all such deeds hereafter made by the proper officers for real estate sold for the non-payment of taxes shall not be questioned in any suit or controversy in this State."[37] In order to "question the validity" of a legal instrument, in this instance a deed, the party must bring a legal challenge to the validity of the legal instrument. Only certain people, usually parties to the transaction, had the legal power to bring suit. The Illinois law precludes suit on the validity of deeds created pursuant to the revenue law.

Joseph Story provides another example of this usage of "to question" when he writes, "It seems at one time to have been thought, that no person but a creditor . . . could question the validity of a disposition made of assets by an executor. . . . [I]t is now well understood that pecuniary and residuary legatees may question the validity of such a disposition."[38] Story highlights the ability of parties to a transaction to bring a legal claim disputing that transaction in court. He uses the verb "to question" in a technical sense to encompass legal action in the context of a lawsuit. A treatise on commercial law from 1861 states, "An assignment is only fraudulent and void as to those creditors who choose

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[36] Chief Justice John Marshall wrote that, "All laws which are repugnant to the Constitution are null and void." Marbury v. Madison, 5 US (2 Cranch) 137, 174 (1803).
[37] PUBLIC LAWS OF THE STATE OF ILLINOIS PASSED BY THE TWENTY-SECOND GENERAL ASSEMBLY, CONVENED JANUARY 7, 1861 170 (1861).
[38] JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 404 (1861).

to question its validity."[39] The treatise went on to explain, "As the instrument is deemed valid, until a creditor, *by filing his bill*, calls it in question . . . . A creditor who designs to question an assignment, is in no condition to do so, until the validity of his claim is *legally settled by a judgment*."[40] To question the validity of the legal instrument, in this case the assignment of a debt, was to bring a legal action seeking a judgment on that legal instrument's validity.

In the state of New York in 1863, a party to a transaction was not "allowed to question the validity, or the terms of an instrument, executed by him."[41] This meant that such a party was "estopped" from bringing legal claims concerning that instrument.[42] In another treatise from the mid-1800s, the purchaser of a mortgage was "entitled to the equity of redemption merely, and cannot question the validity of the prior mortgage."[43] This statement, essentially equivalent to "the validity of the mortgage shall not be questioned," meant that the new mortgagee cannot bring a suit in court disputing the validity of the mortgage. This is further evidence that the meaning of the verb "to question" in the first sentence of Section 4 is a narrow legal term of art meaning "to challenge legally."

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[39] AMOST DEAN, BRYANT & STRATTON'S COMMERCIAL LAW FOR BUSINESS MEN: INCLUDING MERCHANTS, FARMERS, MECHANICS, ETC.: AND BOOK OF REFERENCE FOR THE LEGAL PROFESSION, ADAPTED TO ALL THE STATES OF THE UNION: TO BE USED AS A TEXT-BOOK FOR LAW SCHOOLS AND COMMERCIAL COLLEGES 420 (1861).
[40] *Id.* at 420–421 (emphasis added).
[41] HENRY WHITTAKER, PRACTICE AND PLEADING IN ACTIONS IN THE COURTS OF RECORD IN THE STATE OF NEW YORK UNDER THE CODE OF PROCEDURE, AND OTHER STATUTES, WHERE APPLICABLE: WITH AN APPENDIX OF FORMS 98 (1863).
[42] *Id.*
[43] J.W. BLYDENBERGH, A TREATISE ON THE LAW OF USURY: TO WHICH ARE ADDED, THE STATUTES OF THE SEVERAL STATES RELATING TO INTEREST NOW IN FORCE: TOGETHER WITH A DIGEST OF ALL THE DECISIONS, AND AN INDEX TO THE REPORTED ADJUDICATIONS FROM THE STATUTE OF HENRY VIII TO THE PRESENT TIME 252 (1844).

This background knowledge is critical to understanding the meaning of the first sentence of Section 4. Its authors understood the legal implications of the phrase "the validity of the public debt . . . shall not be questioned." The phrase meant to prohibit a debtor, in this case the government of the United States of America, from taking legal action to repudiate the federal debt. Concretely, the federal government is estopped from denying the validity of the federal debt as a plaintiff or defendant in court.[44]

In the absence of the Public Debt Clause, the United States government might have various means to try to invalidate its own debt, including some means not available to private debtors. For example, the federal government could seek to invalidate debt via congressional legislation or executive order. If a creditor sued the United States government to honor its debt, the government might point to such a statute or order and claim that the debt is invalid. The Public Debt Clause prohibits such a defense, however. It does so because the original meaning of "to question" in the first sentence encompasses *all* legal attempts to repudiate debt in a lawsuit. A debtor can "question" the validity of debt both by bringing a suit regarding the validity of a certain debt or by asserting a

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[44] While the federal government is normally immune from suit, the government can waive such immunity by consenting to suit. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 869 (1970). The Tucker Act provides one such waiver from sovereign immunity. 28 U.S.C. § 1491(a)(1) (2011). The Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

Creditors of the United States have an "express contract" with the United States for repayment of debt. These creditors may sue the United States because the United States government has, via the Tucker Act, waived immunity to a suit "founded upon" such a contract. One scholar notes that "when a Tucker Act claim is founded upon contract, the source of substantive law is a federal common law of contracts." Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 614 (2003).

defense that a debt is invalid in a suit by a creditor. The Public Debt Clause prohibits both actions by the federal government.[45]

More generally, the phrase forbids Congress, the President, and federal courts from taking legal action to repudiate federal debt. Legislation, executive orders, and court judgments purporting to invalidate the federal debt are unconstitutional. This is the case for two reasons. First, the original meaning of "to question" in the first sentence is broad enough to include all legal action available to a debtor. When the phrase is applied to the federal government, it is difficult to see how the phrase does not outlaw congressional legislation, judicial decisions, and executive action repudiating the debt. Second, as will be discussed in Part II, the authors of Section 4 understood the first sentence to prohibit Congress from passing legislation repudiating the debt. The phrase proscribed other legal action besides government lawsuits, or government defenses in lawsuits, attempting to repudiate the federal debt. It makes sense, then, that the phrase forbids Congress, the President, and federal courts from taking legal action to repudiate federal debt. As a result of this understanding, the Public Debt Clause does not forbid congressional action that merely jeopardizes the validity of the federal debt.

[45] One might raise the objection that this reading of the Public Debt Clause prohibits the government from defending against specious debts. For example, an individual might write on a piece of paper that, "The federal government owes me one million dollars." She might then bring a suit to enforce such a debt. Under the proffered reading of the Public Debt Clause, one might argue, the federal government cannot question the validity of that "debt." This argument fails, however, because the piece of paper is not actually a debt. Bouvier's dictionary defines debt as, "A sum of money due by certain and express agreement." BOUVIER, *supra* note 29, at 379. The Public Debt Clause does not prohibit the government from questioning whether an obligation is legally a debt, but from questioning the validity of that debt.

B. Contemporary Dictionaries and the Public Debt Clause

Separate from the legal term of art argument, contemporary lay dictionaries also provide evidence indicating that the meaning of "to question" in the Public Debt Clause is specific. Webster's dictionary from 1866 defined the verb form of the word "question" in the following way: "1. To inquire of by asking questions; to examine by interrogatory. 2. To be uncertain of. To have no confidence in."[46] The first definition does not fit because one cannot ask questions of the validity of a debt or any other abstraction. To state the obvious, it does not make sense for the Constitution to prohibit such questioning. The second definition appears more plausible. The framers, one might argue, meant to prohibit any government action that might cause creditors to "be uncertain of" the validity of government debt. Other contemporary dictionaries also define to "question" as to "doubt."[47] This definition also does not fit well for two reasons. First, the passive construction of the phrase is not conducive to such a definition. If the framers wanted to prohibit Congress from taking any action that would make the validity of the public debt uncertain, they could have been clearer. Second, being uncertain is a subjective action. Absent clear textual indication, constitutional provisions are usually constraints on government, not citizens.[48] It seems unlikely that Congress would use language prohibiting citizens from feeling a certain way or expressing that feeling.

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[46] NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE EXHIBITING THE ORIGIN, ORTHOGRAPHY, PRONUNCIATION, AND DEFINITIONS OF WORDS 806 (10th ed. 1866) [hereinafter WEBSTER'S DICTIONARY].
[47] *See* ROBERT SULLIVAN, A DICTIONARY OF THE ENGLISH LANGUAGE WITH THE PRINCIPLES OF PRONUNCIATION, ORTHOGRAPHY AND ETYMOLOGY FULLY EXPLAINED AND PRACTICALLY ILLUSTRATED 366 (1861); JOSEPH EMERSON WORCESTER, A COMPREHENSIVE DICTIONARY OF THE ENGLISH LANGUAGE 356 (1866).
[48] *See* Lillian Bevier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1769 (2010). The authors note that "the Constitution includes hardly any rules that apply directly to private people." *Id.* at 1769.

Only one definition remains: "To have no confidence in." In this instance, one might proffer an argument similar to the one made against the second definition: Congress cannot regulate subjective feelings of confidence. The phrase "the validity of the public debt shall not be made the subject of no confidence" seems somewhat awkward, but at least more plausible than "the validity of the public debt shall not be made to be uncertain." This is because the former phrase is much less subjective. The phrase prohibits actions that destroy all confidence in the public debt. Repudiation would clearly be such an action. This construction, however, still seems awkward and ill-fitting.

Synonyms for the verb "to question" include "to doubt, controvert, or dispute."[49] Rejecting "doubt" because it is so similar to "be uncertain of," "controvert" and "dispute" seem more promising. "To controvert" means "to dispute; to oppose by reasoning; to contend against in words or writing; to deny, and attempt to disprove or confute."[50] The phrase "the federal debt shall not be controverted" would prohibit official governmental action that disputes the validity of the public debt. The construction is much less awkward than any of the previous constructions. This definition also fits with the legal definition of "question" outlined previously because the definition of "to controvert" includes the idea of dispute and contention "in words or writing."[51] "Controvert" is the best definition for "question," given the context of the Public Debt Clause. It is also the narrowest definition because, for an action to controvert the validity of the public debt, it must dispute or deny the validity of that debt. It cannot merely cast the validity of the debt into doubt.

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[49] WEBSTER'S DICTIONARY, *supra* note 46, at 806.
[50] *Id.* at 224.
[51] *Id.*

The original meaning of the word "question" in the Public Debt Clause is narrow, especially when its history as a legal term of art is understood. As contemporary dictionaries confirm, the word meant to controvert, which means to deny or dispute. Thus the clause prohibits only direct governmental debt repudiation. While constitutional interpretation "of the first glance" might not conclude that the meaning of the Public Debt Clause is narrow, historical research confirms its specific meaning.

II. The Historical Context of Section 4

The historical context of Section 4 also provides strong evidence that the meaning of the Public Debt Clause is narrow. Historical context is critical in ascertaining the original public meaning of a constitutional provision.[52] Yale Law School Professor Akhil Amar, one of the nation's leading constitutional scholars, places great emphasis on historical context in constitutional interpretation:

> Amar's approach is holistic. He relies on text, history, and the structure of the Constitution and the government it establishes to elucidate the best and truest meaning of the language contained in the document. His examination of history includes not simply the specific enactment history, but the broader historical context surrounding the enactment, which is crucial to understanding the purpose behind and reason for the inclusion of particular language.[53]

The purpose of the Fourteenth Amendment generally was to embed in the Constitution "the results of the Civil War."[54] Radical Republicans feared that President Andrew Johnson, with the help of more moderate Republicans and Southern Democrats,

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[52] The D.C. Circuit recently endorsed the use of "not only logic and language, but also constitutional history" in constitutional interpretation. Canning v. NLRB, No. 12-1115, 2013 WL 276024, at *9 (D.C. Cir. Jan. 25, 2013).
[53] Ryan, *supra* note 7, at 1548.
[54] ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1877 114 (1990).

would squander the opportunity to achieve racial equality and citizenship created by Union victory.[55] One historian writes:

> [T]he aims of the Fourteenth Amendment can be understood only within the political and ideological context of 1866: the break with the President, the need to find a measure able to unify all Republicans, and the growing party consensus in favor of strong federal action to protect the freedman's rights.[56]

Section 4 is tied to the provisions on citizenship, due process and equal protection in the Fourteenth Amendment in that they are all measures designed to safeguard the fruits of the Union victory — especially Republican political dominance. This historical context supports a narrow reading of the first sentence of Section 4 because Republicans sought to protect the federal debt from direct repudiation by a future Congress.

Two pieces of evidence from the historical context surrounding the Fourteenth Amendment buttress the assertion that the original public meaning of the first sentence of Section 4 was narrow. First, the threat of federal debt repudiation at the time of the ratification of the Fourteenth Amendment was small and specific. The threats addressed by the second sentence of Section 4, on the other hand, were very serious. The authors of section 4 narrowly tailored the first sentence to address the small and specific threat of federal debt repudiation. Second, pressure from several interest groups resulted in the insertion of the first sentence into Section 4. The language in the first sentence has a specific meaning reflecting the legislative response to such pressure.

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[55] *Id.* at 113-14. Republicans viewed freedmen's rights as "being among the most important of the fruits of victory" after the Civil War. HERMAN BELZ, Preface to A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861 TO 1866 xii (2000).

[56] FONER, *supra* note 54, at 115-116.

A. The Threat of Federal Debt Repudiation

The threat of federal debt repudiation was specific in the minds of Northern Republicans during the drafting of the Fourteenth Amendment. Northerners feared that Southern Democrats would join with moderate Northerners to repudiate the debt. In each of the Southern states, however, the actual threat of Southern politicians organizing with Northerners in Congress to repudiate the federal debt was minimal.

1. The Nature of the Threat of Federal Debt Repudiation

Both the Report of the Joint Committee on Reconstruction (hereinafter "Report") and congressional records indicate that the threat of federal debt repudiation was specific. The Joint Committee on Reconstruction (hereinafter "Committee") repeatedly asked those testifying about the potential for a North-South coalition in Congress to repudiate the debt. For example, the Committee asked Union Lt. Col. Dexter Clapp about the threat of Southern Democrats uniting with Northern politicians to repudiate the federal debt.[57] Clapp testified that some in the South hoped to repudiate the federal debt via this method.[58] He provided no specifics about an organized effort to take over Congress by the Southerners. When asked if there was a "combination" in Virginia to take over the federal government and repudiate the federal debt, George Smith, a Virginian sympathetic to the North, said that there was a conspiracy by some in Virginia to join

[57] J. COMM. ON RECONSTRUCTION, 39TH CONG., REP. OF THE J. COMM. ON RECONSTRUCTION , at 208 (Government Printing Office, 1866) [hereinafter REPORT].
[58] *Id.*

with Western representatives in Congress to repudiate the federal debt. [59] When asked about the particulars of such a plot, however, he gave none.[60]

Union Brigadier General Charles H. Howard testified that the people of South Carolina might send men to Congress who were opposed to paying the federal debt in response to a question about this possibility from the Committee. [61] J.A. Campbell, a Northerner, also stated that the people of North Carolina would "repudiate it (the national debt) if they could."[62] Union Brevet Brigadier General George Spencer testified that Alabamians might try to repudiate the federal debt "when they got power," implying a congressional takeover.[63] Dr. James M. Turner, a Union sympathizer, testified that people in the South would be opposed to paying the national debt only because they were not currently represented in Congress and they did not want to be taxed without representation.[64] Presumably, once they had gained representation in Congress this objection would cease.

Several members of Congress were concerned about congressional debt repudiation. In the House of Representatives, Rep. Samuel J. Randall offered a resolution on the federal debt that read:

> Resolved, that, as the sense of this house, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and inviolate, and must and ought to be paid, principal and interest; that any attempt to repudiate or in any manner to impair or scale said debt shall be universally discountenanced and promptly rejected by Congress if proposed.[65]

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[59] *Id.* at 15.
[60] *Id.*
[61] *Id.* at 39.
[62] *Id.* at 213.
[63] *Id.* at 9.
[64] *Id.* at 128.
[65] H.R. JOURNAL, 39th Cong., 1st Sess. 17 (Dec. 5, 1865); *see also* Eder, *supra* note 9, at 7.

Randall offers no evidence that Southern states were threatening to take over Congress and propose debt repudiation measures, however. Calling for a constitutional amendment protecting the federal debt from repudiation, Representative Hiram Price offered a resolution that stated in part:

> Whereas an attempt to assume the rebel debt in some shape, and to repudiate the national debt in some manner, and also to pay for the slaves who have been made free, are among the possibilities of the future; and whereas the most effectual way of preventing either or all of these would be so to amend the Constitution of the United States as to preclude for all time to come any chance of either of these results.[66]

A federal debt protection provision was not inserted into the Fourteenth Amendment until May 23, 1866.[67] In his rationale for the debt protection provision, Senator Benjamin Wade mentioned the threat of future repudiation by a Congress taken over by Southern Democrats and moderate Northerners.[68] Senator Wade stated, "I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and placed under the guardianship of the Constitution."[69] In that speech he emphasized that protecting bondholders was his chief concern.[70]

2. The Seriousness of the Threat of Federal Debt Repudiation

There was no organized effort to gain a majority in Congress and repudiate the war debt in Virginia. E.F. Keen, a Northerner, stated, "I believe that there is a general disposition on the part of the people of Virginia to sustain the credit of the government in

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[66] H.R. JOURNAL, 39th Cong., 1st Sess. 75 (Dec. 18, 1865).
[67] CONG. GLOBE, 39th Cong., 1st Sess. 2768–69 (May 23, 1866).
[68] *Id.*
[69] CONG. GLOBE, 39th Cong., 1st Sess. 2768 (May 23, 1866).
[70] *Id.*

every respect."[71] Confederate General Robert E. Lee echoed that sentiment.[72] Charles Lewis, a pro-Union official, stated that most of the politicians in Virginia had no intention to repudiate the federal debt and that the "masses of people would be disposed to meet all their obligations to the nation."[73] The Report did state that almost all who testified on the matter of the federal debt agreed that "the people of the rebellious States would, if they should see a prospect of success, repudiate the national debt."[74] The prospects for debt repudiation, however, were not good. The Committee notably did not include a provision protecting the federal debt when it proposed a constitutional amendment after the Civil War.[75]

The people of North Carolina never seriously threatened to take over Congress and repudiate the federal debt. James Sinclair, a neutral Southern minister, testified that the people of North Carolina were willing to pay the national debt and thought that it would be paid.[76] Union Colonel E. Whittlesey testified that he had never heard one North Carolinian say that he was opposed to paying the national debt.[77] Thomas Cook, a pro-Union newspaper correspondent, stated that the people of North Carolina would consent to pay the national debt "cheerfully."[78] Homer Cooke, a Union soldier, noted that they

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[71] REPORT, *supra* note 54, at 165.
[72] *Id.* at 129.
[73] *Id.* at 146.
[74] *Id.* at xvii.
[75] In the first sentence of the Committee's report on this matter, that report states, "The witnesses examined as to the willingness of the people of the south to contribute, under existing laws, to the payment of the national debt, prove that the taxes levied by the United States will be paid only on compulsion and with great reluctance." *Id.*
[76] *Id.* at 172.
[77] *Id.* at 184.
[78] *Id.* at 279.

would vote "no" to pay the federal debt, but he did not describe an organized plan in North Carolina to repudiate the federal debt.[79]

The only indication that there may have been an organized plan to repudiate the national debt in North Carolina is provided in the testimony of Union Lt. Col. Dexter Clapp. Clapp, however, testified that there was not a settled conspiracy to unite with a Northern political party to repudiate the federal debt.[80] He provides no specifics and does not provide a single piece of evidence in regard to an organized effort to take over Congress by the Southerners. J.A. Campbell, a Northerner, also stated that the people of North Carolina would, "repudiate it (the national debt) if they could."[81] According to the testimony given to the Joint Committee and the sources searched by this author, this general feeling never took shape in a more concrete plan to repudiate the federal debt.

In Georgia, Sidney Andrews, a Northern newspaper correspondent, stated, "I heard but little said by anybody in respect to the payment of the federal debt."[82] Stephen Powers, another Northern newspaper correspondent, testifying about the citizens of Florida, Louisiana, and Texas, stated, "They will, of course, grumble at being compelled to pay the national debt, but they will offer *no serious resistance*, at least none, in most cases, which will require the presence of the national troops to quiet it."[83] In Texas, Union General George Armstrong Custer thought, "If they were allowed to legislate upon the question they would be opposed to paying their share of the national debt unless the

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[79] *Id.* at 204.
[80] *Id.* at 208.
[81] *Id.* at 213.
[82] *Id.* at 172.
[83] *Id.* at 145 (emphasis added).

rebel debt was incorporated with it."[84] Thus the threat of federal debt repudiation would not have been concrete but was dependent upon the final disposition of the rebel debt. T.J. Mackey, a Union officer, testified that some in Louisiana might also hesitate to pay taxes and their burden of the national debt.[85] He did not mention a specific plan to repudiate the federal debt.

One South Carolina newspaper reported, "In regard to the national debt, South Carolina, with her sister States, though the debt was incurred in conquering the Southern States, yet they will not consent to repudiate one dollar of it."[86] Union Brigadier General Charles H. Howard testified that the people of that state did not want to pay the federal debt but they expected to be compelled to do so.[87] While the General did indicate that the people of South Carolina might send men to Congress who were opposed to paying the federal debt, he provided no evidence of any organized plan to do so. Much like other testimony his assertions are abstract and in response to hypothetical questions he himself deemed unrealistic.

There is no testimony in the record of the Joint Committee on Reconstruction indicating that people in Tennessee sought to take over Congress and repudiate the federal debt. One newspaper editorial, speculating on why the Radical Republicans wanted a provision in the Constitution protecting the federal debt, stated:

> Why are the Radicals so anxious to guarantee the payment of the national debt by making it a constitutional obligation? It is because that party is the chief holder of the bonds, and has exempted them from taxation. This exemption adds greatly to the burdens imposed upon the people at large, and not a few in the North, are

[84] *Id.* at 75. This is the same General Custer who died in the Battle of Little Bighorn.
[85] *Id.* at 154.
[86] EDGEFIELD ADVERTISER, Aug. 22, 1866, at 2.
[87] *Report*, *supra* note 54, at 39.

> beginning to speak out for taxation of the land or repudiation of the debt. The Radicals fear, too, the precedent established by the repudiation of the debt growing out of the Revolutionary war, and are conscious that the present debt possesses not one of those high claims to be held as a sacred obligation which belonged to the one that was repudiated. The tyranny which *forced* the repudiation of the Confederate debt may incline the popular feeling of the North, towards a similar, but voluntary disposal of the Federal debt. It is not easy to rebut the argument - that repudiation is as just and honorable as the exemption of the rich bond-holder from taxation, whilst the burden, he ought to bear, is laid upon the shoulders of the poor farmer, mechanic, and day-laborer; nor is taxation without representation well calculated to impress the sacredness of a pecuniary obligation upon the people thus wronged.[88]

The editorial does not mention that Southerners might repudiate the war debt by taking over Congress. Instead, the writer describes the threat of Northern commoners angry at corrupt Northern politicians as the real danger in the repudiation discussion. The writer also mentions the precedent of the repudiation of the Confederate war debt, a circumstance likely in the back of the minds of all Northern taxpayers.

Scattered reports of inchoate threats of federal debt repudiation, combined with the conjectural nature of the testimony given to the Joint Committee on Reconstruction, indicate that Congress understood the threat of federal debt repudiation was minimal in the Southern states. As previously discussed, however, that threat was specific. The drafters of the Fourteenth Amendment wrote the first sentence in response to these realities. The broad meaning Abramowicz and others give to that sentence is inconsistent with the historical facts just discussed. There is little evidence to support the broad interpretation Abramowicz and others advocate. The next part will lay out the serious nature of the threats described in the second sentence of Section 4. This context will

[88] CLARKSVILLE WEEKLY CHRONICLE, June 22, 1866, at 2.

make clear that it is a mistake to give the first sentence a broad meaning by isolating the first sentence from the second sentence of Section 4.

B. The Twin Threats in the Confederate States

At the conclusion of the Civil War in April 1865, the Southern states were in disarray.[89] Many in the South hoped to soften the economic toll of the war on families and individual citizens. Consequently, many state governments were threatening to honor outstanding Confederate debt. Further, these governments threatened to compensate slave owners for emancipated slaves. But what exactly was the nature of these threats?

1. The Threat of Assumption of the Confederate Debt

The second sentence of Section 4 of the Fourteenth Amendment has two distinct provisions. The first provision deals with the Confederate debt and reads: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States . . . but all such debts, obligations and claims shall be held illegal and void."[90] This provision plainly applies to war debts incurred by individual states as well as debts incurred by the Confederate government. By one contemporary account, the debt of the Confederate government from the war was "over $2 billion, while individual states and local governments had incurred another billion dollars of debt."[91] Combined, these debts exceeded the value of all the property in the South in 1870 by $1 billion.[92] After the end of the war, many in the South hoped to

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[89] JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 3 (1994).
[90] U.S. CONST. amend. XIV, § 4.
[91] Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us about its Interpretation*, 39 AKRON L. REV. 289, 317 (2006). All amounts listed are in United States dollars unless otherwise noted.
[92] *Id.* at 318.

use state governments to honor state-issued debt as well as the debt of the Southern government.[93] One can confidently define the threat of state debt assumption as organized and serious. Importantly, such a plan did not depend on gaining control of Congress.

In Virginia, the threat of assumption of the Confederate debt was grave. An editorial in *The Daily Dispatch*, a pro-Confederate Richmond newspaper, described the injustice of repudiating the Confederate debt and depriving Confederate soldiers of their pensions.[94] The Richmond *Enquirer* also agreed with this assessment of rebel debt repudiation.[95] Confederate General Robert E. Lee testified to the Committee that he thought Virginians would pay the Confederate debt "if they had the power and ability to pay it."[96] Colonel Orlando Brown of the Union army, who had been living in Richmond after the war, stated that he thought Southerners would "prefer to pay the Southern debt rather than the Northern debt."[97] Lieutenant W. L. Chase, a Union officer stationed in Virginia, thought that, if Virginians had an opportunity to vote, they would vote to assume the rebel debt.[98]

Dr. Robert McMurdy, a Union clergyman residing in Virginia, stated that Southerners would "endeavor, as far as they are able, some way or other, to have the

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[93]The testimony given to the Joint Committee on Reconstruction by Lewis McKenzie, a representative in the Virginia legislature during the Civil War, is a clear indication of the threat of rebel debt assumption: "Question: If the rebels had the opportunity, would they assume the payment of the rebel debt? Answer: Why of course. All the rebel States would if they could do it." REPORT, *supra* note 54, at 13.
[94] THE DAILY DISPATCH, Feb. 13, 1865, at 1.
[95] THE NORFOLK POST, Nov. 1, 1865, at 2.
[96] REPORT, *supra* note 54, at 129.
[97] *Id.* at 126.
[98] *Id.* at 96.

country pay all their debt."[99] Jonathan Roberts, the pro-Union sheriff of Fairfax County, stated that, "the leading men – those who control things – would pay" the rebel debt.[100] It is clear from testimony and newspaper accounts that the threat of rebel debt assumption – either at the state or federal level – was real and serious in Virginia.

The people of North Carolina expressed the strongest desire among the Confederate states to assume the rebel debt. In that state there was an organized, government-sponsored effort to assume the war debt. On December 16, 1866, the North Carolina legislature overwhelmingly rejected the adoption of the Fourteenth Amendment.[101] One article describes the approach North Carolina took to the rebel debt in 1866:

> North Carolina never seriously considered either voiding Confederate-era debts or valuing them at par with United States currency; instead, the Restoration convention declared that all wartime contracts and debts were valid and instructed the legislature to create a statutory scale, possibly unique among ex-Confederate states, for converting depreciated Confederate debts into federal currency.[102]

The convention's act flew in the face of the language of the Fourteenth Amendment. The North Carolina Supreme Court also upheld the validity of contracts payable in Confederate currency.[103] J.A. Campbell of the Freedman's Bureau of North Carolina, speaking about the citizens of North Carolina, stated, "The debt is in such a condition that

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[99] *Id.* at 94.
[100] *Id.* at 34.
[101] JAMES E. BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT 58 (1997).
[102] Joseph A. Ramsey, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 14 (2002).
[103] *Id.* at 14.

they consider the State of North Carolina responsible for part of it. That part of it they would pay."[104]

One Virginia newspaper related an ominous incident concerning the rebel debt during a state convention in North Carolina. While a representative was arguing strenuously against state repudiation of the rebel war debt, "the flag-staff upon the capitol broke, and fell upon the roof with a thunder shock that startled the convention, and was accepted as an omen."[105] Startled, the representative exclaimed: "Yes, Mr. Chairman, when North Carolina submits to dictation, that flag-staff ought to fall!"[106] Speaking of the same matter to the Joint Committee on Reconstruction, Union Colonel E. Whittlesey, assistant commissioner for the Freedman's Bureau of North Carolina, stated, "I think there was a disposition manifested there (at the North Carolina Convention) to make provision for its (the rebel debt's) payment."[107]

Several other states sought to assume the rebel debt and were extremely resistant to the Fourteenth Amendment. The South Carolina state legislature voted down that amendment almost unanimously in 1866.[108] The Columbia *Phoenix* declared, "Confederate notes, on the attainment of our independence, *will be paid*."[109] Speaking of the Tennessee state legislature, the Knoxville *Whig* stated, "If the Legislature . . . does not unite with other Southern states to pay the Confederate debt, it will be from fear or

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[104] REPORT, *supra* note 54, at 213.
[105] THE NORFOLK POST, Nov. 2, 1865, at 2.
[106] *Id*.
[107] *Report*, *supra* note 54, at 184.
[108] BOND, *supra* note 98, at 121.
[109] COLUMBIA PHOENIX, Apr. 1, 1865, at 6.

policy, and not from want of sympathy or desire."[110] Another writer, noting that as a condition for readmission Tennessee would have to repudiate the rebel debt, argued, "It is impossible for such conditions to be accepted without outraging all sense of equity, and without violating the principles of our form of government."[111]

Georgia was a hotbed of debate about the rebel debt. Sidney Andrews, a newspaper correspondent who traveled extensively throughout Georgia, stated, "There was a great deal of talk in the State about the payment of the rebel debt."[112] Andrews thought that Georgia would have assumed the debt if the federal government had not intervened and forced it to repudiate that debt.[113] "Particular decisions that vexed them [Georgia citizens] more than others included . . . repudiation of the war debt."[114] Like South Carolina and Arkansas, Georgia would not ratify the Fourteenth Amendment until 1868 under a Reconstruction government.[115]

In Georgia, "the repudiation of war debt" was not "pleasing to many."[116] At a state constitutional convention in 1865, Georgia "repudiated the state debt only after a bitter debate convinced the delegates that repudiation was necessary for restoration."[117] Sidney Andrews' account of the debate at this convention is illuminating:

> I remember particularly that Judge Simmons, who was quite a strong Union man in the convention of 1861…went so far as to advocate resistance to repudiation to the utmost extremity – to repudiate at the express command of the military power; and then, when…the state of Georgia should once more be a free and independent

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[110] BROWNLOW'S KNOCKSVILLE WHIG AND REBEL VENITLATOR, Jan. 31, 1866, at 1.
[111] DAILY UNION AND AMERICAN (Nashville), Mar. 10, 1866, at 2.
[112] REPORT, *supra* note 54, at 172.
[113] *Id.*
[114] JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 94 (1984).
[115] *Id.* at 243.
[116] *Id.* at 80–81.
[117] BOND, *supra* note 98, at 233.

> sovereignty…he suggested that another convention should be called and the rebel debt assumed. That sentiment was received with many manifestations of approval.[118]

A year after the debate at the convention, "some Georgians would object to the same provision in Section 4 of the Fourteenth Amendment." [119] Georgia Governor James Johnson testified that, "a majority was opposed to repudiating the war debt. But when the necessity of so doing was shown to them they consented to it."[120] Before Reconstruction, Georgia displayed "affection and regret" for the lost cause.[121] The state government clearly sought to assume the rebel debt after the war.[122]

While the Tennessee state government was pro-Union immediately following the end of the war, many in the state advocated for the assumption of the rebel debt. Speaking of the Tennessee state legislature, the Knoxville *Whig* stated, "If the Legislature…does not unite with other Southern states to pay the Confederate debt, it will be from fear or policy, and not from want of sympathy or desire."[123] Another writer, noting that as a condition for readmission Tennessee would have to repudiate the rebel debt, argued that, "It is impossible for such conditions to be accepted without outraging all sense of equity, and without violating the principles of our form of government."[124]

Advocating that the Union Government assume the Confederate war debt, a writer in the Nashville *Daily Union* argued that paying the rebel debt is "right and has for its

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[118] *Report*, *supra* note 54, at 172.
[119] BOND, *supra* note 98, at 246 n. 18.
[120] *Report*, *supra* note 54, at 133.
[121] EDWIN C. WOOLLEY, THE RECONSTRUCTION OF GEORGIA 22 (1901).
[122] For more on the organized effort in Georgia to honor the rebel debt, see CLARA MILDRED THOMPSON, RECONSTRUCTION IN GEORGIA: ECONOMIC, SOCIAL, POLITICAL, 1865–1872 151–152 (1915).
[123] BROWNLOW'S KNOCKSVILLE WHIG AND REBEL VENITLATOR, Jan. 31, 1866, at 1.
[124] DAILY UNION AND AMERICAN (Nashville), Mar. 10, 1866, at 2.

bottom a sound principle."[125] One paper stated, "Most of the Southern members who will be elected to Congress will have a direct pecuniary interest in the payment of this infamous rebel war debt and will act with the Northern copperheads. Before the honest loyal men of the nation shall be taxed to pay that debt, we are in favor of keeping every Southern congressman out of his seat. Nay, we are for a renewal of the war rather than assume such a debt."[126] These contemporary accounts confirm that assumption of the rebel debt was a serious threat in Tennessee.

Arkansas, like Tennessee, had a state government loyal to the Union even before Lee surrendered at Appomattox.[127] This government went so far as to repudiate the rebel debt in 1864.[128] In 1866, however, the people of Arkansas rejected the pro-Union state government and resoundingly rejected the Fourteenth Amendment.[129] Even before this rejection, there were signs that the people of Arkansas wished to pay the war debt. For example, "In 1864 collectors were required by the legislature to receive Confederate currency at the value fixed by [the U.S.] Congress and Arkansas war bonds and treasury warrants were made receivable for county taxes."[130]

The anti-Union legislature elected in 1866 rejected many of the previous government's positions on the Confederacy and displayed a clear desire to pay the war debt.[131] The legislature also passed an act to pay pensions for injured Confederate

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[125] THE NASHVILLE DAILY UNION, Nov. 1, 1865, at 2.
[126] KNOXVILLE WHIG, Nov. 1, 1865, at 2.
[127] BOND, *supra* note 98, at 189.
[128] *Id*.
[129] *Id*. at 197.
[130] DAVID YANCEY THOMAS, ARKANSAS IN WAR AND RECONSTRUCTION: 1861-1875 174 (1926).
[131] Paige E. Mulhollan, *The Arkansas General Assembly of 1866 and Its Effect on Reconstruction*, 20 ARK. HIST. Q. 331, 339 (Winter 1961). This historian describes the situation in Arkansas:

soldiers and for the widows and orphans of dead Confederate soldiers.[132] The pro-Union governor vetoed this bill "because it honored 'the enemies of the United States by conferring upon them rewards and pensions' for services in fighting against the United States."[133] The legislature then passed the bill over his veto. Only military-enforced Reconstruction could stop Arkansas from assuming the rebel debt.

The people of Alabama and Mississippi evidenced a general desire to assume the rebel debt. When asked about the feelings of the people of both of these states towards rebel debt assumption, Union General B.H. Grierson stated, "I think there is a great desire manifest by them for the assumption of the rebel debt."[134] One Nashville newspaper said, "Powerful influences will be brought to bear in Alabama, to induce the State convention, now in session at Montgomery, to recognize the legality of her debt."[135]

At the beginning of the Civil War Florida had "less wealth, and less population than any other slave state."[136] Even so the state authorized almost $3 million in debt from 1860 until the end of the war in 1865.[137] In 1865 many in the state convention in

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Acts were passed ratifying deeds to lands purchased from the state during rebellion upon the presentation of a receipt. Governor Murphy vetoed these acts as a violation of the 1864 constitution, which made all acts of the secession government null and void. These laws were also passed over the veto. On February 9, 1867, Chief Justice David Walker, Arkansas State Supreme Court, rendered a decision in the case of Hawkins vs. Filkins, holding that all acts performed by the state in secession were valid, except those conflicting with the United States Constitution. Persons who had paid public debts with Arkansas War Bonds or Confederate Treasury Notes during the time of secession were given credit for such payment. Murphy again used his veto, but the act was re-passed.

Id. at 338–339.

[132] *Id.* at 339.

[133] THOMAS S. STAPLES, RECONSTRUCTION IN ARKANSAS 111 (1923).

[134] REPORT, *supra* note 54, at 123.

[135] NASHVILLE DAILY UNION, Sept. 21, 1865, at 2.

[136] WILLIAM WATSON DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 3 (1913).

[137] *Id.* at 181.

Tallahassee sought to honor the rebel debt.[138] One historian relates, "The debt was an honest debt and there was bitter opposition to repudiation…. [R]epudiation…engrossed the attention of the convention."[139] The convention eventually decided to hold a popular vote on the issue of debt repudiation, where the voters of Florida almost certainly would have voted to pay the rebel debt. President Johnson intervened and the convention reluctantly voted to repudiate.[140]

Many in Florida continued to think that the state ought to pay the rebel debt. Union Colonel Israel Vogdes testified, "Some of them think the rebel debt ought to be paid."[141] Stephen Powers, a newspaper correspondent, stated, "A majority of the thinking and influential people of Florida, however, were in favor of paying the rebel debt."[142] Although Florida had lost the war, her citizens sought to use the state government to honor the war debt.

In 1867, the Louisiana legislature rejected the Fourteenth Amendment even though the governor of Louisiana was pro-Union and had strongly advocated for its adoption.[143] Many in Louisiana sought to honor the rebel debt during and after the Civil War. John Covode, a Northerner testifying about the condition of the people in Louisiana, stated that, "many in the South would say that the government must pay the rebel debt."[144] Benjamin C. Truman, a correspondent for the New York *Times* who was observing the state constitutional convention, reported, "A majority of the politicians and

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[138] *Id.* at 362.
[139] *Id.*
[140] *Id.* at 363–364.
[141] *Id.* at 121.
[142] *Id.* at 145.
[143] BOND, *supra* note 98, at 87.
[144] *Report*, *supra* note 54, at 138.

others seemed to be in favor of paying the debt. I could see that plainly in the convention."[145] Finally, Union Major General Lorenzo Thomas indicated that Louisiana would not pay the rebel debt but only because she does not have the "means" to do it.[146]

Finally, Texas rejected the Fourteenth Amendment in 1866 and did not ratify the amendment until 1870.[147] By 1866, Texas had a public debt of $8 million in Texas notes.[148] At a state constitutional convention in 1866, delegates repudiated the war debt in an attempt to curry favor with the federal government.[149] Several newspapers criticized the repudiation,[150] and later in 1866 the state senate passed a resolution disavowing the repudiation of the rebel debt.[151] Union General George Custer, testifying before the Joint Committee, predicted that Texans would assume the rebel debt if they had the opportunity.[152]

2. The Threat of Compensation for Emancipated Slaves

The second provision of the second sentence of Section 4 prohibits compensation for emancipated slaves.[153] The value of slaves in the South after the war was staggeringly large; one estimate places the value at over $2 billion.[154] One article describes the financial situation caused by the emancipation of slaves in the South: "A committee of the Forty-Second Congress placed the loss at $1.6 billion. To place this amount in

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[145] *Report*, *supra* note 54, at 140.
[146] *Id*. at 143.
[147] CHARLES WILLIAM RAMSDELL, RECONSTRUCTION IN TEXAS 120, 290–291 (1910).
[148] PATSY MCDONALD SPAW, THE TEXAS SENATE: CIVIL WAR TO THE EVE OF REFORM, 1861–1889 53 (1999).
[149] *Id*. at 65.
[150] RAMSDELL, *supra* note 144, at 102–103.
[151] *Id*.
[152] *Report*, *supra* note 54, at 75. This is the same General Custer who died in the Battle of Little Bighorn.
[153] U.S. CONST. amend. XIV, § 4.
[154] Aynes, *supra* note 88, at 318.

context, one needs to note that the South's entire property, including slaves, was assessed in 1860 at $4.4 billion and in 1870 at $2.1 billion."[155] After reading these figures, it is clear why Southerners demanded compensation for the loss of slaves. It is also equally clear why Northern politicians saw this demand as a serious threat to the finances of the Union. Each of the Southern states sought to provide compensation for emancipated slaves and did not need congressional approval. Some in those states also wished for congressional compensation for emancipated slaves.

In Virginia, many hoped to receive compensation for their slaves from the state or federal governments but few thought that the Union would allow such compensation. Union Colonel Orlando Brown testified, "I have heard men who have been loyal [to the Union] throughout express that expectation, that they were entitled to compensation for their slaves."[156] Throughout the Union there was "fear of an alliance between former slaveholders and their former allies, northern Democrats," which might lead to payment for emancipated slaves.[157] Judge John Underwood, a Union sympathizer, testified that if Virginians could get control of the Congress they "would attempt . . . compensation for their negroes. . . . [T]he leading spirits would claim compensation for their negroes."[158]

Union General Charles Howard, when asked about the sentiments of those in South Carolina with regard to compensation for slaves, replied:

> Your question has brought to my mind something which has been quite frequently expressed to me directly and has been told to me by northern men as being found to be the invariable sentiment that the government of the United States should

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[155] *Id*.
[156] REPORT, *supra* note 54, at 124.
[157] Aynes, *supra* note 88, at 319.
[158] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 282–83 (1914).

> take measures to pay for the slaves. . . . [A] large number of men in the interior seem to think that . . . some measure would be taken to remunerate them for the loss of their slaves.[159]

Although the record is limited, many of the citizens of Tennessee also hoped to receive compensation for their slaves. One of the conditions for the readmission of Tennessee into the Union was that slave owners agreed "never to ask Congress or the State Legislature for any compensation for their emancipated slaves."[160]

In 1866 in Arkansas, "party spirit ran high" and pro-Confederate legislators sought "indemnity for losses in the war," which included compensation for emancipated slaves.[161] In Georgia, "blocking payment for slaves was not pleasing to many."[162] One historian reported, "Particular decisions that vexed them [Georgia citizens] more than others included nonpayment for slaves."[163] One proponent of compensation for emancipated slaves argued, "My own opinion is that if . . . the Southern people are to be deprived of $4,000,000,000 worth of property without compensation . . . the people of Mississippi should not by their action give sanction to this enormous public wrong."[164] Union Major General Edward Hatch testified that the citizens of Alabama had made claims on the federal government for losses during the war.[165] These claims, the general stated, implied that the people hoped to get something for their "property."[166]

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[159] REPORT, *supra* note 54, at 40.
[160] THE NASHVILLE DAILY UNION, Apr. 4, 1866, at 1.
[161] THOMAS S. STAPLES, RECONSTRUCTION IN ARKANSAS 106 (1923).
[162] JAMES, *supra* note 111, at 80–81.
[163] *Id.* at 94.
[164] JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 83 (1902).
[165] REPORT, *supra* note 54, at 7.
[166] *Id.*

In a provision in the new Georgia state constitution abolishing slavery, the state convention included "a proviso that this action shall be no estoppel to future compensation claims for slaves manumitted."[167] One article describes the proviso:

> At the Georgia Convention, elected in October 1865 to frame a new constitution, they abolished slavery but added: [T]his acquiescence in the action of the Government of the United States, is not intended to operate as a relinquishment, waiver or estoppel of such claim for compensation or loss sustained by reason of the emancipation of his slaves, as any citizen of Georgia may hereafter make upon the justice and magnanimity of that government.[168]

At the convention the delegates made clear that "in abolishing slavery…it was not waiving its citizens' right to compensation."[169]

In both Florida and Louisiana, many hoped that the state government or the federal government would provide compensation for emancipated slaves. Union Colonel Israel Vogdes testified that "a very large portion of them still hope for compensation for their slaves, and that they will abandon that hope with great reluctance."[170] In Louisiana Dr. James Turner, a Union sympathizer, testified, "The most of those with whom I have conversed seemed . . . to think that eventually they would be paid for their slaves, if they can arrange matters as they hope to do in Congress."[171] A newspaper account of the state convention reported that the convention claimed "the right of petition for compensation for the loss of slaves."[172] By some accounts even pro-Union politicians in Louisiana sought compensation for their emancipated slaves.[173]

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[167] THE NORFOLK POST, Nov. 1, 1865, at 1.
[168] Aynes, *supra* note 88, at 319.
[169] BOND, *supra* note 111, at 233.
[170] *Id.* at 121.
[171] *Id.* at 128.
[172] THE DAILY PHOENIX, Oct. 25, 1865, at 1.
[173] REPORT, *supra* note 54, at 111.

At the Louisiana state constitutional convention in 1864, the convention adopted a report advocating for the compensation of slave owners.[174] The report recommended "an appeal to Congress on the following grounds: (1) that the loyalists would be impoverished by emancipation; (2) that Great Britain in 1832, in abolishing slavery, gave $20 million for the compensation of slave-holders, and that the United States government had likewise given compensation in the District of Columbia."[175] A majority of those in the convention were in favor of seeking compensation for emancipated slaves.[176] A committee was appointed to appeal to Congress on the matter, but nothing ever came of the appeal. In 1865, when Democrats had regained control of the state, they claimed the right to appeal to Congress for compensation for emancipated slaves. [177]

Finally, many in Texas sought to obtain compensation for their slaves. Immediately after the war there was a "belief . . . that compensation might yet be secured for the loss of slaves, and hence a reluctance to take the amnesty oath lest it should in some way estop claims for the compensation."[178] General Custer also believed that in Texas, "Indemnification would be claimed and insisted upon for all losses."[179]

The historical realities just described significantly inform the original public meaning of the first sentence of Section 4. The threat addressed in the first sentence was much less serious than the threats addressed in the second sentence. As a consequence, the authors of Section 4 narrowly tailored the first sentence. A broad reading of the first

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[174] JOHN ROSE FICKLEN, HISTORY OF RECONSTRUCTION IN LOUISIANA THROUGH 1868 71 (1911).
[175] *Id*.
[176] *Id*. at 70.
[177] *Id*. at 109.
[178] CHARLES WILLIAM RAMSDELL, RECONSTRUCTION IN TEXAS 62 (1910).
[179] REPORT, *supra* note 54, at 75.

sentence is inconsistent with the historical context of Section 4. If the threat addressed in the first sentence was more expansive and serious than the threats addressed in the second sentence, a broad reading of the first sentence might be more plausible.[180] The reality that the threats addressed in the second sentence of Section 4 were very serious casts doubt on any interpretation of Section 4 that isolates the first sentence and gives that sentence a broad meaning.

One noted historian said this about Section 4 of the Fourteenth Amendment: "As for Section 4, it was entirely unnecessary and since it was designed to catch votes, especially those of the soldiers, it deserved to be classified as mere political buncombe."[181] The previous sections of this Note at least partially refute that claim. The threats that the states would pay compensation for freed slaves and repay the Confederate debt were very serious from 1865–1867. Thus the second sentence of Section 4, which addresses these threats, was not motivated by political reasons but by a desire to respond to concrete, state-sponsored threats.

The first sentence of Section 4, however, seems somewhat rhetorical and political when juxtaposed with the second sentence. While, as previously discussed, there was a small threat of Southern Democrats and moderate Northerners joining forces and repudiating the federal debt in Congress, this threat hardly seems worthy of the language

[180] The broad reading of the first sentence advocated by Abramowicz and others would be more plausible if, for example, there was clear historical evidence of a serious, organized Southern threat to jeopardize the federal debt via any means possible.
[181] KENDRICK, *supra* note 154, at 350.

in the first sentence. Consequently, it seems more likely that the first sentence of Section 4, and not the entire section, "deserved to be classified as mere political buncombe."[182]

One who read Section 4 at the time the Fourteenth Amendment was ratified would have understood this. As previously mentioned, the draft of the Fourteenth Amendment presented by the Joint Committee on Reconstruction did not include a provision on the federal debt but did include provisions prohibiting payment of the rebel debt and paying compensation for emancipated slaves. It is also startling to note that the leading Republican senators inserted the first sentence of Section 4 into that section late in the drafting process after a secret caucus.[183] This fact indicates that something more may have been at work when the national debt provision was introduced as the first sentence of Section 4 of the Fourteenth Amendment.

C. Political Pressures and the First Sentence of Section 4

The first sentence of Section 4 was introduced after a secret five-day caucus of radical Republican senators.[184] This is a fascinating piece of history. What was said in the caucus? Why did the senators choose the language they did for the first sentence of Section 4? The historical record provides evidence for one theory that might answer such questions. Powerful political interest groups, including bondholders and former soldiers and sailors, organized to pressure members of Congress to protect the federal debt, including pensions. This impetus led ultimately to the language in the first sentence of

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[182] *Id.*
[183] *See* S. JOURNAL, 39th Cong., 1st Sess. 6 (May 23–29, 1866).
[184] Conspiracy theorists would have a field day if this were the case in a landmark constitutional amendment formulated today.

Section 4. Consequently, the meaning of the language of the first sentence needs to be understood as cabined by the political realities that led to its drafting.

As a primary matter, language passed for political reasons does not count for less than language passed to address real threats. Context is critical, however, in more clearly understanding the meaning of provisions in a text. The textual and political context of a provision provides powerful insights into that text's meaning.[185] Further, the political context of the first sentence of Section 4 indicates that its meaning is limited by a very particular set of historical circumstances.

1. The Soldiers and Pensioners

The first political faction that sought an amendment to the Constitution protecting the federal debt, including soldiers' pensions, was Northern Civil War veterans. One historian notes that Section 4 was "designed to catch votes, especially those of the soldiers."[186] Union soldiers returning from the war would obviously have an interest in making sure the federal government paid their pensions. The language of the final Section 4 protects not only the debt, but the debt "including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion."[187] But why were soldiers so interested in a constitutional amendment protecting the federal debt and their pensions? The answer has to do with the burgeoning pension system at the end of the Civil War.

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[185] *See* Manning, *supra* note 14.
[186] KENDRICK, *supra* note 154, at 350.
[187] U.S. CONST. amend. XIV, § 4.

Over two million people fought for the North in the Civil War between 1861 and 1865.[188] Many of those who fought never came home, leaving wives and children destitute.[189] Further, many who came home had no means to provide for themselves or their families after four years of war.[190] Even before the end of the war, Congress was forced to expand the pension system for Civil War veterans.[191] One historian describes the pension system in 1864:

> By the close of the year 1864, the subject of pensions was playing a large part in national affairs. Within two years, Congress had passed two important and far-reaching pension laws. In his annual report for 1864, Commissioner Barret stated: 'No other nation has provided so liberally for its disabled soldiers and seamen, or for the dependent relatives of the fallen.'[192]

Later in 1865, the Thirty-Ninth Congress provided even further for the disabled veterans of the Civil War. "In the Thirty-Ninth Congress, the soldiers found a responsive body of men."[193] That body authored several bills expanding the pension system:

> Thus during the first session of the Thirty Ninth Congress and within an interval of six weeks two very liberal pension laws had been passed. Pension applications for specific disabilities and on behalf of dependent widows, fathers, and orphans began to pour into the Pension Bureau. . . . More than 33,000 pension claims had been increased and the annual amount now expended for pensions exceeded $18,000,000.[194]

The new pensioners had a large interest in the federal debt for two reasons. First, if the federal government defaulted, the veterans would likely not receive their pensions. Second, some sought to tie the pensions of veterans directly to the national debt. One

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[188] DREW GILPIN FAUST, THE REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 3 (2008).
[189] 4 JOHN WILLIAM OLIVER, HISTORY OF THE CIVIL WAR MILITARY PENSIONS, 1861–1865 10 (1917).
[190] *Id.* at 19.
[191] *Id.* at 5–20.
[192] *Id.* at 17.
[193] *Id.* at 19.
[194] *Id.* at 22.

approach, taken by Senator Thaddeus Stevens, called for paying pensioners with the interest made on government bonds from money made from confiscated Southern property:

> Of the total $300,000,000 should be invested in six per cent government bonds and the interest used in paying pensions. On December 20 he presented a bill in Congress in which he proposed to double all pensions caused by the late war and the funds to pay for the increase were to be raised by a plan similar to the one just mentioned.[195]

While Senator Stevens' provision never passed, the pensioners remained generally and deeply concerned with the protection of the federal debt.

Union veterans expressed their concern for federal debt protection in the conventions of soldiers and sailors held across the country after the Civil War.[196] These conventions were held in Pittsburgh and Cleveland after the passage of the Fourteenth Amendment in Congress, and "did more to popularize the 14th amendment than any other political instrument."[197] The Pittsburgh Convention of Soldiers and Sailors, which met on September 26, 1866, stated, "That the action of present Congress in passing the pending Constitutional amendment is wise, provident and just. . . . It puts into the very frame of our Government the inviolability of the national debt . . . ."[198] This is further evidence that Congress felt pressure to protect the federal debt and consequently the pensioners in a constitutional amendment.

Finally, congressional members acknowledged that the provision guaranteeing the national debt was a result of pressure to protect the pensioners. The author of the first

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[195] *Id.* at 20.
[196] *See* Eder, *supra* note 9, at 10.
[197] *Id.* at 10 n.29.
[198] *Id.* at 10.

sentence, Senator Wade, stated: "[T]his section of my amendment goes further and secures the pensioners of the country."[199] The impetus for the provision was to "do something to protect those wounded patriots who have been stricken down in the cause of their country."[200] He said that he was "anxious to put the pensions of our soldiers and their widows and children under the guardianship of the Constitution."[201] Senator Charles Sumner's earlier proposal concerning the readmission of the states also mentions the "adoption . . . of the national debt and national obligations to soldiers."[202]

By 1865 the ranks of the pensioners were growing at an alarming rate. Congress sought to provide protection to this interest group by including language directed towards protecting pensions and the federal debt in the Fourteenth Amendment. Knowledge of these political realities would have informed and limited the original public meaning of the first sentence of Section 4.

2. The Bondholders

The other group that had a vested interest in protecting the federal debt was the bondholders. In 1861 the federal debt stood at just over $61 million.[203] By June 30, 1866 that debt had ballooned to almost $2.8 billion.[204] Over $1.5 billion of that debt was in the form of bonds held by banks and individuals across the country.[205] Constitutional protection for these bonds would assure their value and create financial stability in the

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[199] CONG. GLOBE, 39th Cong., 1st Sess. 2769 (May 23, 1866).
[200] *Id*.
[201] *Id*.
[202] S. JOURNAL, 39th Cong., 1st Sess. 6 (Dec. 4, 1865).
[203] 1 ELLIS PAXSON OBERHOLTZER, JAY COOKE: FINANCIER OF THE CIVIL WAR 124 (2006).
[204] 2 ELLIS PAXSON OBERHOLTZER, JAY COOKE: FINANCIER OF THE CIVIL WAR 1–2 (2006).
[205] *Id*.

Union. It is hard to imagine that those who had such a huge stake in the federal debt would not push for a constitutional amendment protecting that debt.

Senator Wade described the first sentence of Section 4 as designed to protect the interests of the bondholders.[206] He stated:

> I believe that to do this will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate and placed under the guardianship of the Constitution . . . .[207]

This statement admits that the first sentence of Section 4 is in essence "political buncombe," a provision inserted specifically to satisfy a particular interest group.[208] Some have even argued that this provision was designed to drive up the price of federal debt in a particular way.[209] By securing all federal bonds under the Constitution, those bonds would become more secure and more attractive to potential investors. This would drive the price of those bonds even higher, thus profiting the bondholders.

Opponents of a federal debt protection provision decried the first sentence of Section 4 precisely because it was political language. Senator Thomas Hendricks,[210] speaking against the provision, stated: "Who has asked us to change the Constitution for the benefit of the bondholders? Are they so much more meritorious than all other classes that they must be specially provided for in the Constitution. . . . Why do they ask this

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[206] CONG. GLOBE, 39th Cong., 1st Sess. 2769 (May 23, 1866).
[207] *Id*.
[208] KENDRICK, *supra* note 154, at 350.
[209] *See* Eder, *supra* note 9, at 15; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 64 (Mar. 15, 1860).
[210] Thaddeus Stevens, the leader of the Radical Republicans, stated, "The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors." CONG. GLOBE, 39th Cong., 1st Sess. 3148 (June 13, 1866). While Senator Hendricks was a Northern Democrat in a strongly Republican Congress, he can hardly be called a traitor. For more on his life, see generally JOHN WALKER HOLCOMBE & HUBERT MARSHALL SKINNER, LIFE AND PUBLIC SERVICES OF THOMAS A. HENDRICKS (1886).

extraordinary guarantee?"[211] The provision was the product of a special interest lobby backed by bondholders who wanted to make sure they made as much money as possible on the bonds. In fact, Senator Hendricks thought the actual effect of the provision "would excite distrust and cast a shade on public credit."[212]

Even Northern states attacked the first sentence of Section 4 of the Fourteenth Amendment as politically motivated claptrap. In withdrawing its consent to the proposed Fourteenth Amendment, New Jersey argued thus in one of its resolutions on the matter:

> It (the first sentence of Section 4) appeals to the fears of the public creditors by publishing a libel on the American people, and fixing it forever in the National Constitution as a stigma upon the present generation . . . as if it were possible that a people who were so corrupt as to disregard such an obligation would be bound by any contract, constitutional or otherwise.[213]

The first sentence was placed in one of the Reconstruction amendments partly because of pressures from a powerful interest group, namely the bondholders.

These historical accounts are further evidence that Congress drafted the first sentence of Section 4 for political purposes. Several interest groups stood to gain dramatically from that provision. This is evident to both proponents and opponents of the first sentence of Section 4; and it would certainly have been evident to one seeking to ascertain the meaning of Section 4 in 1866.

3. The Republican Party Platform

Finally, in 1866 the Republican Party platform had, as one of its pillars, the debt provision.[214] The Republican Party of Pennsylvania sent a memorial to Congress

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[211] CONG. GLOBE, 39th Cong., 1st Sess. 2940 (June 4, 1866).
[212] *Id.*
[213] *See* Eder, *supra* note 9, at 13.
[214] *Id.* at 10.

imploring the legislators to protect the federal debt even before the Fourteenth Amendment was drafted:

> The President pro tempore presented a memorial of the Union State Central Committee of Pennsylvania, praying that the Constitution of the United States may be so amended as forever to prohibit Congress, or any convention or other authority, from assuming to pay any part of the debt incurred in opposition to the general government, and from ever repudiating any part of the national debt.[215]

The Republican Party convention held in Philadelphia had as one of its resolutions: "We hold the debt of the nation to be sacred and inviolable."[216] The Democratic Party platform was opposed to the constitutional debt provision.[217] The Republican Party's endorsement of a provision protecting the federal debt supports the assertion that there was political pressure on Congress to pass an amendment protecting the federal debt.

The authors of the Fourteenth Amendment drafted the first sentence of Section 4 in response to specific political pressure. Powerful political interest groups had a financial stake in preventing governmental repudiation of the debt. These groups were interested in preventing direct repudiation. This reality casts light on the meaning of the language in the second sentence of Section 4. There is no evidence that the authors of that sentence, as well as those who advocated its passage, were concerned with stopping fiscal irresponsibility in Congress. They were concerned with the direct repudiation of the federal debt. The language they used reflects this concern.

Conclusion

In the middle of the summer of 2011, former President Bill Clinton suggested that the President could use the first sentence of Section 4 of the Fourteenth Amendment as a

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[215] H.R. JOURNAL 39th Cong. 1st Sess. 42 (Dec. 11, 1865).
[216] *See* Eder, *supra* note 9, at 10.
[217] *Id.*

basis for unilaterally raising the statutory debt ceiling.[218] After understanding the meaning of the text of that provision and exploring the history surrounding Section 4, one can conclude that such a reading of the first sentence seems unwarranted. First, as Part I of this Note argues, the text of the Public Debt Clause has a narrow original public meaning. The phrase prohibited only direct debt repudiation. Second, Part II of this Note argues that the history and the political climate surrounding Section 4 indicate that the first sentence of Section 4 had a narrow original public meaning. Each of these points supports the assertion that the first sentence of Section 4 is a shaky basis for a broad general presidential power to raise the debt ceiling.[219]

Regarding the statutory debt ceiling, congressional refusal to raise the debt ceiling does not violate the Public Debt Clause. Under the original public meaning of that clause, only legal action directly repudiating the federal debt is unconstitutional.[220] While refusing to raise the debt ceiling might potentially jeopardize the validity of the federal debt, this action does not "question" the validity of that debt under the original public meaning of the Public Debt Clause. Because congressional refusal to raise the debt

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[218] James Oliphant, *Bill Clinton Would Raise Debt Ceiling, Bypass Congress*, LOS ANGELES TIMES (July 19, 2011), *available at* http://articles.latimes.com/2011/jul/19/news/la-pn-clinton-debt-ceiling-20110719.

[219] Harvard Law Professor Laurence Tribe argues that those who claim the Public Debt Clause gives the President a unilateral power to raise the debt ceiling go "too far." Laurence H. Tribe, *A Ceiling We Can't Wish Away*, THE NEW YORK TIMES, July 8, 2011, at A23.

[220] One author argues that the Public Debt Clause also prohibits the federal government from defaulting on the public debt. Fagan, *supra* note 9, at 225. Fagan maintains that, "[I]f Congress fails to raise the debt ceiling, causing the Government to be unable to make payments owed to bondholders, it would violate the Public Debt Clause." *Id.* While Fagan provides helpful analysis in the debate over the meaning of the Public Debt Clause, she adduces little contemporary evidence either from the original public meaning of the Public Debt Clause or the history surrounding that provision suggesting the clause prohibits federal government default. The original meaning of the Public Debt Clause, as previously discussed, only proscribes legal action by the government directly repudiating the federal debt. Congressional refusal to authorize the borrowing of additional funds to pay existing debt is not "questioning" the validity of the debt because it is not legal action seeking to have a debt declared null and void by a court. By analogy, an individual who refused to borrow money to pay existing debts is not questioning the validity of that debt.

ceiling is constitutional, a President will not find any justification for unilaterally raising the debt ceiling in the Public Debt Clause.[221]

The D.C. Circuit recently stated, "When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution."[222] Careful historical study can shed light on long-neglected provisions of the Constitution and aid in finding their original public meaning. Hopefully, this study has provided insight into the original public meaning of the first sentence of Section 4. Perhaps, if one day in the future, a President attempts to unilaterally raise the debt ceiling using the first sentence of Section 4 as her justification, this study can help avoid a constitutional crisis.[223]

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[221] Daniel Strickland argues that Section 5 of the Fourteenth Amendment also prohibits the President from raising the debt ceiling unilaterally. *See* Strickland, *supra* note 9, at 801. One scholar criticized such an argument because it is inconsistent with Fourteenth Amendment jurisprudence. Jonathan Zasloff, *The Worst Argument Against Using the 14th Amendment*, THE REALITY-BASED COMMUNITY (July 28, 2011), http://www.samefacts.com/2011/07/law-notes/the-worst-argument-against-using-the-14th-amendment/.

[222] Canning v. NLRB, No. 12-1115, 2013 WL 276024, at *8 (D.C. Cir. Jan. 25, 2013). The court went on to argue, "The power of a written constitution lies in its words. It is those words that were adopted by the people." *Id.* at *21.

[223] Another standoff between the President and Congress over the debt ceiling is expected in 2013 and if recent history is any guide, conflict over the ceiling will continue for years to come. Many public officials and scholars, citing Section 4, are again calling for the President to raise the debt ceiling unilaterally. *See* Doug Mataconis, *The Debt Ceiling and the 14th Amendment*, OUTSIDE THE BELTWAY (Jan. 7, 2013), http://www.outsidethebeltway.com /the-debt-ceiling-and-the- 14th-amendment/.