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"Presidential Power, the 14th Amendment and the
Public Debt"

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The debt ceiling standoff between President Joe Biden and House Republicans has illuminated the Public Debt Clause of the 14th Amendment, one of the most obscure provisions in the Constitution and one seldom discussed since the Civil War. Its invocation may be the key to avoiding economic catastrophe.

Section 4 of the 14th Amendment provides that "The validity of the public debt, authorized by law. . . shall not be questioned." Legal scholars and historians agree that the clause was designed to ensure that the federal government would not repudiate its debts, as some former Confederate states had done.

This relatively unknown clause of the 14th Amendment aimed to place beyond doubt the obligations of the government to repay debts incurred by the Union in suppressing the southern rebellion, but its language, as the Library of Congress' analysis justly observes, "indicates a broader connotation. The validity of the public debt embraces whatever concerns the integrity of the public obligations and applies to government bonds issued after as well as before adoption of the Amendment."

Simply put, the Public Debt Clause declares to the world that America pays its bills. Senate Minority Leader Mitch McConnell has said, "America has never defaulted, and it never will."

U.S. Treasury Secretary Janet Yellin has warned Congress and President Biden that they have only until June 1 to reach a deal to raise the nation's \$31.4 trillion borrowing limit or face a default. The consequences of a default—the failure of America to pay its bills—economists and government officials tell us, would be far-reaching: more than eight million people would lose their jobs; millions of social security beneficiaries, veterans, and military families could lose their monthly payments; and vital federal services including air traffic control could be disrupted if government employees are not paid. In addition, many businesses would be forced into bankruptcy, and financial markets would be gripped by panic. Economic pain in America and across the globe would be long-lasting. It is with good reason that the standoff is described as a crisis.

The looming deadline and the deep-seated difficulties in winning a compromise between President Biden and House Republicans suggest resort to the Public Debt Clause as a solution, although it has never been invoked in previous debt ceiling fights and is wrapped in controversy.

Under section four of the 14th Amendment, which guarantees that the U.S. will not default, but in fact pay its bills, it is unconstitutional for our nation not to pay its debts. President Biden, in the exercise of his duty under Article II of the Constitution—"He shall take care to faithfully execute the laws of the land"—would direct the Treasury Department to issue debts without congressional action that raises the debt ceiling.

Under this theory, since the money authorized by Congress has been spent, the federal government has an obligation to somehow find or mint the money to pay in full those whom it has promised to pay. For those

wondering, President Biden, on the authority of a 1998 Supreme Court decision in the line-item veto case, has no discretionary authority to pick and choose which debts to pay. Again, the nation's debts must be paid. In full.

Those who object to this theory on grounds that such presidential action would constitute a usurpation of the congressional power "of the purse," including the authority under Article I, Section 8, Clause 2, to "borrow Money on the credit of the United States," certainly have a legitimate, textual point.

What is to be done, however, if Congress fails to exercise that power to fulfill its duty in the face of an obligation under the 14th Amendment, a scenario fully contemplated by the drafters of this pivotal Reconstruction Amendment who were very much alive to the possibility that a post-Civil War Congress might resist payment of its debts? Mindful of that scenario, and the economic and systemic calamity that it could produce, the Framers of the 14th Amendment employed language that imposed on the federal government a direct constitutional command: "the validity of the public debt, authorized by law, shall not be questioned."

The constitutional command would be rendered toothless by an obstinate Congress unwilling to carry out its duty to pay debts that have been incurred. But the 14th Amendment is the supreme law of the land and cannot be ignored or circumvented by a legislative body unwilling to pay America's bills. And because it is a law, the president, who has a constitutional duty to execute the laws, should fulfill it by invoking the Public Debt Clause. The fact that there is no clear legal mechanism for the president to do so, other than under the authority of the Public Debt Clause through the performance of his duty in Take Care Clause, does

not relieve the federal government of performing its constitutional obligation to pay the nation's debts.

While the failure of both branches—executive and legislative—to meet their constitutional responsibilities would be reprehensible, it would not begin to compare with the global financial calamity unleashed by the United States if the public debt is not paid before June 1.