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# Clearing the Air on the Debt Limit

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## Summary

As Congress considers how to reconcile rising federal debt levels and the debt limit, discussions about the role of the debt limit among Members of Congress, researchers, and the media promise to become more frequent. During debt limit episodes in the last decade, misleading or inaccurate claims have, at times, surfaced. This report clarifies five issues commonly raised in debt limit debates and explores some open questions. Some of those points in need of clarification relate to the congressional power of the purse, which stems from three closely related constitutional provisions that charge Congress with deciding how the federal government spends, taxes, and borrows.

The Bipartisan Budget Act of 2019 (BBA 2019; P.L. 116-37), enacted in August 2019, had suspended the debt limit through July 31, 2021. The limit was then raised to just over \$28.4 trillion to accommodate debt accumulated during the suspension, as specified in BBA 2019.

The statutory debt limit represents one way that Congress has exerted control over federal borrowing and debt, as it has since the beginning of the U.S. government—despite claims that limits on debt began in 1917. Before 1917, Congress typically specified the interest rates, maturities, call options, and other aspects of debt issuances. The Second Liberty Bond Act of 1917 (P.L. 65-43, 40 Stat. 288) marked a turning point in federal debt policy. The modern debt limit—meaning an overall limit on federal debt without sublimits—was established in 1939.

Some claim the U.S. government suffered technical defaults in the late 1970s. In October 1977 and April 1979, a lapse in temporary debt limit increases left federal debt above its limit for a few days. Payments continued and thus no default occurred in the ordinary sense of that term. A month after the April 1979 episode, payments to some small investors holding Treasury securities were delayed. Computer problems, rather than the debt limit, seem the proximate cause of those delays. Anticipation of changes in Federal Reserve monetary policies seems to be a more plausible explanation of market interest rate increases on the date of the first payment delay.

Others have claimed that debt limit increases were once less contentious or that debt limit modifications were typically “clean”—that is, not attached to other legislative provisions. Assessing trends in the contentiousness of the debt limit may be challenging, and even “clean” measures may have been preceded by sharp negotiations. Debt policy has often been a divisive issue since the beginning of American government. Many of the debt limit measures enacted in past decades engendered substantial division and debate. Debt, by its nature, allows government to shift the fiscal burden of current expenditures or lessen the burden of current taxes by transferring obligations to future taxpayers. Moreover, debt limit measures have been informally or formally linked with other issues for many decades.

Some commentators have pointed to a statutory provision that allows minting of platinum coins as a purported solution to the prospect of a binding debt limit. Proponents of the platinum coin strategy have encouraged the U.S. Treasury to consider minting a high denomination coin, which—according to proponents—could be deposited at the Federal Reserve and exchanged for cash for the U.S. Treasury’s general fund. The platinum coin strategy, however, would present several major policy challenges. Treasury officials have consistently rejected such proposals.

Other commentators have questioned the constitutionality of the statutory debt limit under the Public Debt Clause of the Fourteenth Amendment. The Supreme Court has examined the Public Debt Clause only once, and questions remain concerning its effect on Congress’s decision to set a dollar limit on certain debts.

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As Congress considers how to reconcile rising federal debt levels and the debt limit, discussions about the role of the debt limit among Members of Congress, researchers, and the media promise to become more frequent.<sup>1</sup> During debt limit episodes in the last decade, misleading or less than fully accurate claims have, at times, surfaced. This report provides clarifications on five common debt limit contentions.

The statutory debt limit, which has been modified 18 times since 2002, provides Congress a means of controlling federal borrowing.<sup>2</sup> The limit was reset at just over \$28.4 trillion at the beginning of August 2021, after a two-year suspension. The Bipartisan Budget Act of 2019 (BBA 2019; P.L. 116-37), enacted in August 2019, had suspended the debt limit through July 31, 2021. The limit was then raised, as specified in the BBA 2019, to accommodate debt accumulated during the suspension.<sup>3</sup>

The debt limit represents one way that Congress exerts control over fiscal policy, which stems from closely related constitutional provisions. Those provisions—the Taxing and Spending Clause (“Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”)<sup>4</sup> and the Borrowing Clause (“Power ... To borrow Money on the Credit of the United States”)<sup>5</sup>—establish the basis of the congressional power of the purse.<sup>6</sup> Congress, under its Borrowing Clause powers, has authorized the Department of the Treasury to borrow through various debt instruments to finance expenditures not covered by federal receipts.<sup>7</sup> The total amount of outstanding federal debt, with minor exceptions, is constrained by a statutory debt limit.<sup>8</sup>

When that limit is close to binding, the Treasury Secretary can invoke authorities to employ extraordinary measures to finance federal expenditures.<sup>9</sup> If expenditures persistently outrun receipts, and if the debt limit is not modified, at some point Treasury’s cash balances and borrowing capacity would be exhausted, leaving the Treasury without means to meet federal obligations.<sup>10</sup>

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<sup>1</sup> Kenneth Thomas, a retired CRS legislative attorney, contributed to a previous version of this report.

<sup>2</sup> With the use of suspensions and the extension of temporary debt limits, reasonable people might disagree on the number of modifications of the limit.

<sup>3</sup> P.L. 116-37 § 301(b).

<sup>4</sup> U.S. CONST. art. I, § 8, cl. 1

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 2.

<sup>6</sup> Congress also authorizes governmental entities to draw money from the U.S. Treasury to meet various financial obligations. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”).

<sup>7</sup> These instruments include bonds (31 U.S.C. § 3102); notes (*Id.* § 3103); certificates of indebtedness and Treasury bills (*Id.* § 3104); as well as savings bonds and savings certificates (*Id.* § 3105).

<sup>8</sup> Those categories of federal debt are constrained in other ways. For instance, debts of the Federal Financing Bank (FFB) are subject to a separate \$15 billion limit (P.L. 93-224 § 9).

<sup>9</sup> 5 U.S.C. § 8348(j) et seq. Also see CRS Insight IN10837, “*Extraordinary Measures*” and the Debt Limit, by Grant A. Driessen and Anthony A. Cilluffo.

<sup>10</sup> 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 (2011).

## Point of Clarification 1: The United States Had Debt Limits Before 1917

Federal debt has been subject to limits since the beginning of the U.S. government. Before 1917, Congress typically specified the interest rates, maturities, call options, and other aspects of debt issuances.<sup>11</sup> During wars, however, the U.S. Treasury was often granted more leeway in deciding terms offered to investors.<sup>12</sup> At times, Congress designated loan proceeds for specific purposes such as rolling over existing federal debt, helping construct an intercontinental railroad in the 1860s, or financing the Panama Canal after the turn of the 20<sup>th</sup> century. At other times, Congress authorized issuance of bonds simply to “meet the current expenses of the Government.”<sup>13</sup>

Enactment of the Second Liberty Bond Act of 1917 (P.L. 65-43, 40 Stat. 288) on September 24, 1917, marked a turning point in federal debt policy, but maintained substantial constraints on Treasury debt operations. The act imposed the first aggregate limit on federal borrowing, but retained individual limits on separate bond issues as well.<sup>14</sup>

During the 1920s and 1930s, Congress allowed the U.S. Treasury more leeway to manage federal debt in order to roll over World War I-era debt.<sup>15</sup> That helped the Treasury develop more modern means of public finance, such as using auctions to set interest rates.<sup>16</sup> In July 1939, Congress set an aggregate limit (P.L. 76-201) on federal debt, while allowing Treasury officials to decide how to manage that debt.<sup>17</sup> Thus, the modern debt limit—meaning an overall limit on federal debt without sublimits—was established in 1939.<sup>18</sup> That policy decision, like the passage of the Second Liberty Bond Act, marked one point in the evolution of how Congress controls debt policy, rather than a new assertion of authority.<sup>19</sup>

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<sup>11</sup> For a list of pre-World War I debt issuances, see U.S. Congress, National Monetary Commission, *Laws of the United States Concerning Money, Banking, and Loans, 1778-1909*, 61<sup>st</sup> Cong., 2<sup>nd</sup> sess., 1910, S.Doc. 580, pp. 766-769; [https://fraser.stlouisfed.org/scribd/?item\\_id=21954&filepath=/files/docs/historical/nmc/nmc\\_580\\_1910-pt1.pdf](https://fraser.stlouisfed.org/scribd/?item_id=21954&filepath=/files/docs/historical/nmc/nmc_580_1910-pt1.pdf).

<sup>12</sup> For details, see CRS Report RL31967, *The Debt Limit: History and Recent Increases*, by D. Andrew Austin.

<sup>13</sup> Act of March 2, 1839, 5 Stat. 323.

<sup>14</sup> See Kenneth G. Garbade, *Birth of a Market*, (Cambridge, Mass.: MIT, 2012), ch. 5.

<sup>15</sup> A debt is rolled over by issuing new debt to retire old debt.

<sup>16</sup> Garbade (2012).

<sup>17</sup> “President Urges Ending of Limit on Bonded Debt; Asks Congress to Facilitate Borrowing by Eliminating \$30,000,000,000, ‘Ceiling’ Stands By Total Debt Top \$45 Billion All Right for Now, Message Says—Yielding to Economizers is Seen,” *New York Times*, March 21, 1939. While a separate \$4 billion limit for “National Defense” series securities was introduced in 1940, in the next year federal debt was consolidated under an increased aggregate limit of \$65 billion.

<sup>18</sup> Revenue Act of November 23, 1921 (42 Stat. 227; P.L. 67-98). See also Paul Studenski and Herman E. Kroos, *Financial History of the United States*, 2<sup>nd</sup> ed. (New York: McGraw-Hill, 1963), p. 316.

<sup>19</sup> In particular, the Second Liberty Bond Act provided a broad authorization for how bond proceeds could be used: “Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, on the credit of the United States...to meet expenditures authorized for the national security and defense *and other public purposes authorized by law.*” Emphasis added.

## Point of Clarification 2: Did the Federal Government Default in the 1970s?

Some contend the federal government suffered technical defaults in the late 1970s. An examination of the historical record suggests otherwise. While the meanings of the terms “default” and “technical default” are clear in private contracts, they are less clear when applied to the federal government. Private-sector contracts normally spell out “events of default,” such as failure to pay on time as well as other lapses. Technical defaults typically refer to violations of a legal agreement—such as a loan or securities contract—not involving failure to pay.<sup>20</sup> Instead of relying on bond contracts or similar legal instruments, Treasury offering circulars govern the issuance of Treasury securities. Circulars are federal documents that can govern agency operations and procedures. The Treasury offering circulars used in the 1970s do not address failure to pay or other types of default events.<sup>21</sup> Nor does the Uniform Offering Circular, which has governed issuances of Treasury securities since 1993, reference those terms.<sup>22</sup>

Moreover, a breach of the debt limit—that is, a situation in which total federal debt subject to the limit exceeded that limit—does not necessarily imply delayed or missed payments or other failures to uphold the federal obligations. In three episodes in the late 1970s, lapses in a temporary debt limit increase left the amount of outstanding federal debt above its limit. Those lapses resulted in no payment delays, and thus were not defaults in the ordinary sense of that term. That said, Treasury officials and others viewed those lapses as close calls that raised substantial risks to the U.S. government’s financial credibility and its ability to respond to disasters and emergencies.<sup>23</sup>

### Lapse of Temporary Debt Limit Increase in October 1977

From 1954 until 1983, Congress addressed the debt limit through a series of temporary increases and infrequent permanent increases. Reliance on temporary debt limit increases implied that if Congress did not act before the temporary increase expired, the federal debt would be hundreds of billions of dollars above its statutory limit. In 1971, the permanent debt limit was raised to \$400 billion—\$100 billion over its level at the end of World War II.<sup>24</sup> The permanent limit was not raised again until December 1980. In the meantime, a series of temporary debt limit increases were enacted.

On June 30, 1977, the limit was temporarily increased to \$700 billion until September 30, 1977 (P.L. 94-334). Congress did not act until after the expiration of that temporary debt limit increase, which left total federal debt about \$300 billion above its statutory limit for two business days.

<sup>20</sup> “Lexicon: Definition of Technical Default,” *Financial Times*, n.d., at <http://lexicon.ft.com/Term?term=technical-default>.

<sup>21</sup> Federal Reserve Bank of New York, *Circular 7675: Auction of Notes and Bonds*, July 25, 1975, <https://fraser.stlouisfed.org/title/466/item/476564>.

<sup>22</sup> U.S. Treasury, *Uniform Offering Circular*, Fiscal Service Series No. 1-93, <https://www.treasurydirect.gov/instit/statreg/auctreg/CFR-2014-title31-vol2-part356.pdf>. The Uniform Offering Circular was published as a final rule on January 5, 1993 (58 *Federal Register* 411).

<sup>23</sup> Thomas E. Mann and Norman J. Ornstein, *It’s Even Worse than it Looks* (New York: Basic Books, 2012), p. 6. Also see discussion of 1979 extension of Treasury loan authority below.

<sup>24</sup> See Office of Management and Budget, *FY2022 Budget of the U.S. Government*, Historical Table 7.3, [https://www.whitehouse.gov/wp-content/uploads/2021/05/hist07z3\\_fy22.xlsx](https://www.whitehouse.gov/wp-content/uploads/2021/05/hist07z3_fy22.xlsx).

Several factors contributed to this outcome, including rising polarization on debt issues in the House<sup>25</sup> and a two-week filibuster aimed at postponing action on measures to deregulate or loosen a federal price cap on interstate transportation of natural gas.<sup>26</sup> Action on the debt limit was delayed when the House voted down an initial debt limit measure on September 19, 1977, on a 180-201 vote.<sup>27</sup> On September 28, 1977, two days before the temporary debt limit increase was to lapse, the House passed a second measure (H.R. 9290, 95<sup>th</sup> Congress) on a 213-202 vote “after some arms were twisted.”<sup>28</sup>

Meanwhile, a filibuster of a natural gas measure had tied the Senate in knots since mid-September 1977.<sup>29</sup> The Carter Administration, as part of its National Energy Plan, had proposed capping prices of “new” natural gas.<sup>30</sup> On September 16, 1977, the Senate took up a bill (S. 2104, 95<sup>th</sup> Congress) to raise and extend certain price limits on interstate gas sales. A motion to table a substitute amendment (Bentsen-Pearson) proposing to eliminate price caps on “new” natural gas markets was voted down, signaling the strength of Senate support for deregulation. Senator Metzenbaum and Senator Abourezk then submitted hundreds of amendments.<sup>31</sup> After a cloture motion was agreed to on September 23, 1977, they called up amendments and took other actions to delay action on deregulation of natural gas prices.<sup>32</sup> In particular, on Friday, September 30, 1977, Senator Abourezk stated that he would object to a unanimous consent agreement to call up the debt limit measure.<sup>33</sup>

<sup>25</sup> “Since 1973, the House minority party has systematically withdrawn support for debt limit increases.” Frances E. Lee, “Presidents and Party Teams: The Politics of Debt Limits and Executive Oversight, 2001-2013,” *Presidential Studies Quarterly*, vol. 43, no. 4, December 2013, p. 782.

<sup>26</sup> Sen. Robert Byrd, Senate majority leader at the time, later described it as “the roughest filibuster I have experienced during my fifty-plus years in the Senate.” Sen. Robert Byrd, “The Filibuster and its Consequences,” *The Hill*, May 19, 2010, <https://thehill.com/blogs/congress-blog/lawmaker-news/98681-the-filibuster-and-its-consequences-sen-robert-byrd>.

<sup>27</sup> After that vote, Speaker Tip O’Neill noted it was the “fourth consecutive year that the first time around this legislation has been defeated.” *Congressional Record*, September 19, 1977, p. 29857.

<sup>28</sup> Remarks of Rep. Delbert Latta, *Congressional Record*, October 4, 1977, p. 32104.

<sup>29</sup> See discussion of 1977 filibuster in CRS Report R44395, *Amending Senate Rules at the Start of a New Congress, 1953-1975: An Analysis with an Afterword to 2015*, by Walter J. Oleszek. For a detailed analysis, see archived CRS Report, *Complexities of the Legislative Process: A Case Study of Congressional Consideration of National Energy Legislation During the 95<sup>th</sup> Congress, 79-68 GOV*, by Stanley Bach.

<sup>30</sup> See archived CRS Issue Brief IB81020, *Natural Gas Policy Act*, by Lawrence Kumins, available to congressional clients upon request.

<sup>31</sup> See discussion of 1977 filibuster in CRS Report R44395, *Amending Senate Rules at the Start of a New Congress, 1953-1975: An Analysis with an Afterword to 2015*, by Walter J. Oleszek. At the start of the 96<sup>th</sup> Congress in 1979, the Senate agreed to modify Rule XXII concerning cloture, limiting the total time for consideration of a matter once cloture has been invoked. In particular, some actions taken in the 1977 filibuster were not available after those changes. See Bach (op. cit.) and U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Senate of the United States*, committee print, prepared by Congressional Research Service, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., December 5, 2011, S.Prt. 112-31, pp. 33-34.

<sup>32</sup> See Sen. James Abourezk, “Natural Gas and the Filibuster,” *New York Times*, October 9, 1977, <https://www.nytimes.com/1977/10/09/archives/natural-gas-and-the-filibuster.html>.

<sup>33</sup> *Congressional Record*, September 30, 1977, p. 31788.

Mr. ROBERT C. BYRD. Senators know as well as I that it has been impossible to anticipate what might occur. Anything can happen fast in this situation, and sometimes it takes many days for it to happen. But I would anticipate rollcall votes tomorrow, and I hope the Senate would find a way to reach its final decision tomorrow. But I have been hoping that for several days.

Mr. ABOUREZK. Mr. President, to save the time of Senators, and I know everybody would like to recess and go eat dinner-until tomorrow, I assume-I just want to tell the leader that I would object



That evening, however, the Senate did take a late night break to act on a House-passed measure to raise the debt limit by \$72 billion for one year.<sup>34</sup> Senator Harry Byrd, Jr., proposed an amendment providing for a six-month increase of \$52 billion instead, to which the Senate agreed.<sup>35</sup> After a short discussion, the Senate passed the bill as amended, 58-30. The next day, during a Saturday session, the Senate, without debate and by voice vote, insisted on its amendment to the House debt limit measure and requested a conference.

On Tuesday, October 4, 1977, the House agreed to the Senate amendment to the original House measure (H.R. 9290, 95<sup>th</sup> Congress). The floor manager, Representative Bernice Sisk, conveyed the recommendation of Ways & Means Chairman Al Ullman to adopt the Senate amendment, rather than going to a conference committee, given that it was “imperative” to restore normal operations at the U.S. Treasury. Sisk lamented that this was necessary “due to the circumstances under which the other body has conducted its proceedings for the past two weeks.” President Carter then signed the bill into law (P.L. 95-120) on the same day.<sup>36</sup>

### *Treasury Operations During the 1977 Debt Limit Lapse*

The lapse in the temporary debt limit resulted in a level of federal debt that for two business days stood \$300 billion above the statutory limit of \$400 billion. During those days, Treasury could not borrow, though it had about \$19 billion in cash reserves that sufficed to meet federal obligations for a few days.<sup>37</sup> The lapse disrupted Treasury’s operations by forcing suspensions of Treasury auctions and savings bond sales scheduled for the first few days of October 1977.<sup>38</sup>

The lapse also prompted an emergency loan from the Federal Reserve. A World War II era exception to the ban on direct purchases of Treasury securities by Federal Reserve banks permitted loans up to \$5 billion.<sup>39</sup> On September 30, 1977, the Federal Reserve’s Federal Open Market Committee voted unanimously to purchase a \$2.5 billion certificate of indebtedness from the Treasury, thus providing an equivalent amount of cash to Treasury. The certificate was retired on October 4, 1977, when the debt limit was again raised.<sup>40</sup>

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to bringing up any of those bills, and I would object to routine morning business being conducted.

Mr. LEAHY. Object to what?

Mr. ABOUREZK. Object to routine morning business being conducted.

Mr. ROBERT C. BYRD. Perhaps this could be satisfactory to the Senator. We could get unanimous consent to take up the debt limit extension this evening and vote on it the first thing tomorrow.

Mr. ABOUREZK. I would object.

<sup>34</sup> Sen. Abourezk gave no explanation of why he raised no objection to consideration of the debt limit measure. For a description of Senate and White House discussions, see George Lardner Jr. and Spencer Rich, “Bitterness and Resentment,” *Washington Post*, October 5, 1977, <https://www.washingtonpost.com/archive/politics/1977/10/05/bitterness-and-resentment/8c1b4fa5-f514-4682-9edc-a6fc84f6bdc6/>.

<sup>35</sup> *Congressional Record*, September 30, 1977, pp. 31789-31790.

<sup>36</sup> Remarks of Rep. Bernice F. Sisk, *Congressional Record*, October 4, 1977, p. 32104.

<sup>37</sup> Remark of House Ways & Means Chairman Al Ullman, *Congressional Record*, October 4, 1977, p. 32105.

<sup>38</sup> *Wall Street Journal*, “Expired Debt Ceiling Sparks Juggling Act By U.S. Treasury,” October 3, 1977, p. 31. Also see U.S. Treasury, press release B-472, October 1, 1977, <https://fraser.stlouisfed.org/title/press-releases-united-states-department-treasury-6111/volume-208-587051> (p. 652 of pdf).

<sup>39</sup> Kenneth D. Garbade, *Direct Purchases of U.S. Treasury Securities by Federal Reserve Banks*, Federal Reserve Bank of New York Staff Report no. 684, August 2014, [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr684.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr684.pdf).

<sup>40</sup> Federal Reserve System, Federal Open Market Committee, *Record of Policy Actions: October 17-18 Meetings*,



No federal payments were missed or delayed because Treasury’s cash balances were high enough to cover federal financial obligations for the two days during which it was unable to borrow. Treasury officials responsible for issuing that debt had acted within their statutory authorities. No contractual obligations were breached. Furthermore, no credit rating agency then altered its assessment of federal debt. Given that a technical default is normally defined as “violation of a financial covenant in a loan agreement”<sup>41</sup> and that Treasury securities were not and are not governed by such financial covenants, how the October 1977 incident could be classified as a technical default—as some have asserted—is unclear.<sup>42</sup>

Financial markets did not appear to react strongly to the violation of the debt limit.<sup>43</sup> Newspaper coverage of the debt limit landed in the back of business sections, rather than on front pages.<sup>44</sup> Given that both the House and Senate had approved measures to increase the debt limit, it may have seemed clear that the lapse would be short. Treasury Secretary Michael Blumenthal, in an October 3, 1977, Cabinet meeting, outlined “Treasury’s plans to borrow money in the absence of Congressional action on legislation to raise the debt limit,” but noted no financial market disruptions according to minutes of that meeting.<sup>45</sup>

## Incidents in 1978 and 1979

Another temporary debt limit increase expired on Tuesday, July 31, 1978, leaving federal debt above its statutory limit. While the House had passed a debt limit increase on July 19, 1978,<sup>46</sup> the Senate did not approve that measure until Thursday, August 2, 1978. President Carter signed it into law the following day (P.L. 95-333).<sup>47</sup> That lapse left the U.S. Treasury unable to issue securities to borrow funds during three business days.

The August 1978 act raised the temporary part of the debt limit to \$398 billion through Saturday, March 31, 1979. On March 27, 1979, the Senate passed on a 62-33 vote a bill (H.R. 2534, 96<sup>th</sup> Congress) to increase the debt limit temporarily. That bill included an amendment to require the President to submit a plan for a balanced budget in addition to the ordinary budget submission. The House did not take up and approve the Senate measure until Monday, April 2, 1979.<sup>48</sup> President Carter signed the bill the same day (H.R. 2534, P.L. 96-5).<sup>49</sup>

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November 17, 1977, pp. 33-34, <https://www.federalreserve.gov/monetarypolicy/files/fomcropa19771018.pdf>.

<sup>41</sup> Corporate Finance Institute, “What is a Technical Default?” webpage, <https://corporatefinanceinstitute.com/resources/knowledge/credit/technical-default/>.

<sup>42</sup> Thomas E. Mann and Norman J. Ornstein, *It’s Even Worse than it Looks* (New York: Basic Books, 2012), p. 6.

<sup>43</sup> For instance, the 3-month Treasury bill rate rose 6 basis points on September 30, 1977, and another 6 basis points the following Monday. Short-term Treasury rates remained steady for the rest of the year. See Federal Reserve Bank of St. Louis, FRED website, <https://fred.stlouisfed.org/graph/?g=GlFh>. 100 basis points equals 1 percentage point.

<sup>44</sup> For instance, see *Washington Post*, “Debt Limit Up, Savings Bond Sales Resumed,” October 6, 1977, p. 77; and *New York Times*, “U.S. Debt Ceiling Rise is Approved by House,” October 5, 1977, p. D7.

<sup>45</sup> Executive Office of the President, “Minutes of the Cabinet Meeting,” October 3, 1977, p. 4 (p. 80 of pdf), [https://www.jimmycarterlibrary.gov/digital\\_library/sso/148878/45/SSO\\_148878\\_045\\_01.pdf](https://www.jimmycarterlibrary.gov/digital_library/sso/148878/45/SSO_148878_045_01.pdf).

<sup>46</sup> The House passed H.R. 13385 on a 205-202 vote.

<sup>47</sup> Senate leadership had tentatively planned to take up the debt limit measure on August 1, 1978, but did not do so. Remarks of Senate Majority Leader Robert Byrd, *Congressional Record*, p. 23442, July 31, 1978. The Senate approved H.R. 13385 on a 62-31 vote.

<sup>48</sup> Rep. Richard Bolling stated that “I think we should have acted on this last week. But we did a check, and we found that we would be badly defeated last week. It was the better part of wisdom to postpone it, even though we knew there would be a crisis.” *Congressional Record*, April 2, 1979, p. 6892.

<sup>49</sup> The House passed H.Res. 183 (96<sup>th</sup> Congress), a rule to agree to Senate amendments, on a 209-165 vote.

Due to those delays, the debt limit therefore again reverted to its permanent level of \$400 billion. Prior to the House taking action, Treasury officials had briefed some Members that Social Security and other checks set to be mailed April 3, 1979, might not clear and that \$3.3 billion in maturing Treasury bills could not be redeemed without an increase in the debt limit, which would allow a resumption of the Treasury's capacity to issue debt.<sup>50</sup> Media reports noted that the U.S. Treasury had called in tax receipts held in commercial banks, arranged for a Federal Reserve loan, and made plans to suspend interest payments to Social Security and Civil Service trust funds.<sup>51</sup>

In a September 1979 report, the General Accounting Office (GAO; now the Government Accountability Office) detailed disruptions in Treasury operations and summarized costs due to forgone interest income, cancelled securities sales, and disruptions of government programs. The report also criticized the use of temporary debt limit increases.<sup>52</sup> The Comptroller General warned that:

The Government has never defaulted on any of its securities because cash has been available to redeem them upon maturity or demand. It is unlikely that the Congress would intentionally delay action on public debt legislation long enough for a default to result. Nonetheless, the possibility exists.<sup>53</sup>

## Payment Delays in Spring 1979

Less than four weeks after the temporary increase in the debt limit (P.L. 96-5) was enacted on April 2, 1979, problems in computerizing some Treasury debt operations delayed interest and principal payments to some small investors holding Treasury securities.<sup>54</sup> Some contended this constituted a “mini-default.” A closer examination of those events and market reactions suggests a different conclusion. In particular, market movements in interest rates on critical dates seem to track anticipated changes in the Federal Reserve's monetary stance.

In late April and early May 1979, about 4,000 Treasury checks for interest payments and security redemptions were delayed due to back-office technical and organizational problems, in part related to a reorganization of Treasury debt operations.<sup>55</sup> Delays affected payments estimated at \$122 million, with foregone interest totaling an estimated \$125,000.<sup>56</sup> Those amounts represented a small share of the market in Treasury securities; for instance, a few days before those delays,

<sup>50</sup> Remarks of Speaker Tip O'Neill, *Congressional Record*, April 2, 1979, p. 6891.

<sup>51</sup> John H. Allan, “Delay on U.S. Debt Ceiling Hurts Treasury and Financial Markets,” *New York Times*, March 31, 1979, p. 1.

<sup>52</sup> GAO, *A New Approach to the Public Debt Legislation Should Be Considered*, FGMSD-79-58, September 7, 1979, <https://www.gao.gov/products/fgmsd-79-58>.

<sup>53</sup> Testimony of Elmer Staats, Comptroller General, in U.S. Congress, House Committee on Ways and Means, *Increase in Public Debt Ceiling*, hearing, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., September 11, 1979.

<sup>54</sup> Terry L. Zivney and Richard D. Marcus, “The Day the United States Defaulted on Treasury Bills,” *Financial Review*, vol. 24 (1989), issue 3, pp. 475-489. Also see Edward D. Kleinbard, “The Debt-Ceiling Crisis Is Real,” *New York Times*, August 7, 2017, <https://www.nytimes.com/2017/08/07/opinion/debt-ceiling-congress-default-real.html>. More recently, see Mark Zandi and Bernard Yaros, “Playing a Dangerous Game With the Debt Limit,” working paper, September 21, 2021, <https://www.moodyanalytics.com/-/media/article/2021/playing-a-dangerous-game-with-the-debt-limit.pdf>.

<sup>55</sup> For details, see CRS Report R44704, *Has the U.S. Government Ever “Defaulted”?*, by D. Andrew Austin.

<sup>56</sup> Zivney and Marcus, op. cit.

the U.S. Treasury rolled over \$6 billion in debt.<sup>57</sup> The federal government may have reached a settlement with affected investors.<sup>58</sup>

Those payment delays were also blamed for increasing federal borrowing costs.<sup>59</sup> Market interest rate movements on the date of the first payment delay—April 26, 1979—were more plausibly affected by release of higher than expected inflation estimates<sup>60</sup> and the anticipation of Federal Reserve responses to significant increases in money supply measures.<sup>61</sup> At that time, the Federal Reserve’s monetary policy responses targeted two money supply measures.<sup>62</sup> As anticipated in the financial press, the Federal Open Markets Committee in its April 27, 1979, conference call decided to increase the federal funds rate.<sup>63</sup> As such, payment delays that were not reported until a week and a half later seem a less likely explanation.<sup>64</sup>

## Responses to Debt Limit Lapses in the 1970s

The 1977, 1978, and 1979 incidents prompted some House Members to explore ways to integrate consideration of debt limit measures with legislative action on budget resolutions. Although financial market reactions to those incidents appear to have been muted, many Members were nonetheless concerned about risks to federal credit and the financial system. The efforts of those House Members culminated in a change in the House rules, commonly called the Gephardt Rule, after Representative Richard Gephardt, who helped craft it.<sup>65</sup> The rule linked House agreement on a budget resolution to automatic enrollment of a bill to increase the debt limit to a level considered “appropriate” in that budget resolution.<sup>66</sup>

Other Members sought to curtail the Treasury’s authority to borrow from the Federal Reserve, which had been used briefly during the 1977 and 1979 lapses, as a means of tightening the

<sup>57</sup> “Treasury Bill Auction to Reduce U.S. Debt by About \$200 Million,” *Wall Street Journal*, April 5, 1979.

<sup>58</sup> A class action suit was dismissed with prejudice on May 12, 1980, which barred refiling of the claim. The resolution of the suit is unclear because case records were destroyed on November 28, 2011.

<sup>59</sup> Kleinbard, *op. cit.* and Zivney and Marcus, *op. cit.*

<sup>60</sup> John H. Allen, “Price of Bonds Decline Sharply,” *New York Times*, p. D9, April 27, 1979. One trader was quoted to say “the Consumer Price Index Number set the tone.”

<sup>61</sup> “Big Boost in Money Supply May Put Fed Under Heavy Pressure to Tighten Credit,” *Wall Street Journal*, April 27, 1979, p. 32. The Federal Reserve regularly releases estimates of the money supply. At the time, the Federal Reserve was evolving towards a monetary policy focused on money supply measures M1 (cash and checking accounts) and M2 (M1 plus certain short-term deposits). See Chan Huh, “Interest Rate Smooth and Inflation, Then and Now,” Federal Reserve Bank of San Francisco Weekly Letter, no. 95-34, October 13, 1995, <http://www.frbsf.org/economic-research/files/el1995-34.pdf>.

<sup>62</sup> Federal Reserve, “Record of Policy Actions of the Federal Open Market Committee,” *Federal Reserve Bulletin*, May 1979, <https://fraser.stlouisfed.org/title/federal-reserve-bulletin-62/may-1979-20453/record-policy-actions-federal-open-market-committee-74471>.

<sup>63</sup> Federal Reserve Chairman G. William Miller summarized the discussion saying, “I hope that will be agreeable to everyone because this is a close one to call. I think everyone had a persuasive argument on both sides [but] the differences in terms of what really will be done are fairly narrow. And that being so, my tendency would be to follow the directive as we’ve written it, which the [Open Markets] Desk would interpret as meaning they should be moving [the funds rate] up to 10-1/4 percent.” Federal Reserve, Federal Open Markets Committee, April 27, 1979, conference call transcript, <https://www.federalreserve.gov/monetarypolicy/files/FOMC19790427confcall.pdf>.

<sup>64</sup> Edward P. Foldessy, “Treasury Hits Delays in Mailing Checks to the Holders of its Maturing Securities,” *Wall Street Journal*, May 6, 1979, p. 8.

<sup>65</sup> Rep. Richard “Dick” Gephardt served in the House from 1977 through 2005.

<sup>66</sup> See CRS Report RL31913, *Debt Limit Legislation: The House “Gephardt Rule”*, by Bill Heniff Jr.

congressional power of the purse.<sup>67</sup> While Congress in 1979 extended that authority for two years, it was not used again after the April 1979 temporary debt limit lapse described above.

### *Muted Reactions in Financial Markets*

The muted financial market responses to lapses of temporary debt limit increases may reflect three factors. First, in the 1977, 1978, and 1979 incidents, both chambers of Congress had approved a debt limit measure and a rapid reconciliation of differences between the chamber versions seemed imminent.

Second, financial markets were simpler. Wall Street investment banks were typically structured as partnerships, rather than public companies, and therefore had less capacity and incentive to take on significant risks. Wall Street brokerage fees had only recently been deregulated, and London financial markets—a center for Eurodollar transactions—would not see major deregulation until 1984. Moreover, derivatives markets, while rapidly growing in the 1970s, were still an infant industry.<sup>68</sup> By contrast, the prospect of a debt limit impasse in 2011 generated serious concerns given the prevalence of high-leverage levels and the scale of the shadow banking system that has relied to a large extent on Treasury securities.<sup>69</sup>

Third, as discussed below, the Federal Reserve then had authority to lend the U.S. Treasury up to \$5 billion on short notice, which may have provided financial markets with a measure of reassurance.<sup>70</sup>

Nonetheless, the three debt limit lapses and the resulting proximate risk of default raised concerns. Treasury Secretary Miller testified that

I know that this committee has made every effort in the past to assure timely action by Congress on the debt limit. Yes, the record of the past two years has not been good. During this period debt limit legislation was considered by Congress four times. On three occasions action was not taken before the expiration date, and the Treasury was unable to borrow until the Congress acted two or three days later. Significant costs were incurred by the Treasury, and extraordinary measures were required to prevent the Government from going into default.<sup>71</sup>

<sup>67</sup> George Selgin, “Ron Paul and Our Big, Fat Fed,” Cato Institute weblog, March 15, 2021, <https://www.cato.org/blog/ron-paul-our-big-fat-fed>.

<sup>68</sup> Average daily repo (repurchase agreement) volumes were just under \$8 billion in 1977, compared to over \$4 trillion in 2020. See Kenneth D. Garbade, “The Evolution of Repo Contracting Conventions in the 1980s,” *Federal Reserve Bank of New York Economic Policy Review*, vol. 12, no. 1 (May 2006), <https://www.newyorkfed.org/research/epr/06v12n1/0605garb.html>. Also see Securities Industry and Financial Markets Association (SIFMA), “US Repo Market Fact Sheet,” webpage, January 19, 2021, <https://www.sifma.org/resources/research/us-repo-market-fact-sheet/>.

<sup>69</sup> Financial Services Forum, letter to the U.S. President and Members of Congress, July 28, 2011, [https://web.archive.org/web/20120514130716/http://www.financialservicesforum.org/attachments/365\\_20110728\\_fsf\\_letter\\_to\\_obama\\_and\\_congress.pdf](https://web.archive.org/web/20120514130716/http://www.financialservicesforum.org/attachments/365_20110728_fsf_letter_to_obama_and_congress.pdf). The letter was signed by the heads of 14 major financial institutions. Also see Eric Dash and Nelson D. Schwartz, “A Mobilization in Washington by Wall Street,” *New York Times*, July 30, 2011, <https://www.nytimes.com/2011/07/31/business/wall-street-mobilizes-to-raise-debt-ceiling.html>.

<sup>70</sup> Kenneth D. Garbade, *Direct Purchases of U.S. Treasury Securities by Federal Reserve Banks*, Federal Reserve Bank of New York, Staff Report no. 684, August 2014, [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr684.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr684.pdf).

<sup>71</sup> Testimony of Treasury Secretary G. William Miller, in U.S. Congress, Senate Committee on Finance, Subcommittee on Taxation and Debt Management, hearing, *Expiring \$830 Billion Public Debt Limit*, September 11, 1979, 116<sup>th</sup> Cong., 1<sup>st</sup> sess., <https://archive.org/details/SecTreasAnnReport1979/page/n335/mode/2up>.

## ***Congressional Responses to the Lapses***

The episodes in the late 1970s in which federal debt exceeded its limit for a few days spurred conflicting congressional responses. Some sought to strengthen Congress's control over debt policy by limiting Treasury's ability to obtain emergency loans, which had been used in two of those episodes. Others sought to avoid impasses that led to those lapses by integrating debt limit decisions into a broader budgetary process. Those trends may parallel observations of some political scientists that Congress became a more polarized institution over the course of the 1970s.<sup>72</sup>

### ***Congress Extends and Limits Fed Authority to Lend to Treasury in 1979***

The U.S. Treasury, as noted above, obtained emergency loans from the Federal Reserve in 1977 and 1979. In a 1979 hearing, a Federal Reserve governor and a Treasury official<sup>73</sup> stressed the utility of a lending facility available in an emergency.<sup>74</sup> A measure (H.R. 3404, 96<sup>th</sup> Congress) to extend that authority for five years, however, was voted down in the House.<sup>75</sup> Opponents objected to the increase in the loan limit from \$5 billion to \$15 billion and argued the loan authority weakened congressional control of fiscal policy.<sup>76</sup> Supporters cited the need to respond to major emergencies.<sup>77</sup> Two weeks later the House passed an amended version that extended the authority

<sup>72</sup> Frances E. Lee, "Presidents and Party Teams: The Politics of Debt Limits and Executive Oversight, 2001-2013," *Presidential Studies Quarterly*, vol. 43, no. 4 (December 2013), pp. 775-791.

<sup>73</sup> Testimony of J. Charles Partee and of Paul H. Taylor, Assistant Treasury Secretary, in U.S. Congress, House Committee on Banking, Finance, and Urban Affairs, Subcommittee on Domestic Monetary Policy, hearing, *Federal Reserve-Treasury Draw*, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., March 5, 1979, Serial No. 96-4. Partee stated

Under any future conditions of national emergency occasioned by war or natural disaster, the Treasury might again face unanticipated needs for immediate funds at a time when securities markets are in general disarray. While the Congress probably would be in a position to reestablish an emergency borrowing authority quickly in such circumstances, it seems far more efficient to maintain the existing standby direct borrowing procedures in order to assure the Treasury the capacity to finance for at least a limited period—without the necessity of such congressional action.

<sup>74</sup> On March 28, 1979, the day after the Senate agreed to an amendment to a House-passed version of a debt limit measure rather than approving the House-passed bill without changes, part of a nuclear reactor core melted down at the Three Mile Island power plant near Harrisburg, PA. One House Member seemed to allude to the incident in the May 7, 1979, debate over extending loan authority discussed below.

<sup>75</sup> H.R. 3404 was considered on May 7, 1979, under the suspension of the rules procedure, requiring a two-thirds majority, but obtained less than a majority (175-195).

<sup>76</sup> On May 7, 1979, Rep. Ron Paul contended

The last two times, as was stated, it was used to finance the debt more or less skirting around the Congress, because we had not as of yet raised the debt limit. I do not think that it is wise to permit this back door financing of the national debt. I believe that this authority can act as an off-budget item. Theoretically, even though in the past I admit it has not been used this way, the Government could borrow \$15 billion, keep it for 6 months, pay it off 1 day and review it the next. This would be \$15 billion out of the budgetary controls of the Congress.

*Congressional Record*, May 7, 1979, p. 10082.

<sup>77</sup> On May 7, 1979, Rep. Parren J. Mitchell seemed to allude to the Three Mile Island meltdown:

When the authority was first established we thought of what would be necessary to cover a real catastrophic emergency in this country. If it was \$5 billion way back then, when you consider the cost of inflation, it has now to be at least triple that. By way of illustration, God forbid we should ever have a series of nuclear accidents in this country, let us hope that would never happen, but in the event it does, we do not know what it would cost to deal with that emergency.

*Congressional Record*, May 7, 1979, p. 10082.



for two, rather than five, years and retained a \$5 billion limit.<sup>78</sup> The amended version also subjected any loan to Treasury to the overall debt ceiling, thus limiting its usefulness to Treasury in avoiding a binding debt limit.<sup>79</sup> Uses of the loan authority during debt limit episodes were a central concern during the debate.<sup>80</sup> The enacted measure (P.L. 96-18) extended the loan authority until May 1981, when it lapsed.<sup>81</sup> The loan authority was not used after the 1979 renewal.<sup>82</sup>

### ***House Explores Tying Debt Limit to Congressional Budget Process: the “Gephardt Rule”***

In the winter following the 1977 debt limit lapse, the House Ways & Means Committee reported a measure to increase the debt limit (H.R. 11180, 95<sup>th</sup> Congress) that included a provision to set the debt limit at the level established in the concurrent budget resolution.<sup>83</sup> That provision, however, raised constitutional concerns because the President plays no role in concurrent resolutions.<sup>84</sup> The full House considered the bill on March 7, 1978, and agreed to an amendment stripping the provision to link the debt limit to the budget resolution. The bill subsequently failed on final passage, 165-248, as some Members no longer supported the measure without this language.

In April and May 1978, a House Rules subcommittee held three hearings to consider how to tie the debt limit to revenue and spending decisions reflected in the budgetary framework as expressed in the concurrent budget resolution. The subcommittee chair acknowledged that “the concurrent budget resolution may not be an appropriate method to replace the present statutory system of setting the debt limit” due to procedural and constitutional obstacles.<sup>85</sup> Several legal experts argued that only a law could modify the debt limit because it had been established in law.<sup>86</sup>

<sup>78</sup> *Congressional Record*, May 23, 1979, pp. 12512-12519.

<sup>79</sup> *Congressional Record*, May 23, 1979, p. 12515.

<sup>80</sup> Rep. Robert Bauman stated “This has been Treasury emergency authority since 1942, and has only been used sparingly. But, it has been used, as I understand it, to finance getting around the public debt when the Treasury was up against an expiration of the debt limit. That, in fact, skirts the Congress and allows the Treasury a leeway that I do not think they ought to have.” *Congressional Record*, May 23, 1979, p. 12513.

<sup>81</sup> The version of H.R. 3404 reported by the House Banking Committee proposed allowing the Fed to make emergency loans of up to \$15 billion to the U.S. Treasury in the form of Treasury securities, which could then be sold on the open market to obtain cash. In the enacted version (P.L. 96-18), the Federal Reserve loans of securities would count in the debt ceiling.

<sup>82</sup> Garbade (2014), p. 21.

<sup>83</sup> House Committee on Ways and Means, H.Rept. 95-923 (Part I), 1978. In addition to setting a new temporary debt level for the coming year, H.R. 11180 “would tie the periodic change in the debt limit to the limit specified in the most recently approved concurrent resolution on the budget.” Also see remarks of Al Ullman, *Congressional Record*, February 28, 1978, p. 5034.

<sup>84</sup> Summary offered by Rep. Joe Moakley, *Congressional Record*, March 7, 1978, pp. 5584-5586.

<sup>85</sup> Remarks of Subcommittee Chairman Gillis Long, Subcommittee on the Rules and Organization of the House, *Hearings on Congressional Procedures*, 95<sup>th</sup> Congress, 2<sup>nd</sup> sess., April 26, May 3, May 4, 1978, at p. 2, [https://books.google.com/books?id=b980DHTUXoQC&newbks=1&newbks\\_redir=0](https://books.google.com/books?id=b980DHTUXoQC&newbks=1&newbks_redir=0). Rep. Gillis Long also headed the House Democratic Caucus at the time. Rep. Dick Gephardt succeeded him in that post.

<sup>86</sup> For instance, Patricia Wald, then Assistant Attorney General and later Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, wrote that “[i]n our view, Art. I, § 7 of the Constitution requires any Congressional action having the force of law to be submitted to the President for his approval or veto. Under this bill, Congress would, in effect, assert the power to amend [31 U.S.C.] § 757b without Presidential participation by making the key substantive provision of that section subject to determination by a concurrent resolution.” *Ibid.*, pp. 72-73.

An alternate approach put forth was to have a joint resolution incorporating the debt limit level set in the concurrent budget resolution immediately follow agreement on that budget resolution.<sup>87</sup> Some Members of the House noted that the Senate could attach nongermane amendments to such a debt limit measure.<sup>88</sup> Some Members were also concerned how new debt limit approaches would interact with the congressional budget process, which was then only a few years old.

On September 26, 1979, the House took a more limited path as part of a measure (H.R. 5369; P.L. 96-78) to create another temporary increase in the debt limit.<sup>89</sup> The act established Rule XLIX of the Standing Rules of the House of Representatives, known as the “Gephardt rule,” which instructed the House Clerk to send the Senate an engrossed joint resolution when the House approved a budget resolution. Over time, that rule has been modified, repealed, and reinstated.<sup>90</sup>

Proponents of the rule have argued that as debt is the arithmetical result of spending and revenue trajectories, debt limit policy should be linked to the congressional budgetary process that sets levels of spending and revenues deemed appropriate.<sup>91</sup> Opponents have argued that the rule allows Members to avoid a difficult vote and thus undermines fiscal accountability.<sup>92</sup>

## Point of Clarification 3: Were “Clean” or Less Contentious Debt Limit Increases Once the Norm?

Some commentators have claimed that contentious debt limit episodes are a recent phenomenon or that “clean” debt limit increases were once the norm.<sup>93</sup> Debt policy, however, has been a divisive issue since the beginning of American government and has often been linked with other policy decisions.<sup>94</sup> Debt, by its nature, allows government to shift the fiscal burden of current

<sup>87</sup> Statement of Rep. Robert Giaimo, Subcommittee on the Rules and Organization of the House, *Hearings on Congressional Procedures*, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., April 26, 1978, at pp. 3-5, [https://books.google.com/books?id=b980DHTUXoQC&newbks=1&newbks\\_redir=0](https://books.google.com/books?id=b980DHTUXoQC&newbks=1&newbks_redir=0).

<sup>88</sup> Rep. Claude Pepper—also a former Senator—noted that “when anything is before the Senate, everything is before the Senate.” *Ibid.*, p. 9. Previously, Rep. Barber Conable stated “The so-called limit has done nothing to impede the continual upward march of the national debt to unprecedented levels. When the limit begins to bind, the House simply raises it. Then in the other body, where the word ‘germane’ is not part of the legislative vocabulary, costly spending bills have frequently added to this veto-proof measure. Over the years, the debt limit bills have probably cost us far more than they have ever saved.” *Congressional Record*, March 7, 1977, p. 5876.

<sup>89</sup> The House passed the bill on a 219-198 vote.

<sup>90</sup> For subsequent developments, see CRS Report RL31913, *Debt Limit Legislation: The House “Gephardt Rule”*, by Bill Heniff Jr.

<sup>91</sup> Rep. Gillis Long said “Everyone is aware that the committee bill also provides for a new procedure developed by the gentleman from Missouri (Mr. GEPHARDT) whereby the debt ceiling in the future may be established through the congressional budget process. Various versions of this procedure have been under discussion for a long time. Through persistence, lengthy consultation, brainpower, and creative imagination, the gentleman has refined a procedure that I hope we all can embrace.” *Congressional Record*, September 26, 1979, p. 26338.

<sup>92</sup> Rep. John Ashbrook, opposed the measure, arguing that “we should not abolish separate consideration on the debt limit. In the consideration of the debt limit bills, our attention is focused solely on the amount of debt this country has accumulated. We need to do this from time to time. In budget resolutions, the debt limit figure tends to disappear in a morass of other figures.” *Congressional Record*, September 26, 1979, p. 26339.

<sup>93</sup> Simon Johnson, “The Debt Ceiling and Playing with Fire,” *New York Times*, January 24, 2013. “In the past, the potential for confusion around binding debt-ceiling limits was well understood. The debt ceiling was therefore raised without too much fuss, and the party in opposition would typically object in principle but not put up a real fight.”

<sup>94</sup> Norman K. Risjord, “The Compromise of 1790: New Evidence on the Dinner Table Bargain,” *William and Mary Quarterly*, vol. 33, no. 2 (1976), pp. 309-314, <https://www.jstor.org/stable/1922168>. Thomas Jefferson, before that compromise on the assumption of state debts and the location of the national capitol was reached, wrote to George



expenditures or lessen the burden of current taxes by transferring obligations to future taxpayers.<sup>95</sup> Shifting fiscal burdens into the future through debt management is a powerful and potentially beneficial tool of fiscal policy, but can also become a means of avoiding fiscal responsibility in the present. Debt policy discussions, therefore, often become contentious.

Since 1978, 27 of a total of 59 debt limit modifications were “clean”—meaning that a debt limit measure was not linked to other provisions.<sup>96</sup> That delineation, however, is imperfect. In some cases, a debt limit provision might have been attached to another measure that acted as a convenient legislative vehicle for passage. In other cases, combining a debt limit modification with other provisions may have resulted from a broad fiscal compromise among policymakers. In addition, a debt limit modification enacted as a standalone measure could have resulted from a policy compromise involving other issues. For instance, on February 15, 2014, a “clean” debt limit suspension (P.L. 113-83) was enacted. On the same afternoon, another measure (P.L. 113-82) was enacted to reverse certain reductions in cost-of-living adjustments to working-age military retiree pensions that had been included in the Bipartisan Budget Act of 2013 (BBA2013; P.L. 113-67). Although nothing formally linked the two measures, their passage in quick succession may have reflected a fiscal compromise.

Debt limit measures have been informally or formally linked with other issues for many decades.<sup>97</sup> In 1939, when Congress was considering creating what became the modern debt limit, Senator George Norris offered an amendment to allow the Tennessee Valley Authority (TVA) to use bonds to consummate purchases of some power plants. Once a separate TVA measure was agreed to, the amendment to the debt limit measure (H.R. 5748, 76<sup>th</sup> Congress) was withdrawn.<sup>98</sup> In 1957, Congress declined to raise the limit until the following February, in part to “compel more economy of efficiency, better management of money and manpower in the defense program.”<sup>99</sup>

In the 1960s, debt limit debates provided a forum for those concerned about the expansion of federal spending due to federal credit guarantees, new social insurance programs, and the escalation of the Vietnam War.<sup>100</sup> After a June 1960 debt limit increase (P.L. 86-564) that included various tax provisions, however, unrelated matters were not attached to debt limit measures during Senate floor consideration for the rest of the 1960s.<sup>101</sup>

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Mason that “[i]n general I think it necessary to give as well as take in a government like ours.” (letter of June 13, 1790, <https://founders.archives.gov/documents/Jefferson/01-16-02-0295>). Also see, L.-M. Miranda and Jeremy McCarter, “The Room Where it Happens,” *Hamilton: the Revolution*, (New York: Hachette, 2016), pp. 186-190.

<sup>95</sup> Or, alternatively, to future program beneficiaries affected by later spending reductions.

<sup>96</sup> See CRS Report R41814, *Votes on Measures to Adjust the Statutory Debt Limit, 1978 to Present*, by Justin Murray.

<sup>97</sup> Linda K. Kowalck and Lance T. LeLoup, “Congress and the Politics of Statutory Debt Limitation,” *Public Administration Review*, vol. 53, no. 1 (January-February 1993), pp. 14-27.

<sup>98</sup> Senate debate, *Congressional Record*, vol. 84, part 6 (June 1, 1939), pp. 6480, 6497-6501; part 9 (July 14, 1939), pp. 9141, 9164.

<sup>99</sup> Rep. George H. Mahon, “Battle of the Budget in Defense Program,” Extension of Remarks, *Congressional Record*, vol. 103 (August 30, 1957), pp. H16805-H16809.

<sup>100</sup> For example, a legislative history of temporary debt limit increases in 1967 runs 1,195 pages. See U.S. Congress, House Committee on Ways and Means, *Legislative History of H.R. 4578 to Provide a Temporary Increase in the Public Debt Limit (P.L. 90-3) and H.R. 10867 to Increase the Public Debt Limit Set Forth in Sec. 21 of the Second Liberty Bond Act*, committee print, prepared by Staff of the Committee on Ways and Means, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., 1967, H. 1046 (Washington: GPO, 1967).

<sup>101</sup> Archived CRS memorandum DL751597, *Non-Germane Amendments Attached to Debt Ceiling Bills*, June 12, 1975, by Paul S. Rundquist. Unified partisan control of both chambers of Congress from 1961 through 1969 and a budget surplus in FY1960 may explain the absence of nongermane amendments to debt limit bills in that period. Unrelated provisions might have been combined with debt limit measures through other means.

In the early 1970s, debt limit measures were embroiled in debates over campaign finance reform and in congressional conflicts with the Nixon and Ford Administrations.<sup>102</sup> Senate amendments to debt limit measures increased Social Security benefits in 1971, 1972, and 1973. In 1973, proposed amendments to provide federal campaign financing, to cut off funding for bombing in Cambodia, and to limit presidential impoundment of funds were all rejected.<sup>103</sup>

In the mid-1980s, a group of Senators attached a system of budget constraints and deficit targets, which became known as the Gramm-Rudman-Hollings framework, to a debt limit provision after “partisan and sometimes testy wrangling.”<sup>104</sup>

Debates over what provisions should accompany a debt limit increase in late 1995 and early 1996 also were contentious. In 1995, some Members called for spending reductions of about \$245 billion over seven years as a condition for raising the debt limit.<sup>105</sup> After a related lapse in appropriations and a veto of one debt limit bill (H.R. 2586, 104<sup>th</sup> Congress),<sup>106</sup> the debt limit was raised on March 29, 1996.<sup>107</sup> The debt limit episode of 1995-1996 was described by GAO as a “crisis.”<sup>108</sup>

## Point of Clarification 4: Could a Platinum Coin Avoid a Binding Debt Limit?

Some commentators have pointed to a statutory provision<sup>109</sup> that allows minting of platinum coins as a purported solution to the prospect of a binding debt limit. Unlike other provisions governing coinage, the face values of platinum coins are not limited. That provision, according to its author, was introduced to give the U.S. Treasury flexibility in minting relatively low-denomination platinum coins for collectors.<sup>110</sup>

<sup>102</sup> Ibid. Debt limit bills were H.R. 4690 (1971), H.R. 15390 (1972), and H.R. 8410 (1973). Also see Congressional Quarterly, *Congress and the Nation*, vol. IV, pp. 62-64, 68, 70.

<sup>103</sup> Debt limit bills were H.R. 11104 and H.R. 8410.

<sup>104</sup> Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177). See Jonathan Fuerbringer, “Leaders in Senate Reach Compromise on U.S. Debt Limit,” *New York Times*, October 10, 1985, <https://www.nytimes.com/1985/10/09/us/leaders-in-senate-reach-compromise-on-us-debt-limit.html>. Also see Dick Kirschten and Jonathan Rauch, “Political Poker Game Over Deficit Bill Calls Bluff of Reagan and Congress,” *National Journal*, December 14, 1985, pp. 2857-2858. In addition, see Joseph White and Aaron Wildavsky, *The Deficit and the Public Interest: The Search for Responsible Budgeting in the 1980s*, (Berkeley: Univ. of California Press, 1989), ch. 19, <https://publishing.cdlib.org/ucpressebooks/view?docId=ft5d5nb36w;brand=ucpress>.

<sup>105</sup> Kara Brandeisky, “How Clinton Handled His Debt Ceiling Crisis Better Than Obama,” *New Republic*, August 2, 2011, <https://newrepublic.com/article/93043/obama-clinton-debt-ceiling-crisis>. Also see Associated Press, “Army Says GOP Will Call All The Shots,” January 22, 1996, <https://www.deseret.com/1996/1/22/19220603/army-says-gop-will-call-all-the-shots>.

<sup>106</sup> Vetoed on November 13, 1995. A continuing resolution (H.J.Res. 115, 104<sup>th</sup> Congress) that included spending reductions in Medicare and other programs was also vetoed on the same day.

<sup>107</sup> P.L. 104-121 (H.R. 3136). Two earlier other acts modified the debt limit to allow Social Security payments (P.L. 104-103) and investments in certain federal trust funds (P.L. 104-115).

<sup>108</sup> U.S. GAO, *Debt Ceiling: Analysis of Actions During the 1995-1996 Crisis*, GAO/AIMD-96-130, <http://www.gao.gov/archive/1996/ai96130.pdf>.

<sup>109</sup> 31 U.S.C. § 5112(k).

<sup>110</sup> Dylan Matthews, “Michael Castle: Unsuspecting Godfather of the \$1 Trillion Coin Solution,” *Washington Post*, January 4, 2013, <https://www.washingtonpost.com/news/wonk/wp/2013/01/04/michael-castle-unsuspecting-godfather-of-the-1-trillion-coin-solution/>.

Instead, proponents of the platinum coin strategy have encouraged the U.S. Treasury to consider minting a high-denomination coin, which—according to proponents—could be deposited at the Federal Reserve and exchanged for cash for the U.S. Treasury’s general fund.<sup>111</sup> Officials of both the U.S. Treasury and the Federal Reserve System therefore would have to approve the strategy.

Both the U.S. Treasury and the Federal Reserve, however, rejected such options in 2013.<sup>112</sup> A Treasury spokesman stated that “Neither the Treasury Department nor the Federal Reserve believes that the law can or should be used to facilitate the production of platinum coins for the purpose of avoiding an increase in the debt limit.” The U.S. Treasury again rejected such stratagems in 2015.<sup>113</sup> In September 2021, Treasury Secretary Yellen, in response to a question regarding platinum coin proposals, stated “I believe that the only way to handle the debt ceiling is for Congress to raise it and show the world, the financial markets, and the public that we’re a country that will pay your bills when we incur them.”<sup>114</sup>

Although some contend that the Treasury Secretary could cajole or compel the Federal Reserve to accept a high-value platinum coin,<sup>115</sup> no evidence exists that the current or any past Treasury Secretary would entertain such a fiscal strategy or that the Federal Reserve would accede to such demands.

Others have argued that using a high-value platinum coin to evade the debt limit, even if that were feasible, would impair basic constitutional structures and undermine the legitimacy of federal governance.<sup>116</sup>

Apart from various legal, accounting, and practical uncertainties,<sup>117</sup> the platinum coin strategy would present several major policy issues. First, such actions by executive branch officials could be seen as undermining Congress’s fiscal powers. Second, both the U.S. Treasury and Federal Reserve have sought for many decades to maintain a separation between fiscal and monetary policy.<sup>118</sup> Governments can finance their expenditures through revenues or borrowing or by

<sup>111</sup> Joe Weisenthal, “The Former US Mint Director Behind The Controversial Law Explains Why A Platinum Coin Could Avoid A Major Crisis,” *Business Insider*, January 8, 2013; <http://www.businessinsider.com/mint-the-coin-former-mint-director-philip-diehl-explains-why-the-trillion-dollar-coin-law-would-work-2013-1>. Also see Paul Krugman, “Be Ready to Mint That Coin,” *New York Times*, January 7, 2013, <https://krugman.blogs.nytimes.com/2013/01/07/be-ready-to-mint-that-coin/>.

<sup>112</sup> Ezra Klein, “Treasury: We Won’t Mint a Platinum Coin to Sidestep the Debt Ceiling,” *Washington Post*, January 12, 2013; <https://www.washingtonpost.com/news/wonk/wp/2013/01/12/treasury-we-wont-mint-a-platinum-coin-to-sidestep-the-debt-ceiling/>. Also see then Federal Reserve Chairman Ben Bernanke, Remarks at the University of Michigan Ford School, January 14, 2013, <http://fordschool.umich.edu/sites/default/files/2013-ben-bernanke.txt>.

<sup>113</sup> Daniel Watson, Deputy Assistant Secretary for Public Affairs, “There is Only One Solution to the Debt Limit,” *Treasury Notes*, October 16, 2015, <https://www.treasury.gov/connect/blog/Pages/one-solution-debt-limit.aspx>.

<sup>114</sup> Testimony of Treasury Secretary Janet Yellen, in U.S. Congress, House Committee on Financial Services, *Federal Reserve’s Pandemic Response*, 117<sup>th</sup> Cong., 1<sup>st</sup> sess., September 30, 2021.

<sup>115</sup> Rohan Grey, “Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy,” *Kentucky Law Review*, vol. 109, no. 2 (2020), pp. 229-298.

<sup>116</sup> Philip A. Wallach, “A Trillion Dollar Platinum Coin to Fix the Debt Ceiling: Why not 100 Trillion!?” Brookings Institution web blog, October 26, 2015, <https://www.brookings.edu/blog/fixgov/2015/10/26/a-trillion-dollar-platinum-coin-to-fix-the-debt-ceiling-why-not-100-trillion/>.

<sup>117</sup> For a discussion of issues regarding issuance of such a coin, see “Why the \$1 Trillion Platinum Coin Idea Won’t Work,” January 8, 2013, <http://goldandsilverblog.com/why-the-trillion-dollar-platinum-coin-wont-work-0450/>.

<sup>118</sup> See Charles I. Plosser, President and Chief Executive Officer, Federal Reserve Bank of Philadelphia, “Fiscal Policy and Monetary Policy: Restoring the Boundaries,” *2012 Annual Report of the Federal Reserve Bank of Philadelphia*; <https://www.philadelphiafed.org/publications/annual-report/2012/restoring-the-boundaries>. Until 1981, the Federal Reserve had limited authority to buy Treasury securities directly to meet emergency cash management circumstances. See Kenneth D. Garbade, *Direct Purchases of U.S. Treasury Securities by Federal Reserve Banks*, Federal Reserve

printing money. The latter option, however, would likely affect the value of the dollar by signaling either a reluctance to make fiscal adjustments or that monetary policy goals had been subordinated to other ends. As a senior Federal Reserve official stated,

central banks are generally assigned the responsibility for establishing and maintaining the value or purchasing power of the nation’s monetary unit of account. Yet, that task can be undermined or completely subverted if fiscal authorities independently set their budgets in a manner that ultimately requires the central bank to finance government expenditures with significant amounts of seigniorage in lieu of tax revenues or debt.<sup>119</sup>

Third, were the U.S. Treasury to obtain cash balances via such a strategy, the debt limit would likely continue restricting the issuance of federal securities, potentially disrupting scheduled auctions and undermining the U.S. Treasury’s reputation for regular and predictable debt operations.<sup>120</sup> Such disruptions could raise federal borrowing costs.<sup>121</sup>

Senator Lee introduced S. 185 (117<sup>th</sup> Congress) on February 2, 2021, which would limit the face value of platinum coins issued by the Treasury to \$200. Representative Tlaib introduced H.R. 1030 (117<sup>th</sup> Congress) on February 11, 2021, which would direct the U.S. Treasury to mint and issue two \$1 trillion platinum coins and direct the Federal Reserve to purchase the coins. Proceeds would fund payments to individuals.

## Point of Clarification 5: The Public Debt Clause’s Effect on the Statutory Debt Limit

Some commentators have also argued that if the statutory debt limit were to prevent the federal government from paying obligations, the resulting default would violate a provision of the Fourteenth Amendment commonly referred to as the “Public Debt Clause.”<sup>122</sup> Ratified in 1868,<sup>123</sup> the Public Debt Clause states:

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. 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 emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.<sup>124</sup>

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Bank of New York Staff Report No. 684, August 2014.

<sup>119</sup> *Id.* Seigniorage is the market value of currency minus the cost of minting coins or printing banknotes.

<sup>120</sup> Kenneth Garbade, “The Emergence of ‘Regular and Predictable’ as a Treasury Debt Management Strategy,” *Federal Reserve Bank of New York Economic Policy Review*, vol. 13, no. 1 (March 2007), <https://www.newyorkfed.org/research/epr/07v13n1/0703garb.html>.

<sup>121</sup> U.S. Treasury, “The Meaning and Implications of ‘Regular and Predictable’ as a Tenet of Debt Management,” presentation at Treasury Borrowing Advisory Council, August 2015, <https://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Documents/August2015TBACCharge1.pdf>.

<sup>122</sup> For example, see Paul M. Krawzak, “Debt Limit Options Narrowing, 14<sup>th</sup> Amendment Chatter Returns,” *Roll Call* September 20, 2021, <https://www.rollcall.com/2021/09/20/debt-limit-options-narrowing-14th-amendment-chatter-returns/>.

<sup>123</sup> See Certification of Secretary of State William H. Seward that the Fourteenth Amendment of the Constitution has been Adopted (July 28, 1868), *reprinted in* 15 Stat. 708 (1868).

<sup>124</sup> U.S. CONST. amd. XIV, § 4.

The legislative history of this provision, as well as its interpretation by the federal courts, shed some light on its potential application to the statutory debt limit. However, many questions remain about the types of actions that would constitute “question[ing]” the “validity of the public debt of the United States.”

## Why Does the Fourteenth Amendment Have a Public Debt Clause?

Framers of the Fourteenth Amendment sought to assert federal powers to protect civil rights and ensure that the eventual reentry of former Confederate states would not lead to a rollback of constitutional reforms. During the latter part of the Civil War, Members of Congress began to consider the issue of reconstruction. In 1864, the Wade-Davis Bill, passed by Congress but pocket vetoed by President Lincoln, included a clause that “No debt, state or confederate, created by or under the sanction of the usurping power, shall be recognized or paid by the state.”<sup>125</sup> After the Confederate surrender, the assassination of President Lincoln, the attempted assassination of the Secretary of State, and the inauguration of President Andrew Johnson in April 1865, congressional leaders took more direct initiatives to shape the reconstruction process.

Establishment of federal guarantees for civil and political rights for former slaves became a central aim of a strong majority of lawmakers.<sup>126</sup> Many realized that extending political rights to former slaves would mean superseding the three-fifths clause that set out rules for apportionment of House seats in Article I, Section 2 of the Constitution. Counting former slaves as whole persons for purposes of apportionment would eventually increase the size of delegations from former Confederate states.<sup>127</sup> Representative James Garfield estimated that those states would gain at least 15 seats and others estimated gains of some 40 to 60 seats.<sup>128</sup> Such potential shifts in political power raised alarms that a future coalition could emerge that would repudiate federal debts.<sup>129</sup> While federal guarantees for an expansion of the franchise were viewed as a counterweight to such shifts, an explicit guarantee of the validity of federal debts was also included.<sup>130</sup>

<sup>125</sup> National Archives and Records Administration, “Transcript of Wade-Davis Bill (1864),” <https://www.ourdocuments.gov/doc.php?flash=true&doc=37&page=transcript>.

<sup>126</sup> Joseph B. James, *The Framing of the Fourteenth Amendment* (Urbana: University of Illinois Press, 1956), pp. 3-20.

<sup>127</sup> *Ibid.*, p. 22. On September 18, 1866, *New York Herald* editor James Gordon Bennett estimated that southern states would gain 40 seats if the franchise were restricted to white voters and 61 seats with universal (male) franchise (p. 5).

<sup>128</sup> The 1860 Census results indicated a House of 243 Members, although due to secession the 39<sup>th</sup> Congress had only 193 Members. See Office of the Historian, U.S. House of Representatives, *39<sup>th</sup> Congress Profile*, <http://history.house.gov/Congressional-Overview/Profiles/39th/>. Also see archived CRS Report 95-791, *House of Representatives: Setting the Size at 435*, by David C. Huckabee, available to congressional clients upon request.

<sup>129</sup> James (op. cit., pp. 23-27). On August 16, 1865, Treasury Secretary McCulloch wrote to Sen. Sumner that “nothing can be more damaging to our national credit than the openly-expressed opinion by leading men, that there may arise contingencies in which the national debt will be repudiated.” Quoted in James (p. 25). James (p. 185) suggests that the prospects of repudiation were exaggerated, although several ex-Confederate states repudiated state debts in the post-Civil War period. See William Scott, *Repudiation of State Debts: A Study in the Financial History of Mississippi, Florida, Alabama, North Carolina, South Carolina, Georgia, Louisiana, Arkansas, Tennessee, Minnesota, Michigan, and Virginia* (Boston: Crowell, 1893). Rep. John Bingham, one of the framers of the amendment, asserted that “Unless this Congress, charged as it is, like the first Continental Congress, with the care of the liberties of all, shall perform the duty enjoined upon it, and send to the people the necessary constitutional provisions and guarantees for the future safety of the Republic, I apprehend that there are men now within these walls who may learn, when it is too late, that the ballot in the hand of the conspirator is more dangerous to the safety of the Republic than the bayonet.” *Congressional Globe*, January 25, 1866, pp. 428-429.

<sup>130</sup> Some Civil War loan issues were marketed widely to the public soon after hostilities commenced in 1861. Providing a constitutional guarantee for federal debt, therefore, may have served political as well as financial ends. See Franklin



## The Public Debt Clause: Judicial Interpretation and Open Questions

Though the Public Debt Clause was ratified in 1868, the Supreme Court has interpreted it in a controlling opinion only once, in relation to a key aspect of early New Deal reforms.<sup>131</sup> This single decision, *Perry v. United States*,<sup>132</sup> leaves unanswered many questions concerning the limitations imposed by the Public Debt Clause.<sup>133</sup> The Clause’s potential application to a failure to service debt on account of the debt limit statute is therefore unclear. This report first examines *Perry* and then notes the questions that remain concerning the Public Debt Clause’s effect.

### *Perry v. United States*

Executive and legislative actions affecting the country’s gold supply figured prominently in the opening months of President Franklin D. Roosevelt’s New Deal.<sup>134</sup> In his second fireside chat, broadcast on May 5, 1933, the President outlined his view of the challenges posed to that gold supply by the practice of public and private debtors—including the federal government—agreeing to redeem their debts in gold.<sup>135</sup> The President stated that these promises affected up to \$100 billion in public and private debt, roughly 25 times the domestic gold supply.<sup>136</sup> The President described a potential consequence of this disparity:

If the holders of these promises to pay started in to demand gold the first comers would get gold for a few days and they would amount to about one-twenty-fifth of the holders of the securities and the currency. The other twenty-four people out of twenty-five, who did not happen to be at the top of the line, would be told politely that there was no more gold left.<sup>137</sup>

The President stated that rather than allow such events to unfold, the federal government had “decided to treat all twenty-five in the same way in the interest of justice and the exercise of the constitutional powers of this Government.”<sup>138</sup>

Accordingly, in June 1933, the President signed into law a joint resolution declaring that provisions requiring an obligee to pay in gold or in an amount of money measured in gold (gold clauses) obstructed Congress’s power to regulate the value of money.<sup>139</sup> Congress declared gold

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Noll, “Repudiation! The Crisis of United States Civil War Debt, 1865-1870,” working paper, Graduate Institute of International and Development Studies, Geneva, December 2012.

<sup>131</sup> See Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 610 (1997) (“Probably few constitutional provisions have, like the Public Debt Clause, effectively been forgotten.”).

<sup>132</sup> 294 U.S. 330 (1935).

<sup>133</sup> Commentators have struggled with *Perry*’s meaning since the decision issued. See, e.g., Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057, 1057 (1935) (“Few more baffling pronouncements, it is fair to say, have ever issued from the United States Supreme Court.”).

<sup>134</sup> See CRS Report R44704, *Has the U.S. Government Ever “Defaulted”?*, by D. Andrew Austin, at 9-11.

<sup>135</sup> 2 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 165–66 (1938).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 166.

<sup>138</sup> *Id.* Likewise, the House Committee on Banking and Currency argued that gold clauses encouraged hoarding and the export of gold, thereby interfering with Congress’s ability to create a currency and set its value. H. REP. NO. 73-169, at 1–2 (1933).

<sup>139</sup> Pub. Res. No. 73-10, 48 Stat. 112, 112 (1933) (second whereas clause). In favorably reporting the joint resolution, the Senate Committee on Banking and Currency explained that the measure would “completely regularize[] the present de facto situation as to both public and private debts”—which as a result of earlier legislative and executive actions were already not capable of being paid in gold—in advance of new, needed bond offerings scheduled for June 1933.

clauses to be against public policy and repealed those provisions of federal law authorizing issuance of federal obligations with a gold clause.<sup>140</sup> Existing obligations that carried a gold clause were to be “discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.”<sup>141</sup>

John Perry was one federal bondholder affected by the joint resolution. He held a \$10,000 Liberty Bond, issued in 1918 pursuant to authorization granted by Congress.<sup>142</sup> Its principal and interest were “payable in United States gold coin of the present standard of value.”<sup>143</sup> In May 1934, Perry presented the bond for payment.<sup>144</sup> The United States refused to pay in gold.<sup>145</sup> Instead, as required by the June 1933 joint resolution, it offered \$10,000 in legal tender.<sup>146</sup> Perry asserted that this offer breached the government’s bond obligations.<sup>147</sup> Perry argued he was entitled to payment either in gold of a specified weight or \$16,931 in U.S. currency,<sup>148</sup> with the latter figure reflecting that in January 1934 the President had fixed the weight of the gold dollar at roughly 59% of its former weight.<sup>149</sup>

Perry sued in the Court of Claims, claiming breach of contract and arguing that the joint resolution unconstitutionally deprived him of property without due process.<sup>150</sup> The Court of Claims certified a question to the Supreme Court, asking whether Perry was “entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond.”<sup>151</sup> In *Perry v. United States*, the Supreme Court answered “no” to the certified question, but not before considering the extent of the government’s obligation under the bond and the joint resolution’s constitutionality.<sup>152</sup> Along the way, it construed the Public Debt Clause.

Writing for the Court,<sup>153</sup> Chief Justice Charles Evans Hughes first described the obligation that the federal government undertook when it issued the bond with a gold clause. By stipulating that

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See S. REP. NO. 73-99, at 2 (1933); see also *supra* note 134.

<sup>140</sup> 48 Stat. at 113.

<sup>141</sup> *Id.*

<sup>142</sup> *Perry v. United States*, 294 U.S. 330, 346, 347 (1935).

<sup>143</sup> *Id.* at 347.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

<sup>148</sup> *Id.*; see also *id.* at 355 (describing Perry’s damages computation in more detail).

<sup>149</sup> See, e.g., Proclamation No. 2072, reprinted in 3 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, at 67–69 (1938).

<sup>150</sup> *Perry*, 294 U.S. at 347.

<sup>151</sup> *Id.* The Court of Claims certified a second question, concerning impossibility of performance, but the Supreme Court ultimately concluded that an answer to this second question was “not necessary” given its answer to the first. See *id.* at 348, 358.

<sup>152</sup> *Id.* at 358. The Court decided *Perry* the same day that it decided other cases challenging government action affecting gold, likewise denying relief to these other plaintiffs. Together with *Perry*, these cases have been referred to as the “Gold Clause Cases.” See *Nortz v. United States*, 294 U.S. 317 (1935) (challenge by holder of Treasury gold certificates to the federal government’s refusal to pay out gold coin and requirement to surrender gold certificates to the Secretary of the Treasury in exchange for legal tender of an equivalent face amount); *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (two cases involving railroad bonds containing gold clauses).

<sup>153</sup> *Perry*, 294 U.S. at 346. In a concurrence, then-Justice Harlan F. Stone expressly declined to join the portions of Chief Justice Hughes’s opinion that held the joint resolution exceeded Congress’s authority. Justice Stone thought such comments unnecessary to decide the certified question and could impede Congress’s future ability to make changes to the value of money. See *id.* at 359–61 (Stone, J., concurring); see also, e.g., Gerard Magliocca, *The Gold Clause Cases*



the bond would be payable in gold coin “of the present standard of value,” the United States assured those lending it funds they would not suffer loss through depreciation in the payment medium.<sup>154</sup>

Chief Justice Hughes then considered the joint resolution in light of this obligation, asking whether Congress could use its power to regulate the value of money to invalidate the terms of existing obligations issued under its separate power to borrow money on the credit of the United States.<sup>155</sup> If Congress had the power under the Coinage Clause to modify contract terms, then it would “inevitably follow[]” that Congress could repudiate its obligation to repay any sums at all.<sup>156</sup> Chief Justice Hughes refused to construe the Constitution as granting Congress such power.<sup>157</sup> “When the United States, with constitutional authority, makes contracts,” he explained, “it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments,” except that federal government may be sued only with its consent.<sup>158</sup>

Chief Justice Hughes rejected the contention that the government could not contract away the exercise of its sovereign powers—by, for example, irrevocably committing to repay debt in gold coin.<sup>159</sup> The right to make a binding obligation was an incident of sovereignty, and Congress acts as an instrumentality of that sovereignty when it exercises its legislative powers.<sup>160</sup> But by authorizing Congress to make “definite obligations for the payment of money borrowed,” the Constitution did not also confer “authority to alter or destroy those obligations.”<sup>161</sup>

Chief Justice Hughes then referenced the Public Debt Clause, providing the only interpretation of the Clause that has appeared in a controlling opinion:

The Fourteenth Amendment, in its fourth section, explicitly declares: “The validity of the public debt of the United States, authorized by law, ... shall not be questioned.” While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not

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*and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1269 (2012) (stating that Chief Justice Hughes’s opinion reflected only a “plurality” view insofar as it declared the joint resolution unconstitutional); Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1190–91 (2012) (arguing that *Perry*’s discussion of the Public Debt Clause, “though appearing in the controlling opinion of the case, was not endorsed by a majority of the Justices of the Court” and adding that the discussion is “arguably dicta” that the Court has not “definitively endorsed” in a “legally binding fashion” (footnote omitted)).

<sup>154</sup> *Perry*, 294 U.S. at 348–49.

<sup>155</sup> *Id.* at 350; *see also* U.S. CONST. art. I, § 8, cl. 2 (“The Congress shall have Power” to “borrow Money on the credit of the United States.”); *id.* at art. I, § 8, cl. 3 (“The Congress shall have Power” to “coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”); *see also supra* note 153 (noting that Justice Stone declined to fully join Chief Justice Hughes’s opinion).

<sup>156</sup> *Perry*, 294 U.S. at 350.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 352 (citing *United States v. Bank of Metropolis*, 40 U.S. 377, 392 (1841)).

<sup>159</sup> *Id.* at 353–54.

<sup>160</sup> *Id.* at 353.

<sup>161</sup> *Id.*

considering the expression “the validity of the public debt” as embracing whatever concerns the integrity of the public obligations.<sup>162</sup>

On the basis of this discussion—with its references to the Borrowing Clause, the Coinage Clause, prior Supreme Court precedent affirming the inviolability of federal obligations, and the Public Debt Clause—Chief Justice Hughes concluded that the joint resolution exceeded Congress’s authority.<sup>163</sup>

Having agreed with Perry that the joint resolution exceeded Congress’s authority, the Court nonetheless answered the certified question “no,” an answer that denied Perry any relief.<sup>164</sup> The Court explained that to prevail on his breach-of-contract claim, Perry had to demonstrate actual damages resulting from the government’s breach of the gold clause.<sup>165</sup> Damages “could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred.”<sup>166</sup>

Features of this “internal economy” prevented Perry’s theory from showing harm suffered on account of breach of the gold clause. By May 1934, a “free domestic market for gold was nonexistent.”<sup>167</sup> While Perry alternatively demanded the “equivalent” in currency of the gold coin promised in 1918, the Court wrote that “‘equivalent’ cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used.”<sup>168</sup> Congress had lawfully established a “restricted market” in gold,<sup>169</sup> which impacted the purchasing power of the dollars Perry could have received but for the breach.<sup>170</sup> However, Perry’s theory of damages did not account for these changes.<sup>171</sup> His theory assumed he was entitled to receive payment in legal tender according to the weight of the dollar that existed before the January 1934 devaluation.<sup>172</sup> The Court concluded that payment of this amount “would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.”<sup>173</sup>

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<sup>162</sup> *Id.* at 354.

<sup>163</sup> *Id.* (“We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.”).

<sup>164</sup> *See id.* at 358. Gerard Magliocca argues that the result in *Perry* can be explained, at least in part, by the high stakes involved in the decision of whether to provide a remedy to those seeking to enforce gold clauses. As proof of these stakes, Magliocca points to the draft text of a fireside chat that, if delivered, would have “raised profound questions about the separation of powers” insofar as it appeared to contemplate the “President refus[ing] to follow the law as articulated by the Court.” *See* Magliocca, *supra* note 153, at 1264 & 1277 (reproducing draft text of fireside chat). The Court decided the Gold Clause Cases to deny petitioners relief and therefore President Roosevelt did not deliver the address. *See id.* at 1262.

<sup>165</sup> *Perry*, 294 U.S. at 354–55.

<sup>166</sup> *Id.* at 357.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; *see also, e.g., supra* note 134.

<sup>170</sup> *Perry*, 294 U.S. at 357.

<sup>171</sup> *Id.* at 358.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* In August 1935, six months after the Court decided *Perry*, Congress withdrew any waiver of sovereign immunity with respect to, among others, gold-clause securities, defining that category by reference to the June 1933 joint resolution. *See* Pub. Res. No. 74-63, §§ 2, 4, 49 Stat. 938, 939 (1935).

## Questions Concerning the Public Debt Clause

Several questions remain concerning the effect of the Public Debt Clause on the federal government's debts. *First*, the Court has repeatedly affirmed the generally binding nature of the federal government's contractual obligations.<sup>174</sup> However, except in *Perry*, the Court has not rooted such conclusions in the text of the Public Debt Clause or otherwise interpreted the clause.<sup>175</sup> *Lynch v. United States*,<sup>176</sup> decided eight months before *Perry*, exemplifies a more common basis for describing the binding nature of the federal government's contractual obligations. There, the Court examined a statute that purported to repeal laws granting war risk insurance.<sup>177</sup> The Court characterized this repeal as abrogating "outstanding contracts and reliev[ing] the United States from all liability on the contracts without making compensation to the beneficiaries."<sup>178</sup> It unanimously held this abrogation violated the Fifth Amendment's Due Process Clause.<sup>179</sup> The Court has occasionally cited *Lynch* and *Perry* in tandem, without distinguishing between limitations imposed by the Fifth versus the Fourteenth Amendment.<sup>180</sup> As a result, the Court has not further examined the Public Debt Clause or the broad construction given the clause in *Perry*, as "embracing *whatever* concerns the integrity of the public obligations."<sup>181</sup>

<sup>174</sup> See, e.g., *United States v. Bank of Metropolis*, 40 U.S. 377, 392 (1841) ("When the United States, by its authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. We know of no difference, except that the United States cannot be sued" without its consent).

<sup>175</sup> *Perry's* conclusion regarding the joint resolution's validity is itself not solely rooted in the Public Debt Clause. See, e.g., *Perry*, 294 U.S. at 353 (construing the Borrowing Clause); see also *supra* note 163 and accompanying text.

<sup>176</sup> 292 U.S. 571 (1934) (Brandeis, J.) (unanimous).

<sup>177</sup> *Id.* at 575–76.

<sup>178</sup> *Id.* at 579.

<sup>179</sup> *Id.* (explaining that, though the federal government was in "great need of economy" in 1933, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States").

<sup>180</sup> See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) (citing *Lynch* and *Perry* as support for the rule that a "statute that retroactively repudiates the Government's contractual obligation may violate the Constitution"); *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (citing *Lynch* and *Perry* for the proposition that the federal government has the power to enter into contracts that vest rights in third parties); *United States v. Larionoff*, 431 U.S. 864, 879 (1977) (citing *Lynch* and *Perry* in the course of noting that action by Congress to "deprive a service member of pay due for services already performed" would "appear in a different constitutional light" than action to "prospectively reduce" service member pay before services are performed).

<sup>181</sup> *Perry*, 294 U.S. at 354 (emphasis added). The federal courts of appeals also have not extensively examined the Public Debt Clause's prohibition on questioning the validity of the public debt. In 2016, a federal appeals court affirmed dismissal of a suit challenging the statutory debt limit on, among others, Public Debt Clause grounds. According to the court, the bondholder plaintiff failed to plausibly allege either current injury or nonconjectural future injury caused by the dollar limit on federal borrowing. See *Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016). A 1987 amendment to the Higher Education Act of 1965 (HEA) likewise drew Public Debt Clause challenges. Participants in a federal loan insurance program argued they had contractual rights against the government to receive certain reinsurance payments. The government allegedly repudiated those rights when it withheld reinsurance payments from entities that had refused to comply with the 1987 amendment's requirement to transfer excess cash reserves to the student loan insurance fund. Courts of appeals held that the United States had not repudiated its contractual obligations, as Congress did not unambiguously surrender its authority to amend the HEA to alter the regulatory scheme that defined entitlement to reinsurance payments, and thus found no Public Debt Clause violation. See *Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 18 (7<sup>th</sup> Cir. 1990) ("[N]either Congress, through the 1987 amendment, nor the Secretary has questioned any valid debt. The Secretary took nothing from the agency except the use of funds made available through circumstances unanticipated by either Great Lakes or the United States."); *Ohio Student Loan Com. v. Cavazos*, 900 F.2d 894, 902 (6<sup>th</sup> Cir. 1990) (reversing district court judgment that found a Public Debt Clause violation and explaining that because there was "no abrogation of the 'contract' in the instant case, we conclude that

*Second*, commentators continue to debate at least two aspects of the Public Debt Clause’s application to federal commitments. Commentators have argued that the Public Debt Clause may require a distinction in the types of commitments that constitute the “public debt.”<sup>182</sup>

Commentators have also advanced a range of views concerning the set of facts under which the federal government would be deemed to have “questioned” the validity of the public debt. For example, one commentator has argued that the most likely explanation for the Public Debt Clause’s language is that it was intended to “simply declare[] that all public debt that was valid (i.e., ‘authorized by law’) would remain valid.”<sup>183</sup> A second commentator has cast the Public Debt Clause as prohibiting not only the “total repudiation” of federal debt, but also those defaults on debts that persist for a substantial time period or for which bondholders are not made whole.<sup>184</sup> A third commentator has advanced a “broad construction” of the clause under which “governmental actions short of direct repudiation may trigger the Public Debt Clause if they endanger the validity of debts.”<sup>185</sup>

Given these uncertainties surrounding the Public Debt Clause generally, it is unclear how the provision might apply to the statutory debt limit in particular. Depending on one’s construction of the clause, some nonpayments occasioned by the statutory debt limit might not be circumstances “question[ing]” the validity of the public debt.<sup>186</sup> Such nonpayment would not resemble the congressional action that confronted the Court in *Perry*, an express abrogation of the government’s gold clause obligations.<sup>187</sup> If obligees are made whole after Congress permits resumed debt service and other payments (i.e., raising or suspending the debt limit, cutting spending, or increasing taxes), Public Debt Clause concerns would be further ameliorated.<sup>188</sup> Separately, even if temporary nonpayment could constitute a Public Debt Clause violation with

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there was no violation of section four of the Fourteenth Amendment”).

<sup>182</sup> See, e.g., Abramowicz, *supra* note 131, at 600 & 600 n.191 (noting ways that commitments incurred under fully performed service contracts might differ from commitments under the Social Security or Medicare programs); Laurence Tribe, *Guest Post on the Debt Ceiling by Laurence Tribe*, DORF ON LAW (July 16, 2011), <http://www.dorfonlaw.org/2011/07/guest-post-on-debt-ceiling-by-laurence.html> (arguing that the Public Debt Clause would not forbid the federal government from prioritizing certain payments over others if it cannot make all legally required payments as a result of the statutory debt limit, because not all “legally required payments are part of the debt whose validity cannot ‘be questioned.’”); Michael McConnell, *The Debt Ceiling Is Certainly Not “Unconstitutional,”* ADVANCING A FREE SOCIETY (Jul 4, 2011), <https://www.hoover.org/research/debt-ceiling-certainly-not-unconstitutional> (arguing that “at most” the Public Debt Clause’s prohibition on questioning the validity of the public debt “means that paying the public debts and pension obligations of the United States, as they become due, has priority over all other spending”).

<sup>183</sup> See Michael Stern, “*Threatening Default*”: *A Response to Professor Balkin*, POINT OF ORDER (July 1, 2011), <https://www.pointoforder.com/2011/07/01/threatening-default-a-response-to-professor-balkin/>.

<sup>184</sup> Magliocca, *supra* note 153, at 1256; see also Gerard Magliocca, *Section Four of the Fourteenth Amendment (Again)*, BALKINIZATION (Sept. 20, 2021), <https://balkin.blogspot.com/2021/09/section-four-of-fourteenth-amendment.html> (arguing that the Public Debt Clause applies only to “substantial” questioning of the public debt because, in the years after the Public Debt Clause’s adoption, Congress undertook currency reforms that “changed the value” of federal debts without contemporary observers thinking “that this raised a Section 4 problem”).

<sup>185</sup> See Abramowicz, *supra* note 131, at 596; see also Jack Balkin, *The Legislative History of Section Four of the Fourteenth Amendment*, BALKINIZATION (June 30, 2011), <https://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html> (similarly arguing, based on the Public Debt Clause’s legislative history, that the Clause prohibited “threat[s] of defaulting on government obligations”); but see Stern, *supra* note 183 (critiquing Balkin’s conclusions).

<sup>186</sup> U.S. CONST. amdt. XIV, § 4.

<sup>187</sup> *Perry*, 294 U.S. at 354; but see Robert A. Levy, *Defaults, Debt Ceilings and the 14<sup>th</sup> Amendment*, CATO INSTITUTE (July 7, 2011), <https://www.cato.org/commentary/defaults-debt-ceilings-14th-amendment> (“If a friend refused to repay my loan when due, while assuring me that he would get around to it at an indefinite future date, I would be hard-pressed to intuit that his default—although not a repudiation—left me with a debt of unquestioned validity.”).

<sup>188</sup> See *supra* note 184.

respect to certain debts (e.g., bond debt), the government’s failure to make other payments (e.g., to fund certain grant awards) might not concern the “public debt” within the meaning of the clause.<sup>189</sup>

## Concluding Question: Is the Debt Limit Obsolete?

Various policymakers, former Treasury officials,<sup>190</sup> and commentators have called for eliminating the debt limit on grounds that it is “obsolete,”<sup>191</sup> simply gives a venue to “stir up debate about debt,”<sup>192</sup> or is redundant because the need to issue debt results from the excess of spending over revenues. If Congress were to choose to delegate more of its Article I Section 8 powers of the purse to the U.S. Treasury and the executive branch, some financial risks and contentious debates might conceivably be side-stepped.

While many have called for eliminating the debt limit or making it more automatic, those who have examined how that might be accomplished found themselves facing constitutional, legal, and procedural barriers, as noted in the discussion of events leading to the 1979 Gephardt Amendment.<sup>193</sup>

Others argue that control over debt is a critical third leg of the congressional power of the purse.<sup>194</sup> While the other two legs—the power to authorize spending and the power to collect taxes—allow Congress to fine tune policies and priorities, the debt limit is a blunt instrument. Modifying the debt limit typically involves either a change in the limit amount or the date through which a suspension extends. That bluntness, however, may have the advantage of inducing policymakers to focus on fundamental fiscal issues from time to time.

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<sup>189</sup> See *supra* note 182.

<sup>190</sup> David Wilcox (former director of the Federal Reserve Board’s Division of Research and Statistics and former Treasury Assistant Secretary for Economic Policy), “Don’t Just Raise the Debt Ceiling, Eliminate It,” *Washington Post*, October 5, 2021.

<sup>191</sup> Matthew Yglesias, “The Looming Debt Ceiling Fight, Explained,” *Vox*, August 9, 2017, <https://www.vox.com/policy-and-politics/2017/8/9/16112364/debt-ceiling-explained>.

<sup>192</sup> Bruce Bartlett (former Deputy Assistant Treasury Secretary for Economic Policy), “Why Congress Must Now Abolish its Debt Limit,” *New York Times*, October 22, 2009.

<sup>193</sup> See section “House Explores Tying Debt Limit to Congressional Budget Process: the ‘Gephardt Rule’” above.

<sup>194</sup> Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARVARD JOURNAL ON LEGISLATION 135 (2005).

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