



## The Public Debt Clause and the Debt Ceiling

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**[00:00:00] Jeffrey Rosen:** There are just two sentences in Section 4 of the 14th Amendment of the US Constitution. It's known as the Public Debt Clause. And it's tucked away in a robust amendment that was designed to achieve a new birth of freedom with guarantees of national citizenship, equal protection of the law and due process. The Public Debt Clause states the validity of the public debt of the United States authorized by law shall not be questioned. And that leads to a conundrum, given today's outcries about debt limits and fiscal cliffs. Once the public money has been authorized by Congress to be spent, does the executive branch have the authority to act on its own to guarantee the debt is paid?

**[00:00:53] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center and welcome to *We the People* a weekly show of constitutional debate. The National Constitution Center is a non-partisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, the debt ceiling and the 14th Amendment. We'll drill down on why the Public Debt Clause was written, how it's been interpreted over time, and how things might play out today if it were invoked by President Biden as a way out of the debt impasse.

**[00:01:31] Jeffrey Rosen:** Joining us are two of America's leading constitutional scholars and historians, Eric Foner is DeWitt Clinton Professor Emeritus of History at Columbia University. His book, *The Fiery Trial, Abraham Lincoln and American Slavery* won the Pulitzer, Bancroft, and Lincoln prizes for 2011. And Gerard Magliocca is Samuel Rosen Professor at the Indiana University McKinney School of Law. He's the author of *Washington's Heir, The Life of Justice Bushrod Washington*.

**[00:02:05] Jeffrey Rosen:** Professor Foner, let's start with you. You recently wrote an op-ed for *The New York Times* calling on President Biden to invoke the Debt Clause of the 14th Amendment. Tell us why Section 4 was written, what was its historical context and what were the framers trying to accomplish?

**[00:02:24] Eric Foner:** Well, Section 4, like other parts of the 14th Amendment has several purposes and several parts. You might say that the whole 14th Amendment is meant to put into the Constitution what the victorious north felt were, were the consequences of the Civil War, other than the abolition of slavery which already had been handled in the 13th Amendment.

**[00:02:49] Eric Foner:** So, Section 4 of the 14th Amendment deals with some of the financial consequences of the Civil War. Among other things it says that the Confederate debt will not be repaid if, if southerners loaned money to the confederate government, they're not getting that back. Their bonds will be worthless. It says that nobody's gonna get compensation for the loss of their slave property, if that's, [laughs] that...no chance of getting paid for that.

**[00:03:19] Eric Foner:** And it says, although in odd language that the national debt, the money, the bonds that were issued and sold in order to help finance the war will not be questioned, which is a funny way of putting it. But what it really means is the national debt will be paid. It's not gonna be reduced. It's not gonna be repudiated. It's part of the result of the war that during the Civil War in order to finance it, the federal government issued an enormous amount of paper money, greenbacks. It, it borrowed money that is selling bonds which would be repaid later on. But they borrowed that money by, to help pay for the war.

**[00:04:00] Eric Foner:** So really the purpose of Section 4 is to guarantee that these financial aspects, or consequence of the Civil War are in the Constitution and cannot be changed by southern states or by northern ones either. There was talk by the time the 14th Amendment was being debated in Congress, uh, talk of paying back the bonds or some of the bonds, one issue of bonds the so-called 520s. Paying them back in paper money. Most of the other bonds were paid back to the loaners in gold, which was worth a lot more than paper money which had depreciated in value. But, uh, the law didn't specify exactly how these 520s were gonna be paid. And so, that became a big political issue in the aftermath of the Civil War. So that's a slightly complex answer, but the main point for our purposes here is that the national debt would not be in any way interfered with or repudiated.

**[00:05:06] Jeffrey Rosen:** Tell us more about the story of the payback of the 520s. They're wonderful characters including Senator Hendricks of Indiana, Jay Cooke, George Pendleton, who were these characters and what was the, what was the battle they were fighting about?

**[00:05:21] Eric Foner:** You know, they are interesting characters. Many of them are not exactly household names. I dare say very few people have heard of George Fredericks nowadays. Pendleton was very prominent at that time, not known very much today. He was the vice-presidential nominee of the Democratic Party in 1864 and was angling to get the nomination to run for president in '68. And it was Pendleton, George Pendleton who came up, or at least his name was associated with this idea of paying back these bonds in paper money.

**[00:05:57] Eric Foner:** Now you might say, "Well, they were bought in paper money, what's the problem here?" If bondholders are paid back in gold, they're gonna get a windfall because gold was far more valuable than paper money which was deteriorating. There was something called the gold, [laughing] I came of the exact term now. The gold premium. Let's put it that way. The gold premium, which reached up toward almost, 40% or 50%, by this period. So that the paper money, you'd have to really pay twice as much as the face value to get gold for it. So, you know, this was part of the debate about the consequences of the Civil War.

**[00:06:40] Eric Foner:** Now, Jay Cooke was a financier, a banker from Ohio, very close to Secretary of the Treasury Chase, probably a little closer than he should have been, uh, by modern

standards of, uh, you know, of, of proper behavior on the part of the members of, uh, of the administration et cetera. But, he had worked out a deal with Secretary of the Treasury Chase. He would become the salesman for federal bonds saying, you know, most of these bonds are bought by the banks. But Jay Cooke said, "You know, there's a lot of ordinary people who would like to make a little profit here. The interest payments of the bonds are also paid in gold and that's gonna be good for the holders."

**[00:07:22] Eric Foner:** So he hired an army of salesmen who went around the north selling in small denominations these bonds issued by the federal government. And, you know, he realized that he would make a fortune just selling a lot of these things and he did. And this was one of the first time that the, that the national debt was actually marketed in small amounts to ordinary Americans. You know, so Jay Cooke profited enormously just by selling these bonds to farmers, to working men, to those who wanted to make a profit and also those who, uh, were patriotic and wanted to help, uh, support and finance the Civil War, which cost an enormous amount of money.

**[00:08:03] Eric Foner:** I think the federal budget for the last year of the Civil War was greater than the entire sum of all the federal budgets from the revolution up to the Civil War. [laughs] So this was a completely unprecedented amount of money that the government had to spend, and, uh, they managed to do it. But the question of repaying the bonds kind of got caught in this political debate.

**[00:08:29] Jeffrey Rosen:** Professor Magliocca, you're the author of the definitive biography of John Bingham. Tell us about how the debate over Section 4 of the 14th Amendment related to Bingham and the reconstruction Republicans financial policies after the war and their fear that the south might in the future take control of the legislature and, and repudiate the war debt.

**[00:08:51] Gerard Magliocca:** Well, as you say one concern that people had basically was what would happen when the former confederates returned to Congress? Would they sabotage the union in a way that they were unable to do during the actual war? So, one aspect of that was, of course, the idea of excluding some of these former confederates from returning to office, that was Section 3 of the 14th Amendment.

**[00:09:18] Gerard Magliocca:** Now with respect to Section 4, uh, a concern that was expressed by Bingham, especially when he was out on the campaign stump in 1866 was not only that former confederates might not want to pay the national debt, but also that they would not want to pay the pensions of the service members who had died during the Civil War or been wounded. And of course, that was a good way of explaining it to ordinary voters, right? To say, "We have a sacred obligation to make payments to wounded soldiers and widows and orphans of dead soldiers and the former confederacy might not want to support this or might not want their money to go to the pensions of the soldiers that had invaded their states."

**[00:10:09] Gerard Magliocca:** So basically, you can sort of see all of this as a kind of either anti-sabotage kind of rule that they were setting up about the national debt, because military pensions were specifically mentioned in Section 4 as being part of the debt that could not be questioned. That is the debt that was owed to these soldiers. Um, and you could also understand

it as just a way of trying to persuade people to support the rest of the amendment. That is to say the cause of supporting pensions for soldiers was a popular one, therefore, you could use that as a way to help support other provisions of the amendment that were more controversial or maybe less, uh, simple to explain out to the, out of the country. So, those were a couple of the concerns that, that were raised at that time.

**[00:11:06] Jeffrey Rosen:** Well, I'm now gonna read the text of Section 4, and here it is. It says, "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."

**[00:11:24] Jeffrey Rosen:** Professor Foner, we've already heard that there was a debate about what it means for the public debt to not be questioned and there's a debate about whether you need complete repudiation or default of the debt or, or something that just substantially calls into question public obligations. In light of the history, how would you construe the meaning of that first sentence of the 14th Amendment? What does it mean to say that the public debt shall not be questioned?

**[00:11:50] Eric Foner:** Well, that language is very peculiar. There's no question about it. [laughs] What does it mean to say it... Is that a violation of someone's freedom of speech that you can't get up and say, "I have a question to raise about the validity of the national debt?" I think if you read the debates in Congress. Now this provision was not debated nearly as much as let's say Section 1, by far the most important part nowadays of the 14th Amendment. It was not debated as much as African American suffrage, which was on the political agenda and there was a lot of division about that.

**[00:12:25] Eric Foner:** So, if you just wanna take the so-called originalist approach, you will run into a wall soon because there's not that much discussion of this. And the north they just said, "Look, the, uh, national debt has to be paid and the soldiers have to get their money and the bondholders et cetera." And many southerners, as we heard were seen to be questioning the way that the debt would be paid back, or at least thinking about maybe they could get some compensation for the loss of their slaves.

**[00:12:57] Eric Foner:** So, you know, I think if you look at the context the historical context, 1866, when this is being debated in Congress it's a way of trying to prevent in the future what they call repudiation. Now the chance of the debt being repudiated, that is if Congress just say, "We're not paying any of these bonds back." The chance of that was pretty remote, I think, you'd have to say. But partial repudiation, the Pendleton Plan, which I mentioned before from George Pendleton of Ohio, who said, "Unlike other bonds, these bonds are being paid back in paper money not in gold."

**[00:13:40] Eric Foner:** That was seen as repudiation [laughs] by bondholders. They wanted gold, which was worth much more than the paper money. Would that be enacted if Democrats got back into control of the House and the Senate? So, in a way, the purpose of, of Section 4 is to head off the Pendleton Plan is to head off the possibility of these 520 bonds, as they were called, being, uh, repaid back to the person who had loan them in paper money. So that's the specific

aim to deal with the question of those particular bonds. But the more general aim is to just make sure that the entire federal debt at some point or another, be paid back.

**[00:14:26] Eric Foner:** Now of course, [laughs] usually the federal debt is not all paid back. We have a pretty large debt today. I doubt if anyone thinks it's all gonna be just paid back and there won't be any national debt anymore. But this was part of the politics of debating the consequences of the Civil War for American society.

**[00:14:46] Jeffrey Rosen:** Let's fast forward from the post-Civil War era to the Great Depression era. It's 1933, the United States economy is in shambles and FDR has announced a series of measures to prop up the economy, notably the controversial move to take the US off the gold standard.

**[00:15:03] Franklin Delano Roosevelt:** Our dollar is now altogether too much influenced by the internal policies of other nations, therefore, the United States must take firmly in its own hands the control of the gold value of our dollar.

**[00:15:18] Jeffrey Rosen:** Professor Magliocca, the Supreme Court interpreted Section 4 just once in *Perry v. United States* in 1935. It had to do with FDR's gold policy. Tell us what's going on in *Perry*, what the court held, and what the implications are for the meaning of Section 4?

**[00:15:36] Gerard Magliocca:** Sure. So, to pick up on the theme of gold repayments versus paper repayments of debt, when Franklin Roosevelt took office in 1933, Congress took the United States off the gold standard. And basically, said that from now on, we would be relying entirely or basically on a paper money system. And this meant that the bondholders at that time were no longer gonna be paid back in gold dollars, as they were promised, but would be paid back in paper dollars.

**[00:16:12] Gerard Magliocca:** And as Professor Foner indicated, of course, paper dollars were worth less. Roughly a quarter or a third less than the gold dollars. So, the bondholder sued and basically said, "Look, uh, you promised us repayment in gold dollars, you're breaking your promise. We are entitled to damages." Now this case was highly controversial at the time, because when it came before the Supreme Court, people were frankly worried there would be a financial panic if the court held that the decision to basically change the monetary standard was unconstitutional.

**[00:16:51] Gerard Magliocca:** I mean consider that banks held a lot of these bonds, a lot of financial instruments were based on them, what was gonna happen if you suddenly said that a lot of them were unlawful? And, indeed, it's the only case in the history of the Supreme Court where the court issued a statement at one point saying, "The decision is not coming down tomorrow." Right? Because they wanted to make clear to people that, uh, there wouldn't be, uh, a reason to sort of start rumor mongering or that sort of thing in the financial markets. Every other case the Supreme Court's ever decided they, they just never tell us when, when it's coming out. It just comes out when it comes out. So that gives you an idea of how important it was.

**[00:17:35] Gerard Magliocca:** Now, uh, what did the court do? Well, in a for justice opinion by Chief Justice Hughes, not a majority opinion. The Court held that it was unconstitutional for

Congress to basically not pay the bondholders back in gold dollars. They then though said, "Well, the bondholders aren't entitled to any damages." Now the explanation that the court gave for that without getting into the weeds too much basically made little sense and was widely criticized, um, but was understood as being something they felt that they had to do because to issue a remedy to the bondholders would cause a panic. And that simply wasn't something they were going to do.

**[00:18:20] Gerard Magliocca:** So, some people, at the time, compared the *Perry* case to *Marbury v. Madison* in the sense of saying, "Well, the court in *Marbury* said, 'Geez, *Marbury* really should have gotten his judgeship. It was wrong that he didn't.'" But he can't get it, and then he came up with some reason why he couldn't get it that, that didn't really make all that much sense. And so importantly for what Chief Justice Hughes opinion said, is he said that Section 4 of the 14th Amendment didn't just apply to the debt rung up during the Civil War, it applied to the debt of the United States more generally in keeping with the sort of broader language in the text.

**[00:19:03] Gerard Magliocca:** So basically, that at least means that Section 4 could apply to current debt issues, right? It's not limited in historical time. The court also sort of seemed to say that there was actually a kind of general principle that went back to the founding that the United States had to repay its debts in some general sense, that that was kind of inherent in the nature of borrowing on the credit of the United States, you were sort of implicitly pledging to repay these debts. And that Section 4 was merely confirming this kind of, we'll call it Hamiltonian understanding, right? Rather than creating something new.

**[00:19:50] Gerard Magliocca:** Now, one final point, the court rejected the idea that you needed a total repudiation of debt for Section 4 or the Constitution more generally to apply. The United States made that argument in the briefs saying, "Look, only a total repudiation of the debt is a constitutional violation and paying people back in paper money isn't a total repudiation." But the court said that that wasn't correct, because it, it was, you were in fact questioning the obligation by paying it back in an amount less than was initially promised. So that means that a partial repudiation is something that could come within the ambit of the Constitution. But what, the only thing is it's not a majority opinion. So, it's not binding in any way should a case be brought now around Section 4 or some issue regarding a, uh, sort of partial default. So. we just, we have not a whole lot of law to go on should there be a controversy today.

**[00:21:00] Jeffrey Rosen:** Professor Foner, so the Supreme Court has held that a partial repudiation can trigger Section 4, in your *New York Times* OpEd you called on President Biden to invoke Section 4. What would, what constitutional argument do you advise that he invoke? And what would be the Constitutional support for it?

**[00:21:20] Eric Foner:** [laughs] My...let me just say that I am not a law professor, uh, I'm not a lawyer. I'm giving you my view as a historian and the imperatives of history and of law are not always exactly the same thing. But my argument, uh, is that the debt limit is itself unconstitutional, because it puts the United States in a position where it, it will be repudiating part of the debt. If the debt limit is not extended, um, then the country will default. And we don't

know exactly how or what the Federal Reserve and [00:22:00] the Treasury are seem to be thinking about this and who would get paid, who wouldn't get paid, which, uh, obligations of the federal government are gonna be prioritized? Is it, uh, Social Security checks? Is it payment to some of the bondholders who hold the national debt?

**[00:22:17] Eric Foner:** My argument is very simple. It's that President Biden should ignore the debt limit, if it gets to the point where there is no choice but to abide by the debt limit, and therefore not pay some of the obligations of the government. That there's a basically a conflict between the debt limit, which is alleged, there's a legislation passed by Congress and the requirement of the 14th Amendment Section 4 that the [laughs] national debt not be questioned. If the federal government doesn't pay what, its obligations when they come up, that would certainly seem to be questioning the validity of the national debt.

**[00:23:02] Eric Foner:** There are other ideas floating around as, you know, some of them seem pretty zany, like printing a trillion dollar of, making a trillion-dollar coin and depositing it in the treasury and, uh, borrowing money against it. I still don't understand how people think that actually would work. But that's not what we're here to discuss. So basically my argument is the debt limit itself if the government has to abide by it is in violation of the Section 4 of the Constitution and the requirement that the national debt not be questioned.

**[00:23:39] Jeffrey Rosen:** Professor Magliocca, what do you make of Professor Foner's argument that the debt limit itself may be unconstitutional under Section 4? The debt limit was enacted for the first time by Congress in 1917. Tell us about that history and whether or not you agree with Professor Foner that it may violate the Constitution.

**[00:23:57] Gerard Magliocca:** So I don't agree that the debt ceiling violates the Constitution. The debt ceiling was put in to make it easier for the Treasury to borrow. Now, that, that might seem odd but prior to that time every time there was a need to borrow money, you had to get a specific authorization from Congress. So, the debt ceiling, which was put in during the First World War when, of course, we needed to borrow a lot more money was a way of saying, "Okay. Now you don't need a specific authorization every time you wanna take out debt, you can just borrow as much as you need up to whatever the ceiling is." And then, every time after that for many, many years, the ceiling was just always raised and there was no issue.

**[00:24:40] Gerard Magliocca:** I don't think that the debt ceiling is unconstitutional, because there are other means of paying back debt besides getting more debt. You can do it through spending reductions or tax increases, right? Now the fact that those are either politically impossible or maybe just we know they're not gonna happen doesn't make the debt ceiling unconstitutional. That said, if we reach a point where there could be a default, the president or the Treasury faces nothing but bad choices and will have to break some law somewhere that is either they're not paying the bondholders back, that's breaking the promise to them, they're not spending money on certain things, because they don't have enough money, right? Because they can't borrow more.

**[00:25:34] Gerard Magliocca:** That's also breaking the law, right? By not spending on what Congress has appropriated, or they would, I guess have to raise taxes without any kind of legal

authorization to do that. So, they have to, the president or the Treasury have to break the law somewhere. So, what's the least bad way of breaking the law? And I guess my view on that would be the least bad way would be to make sure that debt payments continue and simply not spend money on certain things if there's not enough money coming in to cover all of the expenses that the federal government has.

**[00:26:14] Gerard Magliocca:** Now my reasoning for that is to say that a central principle of both American and English constitutional law, going back to the struggle between the kings and parliament in England was the king cannot get his own money. He can't borrow money on his own. He can't get taxes on his own. He has to have an authorization. That's what all of those struggles were about. Spending, yes, but a little less so in the sense of, well, if the king had money, he, he could spend it. I mean and, it's just he didn't have enough money usually to spend on what he wanted to spend on. But, I don't pretend that any of these are great solutions.

**[00:27:06] Gerard Magliocca:** One other thing I would add is if the president were to follow Professor Foner's advice, it's not clear that anyone could stop the president from ignoring the debt ceiling. That is, it's not clear anyone would have standing to sue. The bondholders would be paid, they are happy. Congress would be upset, but it's not clear that they could bring a lawsuit to challenge the president's action. It would probably be more like bringing an impeachment or using other tools to express their displeasure. So even if you think the president cannot ignore the debt ceiling, it's not clear anyone could do anything about it if he does.

**[00:27:46] Jeffrey Rosen:** Professor Foner, how, how would your proposal play out in court? Would someone have standing to sue? And given the fact that in the 1930s, the Supreme Court came up with this *Marbury v. Madison* like solution of saying that there was a violation of a right but no remedy, how might the court confront such a lawsuit?

**[00:28:08] Eric Foner:** Well, first of all, I'm not sure that the plan that we heard a minute ago would work very well either. I think one of the problems here is as was said, almost anything that, that could be done once the debt limit is breached would violate something. It would require the violation of laws that have appropriated money and directed the spending of money, and if we don't have that money, we can't do it because of the debt ceiling.

**[00:28:38] Eric Foner:** So, a measure or a, or a policy that requires the president to break the law doesn't sound constitutional to me. After all, one of the president's duties in the Constitution is to ensure that the laws are abided by you know, put into effect, et cetera. I also think that it's not at all guaranteed that the government would prioritize payments to bondholders. In fact, it might look very, it might become unpopular if people say, "Well, Social Security checks are not going out this week because of the debt limit. But we are making sure that our bondholders many of whom are quite well to do, let's put it this way, that they'll get their money so we don't breach the debt limit or default on our payments."

**[00:29:28] Eric Foner:** I'm not sure that kind of prioritization would fly very well, when many people who are [laughs] expecting money from the federal government are not getting it. But across the street they're seeing bondholders, uh, sitting pretty with their, with the money that is owed to them. What would the court say? I've stopped long ago trying to predict what the courts



will do or say and the current Supreme Court who knows would they want to send the economy into a kind of crisis by saying no, you can't that the debt limit is, it has to be abided by and the government is gonna have to go into default.

**[00:30:10] Eric Foner:** I don't know. I don't know what the opinions of most of the members of the Supreme Court are on these financial issues that have never... Well, maybe once now as we heard, have never really been adjudicated before the Supreme Court. So, it's an unprecedented situation and I think right now, it's pretty much speculation as to what the courts or Congress or the president will do if we actually get to a point where, uh, the government just can't pay its bills and can't pay its debts. Let's hope we don't get to that point.

**[00:30:44] Jeffrey Rosen:** Professor Magliocca, say more about your conclusion that only a significant or substantial reduction in debt validity is a constitutional violation, not just any modification or reduction, but you conclude that, in this case, there would be a substantial or significant reduction if the government didn't pay its bills, and therefore President Biden should prioritize paying back bondholders before other, uh, other creditors.

**[00:31:12] Gerard Magliocca:** Well, what I meant to say by that was if there were one or two day delay in making debt payments before a deal is worked out with Congress, I don't know that that leads to a constitutional violation. You might say that that's sufficiently de minimis or trivial that you, you've not actually violated Section 4 or any other kind of constitutional principle. Admittedly, I don't have a good answer as to where do you cross from something that's de minimis to something that's significant enough to create a constitutional violation. But I mean there is at least some wiggle room it seems to me for a political accommodation to be worked out before you are gonna invoke the kind of constitutional machinery.

**[00:32:03] Gerard Magliocca:** Look, that said, if a case were to come before the court about any issue regarding this you again, at some point the kind of cost imposed by having the court unwind transactions that have been entered into, whether it's spending that's been done or bonds that have been issued would cause chaos. And they're probably not gonna do it. To take a simple example. Let's say that the president spends money or doesn't spend money and the court were to come in and say, "No. No. You had to spend the money or you should not have spent the money." Something like that.

**[00:32:48] Gerard Magliocca:** Well, okay, but what kind of remedy can they really order? Take the money back from people that it was spent on, or now you have to spend some money, or if there were bonds issued in defiance of the debt ceiling, well, are those bonds then null and void? And then, well what happens to say banks that own them or financial institutions that have them. So, again, it's the same problem the court confronted in the 1930s, maybe not to the same degree. But kind of, trying to unwind that kind of thing would risk a financial crisis.

**[00:33:25] Gerard Magliocca:** They'll probably just come up with some explanation for why they're not gonna do anything. Now they had an easy answer in the 1930s, which was, their answer now would be easier than their answer in the 1930s. Now they could just say nobody has standing to bring a challenge. In the 1930s, they needed a more convoluted explanation because

the bondholders did have standing since they were claiming that they were supposed to be getting more money than they were getting.

**[00:33:52] Jeffrey Rosen:** Professor Foner, the last big showdown over the debt ceiling was in 2011 when President Obama was, was in office. At that time, former President Bill Clinton said that if he were Obama, he would take matters into his own hands by invoking the 14th Amendment without hesitation and forced the courts to stop me. President Clinton said that the 14th Amendment argument first surfaced when he was president in 1994 when the Republicans in Congress led by Newt Gingrich first floated the idea of invoking it. As a historian and in light of the fact that the 14th Amendment argument has emerged in '94, in 2011, and today, how should history guide President Biden as he decides whether or not to invoke it?

**[00:34:33] Eric Foner:** Well, two instances [laughs] that don't necessarily make an overall pattern, obviously, and don't necessarily predict what will happen now, I think history [laughs], is pretty difficult to predict. I don't know if futures, if this happens, if the worst happens and the debt ceiling just blocks the, eventually blocks the government from spending money or refusing to spend money or paying back bondholders or not paying this group and paying that group. If you get into a real financial mess, then the buck stops here. And I think people in the future will probably blame President Biden for not doing something [laughs] even if they may not know what he should have done.

**[00:35:21] Eric Foner:** If you have a, a deal made in the last minute, sort of like happened with President Obama back in 2011, uh, when, you know, they, there was a deal about cutting spending and raising the debt limit and all that so there was no default by the government. Depends on your politics, I guess, whether you think that's a good idea or not. One problem here is why do we even have this debt limit in the first place? Congress keeps appropriating money it doesn't have, and then it comes up against this borrowing limit. As we said, we're not talking here about future spending, [laughs] we're talking about spending that's already been authorized, uh, and enacted and often spent by Congress. But now we can... It's like a credit card.

**[00:36:10] Eric Foner:** Now we're at the end of the month and we have to pay back, what's on our credit card, we have to pay the credit card dealer, even though we've already enjoyed the use of that money. [laughs] I think what history [laughs] what it should say is they should get rid of this debt limit legislation and, uh, figure out how they're gonna pay for those things they want to, uh, they want the government to do that would seem the most prudent, um, course of action. But, um, we live at a time when politics is very unpredictable predictable.

**[00:36:45] Jeffrey Rosen:** Professor Magliocca, your thoughts about more lessons from history. In the 1930s, President Roosevelt prepared a radio address that was gonna denounce the court and he was bummed that he couldn't deliver it after the court stepped back from the brink.

**[00:37:00]** This is obviously an example of a complicated mix between constitutional law and politics. What are the lessons of the 1930s tell us about how the courts and the political actors should proceed today?

**[00:37:12] Gerard Magliocca:** Right. So, as I mentioned the cases in the 1930s were very high profile and controversial and people really were afraid that there would be a financial panic and

bankruptcy if the Court ruled the wrong way. And of course, it was only a five to four decision in the end to say that the bondholders weren't entitled to anything and FDR did prepare an address that he was gonna give if the government lost the case, in which he was gonna say, "Look, we are not gonna pay the bondholders back. We're going to proceed as if we had won the case."

**[00:37:52] Gerard Magliocca:** And then, the plan was essentially for the United States to invoke sovereign immunity, and thereby not have to pay damages to the bondholders. Now this would have been a very dramatic confrontation, and indeed, I think it's fair to say the court was aware that this was a possibility which is why they came up with a reason not to order a remedy, much in the way that John Marshall did in Marbury because he knew that Jefferson would not obey a decision that commanded that Marbury become a judge.

**[00:38:29] Gerard Magliocca:** One lesson here is that constitutional provisions that deal with financial matters are just very difficult to enforce. Consider many states have a constitutional provision that says you have to have a balanced budget. Okay. Well, what happens if there isn't a balanced budget? Well, for a court to do something about that that would inevitably mean saying, "You have to cut spending, you have to raise taxes." Well, which taxes are you gonna raise or which spending is gonna be cut? Those are decisions that are not legal determinations. They're, they're political or policy oriented, right?

**[00:39:08] Gerard Magliocca:** So, in effect, it's better to understand these kinds of provisions as being directed towards either the legislature or the political branches. That is the people who ought to be paying attention to Section 4 the 14th Amendment are members of Congress, right? They ought to be taking it seriously and not calling the validity of the public debt into question, right? Because once they...they don't do that...it's rather hard for anybody else to sort of correct their error in a realistic way that doesn't cause all sorts of problems. I mean whether it's the president having to break the law or the courts having to make decisions about unwinding transactions.

**[00:39:50] Gerard Magliocca:** So maybe that's a way of saying, "You shouldn't have these kinds of provisions in constitutions that, that's all got to be left to the political process," or that it, it's kind of I'm fond of this idea from Robert Moses, the famous builder in New York profiled by Robert Caro who said basically once you start building a bridge the courts aren't going to make you tear the bridge down. It's too much to unwind it. So, in the same way, once you have, say bonds are issued or spending is done or so on, the courts aren't gonna make you undo that.

**[00:40:31] Gerard Magliocca:** So, I guess that's a practical version of constitutional law, right? But it also might just say that those, those sorts of subjects just aren't really suitable for constitutional resolution in the way they say other things like rights or equality are.

**[00:40:50] Jeffrey Rosen:** Professor Foner, returning to the reconstruction era, what are your thoughts about the lessons of the original debate over Section 4? For today, do you agree or disagree that the reconstruction framers intended it primarily as a command to Congress rather than the courts? And how should Congress and the courts absorb those lessons today?

**[00:41:11] Eric Foner:** Well, of course, the fifth section of the 14th Amendment and the 14th Amendment is the longest Amendment ever added to the Constitution. [laughs] It's got a lot of content within it. The fifth section says that Congress will have the authority to enforce this amendment. So, they were certainly thinking of Congress, this was Congress enacting now, of course, the states had to ratify. They were thinking of Congress enforcing it somehow if that was required.

**[00:41:41] Eric Foner:** The courts were not held in quite the, the degree of esteem back then as they may be by many people today. The shadow of the *Dred Scott* decision, which was anathema to large numbers of people in the North still hung over the court. Chief Justice Taney was still [laughs] at the head of the court while the 14th Amendment was being debated, and certainly Republicans in Congress were not interested in creating a situation where Chief Justice Taney, the author of *Dred Scott* was going to have any significant influence on how the government functioned or what the policies of Congress would be.

**[00:42:22] Eric Foner:** It's difficult for the courts to operate a budget or to levy taxes or spend money, sometimes it happens. Courts have required states to change their funding, for example of educational institutions that there were some areas are getting less money than they need. And courts have sometimes said, "No. This violates state constitutional law of equality," or things like that and demanded or required the legislatures to spend that money. I know that causes problems with state legislatures, but it has been done.

**[00:43:03] Eric Foner:** But I think, as I said, as we heard, there's, there's not much jurisprudence about Section 4. So, it's pretty difficult to, um, kind of figure out what the consequences would be, uh, in terms of, uh, how it would fit in with other federal policies of reconstruction, uh, if it had been actually implemented in any way during reconstruction. Of course, it wasn't... The bonds, by the way, were paid back in gold [laughs] as the, the 20s. Um, the, the federal debt was not repudiated. But that, but this issue has been floating around more at the state level from time to time. At the end of reconstruction there was a whole debate in Virginia by the so-called readjusters, which was a political party basically geared to not paying the debt of Virginia, which they claimed had been authorized in the wrong way.

**[00:44:01] Eric Foner:** Go back 20 years, Abraham Lincoln was involved [laughs] basically in a default by the state of Illinois that, uh, the Whigs, which he was a major leader of had spent so much money or it issued so many bonds in Illinois to pay for internal improvements or infrastructure as we call it, railroads, canals, road building. I mean all that is very important for an economy, but they just didn't have the money to [laughs] pay the bonds back and they defaulted. Didn't seem to make much difference in the long run. Actually, people kept loaning money to Illinois later on even though they defaulted on their previous debt.

**[00:44:45] Eric Foner:** So, this question of, uh, who has the right to, to [laughs] spend money and to borrow money and to pay back money is, uh, has been debated at the state level. It just hasn't been figured out very, uh, often at the federal [00:45:00] level.

**[00:45:00] Jeffrey Rosen:** Well, it's time for closing thoughts in this great discussion. Professor Foner, tell *We the People* listeners what lessons history can teach us about our current debates about Section 4 and the debt crisis?

**[00:45:11] Eric Foner:** [laughs] I have no idea what, what is gonna happen. I can't believe that some settlement won't be reached now. But of course, Congress is pretty polarized at the moment, we know that very well. This is we're in uncharted territory here and that makes it very difficult to know what's likely to happen. But it is almost impossible to imagine the United States, which is the economic [laughs] bulwark of the world and the dollar is the world currency, in effect, uh, just defaulting, and saying, "I'm sorry, folks. We're out of money and we can't do what we're supposed to be doing. We can't spend, we can't borrow, we're just broke." That would that would be quite a shift in American history and I can't possibly imagine what the consequences would be.

**[00:46:08] Jeffrey Rosen:** Professor Magliocca, final thoughts from you about the lessons of history for Constitution and the debt.

**[00:46:16] Gerard Magliocca:** Well, first, let me say it's a great honor to be here with Professor Foner who is one of America's leading historians and whose work I've admired for a long time.

**[00:46:25] Eric Foner:** Well, thank you very much.

**[00:46:26] Gerard Magliocca:** Yeah. Secondly, I'll say Alexander Hamilton established the credit of the United States and he said, and I'm paraphrasing here that the national debt can be a blessing and not a curse, right? Well, we're gonna find out now, because it's a blessing only if you pay the money back. And Section 4 of the 14th Amendment as the Supreme Court explained in the 1930s just confirmed this Hamiltonian understanding that Congress's power to borrow money is conditioned on paying the money back. And it's for Congress to figure this out.

**[00:47:07] Gerard Magliocca:** All of these are the solutions - trillion-dollar coin or President Biden taking things on, on his own, the court's getting involved - they're all interesting but they're all impractical. And, and so we just need Congress to do its job and honor the Constitution and follow what Alexander Hamilton put in at the beginning which has worked extremely well for more than two centuries. So, do your job.

**[00:47:40] Jeffrey Rosen:** Thank you so much Eric Foner and Gerard Magliocca for a vigorous historically informed and illuminating discussion of the 14th Amendment, the Constitution, and the debt. Thank you both.

**[00:47:52] Eric Foner:** You're very welcome.

**[00:47:53] Gerard Magliocca:** Thank you, Jeff.

**[00:47:55] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich and Bill Pollock. It was guest ] produced by Julia Redpath and engineered by Kevin Kilbourne. Research was provided by Liam Kerr, Emily Campbell, Sophia Gardell, Sam Desai, and Lana Ulrich. Please recommend *We the People* to friends, colleagues, or anyone anywhere and always remember that the National Constitution Center is a private non-profit. We rely on the generosity, the passion,

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