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Abstract

In March 2015, the debt ceiling was hit again and sovereign default loomed. Refusing to timely raise the debt ceiling, congressional ideologues have four times pushed our nation to the brink of a catastrophic debt default in as many years. Our struggling economy is again threatened, financial institutions are again spending millions planning for default, and vulnerable citizens are once again worrying about their benefit payments. Enough is enough.

*This Essay argues that nationwide bondholder litigation can void the unconstitutional debt ceiling, and it presents the first litigation in that effort. (*Williams v. Lew*, No. 15-1565, U.S. Court of Appeals - D.C. Circuit). The Constitution guarantees not only*

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that public debt will remain valid, but also that the integrity of those obligations will never be so much as questioned by our nation's government. The debt limit statute, facially and as-applied, violates the Fourteenth Amendment's Public Debt Clause and the Fifth Amendment's Due Process Clause. Bondholders have standing to challenge the unconstitutional statute as they suffer economic and noneconomic injuries resulting from the degradation of their investments' uniquely low-risk profile and monetary value. These injuries manifest as both current harm and certainly-impending future harm.

In the NAACP and ACLU's tradition of "test cases," the author's litigation is prosecuted with modest-success expectations, but with strong determination to prompt future litigation by others. The Justice Department has already exposed a defense strategy based on combining Tea Party default-denial delusion with Clapper v. Amnesty International *standing hurdles.*

The Essay pleas for state sovereigns and institutional bondholders (with alternative standing allegations) to initiate additional litigation. Public interest law firms, such as the National Chamber Litigation Center and the Constitutional Accountability Center, are challenged to lend support. As bond buying has been since the Republic's founding, this litigation effort is a necessary act of economic patriotism.

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I. Introduction

In March 2015, the nation again hit the debt ceiling.[1] The U.S. Department of the Treasury began statutory enforcement with "extraordinary measures" to forestall the effects of a sovereign default.[2] In August 2015, Treasury acknowledged specific current harm resulting from the ongoing debt ceiling deadlock. Treasury is being forced to reduce its "cash balance" (an emergency fund) below the "minimum prudent level" needed to

1. *See* Demetri Sevastopulo, *Lew Warns Congress Over US Debt Ceiling*, FIN. TIMES (Mar. 13, 2015), http://www.ft.com/intl/cms/s/0/0d818286-c9bd-11e4-a2d9-00144feab7de.html#axzz3bkyIMUfm (last visited June 22, 2015) (explaining how the debt limit was reached in March 2015) (on file with the Washington and Lee Law Review); 31 U.S.C. § 3101 (2012) (providing the public debt limit).

2. *See* Peter Schroeder, *Debt Limit Deadline Now Seen at End of 2015*, THE HILL (May 18, 2015), http://thehill.com/policy/finance/242404-debt-limit-deadline-now-seen-at-end-of-2015 (last visited June 22, 2015) ("In March, the federal government was again subjected to an $18.1 trillion borrowing cap, forcing the Treasury Department to begin employing its set of 'extraordinary measures' to free up room under that ceiling.") (on file with the Washington and Lee Law Review); *Federal Debt and the Statutory Limit,* CONG. BUDGET OFFICE (Mar. 3, 2015), http://www.cbo.gov/publication/49961 (last visited June 22, 2015) (explaining Treasury actions to "continue raising cash") (on file with the Washington and Lee Law Review).

address "emerging threats such as potential cyber attacks."[3] Treasury also warned of imminent market distortions resulting from its forced reduction in the supply of short-term securities.[4]

Congressional ideologues have pushed our nation to the brink of a catastrophic debt default four times in as many years by refusing to timely raise the debt ceiling.[5] Former Treasury Secretary Tim Geithner describes their obstruction: "Many of them truly seemed to believe that default could cleanse the sins of the US economy, which was insane." Geithner warns that a debt-ceiling-caused default will be "economic Armageddon."[6]

Extreme debt-ceiling ideologues strongly object to their own party's leadership compromising on, or using procedural maneuvers for, debt limit suspensions or rises: "If reconciliation is used to try and raise the debt ceiling, there may well be blood on the floor of the House chamber."[7] These ideologues are unfazed by warnings of a default's macroeconomic harm[8] or by the angst

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3. *See* Jason Lange, *U.S. Treasury Warns of Debt Cap Impact on Markets, Cyber Readiness*, REUTERS (Aug. 5, 2015, 1:29 PM), http://www.reuters.com/article/2015/08/05/usa-debt-idUSL1N10G16320150805 (quoting Acting Assistant Secretary for Financial Markets, Seth Carpenter).

4. *Id.*; Kasia Klimasinska & Susanne Walker Barton, *Treasury Warns Debt Ceiling Deadlock Could Squeeze Bill Market*, BLOOMBERG (Aug. 5, 2015, 12:03 PM), http://www.bloomberg.com/news/articles/2015-08-05/treasury-warns-debt-ceiling-deadlock-could-squeeze-bill-market?cmpid=yhoo.

5. *See* Danny Vinik, *McConnell to Democrats: Get Ready for Another Debt Ceiling Fight!*, NEW REPUBLIC (May 1, 2015), http://www.newrepublic.com/article/121691/mitch-mcconnell-says-republicans-will-fight-debt-ceiling-year (last visited June 22, 2015) (discussing some of the history of Congress and the national debt ceiling) (on file with the Washington and Lee Law Review).

6. TIM GEITHNER, STRESS TEST 465 (2014).

7. Nick Timiraous & Kristina Peterson, *Debt Limit Drama Returns to Political Stage: Negotiations Complicated by Sharp Divisions Among Republicans in Congress and Coming Budget Talks*, WALL ST. J. (Mar. 13, 2015), http://www.wsj.com/articles/debt-limit-drama-returns-to-political-stage-1426270672 (last visited June 23, 2015) (quoting Rep. Mike Mulvaney) (on file with the Washington and Lee Law Review).

8. *See, e.g.*, Matthew O'Brien, *Not Raising the Debt Ceiling: A Crisis, if We're Lucky, a Historic Calamity if We're Not*, THE ATLANTIC (Sept. 29, 2013), http://www.theatlantic.com/business/archive/2013/09/not-raising-the-debt-ceiling-a-crisis-if-were-lucky-a-historic-calamity-if-were-not/280057/ (last visited June 23, 2015) (predicting the negative, large-scale results of a default) (on file with the Washington and Lee Law Review); Jay Fitzgerald, *Debt Ceiling*

of individual Americans whose very survival is dependent on timely receipt of government benefits (payments for Social Security, veterans, disability, civil retirement, Medicare, Medicaid, etc.).[9] Representatives and senators reject reasoned, expert counsel that the debt limit statute actually causes congressional overspending.[10]

These GOP and Tea Party lawmakers, some of whom are also 2016 presidential candidates, continue to deny that a harmful default will result from a debt ceiling breach.[11] For example,

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Maneuvering Threatens Economy, Analysts Say, BOS. GLOBE (Oct. 13, 2013), https://www.bostonglobe.com/business/2013/10/12/debt-ceiling-maneuvering-threatens-economy-analysts-say/EtLEuIbzsP2bIZhTFWQq9I/story.html#\ (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review).

9. *See, e.g.*, Sheryl Nance-Nash, *Why Seniors Are Mad as Hell*, DAILY FIN. (July 13, 2013), http://www.dailyfinance.com/2011/07/13/social-security-checks-debt-ceiling/ (last visited June 23, 2015) (discussing the effects of not raising the debt ceiling on those awaiting government support) (on file with the Washington and Lee Law Review); Jason Sadler, *Boehner Demands Medicare, Social Security and Medicaid Cuts To Raise Debt Limit*, NAT'L MEMO (Aug. 27, 2011), http://www.nationalmemo.com/boehner-demands-medicare-social-security-and-medicaid-cuts-to-raise-debt-limit (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review); Dylan Scott, *Could the GOP Turn Social Security Into a Perennial "Crisis" Like the Debt Limit?*, TALKING POINTS MEMO (Jan. 23, 2015), http://talkingpointsmemo.com/dc/gop-congress-social-security-cliff-debt-ceiling (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review); Barbara Starr, *Veterans Groups Summoned to White House on Debt Ceiling Impact*, CNN (July 26, 2011), http://www.cnn.com/2011/POLITICS/07/26/debt.veterans/index.html (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review).

10. *See* Gary S. Becker & Edward P. Lazear, *How 'Debt Ceilings' Increase Debt*, WALL ST. J. (Oct. 23, 2013), http://www.wsj.com/articles/SB10001424052702303448104579149503424494292 (last visited June 23, 2015) (explaining how some think the debt limit statute does not encourage overspending) (on file with the Washington and Lee Law Review).

11. *See* Reena Flores & Ali Tejani, *The 2016 Field and the Debt Ceiling*, CBS NEWS (Mar. 16, 2015), http://www.cbsnews.com/news/2016-and-the-debt-ceiling/ (last visited June 23, 2015) (noting the views of prominent GOP leaders on the effect of a debt ceiling breach) (on file with the Washington and Lee Law Review); Ginger Gibson, *Shutdowns, Debt Ceilings Loom: Congress Must Find Negotiators*, INT'L BUS. TIMES (Feb. 26, 2015), http://www.ibtimes.com/shutdowns-debt-ceilings-loom-congress-must-find-negotiators-1828646 (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review); Rachel Bade, *Default Deniers Scoff at Debt-Ceiling Apocalypse*, POLITICO (Jan. 16, 2013),

Senator Rand Paul states with surprising naïveté: "If you don't raise your debt ceiling, all you're saying is, 'We're going to be balancing our budget.'"[12] Paul states there is no reason to raise the debt ceiling;[13] he also made a Facebook pledge not to raise the debt ceiling until a balanced-budget constitutional amendment is enacted.[14] When Republicans pledge not to "default on the debt," it is not a promise to timely raise the debt ceiling. Even Republican leaders, such as Orrin Hatch, Chair of the Senate Finance Committee, deny that a failure to raise the debt limit would result in a Treasury debt default: "I think the administration could work on who gets paid and who doesn't in a way that would pull us through."[15]

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http://www.politico.com/story/2013/01/default-deniers-pooh-pooh-debt-ceiling-apocalypse-86253.html (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review).

12. Jonathan Weisman, *Many in GOP Offer Theory: Default Wouldn't Be That Bad*, N.Y. TIMES (Oct. 8, 2013), http://www.nytimes.com/2013/10/09/us/politics/many-in-gop-offer-theory-default-wouldnt-be-that-bad.html?hp&_r=2& (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

13. *See* Jonathan Easley, *Paul: There's No Reason to Raise the Debt Ceiling*, THE HILL (Oct. 2, 2013), http://thehill.com/video/senate/326265-paul-theres-no-reason-to-raise-the-debt-ceiling (last visited June 23, 2015) (expressing Rand Paul's views on raising the debt ceiling) (on file with the Washington and Lee Law Review).

14. *See* Rand Paul, FACEBOOK (Jan. 4, 2013) https://www.facebook.com/RandPaul/posts/324885054287210 (last visited June 23, 2015) ("I will not vote to raise the debt ceiling . . . .") (on file with the Washington and Lee Law Review). Rand Paul and other default deniers in the 2016 presidential primary race would presumably refuse to sign legislation allowing a debt limit rise or suspension if elected President. GOP presidential long-shot Senator Lindsey Graham has attempted to make an issue of his primary opponents' irresponsible, irrational debt limit positions. *See* Zeke J. Miller, *Lindsey Graham Challenges Republican Rivals on Debt Ceiling*, TIME (June 12, 2015), http://time.com/3919067/lindsey-graham-debt-ceiling/ (last visited June 23, 2015) (noting Graham "challenging his opponents to take a stance on raising the federal debt limit") (on file with the Washington and Lee Law Review).

15. David Weigel, *Republican Senator: We Can Crash Into Debt Limit "Because the Only People Buying Our Bonds Are the Federal Reserve,"* SLATE (Oct. 7, 2013), http://www.slate.com/blogs/weigel/2013/10/07/republican_senator_we_can_crash_into_debt_limit_because_the_only_people.html (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

Congressional default-denial passions were inflamed in 2014 when the Treasury first acknowledged "technological" capability to "make [bond] principal and interest payments while Treasury was not making other kinds of daily payments."[16] A basic tenet of default denial is that prioritization of bond payments, above any of the other eighty million monthly payments made by Treasury, would preclude default harm.[17] Treasury's technical capacity for bond prioritization over its other required payments does not eliminate the legal prohibitions against,[18] or mitigate the

16. Tim Reid, *Treasury Says Debt Payments Could Be Prioritized in Default Scenario*, CHI. TRIB. (May 9, 2014), http://articles.chicagotribune.com/2014-05-09/news/sns-rt-us-usa-treasury-debt-20140509_1_debt-payments-debt-limit-bond-payments (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

17. *See* Aaron Blake, *Majority of GOP Not Worried About Debt Ceiling Lapse*, WASH. POST (Oct. 15, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/15/majority-of-gop-not-worried-about-debt-ceiling-lapse/ (last visited June 23, 2015) (explaining how some leaders are "default deniers") (on file with the Washington and Lee Law Review); Brian Faler, *Debt-Limit Deniers Scoff at Geithner's Warnings of Default*, BLOOMBERG (May 2, 2011), http://www.bloomberg.com/news/articles/2011-05-02/debt-limit-deniers-say-geithner-tries-to-stampede-republicans-on-debt-vote (last visited June 23, 2015) (same) (on file with the Washington and Lee Law Review). GOP congressmen have repeatedly failed to pass legislation requiring bond payment prioritization. *See generally* John Avlon, *Why We Need the Full Faith and Credit Act*, DAILY BEAST (May 9, 2013), http://www.thedailybeast.com/articles/2013/05/09/why-we-need-the-full-faith-and-credit-act.html (last visited June 23, 2015) (explaining the lack of prioritization on requiring bond payment) (on file with Washington and Lee Law Review).

18. Treasury pays its bills as they come due using a classic "First In, First Out" (FIFO) procedure with an implicit pari passu intent. *See generally* Natalie A. Turchi, Note, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM. L. REV. 2171 (2015) (discussing the Treasury bill payment process). *See also* Binyamin Applebaum, *Treasury to Weigh Which Bills to Pay*, N.Y. TIMES (July 27, 2011), http://www.nytimes.com/2011/07/28/business/economy/treasury-to-weigh-which-bills-to-pay.html?_r=0 (last visited June 23, 2015) (discussing how the Treasury Department prioritizes bills) (on file with the Washington and Lee Law Review). Separately problematic, Treasury's Financial Management Service is only responsible for payment of approximately eighty-five percent of government disbursements. The Department of Defense and certain independent agencies independently disburse fifteen percent of government payments. *See Fact Sheet: Payment Management*, FIN. MGMT. SERV. (Mar. 14, 2014), https://www.fms.treas.gov/news/factsheets/pmt_mgmt.html (last visited June 23, 2015) (explaining the Department of Treasury's payment process) (on file with the Washington and Lee Law Review).

systemic economic damage that would result from, such payment prejudice.[19] Yet, the congressional default delusion has only worsened. In May 2015, a former House Republican staffer publically revealed that the Federal Reserve's Open Market Committee had plans to intervene in the event of a debt-limit default.[20] The House Financial Services Committee used the revelation as justification to formally subpoena the Treasury and the Federal Reserve Bank of New York, demanding any contingency plans for a debt-limit-caused default.[21]

During Treasury Secretary Jacob Lew's June 2015 testimony before the House Financial Services Committee, Republican members referenced Lew's answers to the committee as "disdainful." Lew again attempted to rationally explain the limits of bond payment prioritization: "[W]e do have the technical capacity but it would be a terrible thing to do because you would be defaulting." In combative remarks, Representative Mick Mulvaney alleged that Lew and the Obama Administration were purposely promoting marketplace "chaos" by refusing to assure that bond payment prioritization would be implemented in a default. Mulvaney stated to Lew: "[A]nswers regarding payments

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19. *See* S. Rep. No. 99-144, at 5 (1985) (describing the consequences of delayed approval); Prompt Payment Act, 31 U.S.C. §§ 3901 et seq.; *see also* Ian Katz, *Geithner Says Delaying Debt Payments 'Deeply Irresponsible'*, BLOOMBERG (June 29, 2011), http://www.bloomberg.com/news/articles/2011-06-29/geithner-says-prioritizing-debt-payments-deeply-irresponsible- (last visited June 23, 2015) (on file with the Washington and Lee Law Review); Neal Wollin, *Deputy Secretary of the Treasury, Proposals to "Prioritize" Payments on U.S. Not Workable; Would Not Prevent Default,* DEP'T OF TREASURY (Jan. 21, 2011), http://www.treasury.gov/connect/blog/Pages/Proposals-to-Prioritize-Payments-on-US-Debt-Not-Workable-Would-Not-Prevent-Default.aspx (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

20. *Fed Said to Have Debt Ceiling Plan Involving Market Interventions*, REUTERS (May 11, 2015), http://www.reuters.com/article/2015/05/11/usa-debt-idUSL1N0Y21UL20150511 (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

21. David Harrison, *Head of House Panel Sends Subpoenas to N.Y. Fed and Treasury*, WALL ST. J. (May 12, 2015), http://www.wsj.com/articles/head-of-house-panel-sends-subpoenas-to-n-y-fed-and-treasury-1431455910 (last visited June 23, 2015) (on file with the Washington and Lee Law Review). For a recent article suggesting what the role of the Federal Reserve might be in a default, see Charles Tiefer, *Confronting Chaos: The Fiscal Constitution Faces Government Shutdowns and (Almost) Debt Defaults*, 43 HOFSTRA L. REV. 511, 544–51 (2014).

are not being given to us because you want the chaos, because you think it's preferable to you and your administration, this administration, to have the chaos, that it will help you achieve politically what you want to achieve."[22]

Less than a month later, however, Lew found strong support as Congress' own Government Accountability Office (GAO) issued an alarming Report analyzing the market disruptions caused by the 2013 default crisis. As one of the three suggested reform alternatives, the nonpartisan congressional investigative agency proposed that the debt ceiling be eliminated.[23] The GAO reported that the 2013 marketplace experienced "both a dramatic increase in rates and a decline in liquidity in the secondary market where securities are traded among investors."[24] Noting that the research underlying the Report had been subjected to the econometric review of five independent economists,[25] the GAO described:

> During recent debt limit impasses, investors reported systematically taking actions to avoid certain Treasury securities that matured around the dates when Treasury projected it would exhaust its extraordinary measures (at-risk Treasury securities), including selling them, not purchasing them, and not using or accepting them as collateral in financial transactions. These actions caused interest rates on at-risk Treasury securities to increase. They also caused a decline in liquidity for at-risk Treasury securities and ultimately added to Treasury's borrowing costs.[26]

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22. *Video of Secretary Jack Lew's June 17, 2015 Testimony Before the House Financial Services Committee* (C-SPAN television broadcast) [Quoted exchange with Rep. Mike Mulvaney at 02:17:39], http://www.c-span.org/video/?326614-1/secretary-jack-lew-testimony-financial-stability-report. *See also US's Lew Spars With Republican Foes of Dodd-Frank*, MARKET NEWS INT'L (June 17, 2015), https://www.marketnews.com/content/update-uss-lew-spars-republican-foes-dodd-frank (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

23. Nick Timiraos, *Should Congress Abolish the Federal Debt Limit?*, WALL ST. J. (July 10, 2015), http://blogs.wsj.com/economics/2015/07/10/should-congress-abolish-the-federal-debt-limit/ (last visited July 19, 2015) (on file with the Washington and Lee Law Review).

24. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-486, DEBT LIMIT: MARKET RESPONSE TO RECENT IMPASSES UNDERSCORES NEED TO CONSIDER ALTERNATIVE APPROACHES (2015) [hereinafter GAO Report].

25. *Id.* at 4, 57.

26. *Id.* at 12.

In perhaps its most disturbing nontechnical revelation, the GAO Report used the term "at-risk Treasury securities" throughout the report. In the period of time exactly correlated to the political rise of the Tea Party, the risk profile of United States Treasury investments has been degraded from "risk-free" to "low-risk" to "at-risk."

According to Congress's auditing agency, the amount of "at-risk" Treasury securities totaled "more than $3 trillion" outstanding, which was "25 percent of the debt held by the public at the time." [27] A full one-quarter of all the Treasury debt of the United States of America was determined by the GAO to have been "at risk" of default.

Scared investors, large and small, turned to commercial paper and to relatively "safe" securities issued by such paragons of financial stability as Fannie Mae and Freddie Mac.[28] As the Securities and Exchange Commission restricts the ability of money market funds to hold defaulted corporate or sovereign debt (whether Greek, Argentine, or American), money market managers were at the front of the 2013 queue dumping short-term U.S. Treasuries. [29]

The marketplace has long had a rational view of debt default. Leading bank analyst Richard Bove alerted clients in 2013 that, in addition to other severe harms, a default would wipe out the Federal Reserve's working equity and undermine the dollar's value: "The devastation to the United States would be so severe that it would take decades to recover from the Depression caused by a default and the attendant dumping of trillions of dollars of

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27. *Id.* at 14.

28. *See id.*

> Market participants told us that as substitutes for the at-risk Treasury securities, investors used bank deposits, agency discount notes—short-term securities issued by government sponsored enterprises (GSE) such as Fannie Mae, Freddie Mac, and the Federal Home Loan Banks—and commercial paper—short-term securities issued by corporations to raise cash needed for current transactions.

29. *See id.* at 15 ("Fund managers and other market participants said that Securities and Exchange Commission rules also contributed to their decision to avoid certain Treasury securities. These rules limit the ability of money market funds to hold defaulted securities without the approval of a fund's board of directors." (citing 17 C.F.R. § 270.2a-7(f) (2010))).

U.S. Treasury securities on the global financial markets."[30] In October 2013, the ratings firm Fitch placed the United States' credit on a "Ratings Watch Negative."[31] Investment houses, institutions, and individuals sold billions of dollars in short-term Treasury debt.[32] The "TED spread" inverted, evidencing for the first time that commercial interbank loans were considered safer than Treasuries.[33] Large banks and investment houses spent millions of dollars to implement default contingency plans, including developing plans to partially underwrite customers' government benefits. Financial institutions worked closely with the U.S. Securities Industry and Financial Markets Association in attempts to develop protocols to mitigate systemic disruption to markets in a default. J.P. Morgan alone spent more than 100 million dollars in such default planning. "With each crisis, the once-unthinkable scenario of a U.S. default becomes a little more real" to the marketplace.[34]

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30. Mike Obel, *Treasury Default Could Crash US, Global Economy: Bank Analyst Richard Bove, Leading to a Depression Lasting Decades*, INT'L BUS. TIMES (Oct. 3, 2013), http://www.ibtimes.com/treasury-default-could-crash-us-global-economy-bank-analyst-richard-bove-leading-depression-lasting (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

31. *Fitch Places United States' 'AAA' on Rating Watch Negative*, REUTERS (Oct. 15, 2013), http://www.reuters.com/article/2013/10/15/fitch-places-united-states-aaa-on-rating-idUSFit67327220131015 (last visited June 23, 2015) (on file with the Washington and Lee Law Review). After the 2011 debt default crisis, S&P downgraded U.S. Debt for the first time in history. *See* Binyamin Applebaum & Eric Dash, *S&P Downgrades Debt Rating of U.S. for the First Time*, N.Y. TIMES (Aug. 6, 2011), www.nytimes.com/2011/08/06/business/us-debt-downgraded-by-sp.html (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

32. *See* Min Zeng, *Uneasy Investors Sell Billions in Treasurys*, WALL ST. J. (Oct. 14, 2013), http://online.wsj.com/articles/SB10001424052702304330904579135943799655488 (last visited June 23, 2015) (on file with the Washington and Lee Law Review); *see also* D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 8 (2013) (explaining how the debt has been managed in the past).

33. *See* Katie Holliday, *US Treasuries? No Thanks, I'll Take Bank Debt*, CNBC (Oct. 16, 2013), http://www.cnbc.com/id/101115800 (last visited June 23, 2015) (on file with the Washington and Lee Law Review).

34. David Henry & Lauren Tara LaCapra, *Insight: As U.S. Default Threatened, Banks Took Extraordinary Steps*, REUTERS (Nov. 19, 2013), http://www.reuters.com/article/2013/11/19/us-usa-fiscal-banks-warrooms-insight-idUSBRE9AI05P20131119 (last visited June 24, 2015) (on file with the

Over the objection of its default deniers, and at the twelfth hour, in October 2013, Congress temporarily suspended the debt ceiling with the quite accurately entitled "The Default Prevention Act."[35] Agreeing to allow a subsequent February 2014 suspension,[36] GOP leaders strategically deferred the next debt limit battle until after expected Republican 2014 midterm victories.[37] In spring 2015, the Treasury Secretary was again repeatedly writing to Congress—with its House and Senate now infused with additional Tea Party default deniers—pleading for a raise of the breached debt ceiling even as he began its statutory enforcement.[38]

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35. Continuing Appropriations Act of 2014, Pub. L. No. 113–46, 127 Stat. 558-71 (2014).

36. Temporary Debt Limit Extension Act, Pub. L. No. 113-83, 128 Stat. 1001-12 (2014). It was not the "clean" bill as was widely reported. *See, e.g.*, Paul Kane, Robert Costa & Ed O'Keefe, *House Approves 'Clean' Debt-Ceiling Bill, Advance it to Senate*, WASH. POST (Feb. 11, 2014) http://www.washingtonpost.com/politics/house-gop-leaders-will-bring-clean-debt-ceiling-bill/2014/02/11/1544cf8a-9338-11e3-84e1-27626c5ef5fb_story.html (last visited June 24, 2014) (on file with the Washington and Lee Law Review). Section 3 was subtitled "Restoring Congressional Authority Over the National Debt." The statute as amended prevented the Treasury from either prepaying obligations, building a "cash balance above normal operating balances in anticipation of the expiration of such period," or both. The amendment thus envisioned and promoted a future default crisis.

37. *See* Carl Hulse & Jonathan Martin, *Retreat on Debt Fight Seen as G.O.P. Campaign Salvo*, N.Y. TIMES, Feb. 17, 2014, at A15 (discussing the strategy behind delaying the debt limit battle). Even the strategic move by GOP leadership was opposed by their Tea Party caucus, with House threats of rebellion against the Speaker and a Senate filibuster. Only a few rank and file Republicans voted for the 2014 suspension. *See* Michael C. Bender & Laura Litvan, *Tea Party Scorns Republicans as House Lifts Debt Ceiling*, BLOOMBERG (Feb. 12, 2014), http://www.bloomberg.com/news/print/2014-02-11/house-republicansseek-democratic-help-for-debt-limit.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review); Brett LoGiurato, *Analyst: Get Ready for Another Brutal Debt Ceiling Fight After Eric Cantor's Loss*, BUS. INSIDER (June 11, 2014), http://www.businessinsider.com/eric-cantor-loss-debt-ceiling-fight-2014-6 (last visited June 24, 2015) (on file with the Washington and Lee Law Review); Ashley Parker & Jonathan Weisman, *G.O.P. Senate Leaders Avert Debt Ceiling Crisis*, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/13/us/politics/senate-debt-ceiling-increase.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review).

38. *See, e.g.,* Letter from Jacob Lew, Secretary of the Treasury, to the Hon. John A. Boehner, Speaker of the House (March 13, 2015), *available at*

During the most intense times of default crises, calls for unilateral Executive action have been frequent.[39] In 2011, former President Bill Clinton said he would have invoked the Fourteenth Amendment to prevent a default "without hesitation and force the courts to stop me."[40] Jeffrey Rosen, CEO of the National Constitution Center, predicted that the Supreme Court would not likely invalidate such a presidential decision to invoke the Public Debt Clause.[41] Other commentators promoted creative Executive solutions including minting a trillion dollar platinum coin.[42] All of the plans were publically rejected by the Obama Administration, however, even as it privately scrambled for options to avoid a sovereign debt default.[43]

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http://www.treasury.gov/connect/blog/Pages/Treasury-Sends-Debt-Limit-Letter-to-Congress-031315.aspx.

39. *See, e.g.*, Garrett Epps, *The Speech Obama Could Give*, THE ATLANTIC (Apr. 28, 2011), http://www.theatlantic.com/politics/archive/2011/04/the-speech-obama-could-give-the-constitution-forbids-default/237977/ (last visited June 24, 2015) (hypothesizing how President Obama could have dealt with the debt crisis) (on file with the Washington and Lee Law Review).

40. Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out*, N.Y. TIMES (July 24, 2011), http://www.nytimes.com/2011/07/25/us/politics/25legal.html?_r=0 (last visited June 24, 2015) (on file with the Washington and Lee Law Review). *But see* Laurence Tribe, *A Ceiling We Can't Wish Away*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/opinion/08tribe.html (last visited June 24, 2015) (explaining that the 14th Amendment cannot be invoked to solve the debt crisis) (on file with the Washington and Lee Law Review).

41. Jeffrey Rosen, *How Would the Supreme Court Rule on Obama Raising the Debt Ceiling Himself?*, THE NEW REPUBLIC (July 29, 2011), http://www.newrepublic.com/article/politics/92884/supreme-court-obama-debt-ceiling (last visited June 24, 2015) (on file with the Washington and Lee Law Review). *See also* Eric A. Posner & Adrian Vermeule, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), http://www.nytimes.com/2011/07/22/opinion/22posner.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review). For more recent analysis and exhaustive arguments regarding presidential authority to act unilaterally, see generally Zachary Ostro, *In Debt We Trust*, 51 HARV. J. ON LEGIS. 241 (2014).

42. *See* Christopher Mathews, *Three Not-So-Crazy Ways Out of the Debt Ceiling Crisis*, TIME (Oct. 5, 2013), http://business.time.com/2013/10/05/three-not-so-crazy-ways-out-of-the-debt-ceiling-crisis (last visited June 24, 2015) (suggesting alternative solutions for the debt ceiling crisis) (on file with the Washington and Lee Law Review).

43. *See* Ryan J. Reilly, *The Obama Administration Took the Platinum Coin Option More Seriously Than it Let On*, HUFFINGTON POST (Dec. 3, 2013),

There is, however, an unexplored, direct solution to deal with this dangerous, unconstitutional statute: bondholder litigation to void the debt ceiling.[44]

II. Preface: Test Case to Void the Debt Limit Statute

Default dramas should be unacceptable as policy; instead, they have become regular, integral components of the national governance process and electoral campaigns.[45] Even in an age of asymmetric partisan polarization,[46] the specter of congressional ideologues and their leadership strategizing about how best to threaten the validity of the nation's public debt is disturbing.[47]

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http://www.huffingtonpost.com/2013/12/03/platinum-coin-option_n_4351706.html?1386084682 (last visited June 24, 2015) (on file with the Washington and Lee Law Review).

44. This author first noodled the idea for such a lawsuit in 2011. *See* Victor Williams, *Unconstitutional Debt Ceiling: Grandma Bondholder's Emergency Lawsuit if Obama Does Not Invoke 14th Amendment*, HUFFINGTON POST (July 29, 2011), http://www.huffingtonpost.com/victor-williams/unconstitutional-debt-cei_b_913309.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review); Victor Williams, *Preventing Debt Ceiling Catastrophe*, HUFFINGTON POST (Oct. 7, 2013), http://www.huffingtonpost.com/victor-williams/prevent-debt-ceiling-cata_b_4054950.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review); Victor Williams, *Lawsuit Filed to Void Debt Ceiling: Is Jack Lew a "Default Denier"?*, HUFFINGTON POST (May 27, 2014), http://www.huffingtonpost.com/victor-williams/lawsuit-filed-to-void-deb_b_5393293.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review).

45. *See* Peter Weber, *The End of the Debt Ceiling Brinkmanship Should Make You Nervous,* THE WEEK (Feb. 12, 2014), http://theweek.com/article/index/256302/the-end-of-debt-ceiling-brinksmanship-should-make-you-nervous (last visited June 24, 2015) (explaining the significance of defaults in politics) (on file with the Washington and Lee Law Review).

46. *See generally* THOMAS MANN & NORMAN ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012); Matt Grossman & David Hopkins, *Policymaking in Red and Blue: Asymmetric Partisan Politics and American Governance*, APSA Annual Meeting Paper 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2452554##.

47. *See* Josh Hazan, Note, *Unconstitutional Debt Ceilings*, 103 GEO. L.J. ONLINE 29, 29 (2013) (detailing debt ceiling history and explaining how default crises have recently developed).

Can litigation to void the statute accomplish what political leaders will not? Jacob Lew and the Treasury Department have repeatedly acknowledged the current harm to bondholders from the debt limit law.[48] Public debt investors hold this nation's debt under a constitutional guarantee *not only* that the debt instruments will remain valid, *but also* that the "validity" of those securities will never be "questioned" by the nation's government. The debt ceiling facially, and as applied, violates that constitutional guarantee, causing Treasury investors not only both economic and noneconomic injuries, but both current harm and impending future harm.

This Essay summarily presents *Williams v. Lew*[49] as a test case to void the debt limit statute. Initiated in early 2014,[50] the individual effort by this bondholder author follows a long tradition of civil rights/public interest litigation using test case strategy:

> The key to the NAACP's litigation success was its use of "test cases" the strategy by which an organization seeks to find or, if necessary, to create, a legal controversy to establish a point of law . . . . The test case idea in turn had its roots in activism by civil rights campaigners and corporations stretching far back into the nineteenth century . . . . *Plessy v. Ferguson* was such a case.[51]

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48. *See* D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES 20–25 (2013) (discussing Lew's views on the debt limit law's affect on bondholders).

49. No. 14-00183(RJL), 2015 WL 72968 (D.C.C. Jan. 5, 2015).

50. First Amended Complaint For Declaratory Judgment To Void The Debt Ceiling, at 22, ¶¶ 41–42, Williams v. Lew, 1:14-cv-00183(RJL) (D.D.C. 2014), 2014 WL 1392940. This litigation is a project of the author's DisruptiveJustice.org, which attempts to honor Judge Jerome Frank's 1940s vision of the "private attorney general" who sues on behalf of the public on his own private initiative. Associated Indus. of N.Y. State v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943). The "private attorney general" has no accountability to the government, entrenched special interests, or an electoral constituency. Justice William O. Douglas, writing for a U.S. Supreme Court majority, affirmed the role of a "reliable private attorney general to litigate the issues of the public interest." Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

51. Susan D. Carle, *Race, Class and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 100–02 (2002) (citations omitted).

With extremely limited litigation resources and only a grudging acceptance of the federal judiciary's increasingly restrictive standing jurisprudence,[52] *Williams v. Lew* was prosecuted with modest expectations. The benefits of a test case are often indirect and incremental. As evidenced by the National Association for the Advancement of Colored Peoples (NAACP) and the American Civil Liberties Union's (ACLU) early use of test cases, a first-impression test case may be useful for the subsequent analysis of the loss. As 1940s ACLU test cases were then described: "Test cases have also been instituted involving important new issues which have later been resolved through the efforts of other organizations or private individuals."[53]

The first litigation to challenge the debt limit statute, *Williams v. Lew*, is summarized by this Essay to: (1) provide a procedural or theoretical template for future bondholder plaintiffs; (2) expose the Justice Department's (nationally uniform) defense theory and tactics against such claims as based on default denial; (3) explain how the Justice Department's defense arguments against individual bondholder standing serve as an invitation for future state-sovereign and institutional bondholder litigation against the debt ceiling; and (4) frame domestic litigation against the debt ceiling as an act of economic patriotism.

The Essay first analyzes the debt limit statute's unconstitutionality (Part I), then presents the test case summary (Part II), and concludes with a plea for state sovereigns and domestic institutional bondholders to immediately challenge the debt limit statute (Part III).

A. The Debt Limit Statute's Patent Unconstitutionality

On its face, and as it is arbitrarily applied, the debt limit statute violates both the Fourteenth Amendment's Public Debt

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52. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries" and Article III*, 91 MICH. L. REV. 163 (1992); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013).

53. Comment, *Private Attorneys–General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 580 (1949) (citations omitted).

Clause[54] and the Fifth Amendment's Due Process Clause.[55] In *Perry v. United States*,[56] the Supreme Court ruled that the original 1787 Constitution prohibits debt "repudiation" when Congress borrows money on the credit of the United States: "To say that Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and conveniences of the pledgor."[57] Section Four of the Fourteenth Amendment therefore altered the Constitution to guarantee an even stronger protection for debt holders and to mandate a broad application of that debt protection to all government obligations. Section Four prohibits any law or action that so much as questions the "integrity of public obligations."[58]

1. The History and Text of Section Four

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54. U.S. CONST. amend. XIV, § 4. *See also, e.g.*, Chad DeVeaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 CONN. L. REV. 395 (2014); Jacob D. Charles, Note, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227 (2013); Garret Epps, *Our National Debt 'Shall Not Be Questioned,' the Constitution Says*, THE ATLANTIC (May 4, 2011), http://www.theatlantic.com/politics/archive/2011/05/our-national-debt-shall-not-be-questioned-the-constitution-says/238269/ (last visited June 25, 2015) (on file with the Washington and Lee Law Review). *But see* Anita S. Krishnakumar, *In Defense of the Debt Limit Statute*, 42 HARV. J. ON LEGIS. 135, 140 (2005).

55. U.S. CONST. amend. V.

56. 294 U.S. 330 (1935).

57. *Id.* at 351. This case was one of the famed Gold Clause Cases. *See generally* Kenneth W. Dam, *From the Gold Clauses Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504, 514–18 (1983).

58. *Perry*, 294 U.S. at 354. The full text of Section Four is instructive:

> 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.

U.S. CONST. amend. XIV, § 4.

The congressional authors of the Fourteenth Amendment's Public Debt Clause were resolute "to lay down a constitutional canon for all time in order to protect and maintain the national honor and to strengthen the national credit."[59] The textual analysis, drafting history, and functional purpose of Section Four of the Fourteenth Amendment prove that its scope is broad and its proscription against the debt limit statute absolute.[60]

Section Four proponent Senator Benjamin Wade argued that the Treasury bondholder "will feel safer" when the national debt is "placed under the guardianship of the Constitution than he would feel if it were left at loose ends and subject to the varying majorities which may arise in Congress."[61] Even congressional critics of the amendment provision, such as Senator Thomas Hendricks, recognized that the Clause would "change the Constitution for the benefit of the bond-holders."[62] The authority of Section Four is best understood in relation with other amendment provisions; the Civil War amendments fundamentally altered the Republic's political and economic order.[63] The Public Debt Clause joins other broadly stated provisions of the Thirteen, Fourteenth, and Fifteenth Amendments in abolishing slavery,[64] ensuring individual rights and equal protection of the laws,[65] and charging a national protection of the right to vote.[66] Yale University's Jack Balkin connects the Public Debt Clause's history and ratified text to its

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59. Phanor J. Eder, *A Forgotten Section of the Fourteenth Amendment*, 19 CORNELL L. Q. 1, 15 (1933).

60. *See* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 134 (2003); Jack Balkin, *The Legislative History of Section Four of the Fourteenth Amendment,* BALKINIZATION (June 30, 2011), http://balkin.blogspot.com/2011/06/legislative-history-of-section-four-of.html (last visited June 24, 2015) (on file with the Washington and Lee Law Review).

61. Cong. Globe, 39th Cong., 1st Sess. 2769 (1866) (statement of Sen. Benjamin Wade).

62. Cong. Globe, 39th Cong., 1st Sess. 2938, 2940 (1866) (statement of Sen. Thomas Hendricks).

63. *See* 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATION 230–34 (1998).

64. U.S. CONST. amend. XIII.

65. U.S. CONST. amend. XIV, § 1.

66. U.S. CONST. amend. XV.

continued purpose "to prevent future majorities in Congress from repudiating the federal debt to gain political advantage, to seek political revenge, or to try to disavow previous financial obligations because of changed policy priorities."[67] And just as the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment's Section One have been broadly applied beyond the Civil War context to protect the contemporary liberty interests and equal protection rights of all Americans, so should the Public Debt Clause of Section Four of the same Fourteenth Amendment be broadly applied to protect the contemporary interests of all Americans regarding government debt obligations.[68]

2. Perry v. United States*: "Whatever Concerns the Integrity of the Public Obligations"*

The *Perry v. United States* plurality ruled that the congressional statute at issue was a direct violation of the Public Debt Clause. Chief Justice Charles Evans Hughes's opinion emphasized that Congress may not "alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers."[69] The high court explicitly rejected sovereign immunity as a justification for congressional interference with bondholders' rights and further stated that "[h]aving this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations."[70] The *Perry* ruling established an expansive scope for the Public Debt Clause's proscription; "[n]or can we perceive

67. Balkin, *supra* note 60. Public Debt Clause proponents recognized that the Thirteenth Amendment's elimination of slavery and Section Two of Fourteenth Amendment's "counting the whole number of persons in each state" apportionment method would result in an increase in southern states' representation in Congress and the electoral college. *Id.*

68. For an excellent expansion of consistent reading of Fourteenth Amendment provisions and relevant references to recent lower court cases noting *Perry*, see Ostro, *supra* note 41, at 258–60.

69. *Perry v. United States,* 294 U.S. 330, 354 (1935).

70. *Id.* at 353–54.

any reason for not considering the expression 'the validity of the public debt' as embracing whatever concerns the integrity of the public obligations."[71]

The importance and breadth of *Perry*'s authority has been analogized to that of *Marbury v. Madison*.[72] Other helpful commentators apply *Perry* to explain that Section Four was drafted, passed, and ratified to "prevent precisely the abuses" of the debt ceiling's operations.[73] Princeton University's Sean Wilentz argues: "As the wording of the amendment evolved during the Congressional debate, the principle of the debt's inviolability became a general proposition, applicable not just to the Civil War debt but to all future accrued debts of the United States."[74]

3. Abramowicz, Buchanan, and Dorf's Analyses of Section Four and the Debt Limit Statute

The debt limit statute's unconstitutionality was widely debated by academics during recent years' political conflicts and debt crises.[75] George Washington University's Michael

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71. *Id.* at 354.

72. 5 U.S. 137 (1803). Recent scholarship has refreshed the known comparison of *Perry* and *Marbury*, noting the foundational nature of their constitutional jurisprudence and that the two opinions appear to share a "rights-remedy" gap. *See, e.g.*, Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1265–68 (2012). Historian Arthur M. Schlesinger described *Perry* as a "masterpiece of judicial legerdemain hardly matched in the annals of the Court since Marshall's opinion in *Marbury v. Madison*." *Id.* at 1246 n.11. Although Professor Henry Hart criticized the *Perry* remedy as "manifestly useless" for the *Perry* bondholder, he presciently noted that the *Perry* remedy "may not always be useless under different circumstances." Henry M. Hart, Jr., *The Gold Clause in United States Bond*, 48 HARV. L. REV. 1057, 1057–58 n.2 (1935).

73. Sean Wilentz, *Obama and the Debt*, N.Y. TIMES, Oct. 7, 2013, at A27.

74. *Id.*

75. *See, e.g.*, Jack Balkin, *Secretary Geithner Understands the Constitution: The Republicans Are Violating the Fourteenth Amendment*, BALKANIZATION (July 8, 2011), http://balkin.blogspot.com/2011/07/secretary-geithner-understands.html (last visited June 26, 2015) (on file with the Washington and Lee Review); Garrett Epps, *The Constitution's Latest Blaze of Notoriety: Bad for the Republic*, ATLANTIC (June 30, 2011), http://www.theatlantic.com/national/archive/2011/06/the-constitutions-latest-

Abramowicz's 1997 interpretation, analysis, and practical application of the Fourteenth Amendment's Public Debt Clause is foundational to the best of such commentary:[76]

> A debt does not become valid or invalid only at the moment payment is due. A debt's validity may be assessed at any time, and a debt is valid only if the law provides that it will be honored. Therefore, a requirement that the government not question a debt's validity does not kick in only once the time comes for the government to make a payment on the debt. Rather, the duty not to question is a continuous one.[77]

Professor Abramowicz updated and rearticulated this seminal work in a 2011 working paper that argues Section Four bars congressional statutes that merely "jeopardize" the validity of debts.[78] An act of government repudiation or a technical default is not required to trigger protection to public debt holders; the

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blaze-of-notoriety-bad-for-the-republic/241308 (last visited June 26, 2015) (on file with the Washington and Lee Law Review); Calvin Massey, *The Debt and the Fourteenth Amendment*, THE FACULTY LOUNGE (June 20, 2011), http://www.thefacultylounge.org/2011/06/the-debt-limit-and-the-fourteenth-amendment.html (last visited June 26, 2015) (on file with the Washington and Lee Law Review); Peter M. Shane, *What May a President Do if He Cannot Pay Our Bills*, HUFFINGTON POST (July 20, 2011), http://www.huffingtonpost.com/peter-m-shane/fourteenth-amendment-debt_b_903487.html (last visited June 26, 2015) (on file with the Washington and Lee Law Review); Michael Stern, *Arrest Me. I Question the Validity of the Public Debt*, POINT OF ORDER (June 2, 2011), http://www.pointoforder.com/2011/06/02/arrest-me-i-question-the-validity-of-the-public-debt/ (last visited June 26, 2015) (on file with the Washington and Lee Law Review).

76. Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 580–89 (1997). This work formed the basis for Bruce Bartlett's 2011 commentary and congressional testimony. *See* Bruce Bartlett, *What Debt Limit? Plan B is the 14th Amendment,* THE FISCAL TIMES (June 11, 2011), http://www.thefiscaltimes.com/Columns/2011/06/30/What-Debt-Limit-Plan-B-is-the-14th-Amendment (last visited June 26, 2015) (on file with the Washington and Lee Law Review).

77. Abramowicz, *supra* note 76, at 593.

78. Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment's Public Debt Clause* 43–45 (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Paper No. 575, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1874746.

Constitution is violated "as soon as Congress passes a statute that will lead to default."[79]

The nation's leading debt-ceiling scholars, Neil Buchanan, also of George Washington University, and Michael Dorf of Cornell University, have more recently expanded the understanding of what constitutes "public debt" to include all government obligations. They quite persuasively detail how the statute's operation traps the Executive in an unconstitutional "trilemma."[80] The debt ceiling makes the President choose which of his three fiscal statutory duties he must violate—spending, taxing, or borrowing. In 2014, Buchanan and Dorf further explained why operational default is actually "a more dangerous, less effective, and more unconstitutional method of violating the debt ceiling."[81] After the debt limit statute was again breached in March 2015, Professor Buchanan forcefully argued why the debt ceiling must be eliminated.[82]

As bondholder litigation is required to eliminate the debt limit statute, this Essay is thus led back to Abramowicz's Section Four application. While acknowledging the judiciary's restrictive justiciability standards, Abramowicz confidently asserts "the Public Debt Clause's protection of debt-holders provides an anchor on which jurisdiction rests comfortably."[83] He addresses

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79. *Id.* at 24.

80. *See* 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 (2012); Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and for All: Why the President Should Embrace the Least Unconstitutional Option*, 112 COLUM. L. REV. SIDEBAR 237, 239–40 (2012); Neil H. Buchanan & Michael C. Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling A Dead Letter*, 113 COLUM. L. REV. SIDEBAR 32 (2013).

81. Neil H. Buchanan & Michael C. Dorf, *Borrowing by Any Other Name: Why Presidential "Spending Cuts" Would Still Exceed the Debt Ceiling*, 114 COLUM. L. REV. SIDEBAR 44, 49–50 (2014).

82. *See* Neil H. Buchanan, *The Debt Ceiling Law Is Fatally Flawed and Cannot Be Fixed*, VERDICT (Mar. 26, 2015), https://verdict.justia.com/2015/03/26/the-debt-ceiling-law-is-fatally-flawed-and-cannot-be-fixed (last visited June 26, 2015) (arguing against the debt ceiling) (on file with the Washington and Lee Law Review).

83. Abramowicz, *supra* note 78, at 46. The working paper was completed before the Supreme Court's ruling in *Clapper v. Amnesty Int'l USA,* 133 S. Ct.

"the specific financial injury" suffered by bondholders[84] to assert that Section Four "paves the road to judicial enforcement by conferring"[85] litigation rights:

> If a governmental action is found to be a debt questioning under an objective test, then the action has increased the risk of default and thus lowered the value of debt, decreasing the wealth of debt-holders. If a subjective test identifies a debt questioning, then the public is suspicious of a debt's validity and the debt will thus be harder to sell. Either way, a debt questioning inflicts a financial injury.[86]

Abramowicz concludes that the courts "have not been given the opportunity" to enforce the Public Debt Clause, but that a "suit by bondholders . . . would provide a test case."[87]

B. Williams v. Lew *as a Test Case to Void the Debt Limit*

In February 2014, this author ("Plaintiff"), who holds every type and duration of public debt sold by TreasuryDirect.gov[88] and also holds additional Treasury debt through vested retirement accounts, brought suit in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief to void the

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1138 (2013).

84. *Id*.

85. *Id*.

86. *Id*. at 49.

87. *Id*. at 52.

88. The TreasuryDirect holdings include a Certificate of Indebtedness, FRN, TIPS, and various duration of bonds, notes, and bills. The TreasuryDirect holdings create a direct enforceable relationship with the United States and provide direct evidence of the plaintiff's ownership of the public debt. The plaintiff's direct ownership should be contrasted with those Treasury debt "holders" who are beneficial owners of Treasuries in the commercial book-entry system: "The *only* persons entitled to enforce Treasuries held in the commercial book-entry system are the depository institutions with securities accounts at a Federal Reserve Bank to which Treasuries have been credited." Charles W. Mooney, Jr., *United States Sovereign Debt: A Thoughtful Experiment on Default and Restructuring*, *in* IS U.S. GOVERNMENT DEBT DIFFERENT? 169 (Franklin Allen et al. eds., 2012),

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2500&context=faculty_scholarship. *See* 31 C.F.R. § 363 (2012).

statute.[89] The named defendants were the Treasury Department and Jacob J. Lew in his official capacity. The action was pled as a fully justiciable individual rights claim,[90] sought only prospective, specific relief, and was based on the plaintiff's constitutional rights and the defendants' constitutional obligations in the context of the unique "ongoing relationship between the parties."[91] The plaintiff pled judicial review of the nonmonetary action[92] against both the Treasury Department and its named Secretary, pursuant to the Administrative Procedure Act (APA), which includes a right of review with an explicit waiver of sovereign immunity.[93]

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89. *See* 28 U.S.C. § 2201 (2010) (outlining declaratory relief); 28 U.S.C. § 2202 (1948) (delineating injunctive relief). Alternative mandamus relief is also requested.

90. *See* Marbury v. Madison, 5 U.S. 137, 166 (1803). Although "embarrassing confrontation[s] between coordinate branches of the Federal Government" provides political context for understanding the individual rights violation, the claim's review does not ask a "political question" but rather "falls within the traditional role accorded courts to interpret the law." Powell v. McCormack, 395 U.S. 486, 548 (1969) (internal quotation marks omitted); *see also* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1433 (2012); Martin H. Redish, *Judicial Review and the 'Political Question*,' 79 NW. U. L. REV. 1031, 1031 (1985). And the action is ripe for review. Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 82 (1978).

91. Bowen v. Massachusetts, 487 U.S. 879, 905 (1988).

92. As the non-contractual claim is explicit that it does not seek money remedy, the plaintiff's pleadings preemptively reject Court of Claims or Federal Circuit jurisdiction. *Id.; see also* Dept. of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (citing *Bowen*, 487 U.S. at 895); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002) (citing *Bowen*, 487 U.S. at 899). After a debt default, any federal court's subsequent monetary judgment in the plaintiff's favor would be a questionable absurdity as the Treasury-administered Judgment Fund would, like all Treasury accounts, be insolvent.

93. 5 U.S.C. §§ 701–06 (2011). The rationale for a *Larson* constitutional exception to sovereign immunity is also pled as "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949); *see also* 1 CIV. ACTIONS AGAINST THE U.S. § 1:3 (Jon. L. Craig, ed. 2003) ("The exception to sovereign immunity for actions against federal officers seeking specific relief from illegal or unconstitutional conduct recognized in *Larson* is based on the legal fiction that federal officers who act unlawfully in the course of their official duties are no longer acting as representatives of the government.").

1. The Plaintiff's Claims: Facial and As-Applied Violations; Current and Future Harms; Economic and Noneconomic Injuries

The Debt Limit Statute currently harms both economic and noneconomic interests of the bondholder. The plaintiff holds Treasury securities because of their uniquely low-risk profile and constitutionally secure value. Both the government and the marketplace have consistently described treasury debt as "risk-free," backed by the "full faith and credit" of the nation.[94] The statute's facial violation of the Public Debt Clause causes the plaintiff current economic injury because the low-risk profile of his investments are degraded and their value is diminished.[95] This incurs a noneconomic injury because this facial violation causes the plaintiff psychic angst and worry about his investments' present validity and integrity.[96]

These current injuries intensify when the Treasury enforces the unconstitutional statute with "extraordinary measures" just before and after an actual hitting of the debt ceiling.[97] This *as-*

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94. *See* GEITHNER, *supra* note 6, at 465. Treasury bills are treated as money and considered to be substitutes to bank deposits by large investors. Although Treasury debt is held by investors as being free of default risk, inflation risk is always present, of course.

95. The plaintiff's pleadings draw explicit parallels between facial violations of the Fourteenth Amendment's Public Debt Clause and the facial violation of other provisions of the Fourteenth Amendment, such as determined in the *Brown v. Board* cases. *See* Brown v. Board (I), 347 U.S. 483 (1954); Brown v. Board (II), 349 U.S. 294 (1955); s*ee also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that "the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools"). For arguments regarding "illegally segregated public schools and illegally-limited public debt," see Victor Williams, *Applying 'Brown' to Void the Debt Ceiling,* ACS BLOG (May 23, 2014), http://www.acslaw.org/acsblog/applying-%E2%80%98brown%E2%80%99-to-void-the-debt-ceiling (last visited July 8, 2015) (on file with the Washington and Lee Law Review).

96. *See generally* Richard Fallon, *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915 (2011).

97. Author asserts that the Treasury Department begins enforcement of the debt limit statute—even before the ceiling is hit—with its first use of an "extraordinary measure," implemented to forestall the statute's inevitable full-default consequences. *Lew Provides Details of Emergency Debt Limit Measures*, N.Y. TIMES (Mar. 13, 2015), http://www.nytimes.com/aponline/2015/03/13/us/politics/ap-us-treasury-debt-limit.html?_r=0 (last visited June 28, 2015) (on file with the Washington and

applied violation results in additional current economic harm by further degradation of the low-risk profile of the investment and further devaluation of the investment. The plaintiff suffers current noneconomic injury as his angst continues to worsen regarding the security, validity, and integrity of the investment.[98]

As the defendants Treasury and Lew repeatedly acknowledge, full statutory enforcement will cause a government default resulting in "catastrophic" harm to bondholders.[99] Plaintiff suffers impending future economic harm manifesting as a substantial devaluation in his investments' value, freezing of the liquidity of certain of his Treasury holdings—including his nonmarketable Certificate of Indebtedness core account—and devastation of his investments' low-risk profile. Plaintiff suffers impending noneconomic injury of substantial worry and angst over his investments' security, validity, and integrity.[100]

The Treasury's arbitrary enforcement of the statute separately violates plaintiff's due process rights. The Treasury has no legal ability to mitigate harm to the bondholder plaintiff and without legal authority to prioritize bond payments, redemptions, and rollovers, the statute's enforcement is necessarily arbitrary. Thus, in addition to violating the Public Debt Clause, both the preliminary statutory enforcement and the impending full statutory enforcement violate the Fifth Amendment's Due Process Clause.[101] The plaintiff also alleged that the debt limit statute violates the Constitution's structural

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Lee Law Review).

98. These current harms fully satisfy the "concrete" and "particularized" injury requirements articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

99. *Id.*; *see also* U.S. DEP'T OF TREASURY, *Treasury Report: The Potential Macroeconomic Effect of Debt Ceiling Brinksmanship* 1 (2013), http://www.treasury.gov/initiatives/Documents/POTENTIAL%20MACROECONOMIC%20IMPACT%20OF%20DEBT%20CEILING%20BRINKMANSHIP.pdf ("A default would be unprecedented and has the potential to be catastrophic . . . there might be a financial crisis and recession that could echo the events of 2008 or worse.") (on file with the Washington and Lee Law Review) [hereinafter U.S. DEP'T OF TREASURY, *Brinksmanship*].

100. *See* Amended Complaint, Williams v. Lew, No. 15-5065 (D.C. Cir. May 14, 2015) (arguing pursuant to 28 U.S.C. § 1653, No. 1553801).

101. U.S. CONST. amend. V.

and functional separation of powers in preventing the Executive from carrying out sworn Article II, § 3 duties to "take Care that the Laws be faithfully executed."[102]

2. GAO's 2015 Debt Limit Report: A Proxy Amicus Brief to Support Plaintiff

As noted above, the Government Accountability Office (GAO) issued a Report in July 2015 entitled "Debt Limit: Market Response to Recent Impasses Underscores Need to Consider Alternative Approaches."[103] The final Report was based on two years of empirical research and was subjected to the econometric review of five independent economists.[104] The investigative arm of Congress documented the direct costs of the default crisis to the federal government through increased borrowing costs—upwards of $70 billion. The Report explained in detail how the 2013 default crisis, which caused instability in the Treasury market, also agitated other financial markets and threatened to do much worse systemic economic harm.

The Report may also be read as, and was proffered to the appellate court to be, a proxy *amicus* brief in support of plaintiff's allegations of past and current harms from the debt limit statute. In proof of plaintiff's allegations of monetary harm, the GAO analysis evidenced significant damage to the value of Treasury securities during the 2013 default crisis. After the defendant Treasury Department began statutory enforcement of the debt limit with extraordinary measures and a full default loomed in fall 2013, the marketplace began a systematic degradation of short-term Treasury securities. This included "selling them, not purchasing them, and not using or accepting them as collateral in financial transactions."[105] The GAO research found that this degradation involved "hundreds of billions of dollars in Treasury

102. U.S. CONST. art. II, § 3.

103. GAO Report, *supra* note 22, at 1.

104. *Id.* at 4.

105. *Id.* at 12

bills with payments due in late-October through mid-November 2013." The fact that the GAO Report repeatedly used the term "at-risk Treasury securities" to describe the affected investments is a sad congressional testament that validates plaintiff's allegations that the debt limit statute damaged, and continues to damage, the once risk-free profile of his public debt portfolio.

And in support of plaintiff's allegations of impending future harm to his individual holdings, the Report emphasized how "even a temporary delay in future debt payments" would cause "significant damage to Treasury securities and other assets."[106] The Report was explicit that such damage "would affect not only institutions, but also individuals."[107] The damage will be both direct and indirect as changes in Treasuries' value and risk-profile "affect everyone from individuals, whose pension and money market funds invest in these securities, to global financial institutions, whose daily transactions in Treasury securities are vital to the U.S. and global financial markets." And the Report predicted future turmoil:

> Market participants we spoke with identified money market mutual funds as among the investors most affected by the debt limit impasse. All of the money market fund managers that we spoke with said that they had avoided at-risk Treasury securities during the 2011 or 2013 debt limit impasses or planned to do so during a future debt limit impasse.[108]

Plaintiff's allegations of nonmonetary harm (escalating levels of worry about the security of his Treasury investments) were corroborated by the GAO's recorded interviews with a range of other (admittedly much more substantial) market participants. These investors expressed their own angst and concern. The Report details how investors were extremely nervous and how some had begun spurning the once risk-free Treasuries for fear of suffering losses or being subjected to delayed or even cancelled repayment: "Visual inspection of Treasury data and our interviews with market participants indicated that concern over

106. *Id.* at Report's Cover, "*What GAO Found.*"

107. *Id.*

108. *Id.* at 14.

the potential for market disruption escalated rapidly over the final days and weeks of the impasse."[109]

Providing the invaluable service for which the nonpartisan agency has been so highly-regarded for decades, GAO researchers ran econometric models that quantified the "timing, pace, and severity of the escalation of that concern."[110] As is the GAO's custom and practice, illustrative Figures and Tables permeate the Report. The GAO Report described how investor fear continues to affect markets:

> Several money market fund managers also told us that they spent a considerable amount of time and resources addressing client questions and concerns about their Treasury holdings and contingency plans in the event of a delayed payment. One fund manager who said they maintained their holdings of at-risk securities during the 2011 and 2013 impasses told us that they are unlikely to do so in a future impasse in order to address client concerns.[111]

Most relevant to its credibility and relevance as a proxy *amicus* brief in *Williams v. Lew*, the Report contains a statement of affirmance from Treasury's Deputy Assistant Secretary for Federal Finance who had reviewed it in draft: "Treasury agreed with the findings in the Report regarding primary and secondary market functioning during the 2013 debt limit impasse." The defendant Treasury Department "stated that the findings corroborate Treasury's observations as well as market color and commentary that Treasury received from market participants."[112]

This Treasury statement serves as the most recent example of the substantial divergence of public positions between the Justice Department (or at least the trial and appellate litigators assigned to *Williams v. Lew*) and its Treasury Department clients. The statement directly contradicts the Justice Department's consistent assertion, described below, that the

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109. *Id.* at 58.

110. *Id.* ("We identified two measures that proxy for the timing, pace, and severity of the escalation of that concern: Google Trends data and Bloomberg News Trends series counts of news articles that contain key phrases. See figure 9 for an illustration of the Treasury yield dynamics and the proxy dynamics.").

111. *Id.* at 15.

112. *Id.* at 51.

defendant Treasury Department subscribes to the default-denial delusion that the debt limit statute does not cause Treasury debt holders both current and impending future harm. The GAO Report and the Treasury Department's statement of affirmance of its findings also contradict the Justice Department litigators' adoption of most recent GOP and Tea Party congressional assertions that the harm from a full breach of the debt limit statute could be mitigated by the proper management of daily inflows of revenues.

3. The Justice Department's Default-Denier Defense

The Justice Department (DOJ), representing defendants Lew and the Treasury, successfully avoided a substantive analysis of the constitutional claims by lodging a Rule 12(b)(1) dismissal motion on jurisdictional standing.[113] In its cramped analysis of the plaintiff's first amended complaint, [114] the DOJ ignored all current harm allegations and argued that a debt default was highly speculative and based only the hypothetical premise of a default.[115] The DOJ invoked predictable *Clapper v. Amnesty International*[116] quotations on standing restrictions.[117] The district court, in its dismissal ruling of January 2015, mirrored the DOJ's reading of the first amended complaint, erred in refusing to allow the plaintiff to further amend the complaint,[118]

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113. Defendants' Memorandum of Law in Support of Motion to Dismiss, Williams v. Lew, No. 1:14-cv-00183-RJL, 2015 WL 72968 (D.D.C. Jan. 6, 2015).

114. Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, Williams v. Lew, 1:14-cv-00183-RJL, 2015 WL 72968 (D.D.C. Jan. 6, 2015).

115. Defendants' Memorandum of Law, *supra* note 113.

116. 133 S. Ct. 1138 (2013).

117. Defendants' Memorandum of Law, *supra* note 113.

118. The district court abused its discretion by denying in a docket Minute Order, without any stated reasons, plaintiff's early-stage, good-faith motion to file a second amended complaint. The unopposed motion and proffered complaint were offered to clarify jurisdictional allegations regarding current harm. The court then compounded that error by ignoring repeated arguments about current harm contained in plaintiff's response to the DOJ's Rule 12(b)(1) motion. *See* Foman v. Davis, 371 U.S. 178, 182 (1962) ("The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate

and broadly adopted the DOJ's default-denial arguments in its *Clapper* risk analysis.[119]

On appeal to the U.S. Court of Appeals for the District of Columbia, the plaintiff sought to correct and clarify his allegations of jurisdictional standing—pursuant to a 28 U.S.C. § 1653 request to amend his complaint on appeal.[120] Nevertheless, the DOJ continued to minimize the plaintiff's current harm arguments by contending that any averred current harm was actually based on fear of future default.

The DOJ doubled down on default-denial theory at the D.C. Circuit. The DOJ promoted the district court's finding that the plaintiff's future harm claims were only hypothetical and speculative. The DOJ's pleadings restated and argued from the district court's finding of a speculative contingency chain:

> Here, there are a series of contingencies that would have to occur before Plaintiff would suffer any actual harm as a result of the debt limit statute. First, the debt limit itself must be reached. However, the debt limit is currently suspended through March 15, 2015. . . . Second, as Plaintiff's complaint acknowledges, even if the debt limit is reached, Treasury has authority to take certain extraordinary measures to temporarily preserve lawful borrowing authority without

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the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery."); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) ("After the district court dismissed the complaint with prejudice, [the plaintiffs] could amend their complaint only by filing, as they properly did, a 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave of court to amend their complaint."); *see also* Barkley v. U.S. Marshals Service *ex rel.* Hylton, 776 F.3d 25, 38 (D.C. Cir. 2014) ("Federal Rule of Civil Procedure 15(a) allows a plaintiff to amend a complaint 'once as a matter of course' within twenty-one days after service of a defendant's answer or Rule 12 motion. . . . 'The court should freely give leave when justice so requires.'").

119. Williams v. Lew, No. 14–00183-RJL, 2015 WL 72968 (D.D.C. Jan. 6, 2015).

120. *See* Newman-Green, Inc. v. Alfonzo-Larraine, 490 U.S. 826, 831 (1989) ("But § 1653 speaks of amending '*allegations* of jurisdiction,' which suggests that it addresses only incorrect statements about jurisdiction that actually exists, and not defects in the jurisdictional facts themselves."); Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006) (overturned *en banc* on unrelated grounds) (granting the plaintiff's motion pursuant to § 1653 "to remedy any possible shortcomings in its original complaint").

> exceeding the debt limit. Third, once such measures were hypothetically to be exhausted, the United States would be in the position of funding government obligations with the cash it would have on hand on any given day.[121]

Obviously, the finding's first two "speculative contingencies" had again been realized at the time of the appeal. And, as the plaintiff detailed in responding pleadings,[122] the third stated contingency was based on distorted language from, and erroneously cited to, an August 2013 letter from Secretary Lew to House Speaker Boehner. The DOJ and the district court misstated and mischaracterized the letter; a qualifying "only" was omitted from the referenced sentence. The Lew letter actually stated that: "Treasury would be left to fund the government with only the cash we have on hand on any given day."[123] The letter then explained why such a "cash on hand" government-funding scenario was dangerous and "unacceptable."[124]

Indeed, as the plaintiff repeatedly pled at the trial level, defendant Lew had often debunked the "cash on hand" myth, such as when he testified to the Senate Finance Committee in October 2013: "Let me remind everyone, principle on the debt is not something we pay out of our cash flow of revenues. Principle on the debt is something that is function of the market's rolling over."[125]

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121. *See* Treasury's Summary Affirmance Motion, Williams v. Lew, No. 15-5065 (D.C. Cir. Apr. 27, 2015) (restating and citing Williams v. Lew, 2015 WL 72968, at *3 (D.D.C. Jan. 6, 2015)).

122. *See* Williams's Response in Opposition to Treasury's Summary Affirmance Motion, Williams v. Lew, No. 15-5065 (D.C. Cir. May 11, 2015).

123. Letter from Jacob Lew, Secretary of the Treasury, to Hon. John A. Boehner, Speaker of the House (Aug. 26, 2013), *available at* http://www.treasury.gov/initiatives/documents/082613%20debt%20limit%20letter%20to%20congress.pdf (emphasis added).

124. *Id.*

125. *Transcript: Jack Lew's Testimony on Debt Ceiling*, WASH. POST (Oct. 10, 2013), http://www.washingtonpost.com/politics/running-transcript-jack-lews-testimony-on-debt-ceiling/2013/10/10/3edc0122-31b0-11e3-9c68-1cf643210300_story.html (last visited July 8, 2015) (emphasis added) (on file with the Washington and Lee Law Review).

Many of the DOJ's appellate arguments closely paralleled the delusional default-denial thesis currently promoted by GOP and Tea Party congressional ideologues. The Justice Department's reliance on the bond prioritization delusion—erroneously assuming that bond payment prioritization is legal and that daily cash inflows are adequate to prevent a catastrophic default—is most problematic.

Separately characterizing the plaintiff's discrete and particularized harms as a "generalized grievance," the DOJ refused to consider the plaintiff's appellate assertion that his particularized injuries are part of a classic "widely-shared" harm.[126] The plaintiff's pleadings referenced the Supreme Court's *Massachusetts v. EPA*[127] ruling that standing to litigate injuries stemming from harms as widely manifested as global warming was not defeated merely because greenhouse gas emissions inflict a widespread harm.[128] In its reply, the DOJ correctly argued that "Massachusetts, as a sovereign State and not an individual, had a stake in protecting its quasi-sovereign interests. Williams has no such quasi-sovereign interests to protect."[129]

It is unlikely that the DOJ will address why its defense arguments are in such direct contradiction to the many public statements of its clients, Jacob Lew and Treasury Department. In light of federal courts' continued mis-reliance on *Clapper*,[130] it

126. Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998) (ruling that even if the interest claimed by a plaintiff might be more readily addressed by the political branches, that "does not, by itself, automatically disqualify [it] for Article III purposes"). As did the district court, the government places a curious reliance on *Reuss v. Balles* to support a generalized grievance analysis. 584 F.2d 461, 469–70 (D.C. Cir. 1978). *Reuss* involved a congressman's challenge to the appointment process used to place members on the Federal Reserve's Open Market Committee. The congressman-plaintiff failed to offer a causational link between the appointment process of members to the Committee and plaintiff's public debt holdings. *Reuss* actually serves to emphasize, by contrast, the direct causational link that exists in *Williams v. Lew*.

127. 549 U.S. 497 (2007).

128. *Id.* at 517.

129. Treasury's Reply in Support of Its Motion for Summary Affirmance at 7–8, Williams v. Lew, No. 15-5065 (D.C. Cir. May 21, 2015).

130. Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in* Clapper v. Amnesty International, USA *and* City of Los Angeles v. Lyons, 23 WM. & MARY BILL RTS. J. 127 (2014).

appears even less likely that the plaintiff in *Williams v. Lew* will be allowed to stand at bar to substantively challenge the unconstitutional debt limit statute. Still, there is additional present value to be realized in the test case.

4. The DOJ's Arguments Against Individual Bondholder Standing Makes the Case for Subsequent Litigation by Sovereign States and Institutional Investors

The DOJ's generalized grievance argument referencing *Massachusetts v. EPA* was all but an invitation to state sovereign bondholders to sue. Even in this age of increasingly restrictive standing jurisprudence, state sovereigns have very successfully defended their Article III standing to protect their independent proprietary, sovereign, and derivative quasi-sovereign interests. The unique historical position of states in our federal system assures state sovereigns unique litigation rights in the federal courts. In *Massachusetts v. EPA*, the Supreme Court explained that states are not "normal litigants" but are rather entitled to "special solicitude" in Article III standing analyses.[131]

A state sovereign bondholder's litigation against the debt ceiling would have strong and varied standing arguments based on each of the three recognized type interests—proprietary interests, sovereign interests, and quasi-sovereign interests.[132] During the 2011 default crisis, for example, the rating firm Moody's issued analysis warning that a federal credit downgrade tied to a debt ceiling brinkmanship "would immediately lower ratings for 7,000 state and local issuances and possibly affect even some gold plated AAA states."[133] It is telling that the Treasury's first "extraordinary measure" in debt limit

131. Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007).

132. *See* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995); *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601–02 (1982) (delineating the wide variety of proprietary interests possessed by States).

133. Tracy Gordon, *What the Federal Debt Limit has to do with States (and Not)*, TAXVOX (July 22, 2011), http://taxvox.taxpolicycenter.org/2011/07/22/what-the-federal-debt-limit-has-to-do-with-states-and-not/#sthash.UfwsiWVZ.dpuf (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

enforcement is curtailment of special securities to states required for their compliance with federal tax laws and arbitrage rules.[134] As in *Bowen v. Massachusetts,*[135] a state sovereign could aver both current and certainly impending future harm to seek specific relief.[136]

C. A Plea for State Sovereigns and Domestic Institutional Bondholders to Sue to Void the Debt Ceiling

The debt ceiling's constitutional violation is patent; "this wolf comes as a wolf."[137] The Executive, major financial institutions, state sovereigns, foreign sovereigns, and foreign investors must all recognize the current harm, and the future harm inherent, in the debt limit statute's enforcement.[138] Why is the Executive so reluctant to test a unilateral remedy?[139] Why have large institutional, U.S. domestic, and foreign sovereign bondholders not yet attempted litigation to void the statute?

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134. Kasia Klimasinska & Ian Katz, *Treasury to Halt U.S. 'SLGS' Securities as Debt Limit Nears*, BLOOMBERG (Feb. 4, 2014), http://www.bloomberg.com/news/articles/2014-02-04/treasury-to-halt-u-s-slgs-securities-as-debt-limit-nears (last visited June 28, 2015) (on file with the Washington and Lee Law Review); Letter from Jacob Lew, Secretary of the Treasury, to the Hon. John A. Boehner, Speaker of the House (March 13, 2015), *available at* http://www.treasury.gov/initiatives/Pages/debtlimit.aspx.

135. 487 U.S. 879 (1988).

136. *Id.* at 905. In *Williams v. Lew*, the Justice Department has made numerous picayune attempts to minimize the plaintiff's individual bondholder claims by inaccurately asserting that it was citizen-taxpayer action, that the individual might sell his investments before a default, and that the plaintiff's modest number and range of debt holdings limited the chance of a payment or redemption occurring during a default period. These government arguments thus also work to support future litigation by both sovereign-state bondholders and other individual and institutional bondholders who have a long-term history of holding quite substantial, numerous, complicated, and permanent Treasury positions.

137. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

138. U.S. DEP'T OF TREASURY, *Brinksmanship*, *supra* note 99, at 1.

139. *See* Hendrick Hertzburg, *Obama Blinks*, NEW YORKER (July 24, 2011), http://www.newyorker.com/news/hendrik-hertzberg/obama-blinks (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

As with Tiberius's "holding a wolf by the ears,"[140] government officials and major institutional bondholders are perhaps afraid to let go of the debt-ceiling wolf. Again, U.S. Treasury debt is held and valued as a risk-free investment. Perhaps sovereign and institutional holders of Treasury debt are afraid that invoking the Public Debt Clause to initiate litigation against the debt ceiling would shock the markets, and that litigation would work to degrade and devalue their debt investments. What is certain is that congressional default-deniers exploit both the fear of the debt-limit wolf and the inverse fear of a released wolf—all while nurturing their own economic delusions.

The time is now for state sovereigns and large domestic bondholders, with alternative and layered standing theories, to initiate litigation across the nation to void the debt ceiling statute. Such bondholders have the financial resources and institutional knowledge to initiate litigation with documented proof of current injury and impending future harm. This plea to immediately initiate litigation is directed primarily to state sovereigns, but also to domestic institutional holders of public debt.

A direct appeal is made to public interest law groups on all points of the ideological spectrum to support such litigation. The influential Chamber of Commerce, representing over three million businesses, has pushed back against those extremist congressional ideologues who threaten a debt default. Its lobbying efforts were quite helpful in breaking the 2013 and 2014 stalemates over further suspensions to debt limit law.[141] Its elite

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140. Tiberius, a Roman emperor from 14 CE to 37 CE, recognizing his inadequacy as a leader, described that governing Rome was like "holding a wolf by the ears." *Tiberius, The Roman Empire in the First Century*, PBS http://www.pbs.org/empires/romans/empire/tiberius.html (last visited June 28, 2015) (on file with the Washington and Lee Law Review). Thomas Jefferson also used this phrase referencing slavery. *The Wolf by the Ear*, THE JEFFERSON MONTICELLO, http://www.monticello.org/site/jefferson/wolf-ear (last visited July 8, 2015) (on file with the Washington and Lee Law Review).

141. *See* Kevin Bogardus, *Chamber Prods GOP On Debt Ceiling*, THE HILL (February 10, 2014), http://thehill.com/policy/finance/197950-chamber-prods-gop-on-debt-ceiling (last visited June 28, 2015) ("The chamber's chief lobbyist . . . wrote that raising the debt limit would eliminate the threat of default and allow credit markets to function properly.") (on file with the Washington and Lee Law Review).

internal law firm, the National Chamber Litigation Center,[142] has successfully initiated nationwide litigation supporting a range of pro-business causes, and it has achieved particular status and success at the Supreme Court bar.[143] The National Chamber Litigation Center should join forces with a progressive public interest law organization, such as the equally influential Constitutional Accountability Center,[144] to support nationwide adjudication against the unconstitutional debt limit law.[145] Even if actual collaboration is not feasible, the two litigation powerhouses could work in tandem to void this dangerous statute. A national litigation effort with review running through various circuits would set the issue up for final high court resolution.

State sovereigns and domestic bondholders should sue before foreign bondholders beat them to some unknown, foreign courthouse.[146] Unlike overly adjudicated Argentinean defaulted

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142. John Shiffman, *Chamber of Commerce Forms Its Own Elite Law Team*, REUTERS (Dec. 12, 2014), http://www.reuters.com/article/2014/12/08/us-scotus-firms-chamber-idUSKBN0JM10Q20141208 (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

143. Zackary Roth, *How the Chamber of Commerce Conquered the Supreme* Court, MSNBC (May 2, 2013), http://www.msnbc.com/msnbc/how-the-chamber-commerce-conquered-the-sup (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

144. *See generally* CONSTITUTIONAL ACCOUNTABILITY CENTER, *What is Constitutional Accountability?*, http://theusconstitution.org/about/constitutional-accountability (last visited July 8, 2015) (on file with the Washington and Lee Law Review).

145. A model example for such collaboration is the Constitutional Accountability Center's recent joint venture with the libertarian Cato Institute. *See* Adam Serwer, *Liberal and Libertarians Join Forces to Defend Gay Marriage Rights*, MSNBC, http://www.msnbc.com/msnbc/cato-cac-divided-groups-defend-gay-marriage-rights (last updated Apr. 16, 2014) (last visited July 24, 2015) (discussing the groups' teaming up to file legal briefs in challenge to the Defense of Marriage Act) (on file with the Washington and Lee Law Review); *see also* Jess Bravin, *Rethinking Original Intent*, WALL ST. J. (Mar. 14, 2009), http://www.wsj.com/news/articles/SB123699111292226669 (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

146. It should be noted that state sovereigns as such are not allowed to be direct holders of Treasury debt through TreasuryDirect, although the regulations do not appear to restrict foreign sovereigns to be direct holders. *See* 31 C.F.R. § 363.20(c) (2009) (listing the forms of registration required for entities).

debt,[147] our Treasury debt does not contain a default clause with a choice-of-forum provision. Foreign investors and foreign sovereigns could thus initiate litigation in foreign forums.[148] China has reemerged as the largest holder of our debt.[149] Even if state sovereign and domestic institutional litigation is totally unsuccessful, the adjudication will send a strong signal to congressional ideologues to end their brinkmanship. Supreme Court Justice Anthony Kennedy is indeed right when he says:

> Any society that relies on nine unelected judges to resolve the most serious issues of the day is not a functioning democracy. I just don't think that a democracy is responsible if it doesn't have a political, rational, respectful, decent discourse so it can solve these problems before they come to the Court.[150]

Even a failed litigation effort by a wide range of bondholders would lay a foundation for a full congressional repeal of the unconstitutional, dangerous statute as proposed by the July 2015 GAO Debt Limit Report.

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147. *See* Lyle Denniston, *No Relief for Argentina on Debt*, SCOTUSBLOG (June 16, 2014), http://www.scotusblog.com/2014/06/no-relief-for-argentina-on-debt/ (last visited June 28, 2015) (addressing the Supreme Court's decision regarding Argentina's debt) (on file with the Washington and Lee Law Review).

148. *See* Alison Frankel, *If U.S. Defaults, Can Debt Holders Sue for Payment?*, REUTERS (Oct. 9, 2013), http://blogs.reuters.com/alison-frankel/2013/10/09/if-u-s-defaults-can-debt-holders-sue-for-payment/ (last visited June 28, 2015) ("[T]here's nothing to stop foreign citizens—or even foreign governments—from attempting to use their own court system to redress the U.S. government's failure to make good on debt payments.") (on file with the Washington and Lee Law Review).

149. Ian Talley, *China Retakes Top Spot as the Biggest Foreign Owner of U.S. Debt*, WALL ST. J. (May 15, 2015), http://blogs.wsj.com/economics/2015/05/15/china-retakes-top-spot-as-the-biggest-foreign-owner-of-u-s-debt/ (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

150. Brian Resnick, *Anthony Kennedy: U.S. Is Not a Functioning Democracy,* NAT'L J. (Oct. 4, 2013), http://www.nationaljournal.com/domesticpolicy/anthony-kennedy-the-u-s-is-not-a-functioning-democracy-20131004 (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

III. Conclusion

Throughout America's history, buying government bonds has been a profoundly patriotic act, and the debt was considered as secure as the Republic's continued existence. As the first Treasury Secretary Alexander Hamilton said in 1790, "The debt of the United States, foreign and domestic, was the price of liberty."[151] Our government has used a variety of media campaigns to promote the patriotic act of bond-buying and to educate all as to the purpose of public debt.[152] Proudly during peaceful times—and humbly during times of war—individual citizens, state sovereigns, and domestic institutions have held U.S. public debt.[153]

Sovereign states and domestic institutional bondholders hold public debt knowing that the credit afforded their nation's balance sheet allows their nation's government—especially in times of severe budget deficits due to contracting private sector growth—to meet operational needs, provide state assistance, and honor entitlement debt obligations. Institutional bondholders hold public debt knowing that their success and future growth depend on the stability of the macroeconomy. Therefore, for these and many other reasons, these domestic bondholders should be charged with the rare responsibility of defending the Fourteenth Amendment's guarantee of the validity and integrity of public debt.

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151. Adam Hodge, *Remembering the Fathers of the Treasury,* TREASURY.GOV (June 14, 2013), http://www.treasury.gov/connect/blog/Pages/remembering-_fathers.aspx (last visited July 24, 2015) (on file with the Washington and Lee Law Review); *Our History,* BUREAU OF THE PUB. DEBT (Nov. 18, 2013), http://www.publicdebt.treas.gov/history/history.htm (last visited June 28, 2015) (on file with the Washington and Lee Law Review).

152. *See Art Poster Display,* TREASURYDIRECT KIDS, https://www.treasurydirect.gov/kids/art/art.htm (last visited May 25, 2015) (displaying posters used by the U.S. government to convince citizens to take on public debt) (on file with the Washington and Lee Law Review).

153. *See The Patriot Savings Bond*, TREASURYDIRECT.GOV, http://www.treasurydirect.gov/indiv/research/indepth/ebonds/res_e_bonds_eepatriotbond.htm (last visited May 25, 2015) (discussing how Patriot Bonds stood as a means for U.S. citizens to "express their support for our nation's anti-terrorism efforts") (on file with the Washington and Lee Law Review).

It was with a love of our nation, a concern for its economic wellbeing, and an anger that congressional brinkmanship continues to cause unnecessary worry to those Americans dependent on government benefit payments that this author initiated the *Williams v. Lew* test case.[154] Now, it is time for a wide range of state sovereigns and domestic bondholders, supported by public interest groups like the National Chamber Litigation Center and the Constitutional Accountability Center, to litigate to void the debt ceiling. This litigation campaign is a necessary act of economic patriotism.

154. *See generally* Victor Williams, *Economic Patriotism: Why I Sued Jack Lew to Void the Debt Limit Statute*, JURIST (July 24, 2014), http://jurist.org/forum/2014/07/victor-williams-lew-debt.php (last visited June 28, 2015) (on file with the Washington and Lee Law Review).