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Forgotten Section of the Fourteenth Amendment

Phanor J. Eder

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A FORGOTTEN SECTION OF THE FOURTEENTH AMENDMENT

PHANOR J. EDER†

Section four of the Fourteenth Amendment to the Constitution of the United States of America, reads as follows:

> "4. 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 and 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."

This section has lain dormant for years. No cases under any part of it ever seem to have arisen in the courts, nor with a single exception[1] does it ever seem to have been referred to. The leading commentators on constitutional law make only cursory mention of it.

The second part of the section dealing with the non-recognition of the Confederate debt is of historic interest only. The first part however "that the validity of the public debt of the United States, authorized by law, shall not be questioned" has been thrust suddenly into the arena of debate by reason of the Joint Resolution of Congress signed by the President, June 5, 1933. This declares the public policy of the United States and provides that every obligation heretofore or hereafter incurred which purports to give the obligee a right to require payment in gold shall be discharged, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. It further provides that all currencies, including paper money, shall be legal tender for public and private debts.[2]

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†Member of the New York Bar.

[1]Branch v. Haas, 16 Fed. 53, 54 (C. C. Ala. 1883) dealing with Confederate bonds.

[2]The full text of the resolution is:

"JOINT RESOLUTION TO ASSURE UNIFORM VALUE TO THE COINS AND CURRENCIES OF THE UNITED STATES.

"Whereas the holding of or dealing in gold affect the public interest and are, therefore, subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a

Bonds of the United States of America, issued prior to this Resolution and outstanding in large volume, contain the obligation to pay principal and interest in gold coin of the standard weight and fineness existing on the date of issue. Under the Resolution, this public debt of the United States can be paid in any currency, however depreciated. And should the authority given to the President, in his discretion, by the Emergency Farm Relief and Price Inflation Act[3] be

particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it

"Resolved, By the Senate and House of Representatives of the United States of America in Congress assembled, that (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in amount in money of the United States measured thereby, is declared to be against public policy, and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore, or hereafter incurred whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

"(b) As used in this resolution, the term (obligation) means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations.

"Section 2. The last sentence of Paragraph (1) of Sub-section (b) of Section 43 of the act entitled "An Act to Relieve the Existing National Economic Emergency by Increasing Agricultural Purchasing Power, to Raise Revenue for Extraordinary Expenses Incurred by Reason of Such Emergency, to Provide Emergency Relief with Respect to Agricultural Indebtedness, to Provide for the Orderly Liquidation of Joint Stock Land Banks and for Other Purposes", approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

[3]The pertinent sections of this Act are:

"Section 42. Whenever the President finds, upon investigation, that (1) the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currency of any other government or governments in relation to the present standard value of gold, or (2) action under this section is necessary in order to regulate and maintain the parity of currency issues of the United States, or (3) an economic emergency requires an expansion of credit, or (4) an expansion of credit is necessary to secure by international agreement a stabilization at proper levels of the currencies of various governments, the President is authorized, in his discretion—

"(a) To direct the Secretary of the Treasury to enter into agreements with the several Federal Reserve banks and with the Federal Reserve Board

exercised and the gold content of the dollar be reduced, then this public debt of the United States, under the Joint Resolution, could be paid also, at the option of the Government, in such debased dollars.

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whereby the Federal Reserve Board will, and it is hereby authorized to, notwithstanding any provisions of law or rules and regulations to the contrary, permit such reserve banks to agree that they will, (1) conduct, pursuant to existing law, throughout specified periods, open market operations in obligations of the United States Government or corporations in which the United States is the majority stockholder, and (2) purchase directly and hold in portfolio for an agreed period or periods of time Treasury bills or other obligations of the United States Government in an aggregate sum of $3,000,000,000 in addition to those they may then hold, unless prior to the termination of such period or periods the Secretary shall consent to their sale. No suspension of reserve requirements of the Federal Reserve banks, under the terms of section 11(c) of the Federal Reserve Act, necessitated by reason of operations under this section, shall require the imposition of the graduated tax upon any deficiency in reserves as provided in said section 11(c). Nor shall it require any automatic increase in the rates of interest or discount charged by any Federal Reserve bank, as otherwise specified in that section. The Federal Reserve Board, with the approval of the Secretary of the Treasury, may require the Federal Reserve banks to take such action as may be necessary, in the judgment of the Board and of the Secretary of the Treasury, to prevent undue credit expansion.

"(b) If the Secretary, when directed by the President, is unable to secure the assent of the several Federal Reserve banks and the Federal Reserve Board to the agreements authorized in this section, or if operations under the above provisions prove to be inadequate to meet the purposes of this section, or if for any other reason additional measures are required in the judgment of the President to meet such purposes, then the President is authorized—

"(1) To direct the Secretary of the Treasury to cause to be issued in such amount or amounts as he may from time to time order, United States notes, as provided in the Act entitled "An Act to authorize the issue of United States notes and for the redemption of funding thereof and for funding the floating debt of the United States", approved February 25, 1862, and Acts supplementary thereto and amendatory thereof, in the same size and of similar color to the Federal Reserve notes heretofore issued and in denominations of $1, $5, $10, $20, $50, $100, $500, $1,000 and $10,000; but notes issued under this subsection shall be issued only for the purpose of meeting maturing Federal obligations to repay sums borrowed by the United States and for purchasing United States bonds and other interest-bearing obligations of the United States: *Provided*, That when any such notes are used for such purpose the bond or other obligation so acquired or taken up shall be retired and canceled. Such notes shall be issued at such times and in such amounts as the President may approve but the aggregate amount of such notes outstanding at any time shall not exceed $3,000,000,000. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, an amount sufficient to enable the Secretary of the Treasury to retire and cancel 4 per centum annually of such outstanding notes, and the Secretary of the Treasury is hereby directed to retire and cancel annually 4 per centum of such outstanding notes. Such notes and all other coins and currencies heretofore or hereafter coined or issued by or under the authority of the United States shall be legal tender for all debts public and private.

"(2) By proclamation to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an

Are these provisions, as to the public debt of the United States, constitutional[4] in view of the declaration in section four of the Fourteenth Amendment that "the validity of the public debt of the United States shall not be questioned"? What is the meaning and effect of this provision? Does it apply only to obligations existing at the time of the adoption of the amendment or does it state as well a rule for the future?

We are on an uncharted sea and, without the aid of either precedents or recognized authorities on constitutional law, it would be hazardous to venture on any dogmatic assertions. Neither do the recognized historians or the debates in Congress throw much light on the situation. The strenuous debates in Congress turned on the other more controverted sections of the Amendment which were a fiercely burning issue in those critical and rather disgraceful days of our Reconstruction history. Volumes upon volumes have been written on the history of the period and the issue of the Fourteenth Amendment, but I have so far been able to find only a few casual references to the part of this section here referred to. I suggest it as a fruitful field for research.

The Fourteenth Amendment, due to its controversial nature, the extremely bitter political zeal of its advocates, the unseemly controversy between Congress and President Johnson, the resistance of the Southern States and of their Northern supporters and other factors, had a chequered history from its inception to its final ratification. Pending its passage by Congress, it received many amendments in both form and substance. In the original draft prepared and

agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon, and such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum.

"Sec. 43. The Secretary of the Treasury, with the approval of the President, is hereby authorized to make and promulgate rules and regulations covering any action taken or to be taken by the President under subsection (a) or (b) of section 42."

[4]This article assumes the Joint Resolution rendering the gold clause nugatory and the provisions of the Emergency Act to be constitutional, except as the Fourteenth Amendment may stand in the way. The Legal Tender Cases, 12 Wall. (U. S.) 457 (1870); Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1883); Johnson, *Constitutional Limitations and the Gold Standard* (1933) 67 U. S. LAW REV. 187, N. Y. LAW JOURNAL, June 2, 3, and 5, 1933; Post and Willard, *Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. LAW REV. 1225; and pamphlet by the present writer, THE LAW AS TO THE GOLD CLAUSE IN INTERNATIONAL CONTRACTS (June 1933).

presented by the Joint Committee on Reconstruction, it contained no passage as to the validity of the United States bonds, but contained a section as follows:[5]

> "Sec. 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred or which may hereafter be incurred, in aid of insurrection or of war against the United States or any claim for compensation for loss of involuntary service or labor."

To this principle there was no opposition. Mr. Randall, of Pennsylvania, summed up the situation:[6]

> "The fourth section I need not discuss because I believe if that proposition was presented to the House as a single proposition it would be almost unanimously adopted."

But there was a vast amount of Government indebtedness outstanding. Much of it was expressly contracted to be payable in gold. Gold was then at a substantial premium, owing to large issues of legal tender treasury notes—greenbacks. There was then, as there is today, strong sentiment in many sections of the country, and especially among the debtor classes, in favor of inflation. Talk of repudiation was already in the air, and especially there were demands that the burden of taxation should be lifted by having the Government pay its obligations in depreciated currency and not in gold. In the course of a speech by Senator Stewart of Nevada, in favor of the proposed Fourteenth Amendment, on May 24, 1866, he was interrupted by Senator Saulsbury:[7]

> "Mr. Saulsbury. Does the Senator from Nevada say that the Democratic party of this country would, if they had it in their power, repudiate the national debt or would assume the confederate debt? I should like a frank answer. I only refer to it because I observe the Senator has repeated an intimation which I have seen in the public press."

Senator Stewart continuing his speech, answered, indirectly, only one part of Senator Saulsbury's question. After reading an article by Robert Dale Owen, he stated:[8]

> "I concur with Mr. Owen that the dangers to be apprehended are three in number: two political and one financial... The financial danger, so far as it depends upon an assumption or payment of the rebel debt or compensation for emancipated slaves is properly guarded against in the fourth section of the report."

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[5] CONG. GLOBE, May 10, 1866, p. 2542.
[6] CONG. GLOBE, May 10, 1866, p. 2530.
[7] CONG. GLOBE, May 24, 1866, p. 2800.
[8] CONG. GLOBE, May 24, 1866, p. 2800.

Attempted scaling down of the national debt directly or indirectly by repudiating the promise to pay in gold, it was evidently thought, needed to be guarded against. There seems to have been some fear too that the Southern States on their readmission into a share in the national government might be reluctant to recognize their due share of the national debt.[9]

On May 23, 1866,[10] Senator Wade introduced some amendments to the joint resolution, including:

"Section 3. The public debt of the United States, including all debts or obligations which have been or may hereafter be incurred in suppressing insurrection or in carrying on war in defense of the Union, or for payment of bounties or pensions incident to such war and provided for by law, shall be inviolable..."

In his speech in support of his propositions, Senator Wade said:

"In the next place, my amendment prohibits and renders null and void all obligations incurred in rebellion...but then my amendment goes to another branch of this business almost as essential as that. It puts the debt incurred in the civil war on our part under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it. I believe that to do this will give great confidence to capitalists and will be of incalculable pecuniary benefit to the United States, for I have no doubt that every man who has property in the public funds will feel safer when he sees that the national debt is withdrawn from the power of a Congress to repudiate it and 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. I consider that a very beneficial provision, which is not in the original proposition.

"This section of the amendment goes further, and secures the pensioners of the country.... They ought to be there along with your public debt. I think no gentleman will deny that it is very essential that the debt incurred in this war should be placed under the protection of the Constitution of the United States."

Senator Wade's amendments do not seem to have reached a vote. But the majority senators for the next five days were in secret caucus,

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[9] 2 BLAINE, TWENTY YEARS OF CONGRESS (1886) V. 190, says:

"There was a fear that, if by a political convulsion, the Confederates of the South should unite with the Democratic opponents of the War in the North and thus obtain control of the Government, they might, at least by some indirect process, if not directly, impair the public obligations of the United States incurred in suppressing the Rebellion."

The "indirect process" most feared was payment in depreciated legal tender notes in lieu of gold.

[10] CONG. GLOBE, May 23, 1866, pp. 2768, 2769.

thrashing out their differences in regard to the terms of the amendment. In the fourth section Wade's suggestion as to declaring the validity of the National Debt was inserted.[11]

On May 29, 1866, Senator Howard of Michigan introduced the amendments decided on in the caucus.[12] The record on our section is as follows:

> "Mr. Howard: The following is to come in as section 4: 'The obligations of the United States incurred in suppressing insurrection, or in defence of the Union, or for the payment of bounties or pensions incident thereto, shall remain inviolate'. And he explained:
>
> "After consultation with some of the friends of this measure it has been thought that these amendments will be acceptable to both Houses of Congress and to the country and I now submit them to the consideration of the Senate."

The immediate precursor[13] probably of the Wade-Howard amendment was a resolution offered in the House on December 5, 1865 by Samuel J. Randall, which was agreed to by a vote of 162 yeas, 1 nay (Mr. Trimble), viz.:

> "Resolved that, as the sense of this House, the public debt created during the late rebellion was contracted upon the faith and honor of the nation; that it is sacred and inviolate, and must and ought to be paid, principal and interest; that any attempt to repudiate *or in any manner to impair or scale* the debt shall be universally discountenanced, and promptly rejected by Congress if proposed".[14]

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[11]KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) pp. 315, 316.

[12]CONG. GLOBE, May 29, 1866, p. 2869.

[13]Clause I of Article VI of the Constitution contains the declaration that "all debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation". See COOLEY, CONSTITUTIONAL LAW (4th ed. 1931) pp. 74, 75, which adds "A like pledge was made in one of the amendments after the close of the Great Civil War", and after quoting section 4, "The prohibitory portion of this provision was as unnecessary as the other for the purpose of settling any principle". The principle is clear, but a constitutional guarantee was, as a matter of practical fact, deemed essential. GUTHRIE, THE FOURTEENTH AMENDMENT (1898) pp. 17, 18. One scholarly historian, KENDRICK, JOURNAL OF THE COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) p. 350 says: "As for section 4, it was entirely unnecessary and since it was designed to catch votes, especially those of the soldiers, it deserved to be classified as mere political buncombe". But such considerations lie outside the realm of the constitutional lawyer and of the courts. KENDRICK, *op. cit.*, pp. 282–285, summarizes the testimony taken by the Committee in reference to section 4.

[14]W. A. DUNNING, POLITICAL HIST. OF THE U. S. DURING RECONSTRUCTION (1880) p. 109. Italics ours.

On June 4, the Senate as a Committee of the Whole resumed the consideration of the Joint Resolution (H. R. No. 127) proposing an amendment to the Constitution of the United States the pending question being on the amendment proposed by Mr. Howard.[15]

Senator Hendricks, speaking against the amendment, said:[16]

> "The fourth section provides that the public debt shall remain inviolate. Who has asked us to change the Constitution for the benefit of the bondholders? Are they so much more meritorious than all other classes that they must be specially provided for in the Constitution? Or, indeed, do we distrust ourselves and fear that we will all become repudiators? A provision like this, I should think would excite distrust and cast a shade on public credit. But perhaps the real purpose is so to hedge in the bondholders by constitutional provision so that they never may be taxed... such would be the effect of this amendment. Who has attacked public credit, or questions the obligation to pay the public debt? Are the bondholders not receiving their interest, even in advance, *and in gold?* Why do they ask this extraordinary guarantee?"

Senator Howard's amendment was agreed to.[17]

Had Howard's draft been finally adopted, the questions raised at the beginning of this article might not exist. It might then be maintained that the amendment applied only to then existing obligations and could have no application to future obligations of the United States except perhaps those incurred in future insurrections or wars. But the change, before final passage, to its present form is significant. It would thereby seem to have been intended to lay down a general constitutional principle good for all future time and applicable to all public debt of any kind. In the Senate, on June 8, 1866, the date of its final passage by the Senate, the fourth section, as it now stands, was presented as an amendment and the amendment was concurred in, and the whole Joint Resolution was passed.[18] This fourth section was stated to be in place of the original Howard draft of the fourth and fifth sections and it was further said "The result is the same".[19] But is it? Was not this a mere passing remark, not fully weighed, and of little consequence as a guide to interpretation? This is more clearly shown by the fact that Mr. Doolittle, of Wisconsin, proposed an amendment in the same form as Mr. Howard's amendment, *supra*, and it was rejected, by 33 nays to 11 yeas.[20] Another amendment pro-

[15] CONG. GLOBE, June 4, 1866, p. 2938.
[16] CONG. GLOBE, June 4, 1866, p. 2940, italics ours.
[17] CONG. GLOBE, June 4, 1866, p. 2941.
[18] CONG. GLOBE, June 8, 1866, p. 3042.
[19] CONG. GLOBE, June 8, 1866, pp. 3041, 3042.
[20] CONG. GLOBE, June 8, 1866, p. 3040.

posed by Mr. Davis suffered the same fate. He proposed to insert a provision that the obligations of the United States for the payment of private property taken for public use shall also remain inviolate.[21] It is clear that the *public debt* was singled out for constitutional protection, a narrower term than "obligations".

The Joint Resolution as amended by the Senate came to a vote and was passed in the House of Representatives on June 13, 1866.[22] The only statement on the floor in regard to this section was that of Thaddeus Stevens, the protagonist of the Fourteenth Amendment and leader of the Radicals. He stated:[23]

> "The fourth section, which renders inviolable the public debt and repudiates the rebel debt, will secure the approbation of all but traitors".

The Hon. J. H. Defrees, however, was given leave to print and in his speech, he wrote:[24]

> "The fourth section of the joint resolution I presume will meet with little, if any opposition. The good character of the Government depends upon the fidelity with which it meets its contracts and discharges its pecuniary obligations."

Furthermore, the Minority Report of the Joint Committee on Reconstruction, which opposed grouping all the sections for submission as a whole to the country, contained this paragraph:

> "The repudiation of the rebel debt and all obligation to compensate for slave property, and the inviolability of the debt of the Government, no matter how contracted, provided for by some of the sections of the amendment, we repeat, we believe would meet the approval of many of the Southern States."[25]

The record in Congress, brief as it is, discloses that the purposes of the section at least as far as the then existing bonds of the United States were concerned were (1) to have them fully recognized by the Southern States; (2) to prevent definitely any attempt either to totally repudiate or to scale down principal or interest; (3) to maintain the validity of the provisions as to tax exemption contained in the bonds; and, finally, (4) to insure that the principal and interest of the gold bonds should be paid according to their tenor in gold, and not in paper money currency.

This is all amply borne out by the history of the period, which is one of the sources to be looked to in constitutional interpretation.

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[21]CONG. GLOBE, June 8, 1866, p. 3040.

[22]CONG. GLOBE, June 13, 1866, p. 3149.

[23]CONG. GLOBE, June 13, 1866, p. 3148.

[24]CONG. GLOBE, 39th Cong. 1st Sess. Part 5, App. June 13, 1866, p. 227.

[25]DUNNING, *supra* note 14, pp. 93, 99.

The pending Fourteenth Amendment became one of the issues of the campaign for congressional elections in that year. The extraordinary procedure was adopted of holding national political conventions, usually held only in Presidential years.[26] The subject was specifically dealt with in several of the party platforms. The National Union Convention held at Philadelphia in Augnst included in its resolutions the following:[27]

> "8. While we regard as utterly invalid and never to be assumed or made of binding force any obligations incurred or undertaken in making war against the United States, we hold the debt of the nation to be sacred and inviolable; and we proclaim our purpose in discharging this, as in performing all otlier national obligations, to maintain unimpaired and unimpcached the honor and tlie faitli of the Republic."

The Cleveland Convention of Soldiers and Sailors, September 18, 1866, adopted this resolution:[28]

> "We hereby approve the resolutions adopted by tlie National Union Convention held in the city of Philadelphia on the 14th day of August last."

The Pittsburgli Convention of Soldiers and Sailors, September 26, 1866, resolved:[29]

> "That the action of tlie present Congress in passing the pending Constitutional amendment is wise, provident and just... It puts into the very fraine of our Government the inviolability of the national debt and tlie nullity forever of all obligations contracted in support of the rebellion."

The ratification of tlie Fourteenth Amendment made slow progress. Only three states ratified in 1866, New Jersey, Oregon and Tennessee. The proceedings in Tennessee were particularly scandalous.[30] In 1867 fourteen states ratified; the Southern States held out. Ratification was still pending when the Presidential campaign opened in 1868. The situation is thus summed up in the *Cambridge Modern History*:[31]

[26]SAMUEL W. MCCALL, THADDEUS STEVENS (1899) p. 278. See also pp. 271 *et seq.* [27]DUNNING, *supra* note 14, pp. 240, 241.

[28]DUNNING, *supra* note 14, p. 243.

[29]DUNNING, *supra* note 14, p. 242. "Of the four conventions held, this, of the soldiers who had fought the battles of the Union was far the most influential upon public opinion . . . . Their convention did more to popularize the Fourteenth Amendment as a political issue than any other instrumentality of the year." 2 BLAINE, *supra* note 9, pp. 232, 233. But *cf.* H. K. BEALE, THE CRITICAL YEAR, p. 210.

[30]STRYKER, ANDREW JOHNSON (1930) p. 306.

[31]Vol. 7 (1907) pp. 631–633.

"At the same time proposals to pay the principal of United States bonds in paper, and to tax the bondholders were freely made in Congress and in the newspapers; and a Refunding Act providing for coin bonds was successfully vetoed by Johnson in July 1868...

"On the financial issue, the platform (of the Republican National Convention, June 1868) less timid, demanded the payment of the public debt 'in the uttermost good faith'... On the other side, the Democratic party, much infected with inflationist feeling, settled its internal dissensions in characteristic fashion. Governor Seymour of New York, a 'hard money man' was nominated in July after a dramatic 'stampede' in the convention, upon a platform which demanded taxation of the government bonds and their payment 'in lawful money', that is, greenbacks... Thus the two issues were fairly joined.[32]

"The election of Grant as President with a Congress still largely Republican in both branches and the successful ratification of the Fourteenth Amendment guaranteed a completion of both political and financial reconstruction."

Prior to the election there had however been important and much controverted developments. In the course of the first seven months of 1868, two more Northern states and a number of the Southern

[32]The text of the party platforms on the subject was as follows:

Republican Platform, Chicago, May 1868: "We denounce all forms of repudiation as a national crime, and the national honor requires the payment of the public indebtedness in the utmost good faith to all creditors at home and abroad, not only according to the letter, but the spirit of the laws under which it was contracted."

Democratic Platform, New York, July 1868: "Where the obligations of the Government do not expressly state upon their face, or the law under which they were issued does not provide that they shall be paid in coin, they ought in right and in justice to be paid in the lawful money of the United States. . . . One currency for the Government and the people, the laborer and the office holder, the pensioner and the soldier, the producer and the bondholder."

2 BLAINE, *supra* note 9, pp. 387, 388, 391, comments on the conventions. After referring to the choice of General Hawley as permanent President of the Republican Convention, "His speech on taking the chair was earnest and impressive . . . He was especially forcible in rebuking the current financial heresies and in insisting that the full demands of the nation's honor should be scrupulously observed. . . The platform made two principles conspicuous: first, equal suffrage; and, second, the maintenance of the public faith. These were the pivots on which the political controversy of the year turned . . . The one involved the restoration of public liberty . . . the other involved the honor of the Republic in observing its financial obligations.

"The Democratic National Convention of 1868 was invested with remarkable interest . . . from the audacious public policies which would be urged upon it. . . . Would it openly proclaim the doctrine of paying the public debt in depreciated paper money and emphasize its action by nominating Mr. George H. Pendleton, the most distinct and conspicuous champion of the financial heresy?"

Before the next presidential campaign, the Democrats had acquiesed in the fourteenth amendment. The Democratic-Liberal Republican platform of 1872, on which Greeley ran, read: "The public credit must be sacredly maintained, and we denounce repudiation in every form and guise."

States, by their "carpet-bag" legislatures, had ratified the Amendment. New Jersey and Ohio, however, had withdrawn or purported to withdraw their ratifications. Secretary of State Seward on July 20, 1868, issued a qualified proclamation of ratification, very clearly evidencing his doubt as to the effective validity of the ratifications. On the following day, the Senate and the House, still under the lead of the radical reconstructionists and the opponents of Johnson, passed a concurrent resolution declaring the Fourteenth Article to be a part of the Constitution, the enumeration of ratifying states including Ohio and New Jersey; and the Secretary of State then proclaimed anew that the said amendment had become valid to all intents and purposes.[33]

Thorpe's statements in his *Constitutional History of the United States*,[34] summing up public opinion, are particularly valuable:

> "The fourth section, on the validity of the national debt and the repudiation of the Confederate debt and of all claims for the loss of slaves, would not meet with opposition at the north. Public policy demanded the ratification of this clause.
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> "The national debt, which at this time had reached its highest point, over two and three quarters billions of dollars, was held chiefly at the North and its repudiation or diminution in value, or any distrust of its obligations, would affect most disastrously the lives and fortunes of the Northern people and would injure our national credit abroad. Its validity was essential to our prosperity, however great the burden of payment might prove to be."

The Amendment was rejected at first by the Southern States. Thorpe says:[35]

> "The reasons for rejection of the amendment were given in the report of the Joint Committee of the North Carolina December 6 Legislature and may be accepted as the opinion of the majority of the people of the Southern States at this time. ... As the federal debt was already sufficiently secured by the honest intention of the people to pay it, the fourth section of the proposed amendment was therefore useless... By seeking further to bind the people of the whole country to the payment of the public debt, by means of a Constitutional provision, the Government at Washington betrayed a lack of confidence not more in the people of the South than in those of the North."

The chief basis of opposition to the whole amendment was the extension of citizenship to the negro. There was a deep undercurrent of opposition even in the Northern States to this, as is evidenced by

[33] 2 DOCUMENTARY HIST. OF THE CONSTITUTION OF THE U. S. A. (Dept. of State 1894) pp. 638 *et seq; id.* p. 790.

[34] Vol. 3 (1901) p. 297.

[35] Vol. 3 (1901) pp. 308, 314.

the action of Oregon, Ohio and New Jersey in withdrawing their ratification of the amendment.[36] But the fourth section was also included in the attack, not only in the South but in sections of the North. In the Joint Resolutions of the State of New Jersey, February 1868, withdrawing the consent of the State to the proposed Fourteenth Amendment, it was stated, *inter alia*:[37]

> "It (the amendment) appeals to the fears of the public creditors by publishing a libel on the American people, and fixing it forever in the National Constitution, as a stigma upon the present generation, that there must be constitutional guards against a repudiation of the public debt; as if it were possible that a people who were so corrupt as to disregard such an obligation would be bound by any contract, constitutional or otherwise."

The payment of the national bonds in gold according to their tenor as well as the general question of the resumption of specie payments on the greenbacks or legal tender notes, was one of the issues of the Presidential campaign, as we have already noted.

The somewhat doubtful declaration of the ratification of the Fourteenth Amendment was confirmed by the election of General Grant to the Presidency, and with it there was settled for all time, it is the opinion of the historians, the question of the payment of the national bonds in gold. A. Barton Hepburn, perhaps our greatest authority on money and banking, not only for his scholarship but for his outstanding ability as the country's leading bank executive, after setting forth the history of the issue and the party platforms, and referring to President Johnson's message of December 1868 in favor of "scaling" the public debt and the Senate resolution condemning the message, concludes:[38]

> "Subsequently a section in the fourteenth amendment settled the question in the following terms (quoting section 4)".

President Grant's inaugural address, March 4, 1869, rang out:[39]

> "A great debt has been contracted in securing to us and our posterity the Union. The payment of this, principal and interest, as well as the return to a specie basis, as soon as it can be accomplished without material detriment to the debtor class or to the country at large, must be provided for. To protect the national honor every dollar of government indebtedness should be paid in gold, unless otherwise expressly stipulated in the con-

[36] 3 THORPE, CONSTITUTIONAL HISTORY OF U. S. (1901) 402.
[37] 5 DOCUMENTARY HIST. OF THE CONST. OF THE U. S. A. (1905) pp. 533, 536, 537.
[38] A. BARTON HEPBURN, HISTORY OF CURRENCY (eds. of 1915 and 1924) p. 212.
[39] DUNNING, *supra* note 14, p. 416.

tract. Let it be distinctly understood that no repudiator of one farthing of our public debt will be trusted in public place and it will go far toward strengthening a credit which ought to be the best in the world and will ultimately enable us to replace the debt with bonds bearing less interest that we now pay... The young men of the day, those who from their age must be its rulers twenty-five years hence, have a peculiar interest in maintaining the national honor. A moment's reflection as to what will be our commanding influence among the nations of the earth in their day if they are only true to themselves should inspire them with national pride."

The Congress was in full accord with Grant. There could be no doubt that bonds expressly payable in gold should be so paid: the Fourteenth Amendment settled that. There was one large issue however, a fourth of the total debt, where the obligation to pay the principal in gold was not so clear. The first act of the new Congress, that of March 18, 1869, declared:[40]

"In order to remove any doubt as to the purpose of the government to discharge all just obligations to the public creditors, and to settle conflicting questions and interpretations of the laws, by virtue of which such obligations have been contracted, it is hereby provided and declared that the faith of the United States is solemnly pledged to the payment in coin, or its equivalent, of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money, or in other currency than gold or silver."

On which Rhodes comments:[41]

"Thus was settled for all time in both the most honest and the most politic way the question of the payment of the principal of the 5.20 bonds in coin, a question which was raised by Pendleton's advocating their payment in greenbacks, a policy supported by Butler and Stevens."

In the debate on the bill, Senator Sprague, on March 15, 1869, made an interesting allusion to our section of the Fourteenth Amendment, clearly implying that one of its purposes was to put the gold clause in the national bonds under the guardianship of the Constitution, so that a Congress may not repudiate it. He remarked:[42]

"I am not in favor of a repudiation of the national debt. But,

[40]13 Stats. 1 (1869), 31 U. S. C. §731 (1926) DUNBAR, LAWS OF THE UNITED STATES RELATING TO CURRENCY, FINANCE & BANKING (1891) 202.

[41]6 RHODES, HISTORY OF THE U. S. 1850–1877, 242.

[42]CONG. GLOBE, March 15, 1869, pp. 64, 66.

sir, I do not sympathize with that class of men who are holding up to the gaze of the people of the United States the sacredness of that debt. I was opposed in your caucus, Mr. President, to an amendment of the Constitution giving undue protection to that debt, and I am also now opposed to any reiterated protection by the law contemplated by the bill before the Senate... Why not have made an effort to restore prosperity to all the branches of your industry on which to have floated your debt and maintained its price, rather than by constitutional amendments and by statute law constantly making an effort to pull up the price of your national securities, driving what little capital there was left into their investment and depriving every other industry of the necessary means to carry it on."

It cannot be denied that the primary purpose of the first part of section 4 of the Amendment was to insure the full payment, according to their tenor, of the national bonds contracted for the conduct of the Civil War, and that this was the issue uppermost in the mind of the country. But was it the sole purpose? Does not the change both of substance and of form from Senator Howard's proposal to that of Mr. Williams (finally adopted), coupled with the rejection of Senator Doolittle's attempt to resurrect Howard's formula, clearly indicate that the intention was to lay down a constitutional canon for all time in order to protect and maintain the national honor and to strengthen the national credit? Was it not clearly proposed also to establish a perpetual dike against momentary waves of inflation and repudiation, total or partial?

The issue as to the pending public debt having been so emphatically settled, it is not so strange as at first sight it seems, that no reference to the section is to be found in the numerous cases that came before the courts under the Legal Tender Acts. These all dealt only with private debts. The questions in these cases were: did the Legal Tender Acts nullify a gold or coin clause in pre-existing contracts? It was constantly held by the Supreme Court, no constitutional question being involved, that they did not.[43] Again, were the Legal Tender Acts constitutional in so far as they made the greenbacks legal tender in payment of pre-existing private currency debts? It was finally held that they were constitutional.[44] The question of the public debt was in no way involved and scarcely alluded to in any of these cases. It must have been assumed that the sanctity of the public debt ac-

[43]Bronson v. Rodes, 7 Wall. (U. S.) 229 (1868); Butler v. Horwitz, 7 Wall. (U.S.) 258 (1869); Trebilock v. Wilson, 12 Wall. (U. S.) 687 (1871); Bigler v. Wicker, 14 Wall. (U.S.) 297. See also the articles cited in note 4 *supra*, and Nebolsine, *The Gold Clause in Private Contracts*, (1933) 42 YALE L. J. 1051.

[44]*Supra* note 4.

cording to its tenor was inviolate. This assumption underlies the case of *Savage v. United States*,[45] where it was held that a bondholder had waived his right to receive gold by turning in his bonds and accepting payment in legal tender notes.

The only citation of the section I have found in any case is in *Branch v. Haas*,[46] where the reference is to the second part of the section (the Confederate debt) and of no importance to this discussion. We must therefore look to general canons of constitutional construction for guidance. The general historical background and the congressional records clearly settle all questions as to the effect of the provision on the then outstanding debt. "Validity" means full validity of all the terms and conditions according to the tenor of the obligations. The provision binds Congress and the Executive Power as well as the states. But, in the light merely of history, the view that the enactment has no application to future obligations is not wholly untenable. The record is in part ambiguous.

Government loans stand on a peculiar legal footing. The nation is both a sovereign and a private contracting party. It can only be sued with its consent. By its paramount sovereigu fiat, within its own borders and as far as its own citizens are concerned, it has the power, if not the just right, to impair its obligations entered into as a private contractor. In the international forum it is different. Chief Justice Marshall when Secretary of State wrote to Mr. Humphreys, our Minister to Spain, September 23, 1800:[47]

> "Many citizens of the United States complain that contracts entered into with the Spanish Government for metallic money have been discharged to their very great loss in depreciated paper.
>
> "The injustice of this is manifest. Between discharging a debt by paying one-half its nominal amount, and the whole of its nominal amount possessing only one-half its real value there is no difference.
>
> "To your remonstrances heretofore made on this subject, we observe that the minister of His Catholic Majesty has only replied—the absolute right of a sovereign nation on its own territory.
>
> "This right we mean not to question or impair. But coextensive and coeval with it, is the privilege of a foreign friendly nation, to complain of, and remonstrate against, such acts of

[45] 92 U. S. 382 (1875). [46] 16 Fed. 53, 54 (C. C. Ala. 1883).

[47] 6 J. B. MOORE, INTERNATIONAL LAW DIGEST 753, 754; and also see the decisions of the Permanent Court of International Justice, sitting at The Hague, against Serbia and Brazil, July 12, 1929, upholding the international validity of the gold clause. Series A/B No. 34. Series A. Nos. 20/21. Judgments Nos. 14, 15.

sovereignty as are injurious to its citizens or subjects. This privilege we mean respectfully to exercise.

"In contracts entered into by individuals with a sovereign power there exists no tribunal to enforce their performance. For this the good faith of the sovereign is alone relied on. This is held sacred, and is always pledged to exempt from the operation of that paramount power over all transactions within its dominions the engagements of the sovereignty itself.

"The citizens of the United States, therefore, who have formed specie contracts with the Spanish Government, hold as a pledge the faith of that Government solemnly plighted, that its power shall never be so exercised as to work injury or injustice to them."

The same underlying principle of the duty of the sovereign as a contracting party is enunciated in the *Sinking Fund* cases:[48]

"The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

The power of the federal Government is, moreover, in the American frame of government, subject to the paramount sovereignty of the people as expressed in the written Constitution. The people allocate sovereignty between the states and the nation; the people through the constitution and amendments thereto grant powers and impose restrictions. The second sentence of the first section of the Fourteenth Amendment is a restriction only on the states; the first sentence, and the fourth section establish principles applicable to both states and nation. It may well be deemed that the fourth section imposes a restriction on the Federal Government not to exercise the plenary sovereignty it would otherwise possess, to violate contracts deemed peculiarly sacred wherein the nation acts not alone in its sovereign role but also in the capacity of a private borrower.

Of what avail would it have been to protect and maintain by a constitutional safeguard the honor and credit of the United States plighted to its then existing obligations, if it could the next day or the next year or the next generation impair that honor and credit by disregarding obligations contracted in the future? The words of Chief Justice Marshall in *Gibbons v. Ogden*[49] are pertinent:

"As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be under-

[48] 99 U. S. 700 (1878).

[49] 9 Wheat. (U. S.) 187, 189 (1824).

stood to have employed words in their natural sense, and to have intended what they have said."[50]

Disregard for a moment the historical background and the perplexities to which it may be thought to give rise, and analyze the clause itself:

"The validity of the public debt of the United States, authorized by law, including debts incurred in payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned."

"The public debt" is a general phrase. It does not say "now existing" or "heretofore contracted or incurred", or anything of that nature.

"Authorized by law" is a general phrase. It does not say "heretofore authorized by law"; it applies equally to laws that may be thereafter passed.[51]

"Debts incurred", similarly to the phrase "authorized by law" is to be construed to include debts hereafter as well as debts heretofore incurred.[52]

"Services in suppressing insurrection and rebellion" is likewise a general phrase; it does not say, as did the resolution of the House of December 5, 1865, "the late rebellion". It would be reasonable to conclude that the draftsman had in mind the possibility of future insurrections and rebellions and wanted to assure patriotic citizens who might in the future risk their lives for their country that debts incurred to them would never be questioned. In construing constitutional provisions, the particular occasion out of which they grow is

[50]Senator Edmunds, who was a member of the Senate when the Fourteenth Amendment was discussed and recommended by that body, said in his argument in the San Mateo County case in the Supreme Court, December 19, 1882: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered." Quoted by GUTHRIE, FOURTEENTH AMENDMENT (1898) p. 25.

[51]"Words in the present tense include the future". N. Y. CONS. LAWS c. 22 (GENERAL CONSTRUCTION LAW) §48. Compare also the general rule "Constitutions as well as statutes are construed to operate prospectively only, unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable question". Shreveport v. Cole 129 U. S. 36, 9 Sup. Ct. 210 (1888).

[52]See note 51. Note, too, as to the second sentence, that at one time it took the form of "debts or obligations already incurred or which may hereafter be incurred." JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914) pp. 86, 103. It was subsequently shortened to the concise phraseology of its present form, covering both past and future.

never controlling. The occasion may no longer exist, but the constitution remains effective to govern and regulate analogous cases.[53]

But it may be said: the ordinary rules of interpretation of statutes and instruments do not so narrowly apply to constitutions. Broader grounds of national policy must be considered as paramount. The constitution is a living organism; it grows with the times. It changes in each generation. True. But here we tread upon ground in which it becomes increasingly hazardous to make predictions. The prevailing social ideals and the edueation, psychological background, economic ideas of the sitting judges, however conscientiously desirous of adhering to the law and the law alone, inevitably play a part in their decisions. The underlying contest will be not between reactionaries and radicals, liberals and conservatives, but between two schools of thought equally liberal, equally forward minded, equally inspired by broad patriotic motives.

Shall the high humanitarian motives that inspire the new deal and its hopes grounded on a managed currency, the necessity of restoring farming and industry, raising prices, furnishing employment, alleviating and more equally distributing tax burdens, allocating the national income more justly, be deemed paramount? or perhaps shall a longer view prevail that undue inflation, from past experience, always brings in its ultimate train, disaster worse than that which it was designed to conjure? that the paramount consideration shall be the maintenance of the public faith, honor and credit, abroad and at home, wholly unimpaired at all costs and however great the temporary burden? that governments must set the example of living up to public contracts, lest all contracts between man and man, all foundations for credit, all respect for law and traditional justice, suffer such a blow that the whole structure of society, as now conceived by the highest and most progressive American ideals, begin to crumble?

[53]W. D. GUTHRIE, THE FOURTEENTH AMENDMENT (1898) pp. 37, 38.