

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

- [See a sample reprint in PDF format.](#)
- [Order a reprint of this article now](#)

## OPINION

# Rivkin and Casey: The Myth of Government Default

*The Constitution commands that public debts be repaid. There is no such obligation to fund entitlement programs.*

By DAVID B. RIVKIN JR. AND LEE A. CASEY David B. Rivkin Jr.

Updated Jan. 14, 2013 2:51 p.m. ET

Three false arguments, pushed hard by the Obama administration and accepted on faith by the media and much of the political establishment, must be laid to rest if the American people are to understand the issues at stake in the federal "debt ceiling" debate.

The first is that Congress's failure to raise the debt ceiling—the amount of money the federal government is authorized to borrow at any given time—will cause a default on the national debt. The second is that federal entitlement programs are constitutionally protected from spending cuts. The third is that the president can raise the debt ceiling on his own authority.

### Related Video



Editorial page editor Paul Gigot on President Obama's press conference on raising the debt ceiling. Photo: Pool

To take up the first canard: Contrary to White House claims, Congress's refusal to permit new borrowing by raising the debt ceiling limit will not trigger a default on America's outstanding public debt, with calamitous consequences for our credit rating and the world's financial system. Section 4 of the 14th Amendment provides that "the validity of the public debt of the United States, authorized by law . . . shall not be questioned"; this prevents Congress from repudiating the federal government's lawfully incurred debts.

The original concern of this provision was to guarantee the integrity of federal debts incurred

during and immediately after the Civil War (while the debts of the Confederacy were nullified permanently), and to ensure that a newly "reconstructed" Congress—to which the Southern states were readmitted—would not reverse these decisions. However, the amendment's language was not limited to the Civil War-related debts. In *Perry v. United States* (1935), the Supreme Court made clear that the provision "indicates a broader connotation" protecting the nation's debts as a whole.

This means that a failure to raise the debt ceiling—to prevent new borrowing—does not and cannot put America's current creditors at risk. So long as this government exists, and barring a further constitutional amendment, those creditors must be paid.



Getty Images

Nor are they at risk in practice, since the federal government's roughly \$200 billion in tax revenue per month is more than sufficient to service existing debts. If the executive chose to act irresponsibly and unconstitutionally and failed to make any debt payments when they come due, debt-holders would be able to go to the Court of Federal Claims and promptly obtain a money judgment.

These basic facts should inform any credible decisions by credit-rating agencies in establishing the

government's creditworthiness. Significantly, these agencies have traditionally acted favorably when heavily indebted countries have not defaulted on their debt but cut deeply their public spending.

Second, despite White House claims that Congress must raise the debt ceiling to pay the bills it has incurred, the obligations protected as "debts" by the 14th Amendment do not include entitlement programs such as Medicare and Social Security. These programs are not part of the "public debt," which consist of loans that are made to the federal government through bonds and similar financial instruments. Entitlement programs are instead political measures that are fully subject to the general rule that one Congress cannot, by simple legislation, prevent a future Congress from making cuts.

This fundamental and vital distinction is clear from both the text and the drafting history of the 14th Amendment's Section 4. The wording of the section was revised before its enactment and ratification to replace the term federal "obligations" with that of "debts," a far more narrow (and manageable) category.

The distinction was recognized by the Supreme Court in *Flemming v. Nestor* (1960), which involved the power of Congress to modify Social Security benefits. The court noted that entitlements and "contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign."

Congress can reduce a wide range of payments to various beneficiaries at any time by amending the statutes that authorize them or simply by failing to appropriate sufficient funds to pay for them. Nor does Congress have any legal or constitutional obligation to borrow money to pay for entitlements.

Third, assertions, most recently made by [Nancy Pelosi](#), that the president can rely on Section 4 as a pretext for raising the debt ceiling by himself are manifestly incorrect and constitutionally dangerous. Section 4 grants no power whatsoever to the president—instead, the 14th Amendment grants *Congress* the "power to enforce, by appropriate legislation, the provisions of this article."

More fundamentally, this argument—which has been tentatively advanced and then tentatively withdrawn by the White House, both during the 2011 debt-ceiling battle and in the last several weeks

—is contrary to the language, structure and history of the Constitution.

Like the British Parliament before it, Congress controls the power of the purse—the authority to raise taxes, borrow money and direct how revenues are spent. In particular, Article I, Section 2, grants to Congress the power "to borrow money on the credit of the United States." There is no similar grant to the president. Any effort by the chief executive to borrow money without congressional action would be every bit as injurious to our constitutional system as presidentially ordered taxation.

True enough, the "debt ceiling" is not a constitutional requirement. Congress could choose instead—as used to be the case during most of our history—to vote separately on the issuance of each federal debt instrument. However, nowhere in the Constitution is the president authorized to borrow or spend money without congressional action, except insofar Congress itself may permit.

Once these false arguments are cleared away, the real issue in the debt-ceiling debate becomes clear: the proper level of federal spending. Should Congress fail to increase the debt ceiling as much as the president wants, the effective result would be major government spending cuts, with payments on public debt excluded.

This is tough medicine and not to be administered lightly. If Republicans are serious about winning this debate, they must strive to convince the American people that such spending cuts are necessary, given President Obama's openly articulated unwillingness to implement any meaningful spending cuts other than defense and his clear preference for limitless borrowing.

Whether they can succeed in this task is unclear. But the public must at least be allowed to ponder these vital issues without being misled by false claims involving debt default, the nature of federal obligations, and which branch of government is in charge of the public fisc.

*Messrs. Rivkin and Casey are partners in the Washington, D.C., office of Baker Hostetler LLP and served in the White House and Justice Department during the Ronald Reagan and George H.W. Bush administrations.*

---

Copyright 2013 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)