WIPING THE SLATE: MAINTAINING CAPITAL MARKETS WHILE ADDRESSING THE ODIOUS DEBT DILEMMA

Wiping the Slate: Maintaining Capital Markets While Addressing the Odious Debt Dilemma

Thomas S. Wyler

Abstract

In the late 1970s, the average per capita income in Iraq was $4,000\(^1\) and the nation had $40 billion in monetary reserves.\(^2\) Then Saddam Hussein seized power. When he was deposed twenty-three years later, the average per capita income in Iraq was $150\(^3\) and the nation had liabilities in excess of $125 billion.\(^4\) In 1966, Ferdinand Marcos became president of the Philippines. In that year, the state's debt was less than $1 billion.\(^5\) Twenty years later, he and his wife were forced to flee. In their wake, they left a legacy of more than $28 billion in foreign debt.\(^6\) A similar story took place.


\(^3\) See Craze, supra note 1 (describing the debt left behind after Saddam Hussein fell from power).

\(^4\) See Allawi, supra note 2.


\(^6\) Id.
in Zaire under Mobuto Sese Seko. He seized power in 1965 and
maintained control for thirty-two years. When he died in 1997, he
left his people with debt of over $12 billion.7

In each of these historical instances, the funds were nominally
borrowed on behalf of the dictators’ respective states, but
unsurprisingly, each of them looted huge sums for their own
wallets and personal agendas. Whether these rulers personally
embezzled the money or used it to buy dangerous weapons, the
debt incurred attached to the country itself, never to the deposed
ruler or his or her family. According to international law, neither
the removal from power of these dictators, nor their deaths, does
anything to alleviate the debt obligations burdening the states they
once dominated. In other words, a dictator may fall, but the
financial obligations stemming from his or her personal largesse or
blood lust remain to strangle newly freed nations in their
proverbial cribs.

Take Saddam Hussein’s Iraq as an example. In the name of his
country, he incurred massive quantities of debt for palaces,
personal luxuries, and weapons to suppress his people. After he
was deposed, the suppressed became the debtors; the people of
Iraq were actually responsible for paying back the money he
borrowed to keep them under his thumb. He had literally bought
bullets to suppress the people who would end up paying for them.

Such debts are known by an illustrative term: odious debt. For
over a century, international legal scholars have been attempting to
develop a practical and coherent doctrine that would, in certain
instances, erase these obligations after a dictator has fallen. The
scholarly motivations behind these efforts vary widely—some
believe it’s a moral question; others believe it is an economic one—
but the central substantive concern for any proposal aimed at
addressing this problem must involve the balancing of burdens
between creditors and debtors.

Unfortunately, writing off the debt burdens of developing
countries that have recently emerged from a dictator’s control is
not a simple matter. Of course, if one thinks that creditors should
be responsible for how the funds they lend are employed, then one

7 See Michael Kremer & Seema Jayachandran, THE BROOKINGS INSTITUTION
POLICY BRIEF #103: ODIOUS DEBT, available at http://www.brookings.edu/~/
how dictators have accumulated foreign debt while appropriating funds for their
personal use).
may argue that they accept the additional risk that accompanies negligent lending. In other words, if funds are used in a manner hostile to the titular debt holder, then the burden of loss should fall on the creditor. Such a simplistic approach, however, may create more problems than answers. A policy must be carefully constructed and clearly articulated, or capital flows to countries throughout the developing world are likely to either cease or become exorbitantly expensive. Lenders would demand a great premium for the added uncertainty that would exist in a world of flexible debt obligations. A legal doctrine that permits debtors to avoid repaying debt merely because they previously lived under a "bad" ruler would be counterproductive; all over the world, borrowers looking for money would suddenly find themselves lacking access to capital markets.

In fact—and some recent scholarship has confused this point—one must remember that the word "odious" in the phrase "odious debt" modifies the debt, not the ruler. If it were used to define the ruler, what benchmarks would be used? How "bad" is bad enough? What would happen when a sufficiently "bad" ruler actually employed a portion of the borrowed funds for appropriate purposes like roads or hospitals—would the debt still be written off merely because the originator was a dictator?

This linguistic complication—whether to target bad actors or bad expenditures—has resulted in some confusing analysis of the underlying issue. Yet its resolution is critical to any coherent solution. For that reason, this Comment proposes an ex ante labeling mechanism and an ex post judicial body. The labeling function would put lenders on notice that they are contracting with unsavory actors, but the institution of a judicial mechanism after a regime changes hands would allow lenders to defend how their funds were employed. Essentially, my proposal avoids the definitional dilemma by clarifying when the two questions are relevant: a creditor may lend to a dictator officially labeled as a bad actor, but the creditor is then responsible for monitoring how its funds are employed.

This proposal treats the definitional and political questions in a manner that should be acceptable both to those who want to target dictators and to those who are concerned about the "odious debt dilemma" but do not want to risk choking off capital flows to the developing world. Ideally, it would establish a legal regime that imposes on creditors incentives for extreme diligence without severely curtailing those flows of capital.

1. INTRODUCTION

In the 108 years since the concept of odious debt was first directly advanced during the negotiations ending the Spanish-American War, the only constant has been a striking inability to establish a coherent and practical application of the doctrine. As mentioned previously, some argue it is a moral imperative. Others assert that its basis is financial: if developing countries are forced to pay an egregious debt overhang in order to play in global markets, the cycle of economic failure will continue. In the shadow of the Iraq war, and as the dangers of failed states have become abundantly clear, the latter argument has gained increased credibility as part of a larger national and economic security platform.

Yet the most prominent scholarly articulation of the doctrine—the Sackian model—fails to reconcile these divergent motives. In stark contrast to the objectives of those who believe the doctrine is a moral imperative, Sack's model places the burden of proving the "odiousness" of a loan on the newly freed regime. The model also fails to provide a mechanism protecting new regimes that are attempting to repudiate some of their debt from being punished in capital markets. The result is a very real concern among borrower states that any debt repudiation will make it both very difficult and very expensive to gain access to capital markets. In most instances, a newly freed state is going to be so desperate for credit that the last thing it is going to do is risk angering lenders by pursuing a

9 Id. at 1.
10 See generally Soren Ambrose, Social Movements and the Politics of Debt Cancellation, 6 CHI. J. INT'L L. 267 (2005) (arguing that governments should use political capital to repudiate debt in response to the IMF's Sovereign Debt Restructuring Mechanism proposition).
write-off. For this reason, odious debt claims are rarely asserted, and accordingly, the conceptual challenges of the doctrine had not been given a great deal of attention in years. That changed dramatically with the 2003 invasion of Iraq.

For obvious reasons, the new Iraqi government immediately garnered international financial support. Irrespective of the controversy surrounding the invasion, the United States government was going to ensure Iraq's access to global capital markets. Furthermore, the "odiousness" of Saddam Hussein was never in question, and the idea of the newly freed Iraqis having to retroactively pay for the very weapons that were so widely known to have been used against them generated a great deal of international attention. Nevertheless, a practical and coherent solution remained elusive.

A historical understanding of previous failures must precede any new proposed framework, lest the new proposals repeat the previous miscalculations. Since the concerns of burden-balancing between creditor and debtor have plagued this doctrine for over a century, any proposal on the subject requires an in-depth examination of the previous incarnations of the odious debt doctrine and their respective shortcomings. These will be discussed in Section 1 of this Comment. Section 2 discusses the legal theory that makes an odious debt doctrine both necessary and complicated: the doctrine of state succession. The doctrine of state succession—which is customary international law—demands that new regimes inherit the debts of their predecessors. Any odious debt exception to the doctrine will therefore require a strong legal foundation. Sections 3 and 4 of this Comment discuss the early applications and ambiguous history that surrounds the doctrine. Section 5 discusses why the most commonly advanced version of the doctrine to date has been unworkable. Section 6 discusses the recent surge in scholarship on the matter and explains its contemporary relevance. Section 7 details this Comment's proposal for dealing with the dilemma of odious debt in the global economy.

1.1. A New Approach to An Old Idea

Some scholars have argued that the entire concept of odious debt ought to be scrapped in favor of more traditional judicial
This Comment’s proposal, however, asserts that a workable doctrine of odious debt is plausible, and it rests on a shift in the burden of proof from the debtor to the creditor and the establishment of an international organization with limited judicial responsibilities and doctrine borrowed from United States corporate law.

The proposed solution adopts some key concepts from a provocative article that likewise suggested establishing a framework for the development of an ex ante labeling regime, designed to identify governments that are “odious-prone.” It goes a step further, however, by suggesting that this new organization be endowed with an ex post judicial function. Labeling regimes “odious-prone” is merely necessary; it is not sufficient. A workable doctrine also demands this shift in the ex post burden of proof from the borrower to the creditor who lent to a regime with the label affixed to it.

Nevertheless, it is critically important that lending to regimes with the dreaded label attached does not establish an unrebuttable presumption of ex post “guilt” once the government in question is overthrown. Otherwise capital flows to these countries, which are often in dire need of resources, would cease or, at least, become extremely expensive. Creditors, as the party best-positioned to insist on transparency, must therefore be given the opportunity to monitor the use of their loans and to advance an ex post argument, based on evidence gathered during intensive monitoring, that the funds were actually employed appropriately by the noxious regime.

Finally, for this system to be effective, there must be a credible guarantee that sovereigns who repudiate the debt of their odious predecessors will not lose their access to capital markets as punishment. If the sanctioning body is composed of representatives from nations that control access to a sufficient percentage of the world’s capital markets, such as the members of the G8, a guarantee would be a straightforward matter. The G8

---

12 See Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, The Dilemma Of Odious Debts, 56 DUKE L.J. 1201, 1204 (2007) (exploring how private domestic law can be used to protect nations whose leaders have incurred odious debt).

13 See Jayachandran et al., supra note 8, at 19.

14 Id. at 23. Jayachandran et al. refer to the G7 since Russia, the nation that joined the G7 to make it the G8, does not participate in some financial and economic meetings. That said, I would include them in my regime since Russia is, technically, a member of the group now, and I think it would enhance legitimacy
members constitute enough of the world's capital markets that a guarantee of access from their members would prevent this threat of punishment from extinguishing odious debt claims.

Granted, money is fungible, and an odious regime could employ borrowed funds for acceptable purposes, while using alternate funding for odious endeavors. This is a legitimate critique of the entire concept, but a well-crafted version of the odious debt doctrine, while still imperfect, could nevertheless make it much more difficult for these regimes to borrow. Forcing an odious regime to reallocate funds to support its bad habits would likely make it that much harder for it to achieve whatever reprehensible goals it is pursuing. Any doctrine that makes it harder for these regimes to get money, in turn, will make it harder for them to maintain power. Furthermore, this proposal would ensure that at least borrowed funds are used to support proper social functions—a vast improvement over the current system.

1.2. The Proposal in Brief

The regime I propose adopts some concepts that have been advanced by recent scholarship, and it rejects or modifies others. This Comment supports the idea of a new institution designed specifically to address the matter of odious debt. I argue, however, that this institution should be tasked with two discrete functions, one that is straightforward and another that is complicated, but rare. The first task involves ex ante labeling, and the second requires an ex post judicial function. Since one of the most consistent and persuasive criticisms of the doctrine has been its impracticality, I suggest that the jurisprudence of this proposed institution should be modeled on a pre-existing body of law, thereby greatly simplifying its implementation. One of the key elements of crafting a creditor-driven policy requires a shift in the burden of proof from the claimant to the creditor. Fortuitously, the entire fairness standard in Delaware corporate law does something quite similar, and its jurisprudence could prove instructive to this new regime.

Without making too much of this comparison, the logic of the entire fairness standard is similar to what is required in this

and avoid insulting a Russian economy that is growing rapidly. If, however, Russia presented a roadblock to implementation, its participation is not necessarily a prerequisite, but it is a preference. See G8 Information Center, http://www.g8.utoronto.ca/what_is_g8.html (last visited Mar. 27, 2008).
solution to the odious debt problem. Critically, it shifts the burden of proving the entire fairness of a particular transaction to the controlling shareholders. Similarly, if a creditor lends to a nation that has been labeled odious-prone, the creditor would essentially be accepting a fiduciary duty to the shareholders. In this case, the shareholders are citizen taxpayers.

Furthermore, when a creditor lends to a state on the odious-prone list, much like a corporation engaging in a self-interested transaction, the creditor loses the presumption that would be analogous to the business judgment rule. Instead, lending to a labeled state should create something akin to a duty of care—hence the need for ex ante labeling. Naturally, this presumption favors the plaintiff—in this instance, the claimant state. The defendant—the creditor—must prove that the transaction (the loan) was entirely fair.

If implemented, the regime would target the least-cost avoider, the creditor, by making it presumptively liable when lending to an odious-labeled regime. In order to ensure the maintenance of lending to the developing world, however, the proposed institution’s ex post adjudication function would allow the creditor to make a case based on logic similar to the entire fairness standard. In other words, it is a rebuttable presumption, which can be overcome with evidence that the creditor fulfilled its duty of care. There are certainly limits to the analogy—the duty here falls on lenders, not directors, for instance—but it could provide the proposed debt tribunal with a practical model upon which to build a workable understanding of lender obligations in this distinct context.

Additionally, unlike some other recent reform proposals, implementation of this system would not be prohibitively expensive. My proposal would shift the most costly function—monitoring—from the newly created official institution to the relevant private actor, the creditor. The creditor would only be able to fulfill its duty of care through intensive scrutiny of its loan after it has been disbursed. Failing to scrutinize how a creditor’s funds are employed would essentially extinguish its claim for repayment. In other words, the loan agreement would specify and certify how the loans were to be employed. The creditor would then be charged with enforcing the terms of the agreement, and if it failed, it could lose its claim on the lent money.
1.3. Ripe to Overcome Past Challenges?

In its traditional form, the odious debt doctrine always faced significant practical challenges that limited its efficacy. For example, when can it accurately be said that a leader governs without the consent of his or her people? Who makes that determination in the international legal context? If it is somehow determined that the leader does govern without consent, can an entire loan be repudiated even if part of it actually benefits oppressed citizens? These are some of the definitional questions that wreaked such havoc with any real application of the doctrine that it was frequently ignored during the latter half of the twentieth century.

In the wake of the invasion of Iraq, however, the concept has gained renewed relevance. Nevertheless, its impact as a legal rule is still limited by the fundamental disagreement over its application. Much has recently been written in a scholarly effort to translate the odious debt concept into a workable legal doctrine. This Comment outlines the limitations of the historical version of the doctrine, and it elaborates and advances some of the reform proposals that have been made in recent years. Undoubtedly, it leaves much room for improvement. Rather than being an endpoint, this Comment is intended to be another contribution, albeit with some new suggestions, to the growing literature devoted to a serious economic and legal dilemma that often plagues the unfortunate survivors of history’s worst dictators.

2. A HISTORICAL CONCEPT?

2.1. Debt Overhang & the Doctrine of State Succession

In first considering the problem of odious debt, a reasonable preliminary question would be: why bother repaying debt that was clearly used for odious purposes. Ignoring for a moment the dual problems of actually establishing how a loan was used and the reputational concerns accompanying debt repudiation, there is an important principle of international law that underlies the tendency towards repayment. Any discussion of odious debt must begin with an analysis of the doctrine of state succession.

Under Chapter 11 of the United States Bankruptcy Code, a corporation that can no longer finance its debt burden is able to
renegotiate its financial obligations to its creditors. If the subsequent reorganization is insufficient and the company still fails, the remaining debt will die with the corporation. Given these rules, lenders are typically zealous about assessing the risk profiles of would-be borrowers before a dollar ever changes hands.

Corporate law also extends protection to a company's shareholders. They are shielded from responsibility for corporate debt by the principle of limited liability, which holds that debts of a corporation do not pass involuntarily to individual shareholders beyond the respective investment they have already made, which they naturally lose.

Sovereign debt, however, operates very differently. In regard to national debt, state practice demands that the "continuation of the international legal personality of a predecessor state generally obligates the continuing state to the full amount of the predecessor state's national debt." In other words, if Saddam Hussein borrows in the name of Iraq—whether the funds are borrowed from a sovereign, a multilateral institution, or a private lender—the debt attaches to the nation even after Hussein's regime has fallen. This is a reflection of the time-honored doctrine of state succession. The principle holds that when one regime "replace[s] . . . another in the responsibility for [conducting] the international relations of a territory" the "legal personality," which includes debt obligations, remains intact, even though control passes from one regime to another. Continuing the analogy with U.S. corporate

15 See Buchheit et al., supra note 12, at 1207 (describing corporate debt treatment); see also WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 108 (9th ed. 2004) (laying out the characteristics of a public corporation).
16 See Buchheit et al., supra note 12, at 1207 (contrasting corporate debts and sovereign debts, as sovereigns cannot rely on death, bankruptcy, or dissolution to be relieved of "imprudent borrowing").
17 See KLEIN & COFFEE, JR., supra note 15, at 145 (describing limited liability).
19 See Buchheit et al., supra note 12, at 1205–06 (stating that "a government automatically inherits the debts of its predecessor governments regardless of how dissimilar the forms of government may be").
21 See generally Williams & Harris, supra note 18 (discussing how creditor
law, it is imperative to recognize that the doctrine of state succession and the principle of limited liability are fundamentally in opposition to each other. Unlike corporate law, under state succession, Iraq’s shareholders (citizens) remain liable for the entire debt of the corporation (Hussein’s government) when it fails. Granted, the purposes of these two doctrines are different. Limited liability is intended to induce investment, and the rules of state succession are intended to maintain the integrity of sovereign lending in a world that is constantly witnessing the emergence of new regimes. Nevertheless, limiting the liability of citizens that have no hand in the selection or behavior of their leaders—in other words, in the case of dictators or elected leaders that become dictators—would make sense.

Perhaps unfortunately for those who advocate a sovereign debt restructuring mechanism (“SDRM”), the rules governing state succession to debt obligations originate in practice and evolving customary international law,22 a fact that suggests the rule is not easily changed. The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debt tried to codify these principles but, since the convention is not in force, the doctrine of state succession is derived from practice and opinio juris.23 In particular, the period of decolonization after World War II saw significant contribution to the customary international law on this subject.24 Since “the end of colonization resulted in the emergence of approximately one hundred new states,”25 the doctrine of state succession was intensely relevant, and it became a solidly established legal principle due to consistent “state practice.”26 Certainly, lenders are more inclined to take risks secure in the knowledge that debt obligations survive changes in government. By the relatively recent collapses of the Soviet Union and the former Yugoslavia, it was clear that when a regime died its

states effect the allocation of debts and assets when states dissolve, break away, or are restructured).  

22 Id. at 356.
23 Id.
24 Id.

26 Id. at 411.
debt remained generally “congenital, adhesive, and ineradicable.”

2.2. Odious Debt Theory

“When these new citizens . . . appear on the scene, they will inherit many things: a territory, a history, and the infrastructure of society. They may also inherit a stock of unpaid debts . . . that public international law requires them to assume as their own obligations.” Since the principle of state succession binds successor generations, it is not surprising that these suddenly empowered citizens sometimes begin to wonder whether or not there are any exceptions to this “congenital” rule governing state succession. One of the very few theoretical exceptions to it is the doctrine of odious debt. Though the doctrine’s legal foundation is far from stable, its appeal to newly established governments is obvious.

As an example, let us again consider the paradigmatic case of Iraq. Before Hussein’s rise, Iraq was an increasingly productive nation with a relatively substantial per capita income level. When Hussein seized power, however, he squandered billions in state funds on military equipment and on personal luxuries, all without the consent of the Iraqi people. In fact, a substantial portion of that money was spent attacking and repressing the very people who would eventually be left holding the bill. In such an egregious situation, the principle of odious debt, theoretically at least, protects Iraqi citizens from having to repay “debt [that] has been imposed upon the people . . . without their consent . . . [and] has not been incurred for [their] benefit.” The theory also relies

---

29 Buchheit et al., supra note 12, at 1208.
30 See Anderson, supra note 25, at 432 for an estimate of Iraq’s per capita income level at four thousand dollars in 1980.
31 Id. at 433.
32 See id. at 437 (stating that Saddam Hussein used chemical weapons against his own citizens).
on the fact that "creditors, from the beginning, took the chances of . . . investment" with a dictator. Thus, according to the odious debt concept, claims to enforce debts are "inapplicable, legally and morally." Idealistic proclamations aside, the legal foundation of the doctrine has actually rested on shaky ground since it was first invoked over a century ago. Rather than being customary international law, early applications of the odious debt doctrine were based on parochial notions of justice, and it was often directly in conflict with both positive law and judicial opinion on the matter of state succession. Over time, however, the concept generated enough agreement that, if proven, an odious debt was theoretically unenforceable according to international law. Essentially, it was a speculative "carve[] out . . . to the generally accepted rule of repayment" under the doctrine of state succession. A coherent legal standard for establishing whether or not a debt was "odious," however, remained elusive.

3. Early Applications

3.1. The Spanish-American War

In 1898, the United States and Spain commenced the Paris Conference to deal with some of the still smoldering issues of the Spanish-American War of the same year. One of the major elements of the negotiations involved loans to Cuba. Since the loans in question were granted after 1880—when Cuba became a de facto colony of Spain—they were governed by Spanish law. During the period of Spanish control, the loans were Spain’s obligation. At the Paris Conference, Spain argued that the doctrine of state succession meant that those financial obligations passed to

34 On Public Debts, supra note 32, at 368.
35 Id. at 359.
36 See Ernst Feilchenfeld, Public Debts and State Succession 336 (1931) (analyzing negotiations between Spain and the U.S. regarding debts related to Cuba post-independence).
38 Id.
39 See Moore, supra note 33, at 352–85 (highlighting the controversial post-war issues as understood at the time).
40 Khalfan et al., supra note 37, at 25.
the United States since the treaty ending the conflict established U.S. sovereignty over Cuba. In particular, Spain demanded repayment on debt that had been incurred on behalf of Spain, but had been secured with revenue streams flowing out of Cuba as collateral.

Unsurprisingly, the United States balked at assuming debts that were personal to Spain. The response of the Spanish negotiators turned out to be the impetus for what seems to have been the first "direct application of a doctrine of odious debts." Spain claimed that it would,

be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all of his rights over a territory and the inhabitants thereof, and despite this to continue bound by the obligations he had contracted exclusively for their regime and government.

Spain’s argument rested entirely on the traditional rules of state succession, which simply presumed the assumption of responsibility for debt without any inquiry into the specific nature of those liabilities. Spain even defended its position by asserting the sweeping notion that their argument was consistent with the "maxims... observed by all cultured nations that are unwilling to trample upon the eternal principles of justice."

By today's standards, a claim invoking "eternal principles of justice" on behalf of a colonial power is rather comical. Then, of course, Spain’s claim was both serious and typical, which made the

domestic loans. The arrangement allowed Spain to obtain what was essentially free money.

See Buchheit et al., supra note 12, at 1214 (detailing the arguments made by Spain and America regarding the debt).

Id. See generally Feilchenfeld, supra note 36, at 329–43 (providing a general survey of U.S.-Spain negotiations in the Cuban controversy). The Spanish government used the revenue they gained from their Cuban colony to secure


Buchheit et al., supra note 12, at 1214.

Hoeflich, supra note 44, at 53; Khalfan et al., supra note 37, at 26.
United States' rejoinder all the more striking. The American negotiators responded by asserting three justifications for their reluctance to honor the loans. First, the American commissioners claimed that the loans had not been "contracted for the benefit" of the Cuban people, but rather they were contrary to Cuba's interests.\textsuperscript{47} Second, they claimed that the burdens of those loans had been "imposed on Cuba without its consent."\textsuperscript{48} Finally, and most importantly for purposes of this Comment, the American commissioners argued that the creditors knew that the funds were being used in an effort to "suppress a people struggling for freedom from Spanish rule."\textsuperscript{49} In essence, the United States argued that when creditors knowingly contracted with debtors who employed the lent funds for nefarious purposes, they assumed certain risks. One of the risks was unenforceability,\textsuperscript{50} particularly when the "loans were 'hostile' to the very people expected to repay them."\textsuperscript{51}

Negotiations on this specific issue were never actually resolved. Spain refused to relinquish its position, yet neither the United States nor Cuba ever repaid the debt.\textsuperscript{52} Still, the U.S. position, though certainly not understood as a "binding declaration of law, [should be seen] as... [an early] template for understanding the doctrine of odious debt, a doctrine with an unsteady history but a compelling rationale."\textsuperscript{53}

3.2. Soviet Repudiation of Tsarist Debt

Even early in its development, a valid declaration of "odiousness" would theoretically not hinge upon the nature of the succeeding regime. If, for example, an odious regime were to succeed an odious regime, the successor's "odiousness" in no way detracts from its abstract legal right to repudiate the illegitimate

\textsuperscript{47} Khalfan et al., supra note 37, at 26 (emphasis added).
\textsuperscript{48} Id. (emphasis added).
\textsuperscript{49} Buchheit et al, supra note 12, at 1215.
\textsuperscript{50} Id. See generally Joseph Hanlon, Defining Illegitimate Debt and Linking Its Cancellation to Economic Justice, at http://globalfairtrade.ca/Illegitimatedebt.pdf (last visited January 15, 2007) (defining illegitimate debt by analyzing the basis for unenforceability).
\textsuperscript{51} Buchheit et al, supra note 12, at 1215.
\textsuperscript{52} FEILCHENFELD, supra note 36, at 343.
\textsuperscript{53} Chander, supra note 33, at 923.
debts of a prior government.54 "The character of a successor regime is irrelevant to a finding that the debt is odious; in such cases, the [odious] debt still falls with the demise of the prior regime."55 Therefore, when, in 1918, the new Soviet government—not necessarily a prime example of a representative government—announced that it was going to repudiate the debts of tsarist Russia, it supported the declaration by citing the burgeoning odious debt doctrine.56 The new Soviet government pointed to the U.S. repudiation of the Spanish debt and British repudiation of debts from the Boer War, debts which were incurred by Boer forces to actually defeat British advances.57 As in both those earlier applications of the doctrine, it would be difficult to argue that tsarist Russia ruled "in the interests of its population."58 Nevertheless, repudiation was a theoretically legitimate reflection of the preceding regimes nature. Tsarist Russia's repudiation was never formally validated, but the obligations were also never enforced.

3.3. The Tinoco Arbitration

In 1923, the odious debt doctrine was raised once again, this time in a groundbreaking arbitration decision by U.S. Supreme Court Chief Justice William Howard Taft that became known as the Tinoco Arbitration.59 In 1917, Costa Rican Secretary of War Federico Tinoco and his brother seized control of their country.60 Following two years of Tinoco rule, Costa Rican citizens were able to rid themselves of the dictator and his brother.61 Before being removed, however, the Tinocos managed to borrow funds from the Royal Bank of Canada. Nominally, the money was for Costa

54 See ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES [THE EFFECTS OF STATE TRANSFORMATIONS ON THEIR PUBLIC DEBTS AND OTHER FINANCIAL OBLIGATIONS] 157 (1927) ("Quand même un pouvoir despotique serait renversé par un autre, non moins despotique et ne répondant pas davantage à la volonté du peuple, les dettes 'odieuses' du pouvoir déchu n'en demeurent pas moins des dettes personnelles et ne son pas obligatoires pour le nouveau pouvoir.").
55 Khalfan et al., supra note 37, at 27 (citing SACK, supra note 54, at 157).
56 Khalfan et al., supra note 37, at 27.
57 Id. at 26–27.
58 Id. at 27.
59 Anderson, supra note 25, at 410.
60 Khalfan et al., supra note 37, at 41.
61 Buchheit et al., supra note 12, at 1216.
Rica. In reality, the funds were personal to the Tinocos, and they served no public purpose. When the successor government came to power, it immediately passed a law that repudiated the debt owed to the Royal Bank of Canada based on the reality that the loans were personal to the Tinocos, even though the funds were nominally Costa Rica’s.

Former President and then Chief Justice Taft was appointed as the sole arbitrator of the ensuing dispute. During the arbitration, Great Britain asserted that international law—essentially referring to the doctrine of state succession—obligated Costa Rica to repay loans that had been granted to the prior government. Naturally, Tinoco’s successors disagreed. Costa Rica advanced the argument that Tinoco was neither the de facto nor the de jure leader of the state, and therefore lacked the power to bind successor governments.

Chief Justice Taft had a differing view under general principles of international law. His opinion, noting that a “change of Government has no effect upon the international obligations of a State,” upheld the doctrine of state succession. Nevertheless, Taft refused to order Costa Rica to repay the debt owed the bank. He laid down the principle that funds borrowed by a government must be for a legitimate government purpose, not for personal use. Taft wrote:

[t]he transactions in question, which did not constitute transactions of an ordinary nature and which were “full of irregularities,” [sic] were made at a time when the popularity of the Tinoco Government had disappeared, and when the political and military movement aiming at the overthrow of that Government was gaining strength... The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in

---

62 Id. at 1216-17.
63 Khalfan et al., supra note 37, at 41.
65 Buchheit et al., supra note 12, at 1216.
66 See id. at 1217 (laying out Great Britain’s argument that Costa Rica should be held responsible for Tinoco’s debt)). See generally Great Britain v. Costa Rica, 2 Ann. Dig. 34 (1923) (Taft, Arb.) [hereinafter Tinoco Arbitration].
67 Buchheit et al., supra note 12, at 1217.
68 Tinoco Arbitration, supra note 66, at 36.
payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so.69

Taft maintained governmental authority to contract for public debt and to bind its successors, but he also established a legal precedent that made debt unenforceable if it was not for a valid public purpose.70

4. TOWARDS A COHERENT THEORY: ALEXANDER SACK

By the mid-1920s, the progression of the odious debt doctrine was limited to a single legal opinion (the Tinoco Arbitration) and a handful of nonbinding assertions of its existence and applicability. In 1927, Alexander Sack, a legal scholar and former Russian minister, published his famous work that attempted to define this as yet unnamed exception to the law of state succession. Sack was attempting to develop a framework with the clarity and coherency necessary for legal legitimacy and enforceability, while striving to avoid being too limiting.71 He labeled it "odious debt."72

Though he was the nominal father of the odious debt doctrine, he was also a believer in the well-established principle of state succession.73 Sack, like most others, was convinced that the maintenance and stability of international commerce required liability for public debts to survive power changing hands.74 Yet he also firmly believed that "debts not created in the interests of the state should not be bound [by] this general rule."75

According to Sack's synthesis of earlier applications, an odious debt has three fundamental components. First, the borrowing regime is despotic; second, the funds are not employed in the general interests of the people of the state; and, finally, the lender is aware that the expenditures are contrary to the interests of the

69 Khalfan et al., supra note 37, at 41.
70 Id. at 41–42.
71 Id. at 17.
72 PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 165 (1991) (referring to debts that were "not created in the interests of the state" as "dettes odieuses").
73 Id.
74 Id.
75 Id.
people in whose name the debt is incurred. He wrote, "[i]f a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, this debt is odious for the population of all the State." If these criteria are met, the debt should become personal to the regime. If the regime were to fall, so too would the debt.

4.1. Absence of Consent

Though Sack was not explicit about the concept of consent, some scholars argue that his reference to despotic regimes suggests that he was concerned with a "situation [in which] the people of a state do not will the transaction to occur." As mentioned previously, this lack of consent was a critical element of the American claim in the Tinoco arbitration. It is unclear whether Sack believed there should be a mechanism for obtaining consent or whether it should be presumed that despotic regimes always borrow without consent. It seems that most scholars believe lack of consent should be presumed under a despot. In reality, however, such a presumption would dramatically obstruct many states' ability to acquire necessary funds, an unwanted problem that will be addressed in a later section.

4.2. Absence of Benefit

The next element, lack of benefit to the state, has two components. First, the proceeds must be spent contrary to the

---

76 Sack, supra note 54, at 127.
77 Adams, supra note 72, at 165 (citing Sack, supra note 54).
78 See Adams, supra note 72, at 127 (noting that the debt is "personal" to the regime and would not be attributed to the state).
79 Khalfan et al., supra note 37, at 15.
80 Oddly, he does not address non-despotic regime, non-consensual borrowing. Despotism seems to operate as a proxy for lack of consent or, perhaps, he thinks they are interchangeable. In other words, borrowing without the consent of the governed is fundamentally indicative of despotism.
81 See generally Anderson, supra note 25, at 418 (noting that many Third World countries have debts incurred "by undemocratic regimes acting outside the interests of the people"); Buchheit et al., supra note 12, at 118 (equating debts incurred by a despot with debts incurred without the consent of the population); Chander, supra note 33, at 927 (calling odious debts, without the consent of the population, the "fundamental dilemma in international finance"); Jayachandran et al., supra note 8, at 2 (expressing concern over money lent to dictators who often lack public consent).
interests of the state. Second, the debt must actually be contracted for a purpose in opposition to the interests of the state. In other words, if a debt were contracted to benefit the state and consented to, but then spent in a manner that did not benefit the state, the debt would nevertheless attach to successor regimes. Here, like the credit awareness element of his definition, Sack is concerned with the facilitation of lending. As mentioned previously, he was a proponent of international commerce, and the supposition here is straightforward: if creditors begin losing their legal rights over debt that facially appeared to be proper, they would become less likely to lend. If creditors were deceived, Sack argued, they should not have to pay for it. As will be discussed in greater detail, this overly simplistic economic formulation plays a significant role in limiting the practical efficacy of Sack’s version of the doctrine.

The second prong of Sack’s “absence of benefit” test operates similarly, but in the opposing direction. If a debt is contrary to the interests of the citizens at the time for which it is contracted, but is eventually used to benefit the state, the doctrine of odious debt again will not apply. Under this prong, Sack evinces his concern with manipulation of the doctrine and unjust enrichment. He wants to ensure that an improper debt cannot be converted to a proper one, while payment is avoided based on the fictitious original terms. For example, this prong prevents a debtor from borrowing to purchase chemical weapons, then using the funds to actually build a hospital to avoid repayment because the contracting purpose was improper.

4.3. Subjective Creditor Awareness

Beyond all others, it is this prong of Sack’s definition that is misplaced, at least for any modern application of the odious debt doctrine. According to two scholars on the subject, Sack, along with other writers, “elevated the primacy of protection of creditors to the supreme rule.”

82 See Khalfan et al., supra note 37, at 15–16 (noting that, according to Sack, if one of the components is not satisfied, the doctrine should not apply because the lack of resulting benefit to the population alone is insufficient).
83 See id. at 15 (giving the example of South Africa, where funds raised for the apartheid regime that were later used to benefit the population would not be considered odious debt).
84 See id. (recognizing that the creditor would be entitled to restitution under the theory of unjust enrichment, so the odious debt doctrine need not apply).
85 Günter Frankenberg & Ralf Knieper, Legal Problems of the Overindebtedness
For Sack’s doctrine to be applicable, the creditors must have a “subjective awareness” of the odiousness of the loan. The practical implications of this requirement are unclear since the concept has so rarely been invoked. Nonetheless, it must be noted that in both the Cuban loan case and the Tinoco Arbitration, the creditors were presumptively aware of the odious application of their loans without a searching evidentiary inquiry.

It is unclear whether or not the presumption in favor of creditor knowledge existed because both cases were utterly obvious. What is certain, however, is that proponents of an odious debt doctrine consistently assert that the subjective awareness of creditors is a fundamental component. It is also a fundamental error. If subjective awareness is the standard, lenders have a clear incentive to remain willfully ignorant. Conversely, if persuasive ex post sanctions existed, creditors would have a new incentive; they would want to track the application of their loans and to exercise appropriate diligence. Contrary to Sack’s supposition, this Comment vigorously argues that modern creditors are the party best positioned to monitor the use and scope of their funds, provided they are given certain guidelines from the official sector.

5. AN APPEALING THEORY, BUT AN UNWORKABLE DOCTRINE

5.1. The Objective

While Sack’s writing was a milestone in the intellectual development of the doctrine, it also proved to be as confusing and unworkable as it was instructive and original. Under Sack’s formulation, the three elements required to establish that a debt is actually odious are conjunctive. The debt must be incurred by a despot and it must not benefit the state and the creditor must be subjectively aware of these facts. If a democratically elected regime, for example, contracted a debt for some detestable purpose, it could not be deemed odious since it was not incurred

---

86 Khalfan et al., supra note 37, at 16.
87 Id.
88 Id.
89 See Buchheit et al., supra note 12, at 1218 (describing the determinative factors in Sack’s formulation of odious debt).
by a despot. Similarly, if an abhorrent regime contracted a debt for a valid public purpose, but employed the proceeds in a different, less appropriate manner, the debt could not be considered odious. Finally, according to Sack, a debt contracted by a regime hostile to the people of that state would not be deemed odious if the lender "genuinely believe[d]" that the funds were to be used for an appropriate purpose. As mentioned previously, this provision simply encourages lenders to adopt the least invasive accounting standards possible.

For years, Sack's formulation was unsatisfying for those who believe that the purpose of the doctrine is to undermine certain "bad" regimes by cutting off the flow of money. Those scholars argue that if creditors can so easily avoid the ramifications of a successful invocation of the doctrine, there is little reason to take it seriously since capital will continue to flow to the world's worst regimes. Essentially, the doctrine's strict provisions suggest that it could never be invoked in the real world.

On the other hand, "[a] traditionalist—a Sackian" would argue that the doctrine serves a wholly different purpose. The objective is not to target bad guys, but to "identify objectionable cross-border financial transactions that international law should not enforce... if the governmental regime in the debtor country changes." These different interpretations beg critical questions: what is the objective of the doctrine? Is the goal political, financial, or moral? Is it intended to target "bad" regimes or "bad" transactions? Is it possible to accomplish both while establishing and maintaining legal legitimacy?

5.2. Economic Suicide?

"Daniel Ortega, leader of the Sandinista government that succeeded [Anastasio] Somoza, told the United Nations (UN) General Assembly that his government would repudiate Somoza's debt, but he reconsidered when his Cuban allies advised him that
doing so would unwisely alienate Nicaragua from Western capitalist countries." In a theoretical vacuum, the doctrine of odious debt has great appeal. As evidenced by the above quote, however, the real world presents significant practical limitations that hinder the doctrine’s efficacy.

Sack’s formula and all the historical examples demand a public repudiation of debt by a successor government. At first glance, such a requirement may seem both obvious and little more than a formality. After all, how could a legal determination be made that a particular debt met the requirements of odiousness unless the payee brings such a claim? Put another way, if the claimant does not put forth a claim, there is no case. In reality, this seemingly straightforward requirement is quite complicated due to the tendencies of global financial markets. An unreliable debtor is an unreliable debtor, and states, like individuals, worry about their “credit score.” International law may, in theory, provide a remedy to nations subject to odious debt, but “the fact remains that...successor governments to illegitimate regimes do not invoke the odious debt doctrine out of fear that doing so would deprive them of necessary access to global credit markets.”

Recent history and common sense suggest that this is a concern that must be addressed before any workable legal remedy can be established. Considering that the overwhelming majority of states impacted by an odious debt doctrine are likely to be less developed countries (“LDCs”), they are not likely to be in a position to risk their credit rating. If debt repudiation is viewed by creditors as a sign of an unreliable debtor, borrowers are unlikely to bring even legitimate claims. If they repudiate, they will be unable to borrow because they are considered a “risk.” Yet if they pay, their legal

---


96 See generally Jayachandran et al., supra note 8, at 2-10 (citing rising national security concerns in weak and failing states, the lack of a stable body of legal rules to govern the investment cycle, and the complex role of trade sanctions as complicating factors in the global market).

97 Id. at 2.

98 I know of no instance in which any variation of the odious debt doctrine has been considered in regards to a developed nation. Perhaps the closest instance would be the debt consideration of former satellite states of the Soviet Union. Nonetheless, even though they were not from what is commonly referred to as the Third World or sometimes the underdeveloped South, these states were not developed in the sense of their economies or market access.
claim will essentially evaporate, and they will likely drown under a mountain of debt.99

The most recent historical indication of this phenomenon occurred with the fall of the Soviet Union. Once the central government was gone, the question of which newly-formed state would be responsible for which portion of Soviet debt arose immediately.100 Creditors and creditor states made it clear to the former Soviet republics that, “in the interest of any potential recognition of their independence and future loans and assistance,” they needed to quickly come to an agreement about how to resolve the financial obligations of the former Soviet Union.101 Though some of the remaining Soviet debt could arguably have met Sack’s conception of odious debt, the successor states agreed to hold a conference to determine their respective debt servicing responsibilities.102

At the ensuing financial summit, the new states agreed that they would each be individually liable for their appropriate share of the debt.103 However, the creditor states “made joint and several liability a pre-condition to the twelve republics receiving financial assistance from the Western states,”104 thus making each state individually responsible for the entire debt of the former Soviet Union.105 The emerging states shocked nobody when they succumbed to the pressure and signed a memorandum of understanding announcing their intention to be jointly and severally liable for all the remaining debt of the former Soviet Union. Furthermore, the agreement excluded the Baltic States, a fact that upset some of the other parties, most notably Ukraine.

99 Jayachandran et al., supra note 8, at 2–10.
100 See Williams & Harris, supra note 18, at 369 (noting that the meeting of the former Soviet states to allocate appropriate shares of debt occurred before the actual dissolution of the Soviet Union).
101 Id.
102 Id.
103 Id.
104 Id.; see also Leyla Boulton, Republics Give Pledge on Soviet Debt, FIN. TIMES, Oct. 29, 1991, at 14 (“[R]epublics ‘jointly and severally’ take responsibility for the Soviet Union’s foreign obligations . . . .”).
105 Each state was to be held liable for the entire debt in the event that any of the other states failed to pay their share. See generally RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 354–75 (8th ed. 2004) (defining joint and several liability as the ability of a plaintiff to extract full payment from any and all defendants and additionally to receive from secondary defendants any remaining payments which initial defendants were unable to cover in full).
When Ukraine balked at the exclusion of the Baltic States, Western officials stressed that they expected Ukraine to honor the agreement, warning that if it did not, it "would suffer." Irrespective of their frustration, the newly formed nations were, at least in part, unwilling to risk the wrath of the global capital markets.

Some commentators, however, disagree with the emphasis on the reputational element of borrowing. They argue that reputational factors are not of primary importance for LDCs, and therefore, the notion that these states are unwilling to repudiate for fear of economic suicide is erroneous. The argument asserts that LDCs, taken as a whole, are too risky to achieve "reputational 'collateral'" in world capital markets even through maintaining responsible repayment. In other words, lending to these countries is such an inherently dangerous use of capital, that they are incapable of improving their credit rating on their own. For an LDC to be considered a likely candidate for repayment, the creditor must have certain enforceable legal rights against the sovereign's assets. Otherwise, they simply cannot generate the necessary confidence to promote lending. Thus, if an LDC is incapable of forging a good reputation, it has little incentive to forego debt repudiation as an option because there is nothing to lose.

This argument is fundamentally flawed. Even if it is accepted that prompt repayment does not enhance market access for LDCs, it does not necessarily follow that non-payment or repudiation leaves an LDC in the same position. In fact, there seems to be a generally accepted concern that late repayment—and certainly repudiation—does diminish access to world capital markets. "The status quo of the sovereign debt market indeed seems to be that successor governments, concerned about their reputation, typically accept responsibility for debt, independent of the nature

108 See generally id. at 43-48 (citing analysis indicating the general conditions under which small countries are unable to establish the requisite reputation for repayment).
109 See Jayachandran et al., supra note 8, at 11 (illustrating the reputation model of borrowing which indicates factors that effect access).
of the preceding regime." Irrespective of the market factors at play, recent history seems to demonstrate that successor state concern over access to world capital markets is real. Timely repayment may not improve a state’s standing in the eyes of the international financial community, but default will certainly damage it. Therefore, any serious reform proposal must address the reputational concerns that tend to accompany debt repudiation.

An odious debt doctrine that limits the financial resources of regimes that are prone to “bad” transactions, while ensuring that their successor states can maintain sufficient access to world capital markets is not an impossibility. Nevertheless, effectively reforming the doctrine does require a significant measure of international political will and in the wake of the Iraq war the recent surge of interest in the subject suggests that serious reform proposals currently have a fighting chance and ought to be put forth immediately.

6. **CONTEMPORARY REBIRTH & DOCTRINAL NECESSITY**

6.1. Iraq

For years, the impracticability of the odious debt doctrine forced it to languish in the realm of legal scholarship with only an occasional invocation in an obscure tribunal. When it has actually been raised as a legal defense of debt repudiation, authorities have consistently opted to take a pass on the question. Yet, as demonstrated by the earlier discussion of the breakup of the Soviet Union, it has infrequently been invoked. After the United States’ invasion of Iraq, however, the doctrine assumed a prominent position in post-invasion legal discussions. In many ways, Hussein’s debt was the paradigmatic example of an odious debt. As noted in the introduction of this Comment, when

---

110 Id. at 12.
111 See Buchheit et al., supra note 12, at 1221 n.59 (citing Iran’s invocation of the doctrine of odiousness in the Iran Claims Tribunal).
112 Iran argued before the Iran Claims Tribunal that a particular contract with the prior regime could not pass to the newly formed Islamic Republic because it was odious. The Tribunal took a pass, but articulated in dicta its view that the doctrine was only applicable in instances of state succession, not mere governmental succession. United States v. Iran, 32 Iran-U.S. Cl. Trib. Rep. 162, 175 (1996).
Hussein came to power in the late 70s, Iraq had some $40 billion in international reserves and possessed a per capita income of about $4,000. When he was removed twenty-five years later, his regime was approximately $125 billion in debt. He had spent lavishly on as many as seventy or eighty palaces, and had launched a costly eight-year war with Iran. These were not debts consented to by the Iraqis, nor did they benefit the state. On the other hand, though substantial, these improper expenditures did not constitute the entirety of Iraq’s $125 billion debt. Of course, not all of the borrowed money was for an odious purpose.

Largely due to Hussein’s well-known personal “odiousness,” the doctrine underwent a resurgence in the aftermath of the invasion. A number of commentators called for the debt to be labeled odious and written off. While there is little doubt regarding Hussein’s personal nature, the “odiousness” of the entire $125 billion is not as clear cut. Nonetheless, the current high-profile of Iraq and its financial situation has given rise to a renewed, though somewhat incomplete, interest in the subject of odious debts.

A Sackian traditionalist would believe that odious debts were sorted out loan-by-loan and that the objective of the doctrine is to “identify objectionable cross-border financial transactions that international law should not enforce... if the governmental regime in the debtor country changes.” Writing off the entire debt of a state after a regime change would, therefore, not be an application of the doctrine originally synthesized and advanced by Alexander Sack; the post-Iraq notion of “odious debt” is a new, and imprecise concept. For example, if Hussein employed borrowed funds to produce chemical weapons that were used on his citizens, Sack would argue that the debt was odious if the creditor was aware of the manner in which the funds were used. However, if Hussein, evil dictator that he was, borrowed a sum to build a road

---

113 Allawi, supra note 2 (“In the late 1970s when Saddam seized power, Iraq had about $40 billion in international monetary reserves. By the time he was deposed in 2003, this had dissolved into more than $125 billion of liabilities.”); Craze, supra note 3 (“In 1980, the average per capita income in Iraq was $4,000.”).  
114 Allawi, supra note 2.  
115 Anderson, supra note 25, at 436.  
116 Buchheit et al., supra note 12, at 1221.  
117 See id. at 1221-22 (citing the Iraq debt as a factor which “kindled a significant resurgence in the literature and debate” surrounding odious debt).  
118 Id. at 1225.
between, say, Tikrit and Baghdad, Sack would not have considered it odious. On the other hand, post-Iraq odious debt theories tend to argue that it was all odious because the funds were borrowed by Hussein—an odious ruler.\textsuperscript{119} Hussein’s debt is easily painted with this broad brush: “because Hussein’s debts are odious, they are not the responsibility of the Iraqi people, but instead the debts of Hussein’s regime.”\textsuperscript{120} There is no real legal foundation upon which this notion can be advanced, but it has gained currency in light of the situation and the fact that so much of Hussein’s debts were incurred in the violent suppression of his own people.\textsuperscript{121} This reality creates a desire to craft a doctrine that streamlines the ambiguities and shades of gray in Sack’s definition. Such a formulation is certainly appealing in its simplicity, but is it realistic?

While an uncomplicated rule can be helpful in lifting a tremendous burden off the backs of the Iraqi people, such an imprecise and sweeping proposal, if implemented, would wreak havoc in financial markets around the world. If a debt is to be deemed odious based on the leader of the borrowing country, lenders must know who the bad guys are, but the nature of the regime in question is not always as clear as Hussein’s Iraq. Who would get to make such supercharged political decisions as deciding who was “bad” and who was “not that bad?”

Furthermore, what happens to debt incurred by other deposed, but similarly malevolent, dictators far away from the lights of CNN? The debts of countless other regimes would be repudiated immediately. If Hussein’s debts were all written off simply because he was a “bad guy,” many other nations of the world that have suffered under the heel of an oppressive ruler would have an equally valid claim for debt forgiveness.

For instance, in Zaire, Mobuto’s $12.9 billion debt would be repudiated without the rigorous analysis needed to determine how the proceeds from each loan were actually employed.\textsuperscript{122} Like Hussein’s, Mobutu’s personal expenditures were enormous: he

\textsuperscript{119} See id. at 1222 (finding that recent commentators are more willing to assume that all odious regimes behave odiously at all times and therefore that all incurred debts are odious).

\textsuperscript{120} Anderson, supra note 25, at 437.

\textsuperscript{121} See id. (acknowledging that the odious debt doctrine is rarely applied directly, yet citing Yugoslavia as an example where experts interpret the two-thirds reduction in debt as a utilization of the principle of odious debts).

\textsuperscript{122} Id. at 413.
built massive estates abroad and he stole billions of dollars from his country's treasury. But a complete ex post repudiation could certainly present a problem of unjust enrichment. Like Hussein, it is unrealistic to assume that none of Mobuto's debt was incurred and spent on behalf of the public. Although he decimated his population for decades, it does not logically follow that surviving generations should automatically be free from repaying all loans incurred during his reign.

Finally, there is another logical flaw in Sack's doctrine that must be addressed for any reform to be effective. Sack's version creates a significant loophole wherein a dictator could borrow funds to cover legitimate state needs, thereby freeing up other sources of money to fund gross military expenditures or the like. Doing so would be a fairly simple, and protected, sleight-of-hand trick. It may be impossible to completely eliminate this problem, but it is important to recognize its existence.

6.2. Third World Debt Crisis

While Iraq's unique situation began the revival surrounding the odious debt doctrine, Hussein's debts are not the only contemporary issue that has sparked appealing, but inaccurate, support for the doctrine. It is simply a fact that much of what is becoming known as the "Global South" suffers from a "destructive cycle of debt" that demands serious attention from the developed world. This external debt harms countries in two ways. It diverts resources "that could otherwise be used for public services and poverty eradication . . . and indeed, this diversion alone should be grounds for cancellation of debt in deeply impoverished countries . . . . But probably more important is the inextricable link between debt and countries' vulnerability to the demands of multilateral creditors."

In recent years, it has become increasingly clear that failed states are both a moral quandary and a national security hazard. The United States and other developed nations have a great deal of work to do on the matter, but even self-interested recognition of

---

123 Id. at 436.
124 Ambrose, supra note 10, at 267.
125 Id. at 270-71.
the crisis surrounding failed states is a start. Nonetheless, any attempt to categorize stifling sovereign debts as doctrinally odious is misguided.

Unfortunately, neither overwhelming debt nor wide agreement about the nature of dictatorships has the requisite precision to serve as an international legal standard upon which to rest a modern formulation of the odious debt doctrine. It is entirely plausible that the international community may want to forgive debts incurred by dictators like Hussein or to relieve the massive debt overhang afflicting so many developing nations, but it cannot be done effectively if the approach is ad hoc and too freewheeling. Paradoxically, the results of such a standard-less but benevolent approach could be devastating for the developing world’s access to capital. The risk of lending to LDCs would be too great. Either loan requests would be outright denied or exorbitant risk premiums would be charged. Either way, a policy that lacks some ex ante clarity for lenders would be damaging to countries in need of capital.

7. TOWARDS AN IMPROVED DOCTRINE

In this section, I outline a proposal that incorporates and expands upon some other recent suggestions for the reformation of the odious debt doctrine. My analysis operates on the assumption that the right to repudiate illegitimate debts exists within international law, but the challenge of establishing sufficient proof, and concerns regarding future access to credit, make it highly improbable that a burdened state will attempt to exercise its right of repudiation.

One of the hallmarks of this proposal involves a shift in the burden of proof from the borrower to the lender when a prior regime has been labeled as “odious-prone.” Shifting of the burden, coupled with proper enforcement, will push creditors towards self-policing, a responsibility they are well positioned to execute. While my proposal is not the first to advocate shifting the

---

126 The National Security Strategy, supra note 11, FORWARD (noting that poverty, weak institutions, and corruption make “weak states” vulnerable to the operation of terrorist networks and drug cartels within their borders and thus make them a danger to the national security interests of “strong states”).

127 See generally Jayachandran et al., supra note 8 (advocating for an alternative reform program for odious debt that gives lenders the responsibility to cite specific legitimate ends for the funds and the due diligence monitoring plan they will implement to ensure the funds are indeed used for such purposes).
burden onto the backs of creditors, it does propose specific mechanisms for doing so that are, I believe, unique.

My formulation of the odious debt doctrine would also, in part, "serve as a preventative measure in that it is [sic] would induce creditors, in the future, to be less cooperative in their dealings with dictators." Under the logic of the current doctrine, creditors actually have an incentive to learn as little as possible about how their funds are deployed. That must change.

Additionally, as discussed earlier, nations that would be inclined to repudiate debt as odious frequently opt not to take such measures due to fear of retribution. For that reason, another prominent feature of any serious reform proposal must include a mechanism that will guarantee continued access to the world's capital markets for any debtor nation that attempts to repudiate its debt.

7.1. Target: Creditors

Alexander Sack published his landmark treatise in 1927. It was not the first articulation of the doctrine, but he did synthesize the earlier applications in an attempt to craft a coherent definition. One of the important features of Sack's formulation, and of conventional wisdom at the time, was that any exception to the doctrine of state succession should be primarily concerned with the protection of creditors; hence, a third prong of the definition is subjective creditor awareness.

In that era, after World War I and shortly before the Depression, ensuring flows of capital was paramount, and the creditors held all the cards. In fact, "[f]or nearly two centuries, the official sector has tried to distance itself from direct responsibility for the fate of private sector lenders to sovereign debtors." The
Sackian view was that the creditors who were aware of the nature of these expenditures had "committed a hostile act with regard to the people," but the burden to prove that awareness was on the borrower.\textsuperscript{132} Attempting to meet that burden, of course, required repudiating the debt and risking access to borrowing. Even if a debtor nation could meet the burden, conventional wisdom suggested they would be denied resources, and certainly lending would be denied if they failed to meet the burden. Even if borrowers won, they still lost, and if they lost, well, they clearly lost.

Today, increasingly integrated world markets make such a relatively laissez-faire attitude towards creditors dangerous, and if an effective odious debt doctrine is actually to be crafted, it is a completely untenable approach. Beyond the financial concern of systemic contagion which accompanies market integration, there are national security implications surrounding failed states that resonate at the highest levels of government.\textsuperscript{133} Now, "the official sector [views] a sovereign debt problem in one country as a potential source of disruption elsewhere. The financial and geopolitical consequences of an unmanageable debt crisis can no longer be neatly contained in a single country, or even a single region."\textsuperscript{134} Granted, the instances of so-called odious debt are only one element of a larger problem, but the increasing necessity of official sector involvement in the sovereign debt crisis has created an opportunity to formulate an odious debt doctrine with teeth—a doctrine that limits the free reign previously enjoyed by creditors.

Today, the quantity of debt passing between private lenders and sovereign borrowers is staggering. As mentioned earlier, when Saddam Hussein's government was toppled, it was $125 billion in debt.\textsuperscript{135} Under a Sackian view of the doctrine, each individual loan that contributed to that $125 billion overhang must be parsed and analyzed to determine its specific use. And then, the borrower would have to prove that each creditor was aware of the nefarious application of each of its loans. Since Hussein was

\textsuperscript{132} ADAMS, supra note 72, at 165.

\textsuperscript{133} The National Security Strategy, supra note 11, FORWARD.

\textsuperscript{134} Buchheit, supra note 131, at 334.

\textsuperscript{135} See Allawi, supra note 2 (noting that Iraq's national debt under Hussein rose from $40 billion to over $125 billion).
clearly a despot, a lack of consent is presumed. But which loans were used on roads and which were for weapons? What about the loans that were divided; say one-third was used to construct a hospital and two-thirds were used on a lavish palace for Saddam? Again, should bean counters be tasked with combing through records in an effort to determine the amount of debt used to "benefit" the people as opposed to the quantity that was personal to Hussein's regime?

Yes, this regime, if instituted, does not make evasion impossible. A dictator of Saddam's ilk would simply purchase all his weapons with cash from oil revenues, and he would borrow to support any social welfare initiatives. Here, Hussein is not actually the paradigmatic example. Iraq's oil revenue makes this scenario more plausible than it would be for other, similarly situated dictators. Many of the states that would be tagged with an odious label lack significant resources outside of borrowing. Instituting this regime would not eliminate all bad actors, nor would it eliminate all bad expenditures, but any doctrine that makes it harder for bad guys to borrow, and makes sure that when they do, the funds are devoted to social welfare, is certainly going to be a positive development.

Putting aside the obvious definitional problems with this conception of odious debt, the practical limitations are clear. The sheer manpower it would take to exhaustively examine so many records is staggering. Moreover, it seems unlikely that dictators of Hussein's ilk put great emphasis on their financial record keeping. The only way a doctrine of odious debt will ever work is if the burden is shifted from the borrower to the much stronger shoulders of the creditor. The lender, after all, is the party best positioned to monitor its internal decision making and the use of its funds. The creditor can simply attach stipulations to its loan.

136 See generally Anderson, supra note 25, at 439 (noting that Iraq's dealings with odious debt would have consequences for other countries with loans made by authoritarian regimes); Chander, supra note 33, at 927 (discussing the dilemma in odious debt of not saddling a population with repayment of a loan to which it did not consent); Jayachandran et al., supra note 8, at 2 (discussing the specific problem of when dictators borrow money and put it toward illegitimate purposes).

137 The tools of private lenders in international finance allow them to monitor and police their funds better than anyone else. Additionally, borrowers have an obvious incentive to comply with lenders when they request certain information. If such requests are not honored, the creditor can easily cease lending, and they would if continuing meant risking their legal rights. Chander, supra note 33, at
agreements demanding the ability to audit. States that are legitimately in need of funds are not going to balk at such a requirement.

Under the classical model of the odious debt doctrine, creditors stand to lose their legal right of enforcement only if it is proven that they are subjectively aware of the funds’ intended use. Such a requirement naturally creates incentives for lenders to employ the lowest level of due diligence possible. Creditors will go out of their way not to know how their funds are going to be spent in order to maintain their right of repayment. On the other hand, a properly crafted policy that shifts the burden of proof to the creditor and uses an objective measurement to determine creditor awareness would do precisely the opposite: create an incentive for extreme diligence. A creditor could guarantee its right of repayment by being able to demonstrate its meticulous attention to the uses of its money. Such a shift would depress, but not eliminate, the flow of capital to regimes prone to odious expenditures. Slowing the train of capital to bad regimes is not necessarily a bad thing. Of course, funds used for odious purposes are still going to trickle into the coffers of dictators, but it would become more difficult to use loans in such a manner if the commercial creditor is constantly monitoring the allocation of borrowed resources.

Nevertheless, exceptional “care must be exercised to develop arrangements which strike an appropriate balance between realizing the benefits of a more logical approach towards the resolution of odious debts and the corresponding potential for a chilling impact on legitimate sovereign borrowing.” If the new rules are vague, the risk premium for lending to developing nations will be too high. Slowing the stream of money pouring into the treasuries of these regimes is probably helpful, but preventing it entirely is perhaps even more likely to curtail development and create failed states than the unworkable odious

---

926 (stating that “certain players in international finance are more likely to have knowledge of the uses of the borrowed funds than others”).

138 See Jayachandran et al., supra note 8, at 21 (arguing that the due diligence model would involve a higher bar of due diligence for lenders than the classical model’s subjective knowledge standard of “willful and reckless failure to make inquiries”).

139 See id. (asserting that any modicum of diligence would satisfy the “willful and reckless failure” standard).

140 ld. at 15.
WIPING THE SLATE

debt doctrine we have been stuck with for more than a century.

If balancing these concerns is truly the key, it becomes critically important to make sure that creditors are aware of the rules of the game. In an effort to give lenders a clear picture of the playing field, Seema Jayachandran, Michael Kremer, and Jonathan Shafter developed an idea to create an organization with the express purpose of “determin[ing] ex ante that specified nations are prone to odious debt.” They propose an international organization that is constantly monitoring regimes around the world and, when appropriate, has the authority to label certain regimes “odious-prone.” Much of their work is immensely helpful, and the notion of ex ante labeling is critical, but the second major element of their proposal, which would endow that same organization with a costly monitoring function, limits its viability. Still, their work, particularly the formation of an organization that labels regimes, has been integral to the development of my proposal.

Labeling a regime as “odious-prone” ex ante—that is relative to collapse, not to lending—is possible and necessary. The multilateral organization would establish a set of criteria to determine “odiousness,” and once a determination that the label should be affixed to a state has taken place, lenders would be officially on notice. Any funds lent to that state demand an extreme level of scrutiny. Any loans that were dispersed prior to the designation would not be subject to these rules. If the regime were to fall, the succeeding government would be responsible for debts incurred prior to the labeling. In addition, Jayachandran et al. propose granting the organization a monitoring function as well. My proposal adopts their labeling function, but rejects the monitoring function in favor of a judicial role that would only be invoked when a regime falls and the successor government brings a claim.

Under this proposal, once a regime is labeled as “odious-prone,” loans can still be granted, but they require extreme diligence by the creditor. If the “odious-prone” regime falls, the successor then has a judicial venue before which it can bring an odious debt claim. If a matter progresses to this point, any lender whose debt has been repudiated has the burden of proving that

141 Id. at 19.
142 Id. at 21 n.28.
143 See id. at 19–22 (arguing that “[a]n organization should be enlisted or designed to determine ex ante that specified nations are prone to odious debt”).
they exercised *extreme diligence* across the life of the loan. In other words, a creditor may choose to lend without exercising diligence in hopes that the regime continues on in perpetuity, or it can exercise the requisite diligence and maintain their claim irrespective of the fate of the odious regime. Of course, the corollary to this is that a creditor must cease lending and demand repayment if the diligence discovers improper expenditures.

7.2. The Least-Cost Avoider and Legitimate Lending

After the label is affixed to a regime, all lenders would be considered on notice; they contracted with eyes wide open. Not only would these lenders possess the best information about their borrowers, they are also in the best position to demand a constant stream of data regarding how their money is being spent. “[B]anks [have] branches or representative offices in the debtor countries and they [are] thus in a position to assess firsthand the local political and economic scene.”¹⁴⁴ If the creditor cannot prove it constantly met the exacting standard of extreme diligence, the loan will be considered presumptively odious, the creditor presumptively knowledgeable, and the loan will be written off. The legal rights of the lender, in regards to a specific loan, will be extinguished.

Once again, there is a concern that legitimate lending to the developing world will be depressed if an aggressive odious debt regime is implemented.¹⁴⁵ As Jayachandran et al. point out, “[a] private bank would think twice before lending to a regime if the world’s leading powers, international organizations, and financial institutions had declared that the regime lacked public consent and announced that they would consider successor governments justified in [attempting to] repudiat[e] any new loans the odious regime incurs.”¹⁴⁶ This quotation, offered as a defense of the proposal, is actually indicative of a major problem which surrounds any proposal that seriously burdens creditors. Establishing an organization with labeling authority, however, is


¹⁴⁵ See generally *id.* (discussing the balance between holding bondholders accountable for irresponsible lending and ensuring the flow of capital to the developing world); Buchheit et al., *supra* note 12 (arguing for a less dramatic approach than the odious debt doctrine).

¹⁴⁶ Jayachandran et al., *supra* note 8, at 5.
unlikely to drastically cut off lending to most developing nations since it will only impact those saddled with the odious label. In fact, it will signal to the international financial community which developing nations are a safer bet.

The regime, however, will depress lending to odious-prone states, and potentially, it will have the added benefit of making it more difficult for such despots, now plausibly strapped for cash, to maintain their power. Admittedly, it will also make legitimate borrowing by odious-prone regimes more difficult and expensive, but will not eliminate it. In fact, given demand in the sovereign debt market, it seems likely that this new regime could give rise to a new kind of bank: banks with highly sophisticated monitoring capabilities that specialize in lending to odious-prone regimes.

7.3. Capital Market Access

The success of this proposal rests almost entirely on the ability of governments, newly emerged from under the heel of an odious-prone regime, to safely bring a claim. Win or lose, these new states must be confident in their ability to access the capital markets. Without this safeguard, the argument is merely academic. Though any such body must be considered broadly legitimate, it need not be part of a truly global organization. The governments participating in it simply must control enough of the world’s credit to guarantee any sovereign that brings a claim continued access to significant quantities of capital. If a sovereign is confident that its access to credit will not vanish in the wake of attempted debt repudiation, claims will not disappear under a fear of reprisal.

Jayachandran et al. suggest a few different bodies for implementation of this proposed organization. Among the possibilities, they mention the G8. The G8, meeting annually since 1975, was designed to serve as a forum for the leading industrialized nations to address issues relevant to the ever-changing world economy. Addressing the “dilemma of odious debt” falls precisely in line with their mission. Furthermore, the G8 actually controls enough of the world’s capital to effectively create this kind of institution. The member nations of the Group of Eight represent 49% of world exports and 51% of global industrial

---

147 Id.
148 G8 Information Center, supra note 14.
149 See Buchheit et al., supra note 12, at 1201.
output. If the eight member countries adopt this proposal, newly emerged governments could assert an odious debt claim confident that the vast capital markets of the G8 nations would remain open to them, irrespective of the outcome of their claim.

Creating an organization staffed with economists and political scientists tasked with labeling and, when an odious-prone regime collapses, with lawyers and judges, would not be a massive financial or bureaucratic burden. In fact, this is one of the major improvements of this proposal over the Jayachandran plan, which envisioned the labeling organization as also maintaining a cumbersome and costly monitoring capacity. Private lenders, however, are better positioned to monitor themselves, and they will do so if appropriate legal rules are created and enforced. Additionally, the institutional commitment required to closely examine all loans to odious prone regimes would be extreme. The G8 is simply not going to make that kind of commitment.

On the other hand, an organization tasked merely with the labeling function and with the role of adjudicating claims that arise after an odious regime has fallen and after the successor regime opts to bring an odious debt claim, demands a much less significant, and more realistic commitment. This judicial function is not necessarily simple or inexpensive, but the instances of a labeled regime falling, and of the successor opting to bring a claim, would likely be very few. The judicial function would rarely be needed, and it would therefore require significantly fewer resources. Yet, the infrequent necessity of the judicial mechanism would make establishing a comprehensive body of precedents difficult. There is, however, a pre-existing body of law that bears some factual similarities to the jurisprudence that the new organization would require: Delaware corporate law.

7.4. Delaware Corporate Law: A Model For A New Regime

Perhaps the most enduring problem plaguing the various theories supporting the doctrine involves its practicality. Earlier reform proposals have tended to require either a costly international oversight regime, which is unlikely to ever be implemented, or an ex post loan-by-loan analysis in nations that do...
not typically have the most sophisticated financial record keeping policies. A loan-by-loan system of inquiry would also be cost prohibitive. My proposed organization, however, could be maintained on a relatively spare budget, except in the uncommon instances when a regime falls and the successor repudiates the debt.

This proposed judicial function exposes a plausible, and familiar, critique: it is too costly to be realistic. Establishing a tribunal is a significant undertaking, but there is an appropriate jurisprudential model that, if applied, would greatly reduce the “start-up” costs involved in the establishment of this new body: the Delaware corporate law entire fairness doctrine.152

American corporate law has developed this standard to address the problems inherent in self-interested transactions. Delaware has established the rule that “the controlling or dominating shareholder proponent of the transaction bears the burden of proving its entire fairness.”153 In other words, when a controlling shareholder or a self-interested board of directors concludes a transaction, they face the burden of demonstrating both fair dealing and fair terms.154 The burden I propose to place on creditors that lend to “odious-prone” regimes is exceedingly similar.

Underlying this standard is the supposition that corporations are best positioned to monitor their own activities.155 The entire fairness standard has not brought an end to controlling shareholder or board-driven transactions. To the contrary, it has caused boards to establish independent committees to carefully review the terms of deals, lest the courts intervene. The controlling party has the responsibility of ensuring and demonstrating that the underlying transaction was fair.

Application of a similar standard in the odious debt sphere makes a great deal of sense, and the logic of my proposal mirrors that underlying the entire fairness standard. Like the entire

152 See generally Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (finding that where one stands on both sides of a merger, he/she has the burden of showing the entire fairness of the transaction).
154 Kahn, 638 A.2d at 1115 (quoting Wiengerger, 457 A.2d at 710) (“The concept of fairness has two basic aspects: fair dealing and fair price.”).
155 See Kahn, 638 A.2d at 1117 (discussing independent directors’ approval creating a presumption of fairness).
fairness doctrine, it would demand that the party best positioned
to monitor a transaction scrutinize it very closely. Establishing
divisions or departments specifically designated to lend to and
monitor regimes labeled odious-prone, much like the corporate
special committees, is one possible product of instituting my
proposal. As a result of Delaware’s law, establishing these
committees has become common practice. Likewise, creditor-
established odious lending departments are likely to become the
norm since their efforts will be essential to maintenance of the
debtor’s obligation. Lending to these regimes will still be
profitable, and creditors will have an incentive to continue
contracting with them. They will also have an incentive to do so
with caution, and developing expertise is an efficient way of
achieving these two goals. These newly formed departments will
demand more detailed auditing than ever before, and they will be
well-positioned to lift the veil and see behind the scenes of these
regimes. Creditors will require highly convincing evidence
regarding the use of their funds since, if the borrowing regime
falls, they will face the loss of their claim. Of course, if the creditor
cannot conclusively prove to the tribunal appropriate diligence of
their loans ex post, they will not be able to satisfy the burden of
“entire fairness.”

Though the analogy to Delaware corporate law is imperfect,
and a more significant analysis of the relevant jurisprudence is
needed to determine the extent to which the analogy is useful, the
logical parallels, however limited, are instructive.

8. CONCLUSION

The reality of a Sackian definition of odious debt is that it only
targets “loans to corrupt dictators who, with the lenders’ knowledge,
used the proceeds for their own private enrichment, and loans
whose proceeds were employed to suppress rebellious subjects.”
This version is rife with obvious and significant problems.
Namely, creditors will work to lend blindly.

If, on the other hand, as some theorists would like, the doctrine
is modified to target bad regimes generally, it immediately
becomes an impractical academic exercise stuck in definitional
quicksand. Who gets to define which regimes are sufficiently bad?
Is it a political tool or an economic one? Should the doctrine be

156 Buchheit et al., supra note 12, at 1228 (emphasis added).
crafted to inhibit general lending to bad guys? In short, the doctrine would become little more than an economic sanction employed against the enemies of the powerful.

These concerns demonstrate that one of the significant problems plaguing the evolution of a workable doctrine has been the convoluted objective. Clearly, formulating a feasible policy has proved daunting, but the necessity of devising clear principles on the matter remains important, and it demands concentrated attention. Admittedly, my proposed solution could conceivably allow bad actors to essentially launder money. They could use borrowed funds properly, thereby freeing other revenue streams for inappropriate uses. This is a real issue that survives my proposal, and it is a legitimate and likely critique, but it is not prescriptive. In other words, while this is an imperfect solution, it is a helpful and plausible one. It will not put all dictators out of business, but it may make it harder for them to finance their reprehensible agendas, and it may allow a succeeding regime an opportunity to relieve some of its debt burden.

My proposal attempts to strike a balance between the competing concerns of political practicality, capital flows, and burden imposition on creditors. It assumes that alternatives could exist in which creditors continue to lend to the developing world, but intensely monitor the use of their capital. Above all else, I have tried to formulate a proposal that creates incentives for extreme diligence by creditors, but I have tried to remain cognizant of the necessary equilibrium between the benefits of a more logical doctrine and its potential for disturbing legitimate sovereign lending.