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The Due Diligence Model: An Executive Approach to Odious Debt Reform

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The Due Diligence Model: An Executive Approach to Odious Debt Reform

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The Due Diligence Model: An Executive Approach to Odious Debt Reform

Jonathan Shafer†

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Introduction

The legal doctrine of odious debt began with Alexander Sack's seminal work in 1927, but the doctrine's roots are perhaps as ancient as the idea that a ruler's legitimacy is contingent on an obligation to pursue the public interest. Saddam Hussein's fall

† Principal at Boston Provident, an investment firm specializing in the financial services sector. Contact: Jshafer@Bprov.com. I would like to thank Michael Kremer and Seema Jayachandran whose contributions to the development of the ideas in this paper are too great for conventional citation. I would also like to thank Jason Gottlieb, my colleague on the International Law Committee of the New York City Bar Association, and Roberta Shafter for her invaluable editorial assistance.

1 See ALEXANDER N. SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES [THE EFFECTS OF THE TRANSFORMATIONS OF STATES ON THEIR PUBLIC DEBT AND OTHER FINANCIAL OBLIGATIONS] (1927). In the interest of saving both the unnecessary destruction of trees and the reader's attention-span, I will rely on the numerous well-written explications of the odious debt doctrine found elsewhere in this volume rather than present the doctrine and its background de novo. The classic definition of odious debts as debts incurred without public consent and utilized for illegitimate purposes with creditor awareness of these facts is assumed throughout the paper. Id. at 127. While debts incurred out of proportion to the prudent fiscal resources of a state but with no additional illegitimating factors are a significant problem, they are outside the scope of this work.

2 In Western thought this concept is often attributed, at least in its formal enunciation, to John Locke. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Cambridgeshire ed., Cambridge Univ. Press 1988) (1690). But the idea that the legitimacy of a leader's actions is not absolute but contingent upon some form of public
from power triggered the current upsurge in attention to odious debts. The range of voices demanding relief for the new Iraqi government from Saddam’s debts is staggering. It is unlikely that many other policy initiatives could unite such individuals and organizations as Joseph Stiglitz,3 Oxfam,4 the Cato Institute,5 and the Heritage Foundation.6 When Naomi Klein and the Wall Street Journal editorial staff share a common agenda, prospects seem uncommonly high for bipartisan action.7

Unfortunately, the current Iraqi debt relief has come in the form of ad hoc forgiveness rather than a new general policy approach to sovereign debt.8 Odious debt reform efforts seem

mandate emerged in different forms far earlier than the Enlightenment era. For example, in China the “Mandate of Heaven” was used to justify the transfer of power from the Shang to the Zhou dynasty in 1046 B.C. See F.W. Mote, Imperial China: 900-1800, at 8-10 (1999); see also Piero Tozzi, Note, Constitutional Reform on Taiwan: Fulfilling a Chinese Notion of Democratic Sovereignty?, 64 Fordham L. Rev. 1193, 1194 (1995) (“In classical Chinese thought, an emperor legitimately wielding the ‘Mandate of Heaven’ ruled for the benefit of the people; if he ceased to place their welfare paramount, popular revolt was justified.”). In another setting, political scientist Daniel Elazar has written extensively on the idea that the concept of the covenant—a voluntarily contracted pact of bilateral responsibilities and obligations—was the structure through which the ancient Israelites developed their relationship both to the divine and to their earthly rulers. See generally Daniel Elazar, Covenant and Polity in Biblical Israel: Biblical Foundations and Jewish Expressions (1995).


8 In 2004, then-U.S. Secretary of State Colin Powell testified before the House Committee on International Relations that the Iraqi situation was unique and that therefore “Secretary Baker, in seeking reduction of at least the vast majority of Iraq’s debt, has stressed these unique factors, instead of relying on the odious debt argument.” The President’s International Affairs Request for Fiscal Year 2005: Hearing Before the H. Comm. on Int’l Relations, 108th Cong. 108-88 (2004).
trapped in a frustrating political cycle. There is a substantial and warranted legal reluctance to establishing retroactive penalties for actions taken before promulgation of a new rule. This taboo is occasionally breached but only with caution. Aside from basic principles of justice, our economy would cease to function if confidence was lost that long-term agreements could be forged within a stable legal framework. Thus, when the collapse of a dictatorial regime reveals a legacy of crippling odious debts it is already too late. But mustering political capital for prospective odious debt reform is difficult since there is no manifest public injustice to rally supporters around. Eventually attention to odious debt trails off until the next tragic iteration of the cycle.

Right now there is a residual political consciousness that odious debts are problematic. In addition, enough time has passed since the fall of Saddam Hussein that the topic can be discussed in terms of a general, forward-looking solution. This window of opportunity will not remain open forever.

I. Problems with Judicial Strategies of Reform

A. The Recognition Power

Very few skeptics of odious debt reform defend the utility or morality of debts incurred by regimes lacking public consent and used for illegitimate purposes. Rather, reform skeptics argue that upending established practices of regime succession to sovereign debts would have a dangerous, destabilizing impact on the global financial system. But on the whole, opponents of odious debt

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10 While there are epistemological difficulties in proving a negative through empirical observation, see KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (Routledge Classics 2002) (1935), limited research on the part of the author finds no writer making such claims. But it is almost certain that someone, somewhere is making the argument that it is rank imperialism for Western nations to impose their constructs of popular consent on the third world.

reform are safely outnumbered by supporters. Why then have reforms never gained political momentum? In the absence of a pressing crisis perhaps the topic has never been seen as sufficiently compelling to earn space on a crowded national policy agenda.\textsuperscript{12}

Many odious debt reform advocates place their hopes in the courtroom rather than political institutions, believing that the odious debt doctrine either already exists in the law or can be derived from other well-established legal principles. Supporters of the first approach traditionally make their case on the basis of international law. I refer to this line of argument, extending back to the early nineteenth-century, as the "Classical Model" of odious debt reform.\textsuperscript{13} The second approach is a more recent variant set forth by Lee Buchheit, Mitu Gulati, and Robert Thompson (referred to herein as the "Private Law" model).\textsuperscript{14} Buchheit,


\textsuperscript{13} An excellent argument for the proposition that the odious debt doctrine is an existing component of international law is made by Ashfaq Khalfan, Jeff King, and Bryan Thomas. Ashfaq Khalfan, Jeff King, & Bryan Thomas, Advancing the Odious Debt Doctrine (Ctr. for Int'l Sustainable Dev. L. Working Paper, 2003), http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf. King finds support for the doctrine in each of the four foundational pillars of international law: international conventions, international custom, general principles of law recognized by civilized nations, and the judicial decisions and teachings of the most qualified legal publicists of the world's nations. Id. at 2-4. King does appear to somewhat overstate his case by concluding that the doctrine of odious debt has "considerable support under the traditional categories of international law." Id. at 48. However, if the odious debt doctrine was indeed firmly established as international custom, then we would doubtless see more examples of its usage in the modern era.

Gulati, and Thompson make a very persuasive case that a formal odious debt doctrine is unnecessary under American law as similar results can be achieved via well-established principles of domestic private law.\textsuperscript{15} The authors raise four possible legal defenses for sovereigns seeking to repudiate illegitimate debts in American courts. First, bribery of governmental officials is manifestly contrary to public policy and courts may in extreme circumstances take public policy into consideration to deny enforcement of otherwise valid contracts.\textsuperscript{16} Second, where a lender knowingly facilitated foreign governmental corruption, its claims may be barred on the equitable basis of unclean hands.\textsuperscript{17} The final two Private Law sovereign defenses are based on conceptualizing the relationship between a regime and its state along principal-agent lines. Thus, where a lender knew or reasonably should have known that an agent (i.e., government regime) engaged in self-dealing in violation of the duty to act for the benefit of its principal (i.e., the state), such debts will not attach to the state.\textsuperscript{18} Finally, the Private Law model invokes an analogy to the corporate law doctrine of veil piercing.\textsuperscript{19} Where the corporate form is egregiously abused to perpetrate a harm, courts may refuse to honor the corporation's limited liability structure.\textsuperscript{20} Similarly, the Private Law authors suggest that courts should look through the state to its governing regime where the state form is abused for the regime's personal benefit.\textsuperscript{21}

Even if we assume that these arguments are correct and the doctrine of odious debt, or a functional domestic equivalent, is good law, not all good law is suitable for judicial oversight.\textsuperscript{22} The political question doctrine of American constitutional law

\textsuperscript{15} Id. at 29-30.
\textsuperscript{16} Id. at 31.
\textsuperscript{17} Id. at 34-36.
\textsuperscript{18} Id. at 36-40.
\textsuperscript{19} Id. at 44-47.
\textsuperscript{20} Buchheit, Gulati, & Thompson, supra note 14, at 45.
\textsuperscript{21} Id. at 47.
\textsuperscript{22} Ashfaq Khalfan, Jeff King, and Bryan Thomas present an extensive strategic analysis on the appropriateness of various judicial venues for advancing the odious debt doctrine. See Khalfan, King, & Thomas, supra note 13, at 57-75.
acknowledges that, in some circumstances, the question of what is good law is separable from the question of whether a court can or should implement that law.  

The political question doctrine is best understood as an umbrella under which two somewhat independent constitutional concepts find shelter. The first strand of the political question doctrine deals with the constitutional separation of powers between the executive, legislative, and judicial branches of the federal government. In *Baker v. Carr*, the Court expressed its reluctance to involve itself in political questions where it finds one of the following:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; ... or the impossibility, of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Court's aversion to questions reserved for the political branches is quite strong. In no sphere is the judiciary more wary to risk treading upon the just prerogatives of another governmental branch as foreign affairs. Courts consistently apply a strong presumption of deference to the executive in foreign affairs based on "residual" executive authority over international matters. This deference is strongest where the text of the Constitution makes an explicit grant of executive power. One power the Constitution directly vests in the executive branch is the authority

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23 See *U.S. Dep't of Com. v. Montana*, 503 U.S. 442, 458 (1992) ("In invoking the political question doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.").


25 See generally Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *Yale L.J.* 231 (2001) (providing an historical understanding of the Constitution's allocation of broad "residual" foreign affairs discretion to the executive where power has not been explicitly assigned to another governmental branch).
to recognize foreign governments.\textsuperscript{26} Thus, in \textit{Baker} the Court declared that "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing."\textsuperscript{27}

The executive's recognition power has a scope extending beyond simple acknowledgement that a foreign government is the legitimate representative of its state. The executive also has the authority to decide for purposes of United States law, who speaks for a foreign government and what actions of that government are legitimate. An early and fascinating example of this doctrine can be found in Justice Taney's opinion in \textit{Doe v. Branden}.\textsuperscript{28} At issue in \textit{Doe} was title to a large parcel of Florida land.\textsuperscript{29} The crux of the dispute was whether the 1821 treaty ceding Florida from Spain to the United States annulled the Duke of Alagon's title to a large part of the ceded territory.\textsuperscript{30} The Duke had been granted ten million acres of Florida property by the King of Spain prior to ratification of the treaty.\textsuperscript{31} Although the treaty document signed by the King directly revoked the Duke's title, a successor to the Duke's land interest argued that the King lacked power under Spanish law to do so.\textsuperscript{32} Justice Taney dismissed the case as an inappropriate matter for judicial evaluation, stating that pursuant to his powers of recognition and treaty making, the President is enabled to:

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\textsuperscript{26} U.S. CONST. art. II, § 3 ("he shall receive Ambassadors and other public Ministers"); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("[p]olitical recognition is exclusively a function of the Executive").
\textsuperscript{27} \textit{Baker}, 369 U.S. at 212.
\textsuperscript{28} 57 U.S. (16 How.) 635 (1853).
\textsuperscript{29} Id. at 636, 654.
\textsuperscript{30} Id. at 654-55. The treaty was originally ratified in 1819, \textit{id.} at 654, but was re-ratified in 1821 with an addendum stating that it was the understanding of both parties when the original treaty was signed that any prior grants of the property ceded by the treaty were annulled, including any grant to the Duke of Alagon. \textit{Id.} at 656. The original treaty had stated only that any grants of the property in question made since January 24, 1818 would be annulled. \textit{Id.} at 655. For the full text of the treaty, see Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.-Spain, Oct. 29, 1820, 8 Stat. 252.
\textsuperscript{31} \textit{Doe}, 57 U.S. (16 How.) at 654.
\textsuperscript{32} \textit{Id.} at 655.
\end{flushright}
obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty, and under what limitations; and how far the party who ratifies the treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion . . . . [I]t would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered. 33

Doe demonstrates the extreme deference required by the Constitution to a President’s decision on who may speak for a foreign state and how far that regime may go in binding its state. Furthermore, the Executive has the sole right to decide what limitations exist on the regime’s sovereign powers. In other words, the Executive has exclusive authority not only to recognize a foreign state’s government, but to define that state’s system of government. This determination of the boundaries of a regime’s public powers is binding upon the judiciary and may not be challenged by an evidentiary analysis of the state’s domestic laws. Thus, a foreign state’s constitution might enshrine a despotic regime as domestically omnipotent, but if the executive declares limits on that regime’s public authority, then regime behavior outside those boundaries must be treated as a private act.

Subsequent cases reveal that the Executive has broad powers to preempt matters normally within the province of the judiciary pursuant to its recognition of a foreign government. In particular, the Executive is empowered to settle legal claims involving a foreign sovereign where those claims interfere with United States foreign policy objectives. One such case, United States v. Pink, concerned the assets of the New York subsidiary of a Russian insurance company nationalized by the Soviet government in 1918. 34 The Pink Court held that the “[executive’s recognition] authority is not limited to a determination of the government to be

33 Id. at 657 (emphasis added).
34 315 U.S. 203, 210 (1942).
recognized. It includes the power to determine the policy which is to govern the question of recognition."\(^{35}\) Accordingly, the Court found that where the executive decides that outstanding private claims between its citizens and a foreign sovereign impede broader United States policy objectives, "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President."\(^{36}\)

Another case demonstrating the power of executive recognition is *Dames & Moore v. Regan*.\(^{37}\) *Dames* stemmed from the breakdown of relations between the United States and Iran following the Iranian hostage crisis.\(^{38}\) The petitioner brought suit in a federal district court alleging that it had performed services for the pre-revolutionary Iranian government without payment, and orders of attachment were issued against certain Iranian assets held frozen in the United States to secure a potential judgment.\(^{39}\) Subsequent to that attachment, the hostage situation was resolved via the Algiers Accords (implemented by Executive Order) under which the United States committed to terminate any claims, judgments, or attachments of U.S. nationals against Iran and transfer such claims to the Iran-United States Claims Tribunal for binding arbitration.\(^{40}\) In accordance with this Executive Order, the petitioner’s attachment was vacated and its claims against Iran stayed.\(^{41}\) The petitioner then filed for declarative and injunctive relief, claiming the United States government exceeded its statutory and constitutional authority.\(^{42}\)

The Court found that the President had statutory authority to nullify the Petitioner’s attachment under the International Emergency Economic Powers Act, but could find no statutory basis for an executive power to suspend claims pending in

\(^{35}\) *Id.* at 229.

\(^{36}\) *Id.*


\(^{38}\) *Id.* at 662-63.

\(^{39}\) *Id.* at 663-64.

\(^{40}\) *Id.* at 664-66.

\(^{41}\) *Id.* at 666.

\(^{42}\) *Id.* at 666-67.
American courts. Nevertheless, the Court held that by not expressly denying this power to the President, the legislature implicitly assented to the President's traditional authority to settle claims between its nationals and foreign governments where such claims threaten American foreign policy objectives. The Court commented that, "[t]hough those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate."

The Algiers Accords contain a section of particular relevance for odious debt reform. Under the Accords, the United States pledged to:

freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran.

The United States also agreed that "the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the Act of State doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law." Note that no

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43 Dames & Moore, 453 U.S. at 675.
44 Id. at 679.
45 Id. at 680.
47 Id. at Point IV, § 12.
48 Id. at Point IV, § 14. The Act of State doctrine is best enunciated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Banco Nacional de Cuba involved the expropriation of sugar by a corporation with largely American shareholders in 1960. Id. at 401. The question raised was whether the expropriation decree was legal under Cuban law. Justice Harlan, echoing the earlier words of Chief Justice Marshall, stated:

[O]ne nation must recognize the act of a sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state . . . . An inquiry by the United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question.
reference is made in the Accords to the citizenship of the Shah or his relatives. This suggests that the Executive's recognition-based claims settling powers are not limited to claims between U.S. citizens and a foreign sovereign, but encompass any U.S. litigation involving a foreign sovereign which significantly implicates foreign relations.  

Another relevant opinion is the Second Circuit's decision in *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia.* In *767 Third Ave.*, landlords of Yugoslavia's leased New York consular offices brought suit against the former nation's successor states for unpaid rent. The Second Circuit found that this suit raised "virtually all of the *Baker v. Carr* factors," and was therefore nonjusticiable as "the allocation of debt among the successors might hinder or prejudice the future resolution of this issue through negotiations or another determination by the Executive." For the Second Circuit, "questions of title [are] 'inextricably intertwined with the question of state succession and sovereignty,' which are reserved to determination by the executive branch." Thus, *767 Third Ave.* indicates that the recognition power gives the executive authority to decide which debts are inherited by a foreign successor regime.

Precedent therefore establishes the following aspects of the recognition power:

1. The recognition power includes the authority to decide who represents a foreign state and the scope of that

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*Id.* at 415 n.17. Justice Harlan further explained that this "Act of State" doctrine is not mandated by international law; but rather, arises out of our Constitutional separation of powers. *Id.* at 423.

49 The Executive's powers are not totally unbounded. The Ninth Circuit ruled that a construction of the Algiers Accords which allowed the taking of assets from a U.S. resident without due process of law would "raise grave questions about the enforceability of that part of the Accords." *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1411 (9th Cir. 1995). The *Dames* Court, although not ruling directly on the matter, commented that the President may have the power to settle claims between U.S. nationals and Iran, but that this does not necessarily preclude the aggrieved national from raising a takings claim against the U.S. government. *Dames & Moore,* 453 U.S. at 689.

50 218 F.3d 152, 159 (2d Cir. 2000).

51 *Id.* at 155.

52 *Id.* at 160.

53 *Id.* at 161 (citing *Can v. United States,* 14 F.3d 160, 165 (2d Cir. 1994)).
representative’s authority to act on behalf of its public.

2. The executive has broad discretion to settle foreign sovereign claims in connection with normalizing foreign relations.

3. Recognition powers are applicable in cases of both state and regime succession.

4. The recognition power is exclusively executive. Every power necessary to implement an odious debt reform policy is contained within the executive's recognition authority. A corollary of this fact is that there are significant limits on judicial power over odious debts, but this bar is not absolute. A series of cases involving litigation against deposed dictators in American courts show that there may be some scope for judicial jurisdiction over the subset of odious debts implicating theft of public funds.

In Republic of Philippines v. Marcos, the Republic of Philippines sought an injunction preventing Ferdinand and Imelda Marcos, and others, from transferring or encumbering properties alleged to have been purchased with funds illegally stolen from the Republic. The Second Circuit denied Marcos' argument that this case was unfit for adjudication due to the Act of State doctrine, noting that while the Act of State doctrine does apply to actions of a foreign sovereign (including acts of officials purportedly behaving in their official capacity) it is irrelevant with respect to purely private behavior. The Ninth Circuit came to a similar conclusion in a different stream of Marcos litigation, stating:

[although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law.]

Two other cases where courts found that former heads of state were acting in a private capacity are United States v. Noriega and

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54 See supra text accompanying notes 28-53.
55 Republic of Philippines v. Marcos, 806 F.2d 344, 348 (2d Cir. 1986).
56 Id. at 359-60.
57 Republic of Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988).
Jimenez v. Aristeguieta.\textsuperscript{59} Similar to the Marcos cases, these actions were brought by successor regimes to recover allegedly stolen state property.\textsuperscript{60} Noriega and Jiminez, both deposed dictators, each claimed that as autocrats all of their actions were de facto public acts.\textsuperscript{61} In each case, this argument received a level of judicial respect on par with the esteem the French Revolutionary National Council had for Louis XIV’s theory that “l’état c’est moi” when they removed his descendant’s head for treason.\textsuperscript{62} The Noriega court ruled that:

> [t]his sweeping position completely ignores the public/private distinction and suggests that government leaders are, as such, incapable of engaging in private, unofficial conduct. Aside from its lack of logic, suffice it to say that this argument has been implicitly rejected in several cases distinguishing the private from public conduct of heads of state and foreign dictators.\textsuperscript{63}

Indicating that the Act of State doctrine\textsuperscript{64} might apply if Noriega had conducted his drug smuggling and money laundering operations on behalf of the Panamanian state, the court failed to see how these crimes “could conceivably constitute public action.”\textsuperscript{65} Similarly, the Fifth Circuit mocked Jimenez’s pretensions to personally embody Venezuelan sovereignty:

Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. . . . Appellant’s acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown

\textsuperscript{59} Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962)

\textsuperscript{60} Id. at 552.

\textsuperscript{61} Jimenez, 311 F.2d at 553; Noriega, 746 F. Supp at 1522.


\textsuperscript{63} Noriega, 746 F.Supp at 1522.

\textsuperscript{64} The Act of State doctrine provides that “every sovereign is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.” Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

\textsuperscript{65} Noriega, 746 F. Supp at 1522.
were not acts of Venezuela sovereignty. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an 'Act of State'.

How can we reconcile the willingness of the courts in the dictator cases to probe the public-private nature of these fallen leaders' actions with the executive's exclusive power to define the boundaries of a foreign regime's public authority? To begin with, in the dictator cases the public-private question was raised in the context of the Act of State doctrine—a flexible, prudential judicial doctrine not mandated by statute, constitution, or international law. If the executive had explicitly utilized its authority to define a foreign state's form of government and affirmed the dictators' claims that their alleged deeds were indeed legitimate public acts, then these cases would have terminated not on act of state grounds but on the failure to state a claim. In each case the executive advocated for a denial of the act of state defense. We can infer from this precedent that the personal conversion of state property in violation of that state's internal laws is by default excluded from the United State's recognition of a regime's valid scope for public authority.

A prior regime's solely private actions warrant little special treatment in our judicial system. Sovereign borrowing is undoubtedly a public action. But if the theft of state funds is a de facto private act, then sovereign lenders have the same equitable obligation to avoid abetting a regime's private self-dealing that they would in any other commercial transaction. This public-private distinction is the key which facilitates the Private Law model defenses against the enforcement of debt obligations by lenders with actual or imputed knowledge of their role in a scheme to defraud the regime's state. The locus of analysis is not on the regime's public act of borrowing funds but on the subsequent

66 Jimenez, 311 F.2d at 557-58.
67 See supra text accompanying note 64.
68 Public action here refers to the valid capacity of a regime to act as an agent of the state. The Foreign Sovereign Immunities Act which relegates borrowing to the status of a commercial, not sovereign, act, is not relevant in this context. See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (1976).
private act of theft.

Unfortunately there are sharp limits on the scope of this approach. Illegal looting of public funds is perhaps the most common illegitimate use of debt financing but there are certainly others. Regimes borrow funds to finance mechanisms of internal domestic repression and wage hostile, external wars. For example, Saddam Hussein's military waged multiple genocidal campaigns against domestic opponents such as the Kurds and the Marsh Arabs and launched an aggressive war of conquest against Iran. By what logic should the Iraqi people inherit debts used to finance their own subjugation or ill-conceived wars they had no ability to stop? But as repulsive as Saddam's campaigns of genocide and foreign aggression were, there is no basis to presume they were not public acts. Thus, the executive could decide that Saddam lacked public authority to bind the Iraqi state with debts used to finance his apparatus of repression, but a court would be prohibited from making any such determination.


70 This does raise some interesting theoretical questions. The executive could settle Saddam's debts through its claims-settling power pursuant to establishing normal diplomatic relations with the new Iraqi government even if those debts are legally legitimate. On the other hand, if the executive stated that Saddam's public mandate did not include the power to wage hostile wars or conduct internal repression, then lenders seeking enforcement of debts connected with those actions would face the same equitable defenses as a theft situation. But is the executive recognition power retroactive? Can the executive now declare that Saddam did not have sovereign authority for certain acts if evidence demonstrated that the United States in fact sanctioned these acts as legitimately public functions at the time? Such declarations as default rules of recognition might also be problematic. After all, the power to wage war is the ultimate public function. If the executive stated that no regime could claim public authority to wage illegitimate wars, the regime's state would be absolved of any responsibility even if it was the enthusiastic mandate of a democratic populace.

What of a potential rule that no regime has the public authority to wage an illegitimate war without public consent? While this might be a desirable policy, it would be difficult to apply in a judicial setting. Whether a war was legitimate under international law would almost certainly be a political question in American law and thus unsuitable for judicial determination, and courts would have significant problems applying a legal standard of popular consent—as will be explained in the following section.
B. Nonjusticiability

It is unlikely that Congress could reallocate a portion of the recognition power to the judiciary to facilitate odious debt litigation. The Supreme Court has thus far avoided a clear statement on the limits of Congressional power to override traditional executive foreign affairs powers. But here the executive’s powers are rooted in an explicit, not residual, constitutional allocation. Even if such legislation were constitutionally feasible it would not be advisable. This brings us to the second strand of the political question doctrine—nonjusticiability. A matter is nonjusticiable and thus not a proper subject for judicial determination if “judicially discoverable and manageable standards” cannot be devised which are clear and universal.71

Nonjusticiability raises the fascinating question of how, if at all, the judicial role differs from that of explicitly political institutions. This question has been at the heart of legal scholarship ever since the breakdown of formalism. The nonjusticiability doctrine presumes that judicial power is ultimately bounded by the need to make decisions in accordance with clear universal standards. The judiciary must abstain from matters which defy resolution within this framework. Justice Scalia expounded on this view in Vieth v. Jubelirer:

‘The judicial Power’ created by Article III, § 1, of the Constitution is not whatever judges choose to do... or even whatever Congress chooses to assign them... It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.72

In Vieth, Scalia asserts that nonjusticiability is not merely a pragmatic doctrine but a constitutional limitation on judicial jurisdiction. This idea found earlier expression in Nixon v. United

States, wherein Chief Justice Rehnquist explained that separation of powers and nonjusticiability were not wholly distinct, but rather, "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."\(^{73}\)

Of what relevance is this for odious debts? Recall that the classic definition of odious debt is an obligation incurred without public consent and utilized for illegitimate purposes.\(^{74}\) I posit that the question of whether a debt was incurred without popular consent is a quintessentially nonjusticiability issue.

In Vieth the Court ruled that political gerrymandering substantively disadvantaging the capacity of certain groups to effectively engage in the political process violates the Equal Protection Clause. Nevertheless, the Court ruled that the judiciary should abstain from arbitrating such claims on grounds that no principled and consistent standards have been found to distinguish permissible voting districts from those that are impermissible. In light of a ruling in which the Supreme Court admits that it must abdicate enforcement of the Constitution because it cannot devise a reasonable standard of when the rights of American citizens to domestic political representation have been abrogated, it seems improbable that the judiciary could decide whether the actions of foreign governments were authorized by adequate popular consent.

No workable standards presently exist to systematically determine if a foreign government’s action was sanctioned by public consent, and it is questionable whether such standards are even possible. Some scholars contend that this pessimism is unwarranted. For example, Thomas Franck believes there is an emerging global entitlement to democracy under which international governmental legitimacy is increasingly conditional upon popular consent.\(^{75}\) Franck finds that the democratic entitlement already possesses a high degree of legitimacy and specificity drawn from treaty texts and the practices of global,


\(^{74}\) See Sack, supra note 1, at 127.

regional, and non-governmental organizations.\textsuperscript{76} Gregory Fox goes even further in his examination of a range of treaty sources and the conduct of United Nations electoral monitoring missions.\textsuperscript{77} Fox found that indeterminacy over the contents of a right to participation, a right which he defines as elections based on multiple political parties and certain other universal procedural elements, "no longer exists."\textsuperscript{78} Matthew Griffin establishes empirical support for the existence of the democratic entitlement in the actions of the UN between 1991 and 1999, when accreditation was denied to five governments in effective control of existing states (Haiti, Sierra Leone, Cambodia, Liberia, and Afghanistan) due to a lack of democratic credentials.\textsuperscript{79}

By no means would I argue against the desirability of some baseline universal norm of global democratic governance. But the existence of a legal right and the appropriateness of arbitrating that right in a judicial setting are two different issues. When a court operates under vague, ad hoc general principles, it violates widespread norms of institutional legitimacy. Even some advocates of the emerging global entitlement to democratic representation concede that the concept is still too vague for judicial application.\textsuperscript{80} In one of its earliest cases on this subject, the Supreme Court ruled that, although Article IV of the Constitution guarantees to each state a republican form of government, it is for Congress, not the courts, to oversee its enforcement.\textsuperscript{81} Similarly, determinations of foreign governments’

\textsuperscript{76} Id.


\textsuperscript{78} Id.


\textsuperscript{80} In his article, Matthew Griffin concludes that the “difficulties of devising a definition of democracy, and the litany of problems associated with designing a new credentials test, are significant. However, there is room for the credentials process to serve the interests of democracy, though in a less systematic and rigorous manner.” Id. at 783. Franck, however, is a notable proponent of the idea that all questions are justiciable and denies a conceptual divide between the political and judicial spheres of competence. See Franck, \textit{supra} note 75, at 91.

\textsuperscript{81} Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).
public mandates are best left to political institutions.

The case that intelligible, universal standards of popular consent can be derived from treaty law and international custom is unpersuasive. Even if a sufficient base of precedent exists—from decades of multinational election monitoring—to clearly define the requisites of a free and fair election, this still fails to answer a necessary second question: free and fair elections for what? In *Bush v. Gore* the world watched as an election for the American presidency turned on the constitutional musings of nine unelected figures with lifetime tenure.\(^82\) Imagine how strange and undemocratic this must have appeared to those without knowledge or appreciation for the reverence Americans have for the delicate checks and balances in our federal architecture. When tempers settled, the vast majority of Americans accepted the election’s outcome and retained faith in the legitimacy of the Supreme Court, despite the fact that many were unsatisfied with the ultimate result.\(^83\)

Now consider Turkey’s unique system of checks and balances. Kemal Ataturk forged the modern nation of Turkey from the ruins of the Ottoman Empire, and since that time, the military has conceptualized its role as the guardian of his secular vision.\(^84\) In 1960, 1971, and 1980, the military forcibly displaced civilian governments it saw as threatening the nation’s secular democratic orientation, and, as recently as 1997, pressured the elected Islamist government to abdicate power.\(^85\) Yet, in September of 2005, a newspaper poll found that the military is Turkey’s most trusted institution.\(^86\) While Turkey’s military-civilian relationship has moved closer to Western norms as a result of EU accession talks, the Turkish military retains a quasi-constitutional role unthinkable in most democracies.\(^87\) What clear rule can distinguish between

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\(^82\) 531 U.S. 98 (2000).

\(^83\) Dan Balz, *Victory for Bush; Texan Claims Presidency After Gore Concedes Election; Both Pledge Unity and End to 'Bitterness' and 'Rancor'*, *WASH. POST*, Dec. 14, 2000, at A01.


\(^85\) *Id.* at 78-80.

\(^86\) *Id.* at 78.

\(^87\) *Id.* at 77-90.
the examples of the United States and Turkey? Would that rule also encompass the Iranian case where elected bodies exist in ultimate subordination to clerical authority?

At some point, the subordination of the powers of democratically elected officials to non-elected institutions crosses a line where the mere fact that elections are held becomes an insufficient proxy for popular consent. Moreover, should we even be looking for universal standards, or is the proper question whether a specific populace views its own institutional arrangements as legitimate? Is it enough that, by and large, the American public recognized the legitimacy of the Supreme Court to intervene in the 2000 election or must such intervention meet a universal global standard?

Another example of popular consent's indeterminacy is proportional representation. For example, the Lebanese Constitution reserves specific political offices along religious lines and Parliamentary seats are allocated half to Christians and half to Muslims. This sensitive balance of power was the Ta'if Accord, the negotiated compromise that represented the end of a brutal civil war. However, it is estimated that Lebanon's population is now nearly 60% Muslim and almost 40% Christian. Does the disproportionate political representation of Lebanese Christians mean that Lebanon's government lacks public consent? There is no clear method for comparing this to the American Senate, where the half-million citizens of Wyoming possess voting power on par with California's thirty-six million. The same is true in Japan, where the Liberal Democratic Party has maintained a near monopolistic control over the Japanese political system due to the

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88 CONSTITUTION, Tit. 2, Ch. 2, Art. 24 (Leb.).

89 The Ta'if Accord, which ended the Lebanese civil war in 1989, states an objective of eventually eliminating sectarianism from the Lebanese political system. This goal has not yet been achieved. For a discussion of the Ta'if Accords, see JOSEPH MAILA, THE TA'IF ACCORD: AN EVALUATION IN PEACE FOR LEBANON? FROM WAR TO RECONSTRUCTION 31-44 (1994). The Ta'if Accord deals with all facets of Lebanon's reconstruction, from political, economic and social rebuilding to the withdrawal of foreign forces from Lebanon. See id.


vastly disproportionate voting power of rural areas.\(^92\) It is not clear when exactly the distribution of electoral power across different population segments becomes so disproportionate that popular consent fails. And again, it is far from certain that we can create a clear, predictable, and global legal standard to draw that line. The allocation of electoral representation is so dependent on each nation’s specific historical context that universal rules seem highly improbable.

Justice Kennedy distinguished his concurrence in *Vieth* from the plurality determination that gerrymandering cases are prima facie nonjusticiable.\(^93\) Kennedy found that simply because jurists had yet to find clear, manageable, and politically neutral standards to prevent future cases from arriving at “disparate and inconsistent” results, this was not proof that such a standard would never be found.\(^94\) Accordingly, while Kennedy agreed that the Court must refrain from intervention in *Vieth*, he would not bar future cases should workable standards someday be developed.\(^95\) I take Justice Kennedy’s perspective with regards to a judicially manageable standard for popular consent. Until a workable standard is developed, however, determining what government acts were performed with popular consent is more suitable for political, rather than judicial determination.

International lawyers may see this discussion of American constitutional precedent as somewhat parochial. But even where the nonjusticiability doctrine has no binding precedential value it should be regarded as a good principle of institutional design. Any judicial venue—whether one already existing or a future international tribunal established specifically to arbitrate odious debt claims—will confront the problem of developing clear, universal standards for popular consent. If a court’s jurisdiction is not thwarted by the inability to find such standards, a court will have no choice but to rule on the basis of ad hoc, inconsistent principles. In short, the venue will, for all intents and purposes, be a political rather than a judicial institution. The political question


\(^93\) See *Vieth*, 541 U.S. at 306-17.

\(^94\) *Id.* at 308, 311.

\(^95\) *Id.* at 311.
doctrine may be a specific quirk of American law, but the idea that judicial institutional legitimacy is contingent upon consistent, universal reasoning extends well beyond U.S. borders. If there is such a thing as a global idea of the rule of law, consistency and universality are surely elements of its definition.

Vague ad hoc judicial decision-making would also deny lenders the ability to predict compliance with odious debt lending standards. In the absence of reasonable predictability, rational lenders would either curtail financing to all but the most black-and-white exemplars of democratic legitimacy or demand greater compensation for assuming the risk of legal uncertainty. In either scenario, entirely legitimate non-odious credit for developing nations would be restricted. The magnitude of this chilling effect would be proportional to creditor uncertainty over potential liability under odious debt standards. The more clarity lenders have prior to committing funds to a sovereign, the less interference odious debt reforms will have on legitimate financial transactions. Unfortunately, most judicial institutions are too poorly structured to offer clear ex-ante guidance.\(^9^6\)

Judicial institutions are inhospitable venues for the odious debt doctrine. The Classical Model approach is unlikely to make much headway in an American courtroom. Even if the hurdle of proving the odious debt doctrine’s legal validity under international law is surmounted, multiple prongs of the political question doctrine create a formidable barrier against its judicial application. The Private Law approach is more promising but seems limited to the narrow subset of odious debt situations concerning theft. While an improvement on the status quo, too many harms remain outside the scope of its reach for satisfaction. Even if it could be extended beyond theft situations, the Private Law approach shares significant drawbacks with all judicial based policy models—whether in domestic, foreign, or multinational settings. Judicial institutions are designed to accommodate ex post dispute resolution rather than ex ante problem solving and with ex post uncertainty comes very real deadweight economic costs for both investors and borrowers.

II. The Due Diligence Model of Odious Debt Reform

The previous section discussed problems with judicial solutions to the odious debt problem. Fortunately, under American law the executive branch has broad powers to remedy the problem of odious debts. Unfettered by the need to place each policy decision in the context of general, universal standards, the indeterminacy of popular consent is far less of a binding constraint on the executive than it is for the judiciary. Moreover, with its broad global reach, the executive is uniquely competent to understand the local context of foreign political institutions.

While the President has broad powers to prevent the enforcement of specific odious debts under U.S. law, an ad hoc, ex post exercise of this power would generate costly uncertainty for financial markets and developing nations. A better approach would be to embed this power within an executive branch institution capable of providing creditors with reasonable ex ante guidance. Consider an executive branch institution placed under the auspices of the State or Treasury Departments with the power to designate foreign government regimes as high risk for incurring odious debts. Such a determination would require a two part test: First, is it probable that a regime would incur debts without popular consent? Second, is there a high risk that the debts would be utilized for illegitimate purposes and cause material harm to the state’s population? If a regime is so designated, future lending to that government would be considered to be the personal debt of the regime—and therefore not transferable to a successor government in the event of regime change—unless there is full documentation of legitimate public purposes for the financing. Moreover, the creditor would have to gain pre-approval of a due diligence plan to ensure that debt funding is actually utilized for the previously stated legitimate purposes.

The form of an actual due diligence plan would be highly dependent on context. Rather than mandate a fixed approach, the institution should allow innovative techniques of auditing and deal-structuring techniques to evolve over time. A proposed plan

97 See Shafter, supra note 12, at 58.
98 See id.
99 See id. at 60.
must reasonably balance four factors: the potential for public harm if funds are diverted for illegitimate use, the social utility from the proposed use of funds, the cost of compliance, and the likelihood that the proposed due diligence structure will control the use of funds. "Mechanisms of implementation might include the employment of certified outside auditors, escrow accounts, offshore special-purpose vehicles," or "other deal-structuring technologies which lower the risk of illicit funds diversion."

If the implementing institution determines that a proposed use of funds is legitimate and approves a due diligence plan, it would grant a formal ex-ante approval. Once approval is granted, enforceability of the loan in a regime change situation is assured so long as the creditor can produce sufficient evidence that it made a good faith effort to comply with its pre-approved due diligence plan. If a creditor makes this good faith effort then it would not be held liable if a creative regime manages to divert funds towards non-specified ends. Under this due diligence approach, creditors would have significant ex ante certainty that credit issued to a borrower regime not previously designated is free and clear from potential ex post odious debt complications. As it is expected that regime designation will be a rare action, there will be a de minimis chilling effect on legitimate sovereign lending. Furthermore, creditors have a very clear method of establishing compliance with lending to targeted regimes. As long as a good faith effort is made to comply with the pre-approved due diligence plan and proper documentation of that compliance is maintained, creditors will not be held responsible for outcomes beyond their control.

One potential problem with this plan is its scope. So far we have assumed that the executive branch of the United States acts

100 Id. at 61.
101 Id.
102 See Shafter, supra note 12, at 61.
103 See id.
104 Id.
105 Id. Good faith compliance is a fully justiciable empirical question and disputes over compliance could be a matter for judicial determination.
106 Id.
107 See Shafter, supra note 12, at 61.
unilaterally. In part, unilateral action may be presumed because unlike other types of sanctions, an effective odious debt policy would not require unanimous global participation so long as nations implementing the policy control a "critical mass" of the world's credit supply.\footnote{See id. at 63-65.} To illustrate this point, assume a world in which countries controlling half the world's credit supply adopted a coordinated odious debt policy and half abstained.\footnote{See id. at 63.} Odious debt-prone regimes "would still have full access to credit from the nonparticipating nations of the world."\footnote{Id.} Non-participant countries would know, however, that should a designated odious debt-prone regime collapse, the successor government in that country would have full access to the credit markets of participant countries upon repudiating any debts not made within the structures of the due diligence system.\footnote{Id.} Since future access to credit markets is a primary reason why governments pay their debts, if the participant countries control a sufficient percentage of the world's credit supply that the successor government could economically meet its financing needs from participant nation creditors, it can safely repudiate its odious debts.\footnote{See Jayachandran & Kremer, supra note 96, at 90.} In these circumstances, it is likely that even non-participant nations would sharply restrict the supply of potentially odious credit to targeted regimes.\footnote{See id. at 82, 90. It should be noted that the extent to which sovereign loans are made for geopolitical rather than economic reasons will determine how this proposal would impact the actions of non-participants.}

But while the United States is certainly a dominant force in global capital markets, its proportionate dominance is far less than it once was. At the end of 2006, 45% of international bonds outstanding were Euro-denominated, versus 36% U.S. dollar and 10% British Pound.\footnote{Press Release, International Capital Markets Association, ICMA Figures Show International Bond Market Size Now Stands at Over US $10.5 Trillion (Jan. 4, 2007), available at http://www.icma-group.org/content/news1/press.html (follow "January 4, 2007" hyperlink).} With the fulcrum of global economic growth moving from the mature industrial economies of the West
to developing nations such as China, this relative position will only continue to diminish. To the extent that the aim of an odious debt policy is not simply to wash our hands of ethical problems, but rather to prevent such debts from burdening the capacity of successor governments to build a decent future for their population, some form of multilateral coordination seems preferable and perhaps necessary. Multilateral solutions have the additional benefit of superior legitimacy in the eyes of many observers.\footnote{Shafter, \textit{supra} note 12, at 64.}

There are several possibilities for the design of a multilateral approach. One option is to utilize the United Nations Security Council, which has perhaps unmatched global legitimacy.\footnote{Id.} The Security Council is, however, hampered by a cumbersome veto structure and the membership of nations with less than wholehearted commitment to the principal of popular consent.\footnote{See \textit{id}.} Another alternative might be an agreement among the Group of Eight ("G8")\footnote{See \textit{The American Heritage Dictionary of the English Language} 716 (Joseph Pickett, et al. eds., Houghton Mifflin Company 4th ed. 2000) (defining "G8" as the "countries of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. Representatives from these countries meet to discuss economic concerns.").} powers, which collectively account for a majority of global economic output.\footnote{Shafter, \textit{supra} note 12, at 58.} A G8 agreement has the advantage that, as a group of advanced industrial democracies, these nations have a sufficiently aligned commitment to global democracy so that coordination is feasible, but retain enough geopolitical rivalry to mitigate the chances that the sanctions process will be abused.\footnote{See \textit{id.} at 62.} As it is likely that one day China will be incorporated into the G8,\footnote{See Minnie Chan, \textit{Russia to Propose China and India Be Made Full Members of G8}, \textit{S. China Morning Post}, July 15, 2006, at 6.} a commitment to participate in a common odious debt policy could be used as one of the requirements for Chinese accession, thus bringing a substantial segment of the global capital base into this policy structure.
A multilateral implementation of the Due Diligence proposal would resemble the unilateral approach described above in most respects, with the notable exception of collective decision-making structures. For example, should decisions be made by a majority vote of the participant governments or should there be a higher threshold up to the point of requiring unanimity? The higher the bar is set for consensus, the more protection there is against the structure being used to improperly punish opponents, but the less likely it is that it will be properly invoked against legitimate offenders. Super-majority decision-making structures are increasingly paralyzing as the group of participant governments grows broader and more diverse.

III. Conclusion

The Due Diligence policy model should achieve the aims of odious debt reform while avoiding the problems raised by arbitrating these questions in judicial venues.\(^\text{122}\) It acknowledges that whether or not a government had popular consent for an action is a question better suited for political, rather than judicial institutions. In addition, the Due Diligence policy would impose virtually no costs on legitimate cross-border lending.

Certainly there are questions which demand further examination. First, fungibility is a potential problem for the model.\(^\text{123}\) The Due Diligence model allows odious debt-prone regimes to engage in supervised borrowing for legitimate purposes while curtail the accumulation of liabilities for improper ends. It may not be realistic to suppose that funds can be so neatly segregated, or that regimes won’t simply finance illegitimate projects with internal funds freed up by financing legitimate budget items with overseas funds. On these grounds, some have suggested that only a total ban on borrowing by targeted regimes would be effective. The flexible structure of the Due Diligence model should allow the supervising organization to consider fungibility risk on a case-by-case basis and substantially mitigate this problem.\(^\text{124}\) For example, if there is a high probability both that funds will be diverted towards illegitimate uses and that this

\(^{122}\) Shafter, supra note 12, at 58.

\(^{123}\) See id. at 62.

\(^{124}\) Id.
spending could cause significant harm, then perhaps no feasible due diligence plan can be approved which balances the risk-reward equation. This would establish a de facto total loan embargo. In other cases, public benefits from legitimate projects financed with appropriate oversight may outweigh fungibility risks.

Second, this paper assumed that all debts are the same. In reality, there are important distinctions between private debt, bilateral debt (government to government), and multilateral debt (i.e., World Bank).\textsuperscript{125} It is unclear if a single policy structure is appropriate for all three categories.

Finally, it may be obsolete to think in terms of odious debt rather than odious capital. When the classical doctrine of odious debt was formulated, debt financing was the only type of capital market transaction in which governments were engaged. Today the situation is more complex. Consider the hypothetical case where a non-democratic regime utilizes funds raised through an initial public offering of state assets on an overseas stock exchange for illegitimate ends. The net impact of an "odious privatization" on subsequent generations is in many ways equivalent to that of odious debt: aggregate future resources for legitimate public spending are reduced. If restrictions are only placed on the capacity of odious debt-prone regimes to finance their illegitimate pursuits with debt, they may simply turn to auctioning public assets. Even without transferring actual ownership, regimes could sell forward contracts on natural resource production to create synthetic loans. It is also important to consider whether credit derivatives might be utilized to frustrate the effectiveness of an odious debt policy.\textsuperscript{126}

The idea of odious debt—that under very specific circumstances sovereign debts become the personal debts of a governing regime—is wholly consistent both with international law and long established traditions of American domestic private

\textsuperscript{125} See id. at 65-66.

\textsuperscript{126} This point was raised by Mohammed El-Erian at the Blue Sky Conference hosted by the Center for International Development at Harvard University, Sept. 9, 2006. A video of this session is available at http://www.cid.harvard.edu/bluesky/videos.html (follow "watch video of this session" under "Applying the Odious Debts Doctrine while Preserving Legitimate Lending").
law. Much of this article discusses the problems of implementing the odious debt doctrine in a judicial venue. This is in no way a defense of the status quo. While there are serious problems with a judicially-oriented solution to the odious debt problem, it is not enough to raise objections to a new policy without considering how harmful it would be to leave the status quo intact. Alleviating the painful consequences of odious debt might well outweigh a potential chilling effect on some portion of legitimate cross-border financing and abstract concerns for the proper scope of judicial decision-making.

That said, an executive model of odious debt reform—either in the form of a unilateral executive policy or a multilateral institution—has many advantages over the classical judicial approach. Political entities have a lower barrier to making legitimate decisions where clear, universal legal standards are difficult to formulate. Executive institutions also have greater flexibility to engage in ex ante problem-solving than most ex post oriented judicial venues. Finally, in the American context, judicial involvement faces possibly fatal constitutional obstacles, while the executive has all necessary power to implement an odious debt policy.

This paper began with a discussion of the political forces which have come into alignment to support American action on odious debt. Even the most fervent multilateralist would agree that as the international system's leading power, American involvement is indispensable for global odious debt reforms. The executive branch has all the power it needs to act. The only real obstacle is getting odious debts onto the executive agenda. Odious debt reform is not only good policy, but it is good politics, and debt reform advocates should press forward with building public and political support for executive action. Still, it rarely hurts to approach a political situation with both a carrot and a stick. The stick here is the opening for judicial action revealed by Buchheit, Gulati, and Thompson.127 Perhaps it is time to probe the Private Law approach with a test case. At worst, we will find that the theory fails and there is no judicial alternative to an executive approach. On the other hand, success would not only represent an improvement from the status quo, but it could trigger an executive

127 Buchheit, Gulati, & Thompson, supra note 14.
policy response to prevent a loss of authority over foreign affairs. It is also likely that the financial community’s enthusiasm for executive action on odious debts would rise once faced with the long-tailed ex post uncertainties of domestic litigation. It may seem odd that an article devoted to advancing the merits of an executive model of odious debt reform over judicial solutions ends with a call for strategic litigation. But if the essential message of this text is that odious debt calls for a political solution, then it is worth contemplating a valuable old saying: “politics makes for strange bedfellows.”128