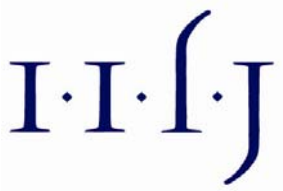

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2012
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

January 25	Harlan Grant Cohen, *University of Georgia* "Finding International Law, Part II: Our Fragmenting Legal Community"
February 1	Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University* "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System"
February 8	Odette Lienau, *Cornell University* "Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century"
February 29	Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University* "Pluralism and Global Public Goods"
March 21	Doreen Lustig, *New York University* "History of Responsibility of Corporations in International Law"
April 4	Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University* [to be held in Pollack Colloquium Room, 9th Floor, Furman Hall, 245 Sullivan St.]
April 17	Horatia Muir Watt, *Sciences Po* "Global Governance and Private International Law" [to be held, exceptionally, on a Tuesday at 4pm; location TBA]
April 18	Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University* "Sovereign Debt"

RETHINKING SOVEREIGN DEBT:
THE POLITICS OF REPUTATION IN THE TWENTIETH CENTURY

Forthcoming, Harvard University Press

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To IILJ Colloquium Participants:

Thank you for taking a look at the introduction and the first/theory chapter of my book manuscript, *Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century*. This is still a work in progress, and I'm attempting to engage with a potential readership including legal academics, political scientists, other social scientists, and practitioners.

Any thoughts about the material are very much appreciated. In particular, I would welcome feedback on whether I have convincingly laid out the stakes of my argument vis-à-vis the dominant approaches and properly framed the work for multiple audiences. I also would appreciate advice on the degree to which the sections of chapter 2 in their current length/form (1) are necessary for the argument and (2) hang together as a coherent whole.

Thank you in advance and I look forward to hearing your questions and suggestions.

Best,
Odette Lienau

RETHINKING SOVEREIGN DEBT:
THE POLITICS OF REPUTATION IN THE TWENTIETH CENTURY

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INTRODUCTION

Chapter 1

In recent years, two world events have featured prominently in the news headlines: the European sovereign debt crisis and the upheavals and transitions of the Arab world. The magnitude and potential ramifications of the former have transfixed many, as has the specter of Europe – at the heart of the advanced world economy – spiraling out of financial control. The commentary on the 'Arab spring,' at least from countries on the other side of a democratic transition, has been hopeful and admiring, though the discussion of how best to support the revolutions has engendered considerable disagreement. Interestingly, relatively little has been said about the financial ramifications of the Arab spring – or about the possibility of a second, smaller debt crisis that might result from its political disruptions. In part this is doubtless because the financial burdens of these countries pale in comparison to the sums at stake across the Mediterranean. However, there also seems to be relatively little concern that these new regimes will seriously challenge their debt loads. During these twin upheavals, financial analysts tended to consider the debt of Arab spring nations less risky than that of a number European states – notwithstanding the potential irregularity of some of the Arab sovereign loans, or the certain irregularity of several of the previous rulers. The cost of insuring such debt was actually lower than that for some European counterparts, reflecting an apparent confidence that the Arab loans would continue to be repaid.[1]

Indeed, among the most remarkable aspects of contemporary sovereign debt is the degree to which the basic expectations of borrowers remain relatively uniform. This is the case even despite dizzying variation in the types and circumstances of sovereign borrowers, the motivations of creditors, and the initial reasons for any indebtedness. These basic expectations resolve into one default rule: sovereign debtors must continue to repay, regardless of the circumstances of the initial debt contract, the actual use of loan proceeds, or the exigencies of any potential default. Accordingly, sovereign debtors should bear the brunt of any restructuring and thus will find themselves on the defensive during negotiations. Although some efforts have been made to encourage deviation from this basic theme – due to concerns for domestic stability, financial prudence, or a sense of justice or morality – the expectation of repayment stays remarkably stable. This is not to say that countries always pay; certainly, they do not. But the uniform background rule remains, and it sets the standard by which creditors form their judgments and against which sovereign borrowers are evaluated and chastised.

From what does the strength of this expectation derive? International law requires that transnational contracts be honored as a general matter, but on more difficult issues like debt repayment after state succession and potentially illegitimate debt there is no multilateral treaty in force, even despite several efforts. Notwithstanding this uncertainty, the seemingly powerful rule of continuous repayment is buttressed by its popular identity as a 'market principle' – something like the principle of gravity – which has effects that might be measured and identified, but which ultimately can not be changed. In this characterization, market discipline does not trace back to an identifiable set of agents but rather, again like gravity, seems to emanate from the universe itself. Even those actors that have power and influence are ultimately mere participants, subject to the same basic laws if they wish to remain active and competitive. A key

[1] Camilla Hall, "Arab states' debt favoured over Europe's worst," *Financial Times* (October 26, 2011)

element in this market story is the mechanism of *sovereign reputation*, which is generally understood to underpin the principle of repayment. Without the coordinating and disciplining mechanism of reputation to reinforce the background rule of consistent repayment, no lending to sovereigns would occur. International debt markets in the absence of a clear cross-border enforcement mechanism would be too risky, requiring more information on sovereign borrowers' subjective repayment proclivities than would be worthwhile for any creditor to collect.

This framing of repayment and reputation as the market equivalent of a natural law carries with it the following core assumptions. First, although creditors may assess a specific borrower's political characteristics through the lens of sovereign risk, judgments about a borrower's repayment decisions are not shaped by political ideology *per se*. Rather, they are simply the best objective assessment of a given set of material facts. Second, the mechanism of sovereign reputation itself is similarly free from subjective and historically variable political judgments. And third, all rational creditors are expected to respond in basically the same way to particular market events – especially those events that challenge the principle of continuous repayment. Therefore, it is not necessary to study the historically conditioned identities and interests of particular creditors to understand how the capital markets, as a whole, will respond to any given sovereign action. Following from these assumptions is the expectation that the basic contours of the sovereign debt regime are analytically and historically constant.

What is at stake in this conventional understanding? The framing of the repayment rule, along with its underlying reputational mechanism, as immutable market principles helps to immunize the sovereign debt regime from serious challenge and thus stabilize the massive sums at stake. In particular, the current regime's assumptions of political neutrality, reputational solidity, creditor consistency, and historical inevitability buttress our avoidance of prickly questions about fairness and appropriateness in the international economic arena. Among the more troubling queries in the last several decades have included questions such as: Should a black-African led South Africa really be expected to repay apartheid era debt? Or, given that Saddam Hussein was a dictator who used funds for the oppression of a majority of Iraq's population, would it be appropriate to require future Iraqi generations to pay for his iniquity? More generally, who counts as the 'sovereign' in these debt situations – is sovereignty just the legal shell for whoever happens to control a territory, or does it imply underlying principles of popular representation or popular benefit?

Similar questions can be raised across a number of cases – a number that might be alarmingly large to creditors as a whole. Particularly given that democratic transitions are likely to remain a feature of news headlines going forward – and in light of the vagaries of the global economy – these questions are unlikely to disappear any time soon. Indeed, legal scholars and activists have attempted to fashion potential resolutions to such questions in part through formulating principles of responsible sovereign lending and resuscitating ideas such as a doctrine of "odious debt." According to the latter doctrine, which was revived by international legal scholars in the late 1970s and 1980s as well, a fallen regime's debt need not be repaid if it was not authorized by and did not benefit the underlying population. In spite of the pressure added by this renewed discussion, international economic actors, along with academic economists and political scientists, are excused for their failure to fully engage with these questions and proposals. By accepting that debt repayment across all situations is a constant market principle – giving rise to rules by which even creditors, academics, and policy advocates must play – we end the conversation before it begins.

In this book, I contend that the policy and scholarly conversation on sovereign debt is far narrower than it need be. In particular, I argue that the contemporary norm of sovereign debt continuity – the rule that sovereign states should repay debt even after a major regime change and the related expectation that they will otherwise suffer reputational consequences – is not as theoretically or historically stable as it first appears. Far from being a neutral and inevitable market principle, the norm is intrinsically political and therefore open to discussion and intervention in two ways. First, any discussion of sovereign debt and reputation is rendered intelligible *only* by implicitly incorporating a definition of "sovereignty" that is necessarily normative; indeed even today's most hard-nosed analysts unavoidably use this highly contested theoretical concept. Depending on the theory of sovereignty implicitly or explicitly adopted in international economic relations, the practices of sovereign debt and reputation will diverge significantly. And, second, the historical development of a consistent repayment principle in modern international finance has been significantly shaped by geopolitical considerations and politicized state actors and public institutions as much as by private market activity. This means that scholarly and popular discussions of the sovereign debt regime have the potential to be much broader-ranging than their current contours imply.

PROBLEMS WITH THE CONVENTIONAL WISDOM

I will take a closer look at the assumptions of neutrality, reputational stability, and creditor uniformity that underpin the repayment norm in Chapter 2, but a quick note is warranted as background. Each of these assumptions is, if not entirely wrong, at least greatly oversimplified. To begin with, one of the most theoretically puzzling elements of the conventional narrative is the notion that the sovereign debt regime's repayment rule could be apolitical. The mere mention of sovereign debt invokes one of the most politically controversial concepts in global affairs and international law: sovereignty. And perhaps unwittingly, a very distinct political theory of sovereignty supports the current system of international lending. In discussing claims that the post-2003 Iraqi regime should be freed of Hussein-era debt, a *Financial Times* leader noted, "The principle [being attacked] is sovereign continuity – the idea that governments should honor debts contracted by predecessors. Without this, there would be no lending to governments."[2] Sovereign continuity means that the same 'sovereign' remains, and thus is subject to the same contractual obligations, regardless of any internal political changes. It effectively derives from what I call a strictly *statist* conception of sovereignty – the idea that the content of and changes in a state's internal structure, interests, and legitimacy are irrelevant to its status as 'sovereign' and thus to its external relations and obligations. While this statist vision has deep roots in global affairs, it is heavily contested in legal and international relations theory, and indeed it has been subject to debate and alteration over the 20th century and into the 21st. In particular, the possibilities of democratic sovereignty or a sovereignty legally bound by constitutional norms are some of the *non-statist* concepts of sovereignty that have gained considerable traction in the international arena. An international economic regime more attuned to these alternative, non-statist concepts should be much more hospitable to something like the odious debt idea mentioned above – and thus more amenable to debt cancellation under certain circumstances. And indeed, I argue that the necessity of a statist approach for continued sovereign lending is a contestable claim. But what is perhaps most puzzling is the way in which,

[2] Leader, *The Financial Times*, 16 June 2003.

in the face of these multiple alternatives, a statist political theory has become so thoroughly embedded in the sovereign debt regime that its deeply *political* character effectively disappears.

Turning to reputation does not in and of itself provide a sufficient answer. Just as the rule of continuous repayment depends on a particular vision of sovereignty, the reputational mechanism supporting this rule takes the same implicit theoretical approach. The determination of *which sovereign* a reputational assessment attaches to is necessarily infused with a background political judgment: Should a recently anointed democratic government, flush from the overthrow of a dictator, be assessed as a new, untested sovereign? Or is it evaluated as a continuation of the previous regime? The statist and non-statist concepts of sovereignty suggest very different responses. In short, the need to make a reputational assessment does not on its own necessitate the adoption of a statist political theory. It is entirely possible to maintain the importance of reputational assessments in general while accepting that debt repudiation should *not* result in a lending hiatus in all cases. Far from leading in a mechanistic way to the repayment-as-market principle conclusion, reputational judgment itself is fairly flexible. This plasticity only deepens the puzzle of how the very notion of a working reputational mechanism became so thoroughly conditioned to a statist definition of sovereignty that the possibility of alternatives faded away.

Perhaps this all leads to the final key assumption of the market principle story – that rational creditors will respond in basically the same way to market events, and in particular will respond in the same hostile way to events that challenge the rule of continuous repayment. Certainly, the norm of sovereign continuity provides something of a windfall to creditors as a whole; it means that states will be expected to repay debt that might have been subject to cancellation under alternative frameworks of sovereignty. But even accepting this windfall, what would account for the *conceptual* strength of a statist approach relative to all others? Part of what is interesting is the absence of any acknowledgment that non-statist approaches are entirely consistent with making reputational judgments. Would the argument be that creditors coordinate to suppress the very idea that a non-statist approach is plausible, including in academic discussions of sovereign debt? This would be quite a feat of deliberate collusion – one for which there doesn't appear to be evidence, though such findings undoubtedly would be newsworthy. I find it more likely that contemporary creditors, and those that write about them, have been similarly conditioned to understand the rules of repayment and reputation according to a fairly narrow political theory.

But even the initial assumption of a shared creditor interest in universal repayment is problematic, and is not fully supported by the historical record. To begin with, it is not entirely clear that all creditors would oppose non-payment in all instances. This could be the case if, for example, a creditor accepted as plausible the argument that a successor regime constituted a new sovereign, worthy of modest and appropriately priced investment, rather than an intransigent continuation of the previous regime. Such a stance would effectively indicate a reputational assessment consistent with a non-statist concept of sovereignty. While a creditor would hardly be keen to hear such an argument from its own debtor, it might be more receptive to such an argument from a new potential client, particularly in the context of a competitive market. Furthermore, there are historical instances in which creditors respond in entirely different ways to the same debt repudiation. The Soviet repudiation of Tsarist debt, perhaps the most notorious default of the 20th century, is generally read as an example of the reputational risk associated with repudiation, and as supportive of the repayment rule's status as a uniform and historically

stable market principle.[3] However, as I argue in Chapter 3, this reading – based principally on the fact that the new regime was unable to float bonds on the international capital markets – overlooks key elements of the historical record. In fact, while the creditors of the previous Tsarist regime remained very hostile and insistent on repayment, several newer American banks actually sought to facilitate long-term bond issues by the new Soviet government in the 1920s. The banks were thwarted not by a reputational assessment – indeed they were impressed by the Soviet Union's reliable payment of shorter-term trade credits they had extended – but rather by the United States government's *political* hostility to the regime. A closer look at both the theory and history of creditor interaction thus demonstrates that the existence of a relatively uniform creditor approach to sovereign reputation cannot simply be assumed but has to be explained.

What does this mean for the solidity of the sovereign debt regime, including its bulwark rule of repayment and its coordinating reputational mechanism? The contemporary regime is not natural, ideologically neutral, and ahistorical, but rather is inherently politically shaped and historically conditioned. The fact that the current system looks to many like an immutable market principle, with seemingly consistent creditor reputational assessments, constitutes a puzzle in itself. So far, we have yet to see a satisfactory explanation for this puzzle.

ODIOUS DEBT AS SOVEREIGNTY IN PRACTICE

Even if the market principle assumptions underpinning the contemporary norm of sovereign debt continuity do not hold, where does that leave the repayment rule as a practical, historical matter? For any given sovereign borrower, international debt practices can still seem an extremely unyielding edifice. Nonetheless, the theoretical instability does encourage a closer, more critical look at the historical record, and raises a series of questions open to empirical study: Have non-statist understandings of sovereignty and debt emerged as possibilities at previous historical junctures? What conditions allowed alternatives to become plausible? If we know that the current approach is inherently political and necessarily historically shaped, then there should be a way to identify the political assumptions and machinations that underlie a particular moment in sovereign debt.

While all this may ring true, studying a loaded theoretical term such as 'sovereignty' in practice remains quite difficult. The issue of sovereignty is notoriously slippery and does not easily lend itself to concrete examination. Accepting that the contested concept of sovereignty plays an important role in any discussion of sovereign debt and reputation does not in itself grant access to its workings. Usually, the question of who is 'sovereign' in economic relations and sovereign debt issues remains in the background and is largely forgotten. States enter into and threaten to default on contracts fairly regularly, and the particularly *political* character of sovereign debt is rarely raised by either party. As such, it is very difficult to study in practice whether any particular concept of sovereignty is at play in a given debt interaction.

There are certain types of debt repudiation, however, that bring these background issues to center stage. I earlier mentioned the issue of odious debt, in which an illegitimate regime contracts debt that is not authorized by and does not benefit a nation's people, as relevant to thinking about the question of sovereignty in sovereign debt. But the idea of odious debt is much more than merely relevant: it helps to demonstrate – or operationalize, in the preferred language of social science – the theory of sovereignty underpinning the debt regime at a given moment.

[3] See, e.g., Michael Tomz, *Reputation and International Cooperation*, pp. XX (2007). In support of this argument, Tomz looks at the bond float data from the 1920s and beyond and surveys the investment advice literature.

The legal doctrine of odious debt, first developed after the Spanish American War of 1898 and formalized by Alexander Sack in 1927, states that sovereign state debt is 'odious' and should not be transferable to successors if the debt was incurred (1) without the consent of the people, *and* (2) not for their benefit.[4] This doctrine directly counters the idea of sovereign continuity in two ways, corresponding to the two prongs of the doctrine. It first suggests that some form of popular consent may be relevant to the existence of binding debt obligations, contradicting the statist theory of sovereignty that underlies sovereign continuity. Alternatively, it highlights the centrality of a debt's *purpose* by noting that any binding sovereign obligation must be entered into for the purpose of benefiting the underlying people.[5] As a whole, it remains fairly conservative – a creditor can expect to be paid so long as the funds are either authorized by the people or are incurred for the public benefit.[6] Were the doctrine to be adopted more broadly, it is likely that most sovereign debt incurred in the contemporary era would still be binding most of the time.

Although Sack's formulation is the one cited by scholars as 'the doctrine of odious debt,' multiple permutations are possible when we consider the many available theories of procedural sovereignty and varying characterizations of legitimate governmental purpose.[7] Indeed, recent

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[4] Alexander N. Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques et Autres Obligations Financières* (Paris: Recueil Sirey, 1927) 157. For discussions of issues surrounding odious debt, *see, e.g.*, Seema Jayachandran and Michael Kremer, "Odious Debt," *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis*, ed. Chris Jochnick and Fraser A. Preston (New York: Oxford University Press, 2006): 215-225; Ashfaq Khalfan, Jeff King and Bryan Thomas, "Advancing the Odious Debt Doctrine" McGill University Centre for International Sustainable Development Law Working Paper (2003), http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf; Patricia Adams, *Odious Debts: Loose Lending, Corruption and the Third World's Environmental Legacy* (Toronto: Earthscan, 1991). For definitions of 'illegitimate debt' more broadly, see Joseph Hanlon, "Defining 'Illegitimate Debt': When Creditors Should Be Liable for Improper Loans," *Sovereign Debt at the Crossroads,* 109-132. For an excellent series of contemporary legal analyses of the doctrine, including potential modifications, extensions, and ramifications, see the double issue on odious debt of Duke's *Journal of Law and Contemporary Problems*, vol. 70 (2007).

[5] As the connector 'and' between the doctrine's two parts makes clear, if a debt was in fact incurred to benefit the people, then it should not be considered odious even it lacked popular consent (i.e. for an infrastructure project entered into by a dictator). And similarly, a popularly incurred debt that ultimately failed to benefit the people would still be valid (i.e. for an unwise war supported by a democratic public). The doctrine thus draws from both a procedural conception of sovereignty as a legitimate representative relationship, and an outcome-oriented conception of valid sovereign action as serving the public benefit or national interest.

[6] Furthermore, the remedy of repudiation may not be available under international law unless the lender knew about the illegitimate nature of the debt, i.e. that the end uses would be contrary to the interests of the people. Thus, if a lender makes a loan in good faith, it should be able to collect on that loan despite its ultimate ill use. This requirement is highlighted in Sack's 1927 formulation and is reiterated by most definitions. However, U.S. Supreme Court Justice William H. Taft noted in the 1923 *Tinoco* arbitration, discussed in Chapter 6, that the claimant failed to present a case for its own good faith, stating "It must make out its case of actual furnishing of money to the government for its legitimate use." Great Britain v. Costa Rica (*Tinoco Case*, Oct. 18, 1923), *Record of International Arbitral Awards*, vol. 1 (1923): 399, reprinted in *American Journal of International Law*, vol. 18, no. 1 (1924):174. Although Justice Taft suggests that the creditor in fact knew that the funds were to be used by Tinoco for his personal support, the general requirement for good faith suggests that a creditor could fail to recover if it knew *or should have known* that the money would be ill-used. This formulation has been used in other contexts to close a loophole that could exist by excusing willful ignorance and a lack of due diligence. [Cite to Tinoco article.]

[7] The case study of Costa Rica in chapter 4 in fact presents U.S. Supreme Court Justice William Howard Taft's alternative formulation from 1923, in which a rule of law conception of sovereign action is combined with a minimal requirement of public benefit.

legal scholarship on the idea of odious debt has frequently focused on how it might be applied as a contemporary doctrine. For the purposes of this book, however, the key point is that all versions of an odious debt idea challenge the dominant statist vision of sovereignty in international economic relations. If we are concerned with the existence of a legitimate link between a state and its people, then the idea of certain types of principled debt cancellation makes sense; it seems philosophically and legally problematic to expect a state's people to pay back debt that they did not authorize and from which they derived no benefit. In other words, an application of non-statist visions of sovereignty to international economic relations suggests that debt should *not* be continuous in some cases. Conversely, if we subscribe to a strictly statist conception of sovereignty, then it logically follows that all debt should be repaid, even if it is 'odious,' because popular consent and benefit are irrelevant. While a narrow insistence on debt continuity exposes a strictly statist vision of sovereignty in the sovereign debt regime – and thus closes off the possibilities of advancing alternative, equally plausible approaches – adopting an odious debt-type concept suggests a more flexible vision of sovereignty underlying the debt regime.

The idea of odious debt also hints that we would be most likely to see challenges to the principle of sovereign continuity and the expectation of uniform debt repayment in response to regime change. Although the claimed existence or the enforcement of any sovereign debt necessarily rests on a theory of sovereignty, usually this remains a background issue. However, when a regime changes, the incoming regime frequently seeks to distinguish itself from its predecessor, and may consequently seek to free itself of the predecessor's debt obligations on the basis of right. Sack distinguished between proper 'national debt' and the 'personal debt' of a previous regime, and argues that only the former should continue to successors.

> If 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… [t]his debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls with the fall of this power.[8]

Most loosely, 'regime change' constitutes those moments at which a new agent claims to represent a nation's people. The most extreme transformation involves state succession, in which there is a change of sovereignty over a given territory,[9] as in the case of decolonization.[10] A change in government administration stands at the opposite pole, in which there is a legitimate change in leadership within an existing political and constitutional framework.[11] For the purposes of this project, a 'regime change' – or government succession – is the intermediary

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[8] Sack, *Les Effets*, 157, as translated in Adams, *Odious Debts*, 165.

[9] For these formulations, see Peter Malanczuk's citation of the *Restatement of the Law (Third), Foreign Relations Laws of the United States*, vol. 1 (Philadelphia: American Law Institute, 1965) paras. 208-210. Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (New York: Routledge, 1997), p. 161.

[10] In fact, the international law of state succession falls into different classes and encompasses varied obligations. Forms of state succession include state unification, dismemberment, and enlargement, in addition to the establishment of a new state through decolonization. Malanczuk, *International Law*, 161-168. For the purposes of this preliminary definition, however, these distinctions remain of secondary importance.

[11] Changes of government leadership or administration are the least problematic under international law. A state's private and public contracts remain valid and no problem of recognition arises with regard to other states. See Ibid. 86.

action, in which there is no change in the most basic form of sovereignty (which remains vested in the same territory and people), but where there has been a significant change in the political and constitutional framework and associated practices.[12] The idea of odious debt thus provides some guidance as to the types of claims states may make in problematizing the conception of sovereignty underlying sovereign debt issues. It also hints at the times that states are most likely to make such claims. In short, this approach helps think through ways to study how modern debt practices developed toward a relatively narrow approach, i.e. to so uniformly expect a statist norm of debt continuity despite other possible alternatives.

In discussing the contrasting approaches of uniform debt continuity and odious debt, I have highlighted the political choice inherent these alternatives: a statist theory of sovereignty necessarily underpinning debt continuity, and non-statist concepts underlying certain allowances for debt discontinuity. While I encourage normatively-inclined readers to think through these ethical questions – as I discuss in the conclusion, the policy issues are complex to say the least – the book's primary purpose is not normative argumentation per se. Rather, I contend that the historical contexts in which odious debt might be an issue offer windows into how the market structure, political interests, and legal frameworks in any given instance privilege one approach over another in the sovereign debt regime. Studying cases of arguably odious debt across time and in relation to one another sheds light on the historical and political foundations for the contemporary norm of sovereign debt continuity and its related reputational mechanism. It also casts empirical doubt on the suggestion that the practice of debt continuity is a historically uniform market principle. This should concern those studying the development of norms in sovereign debt and other areas of the international political economy, as well as those interested in the foundations and ramifications of contemporary international financial practice.

AN OVERVIEW OF THE ARGUMENT

The initial expectation of uniform repayment across all sovereign debt – regardless of its circumstances or provenance – rarely seems puzzling to those working in the international economic field. Despite an absence of any clear legal rule on the topic, the implicit treatment of debt repayment and its reputational mechanism as a basic market principle covers over any lingering questions about the practice. However, the assumptions undergirding the market principle status of uniform debt repayment are hardly unproblematic. Far from being neutral and historically uniform, sovereign debt practices implicate inherently political ideas and are located in necessarily variable and politicized historical contexts. And the issue of odious debt offers some guidance as to when we might see this usually-hidden element of debt rise to the surface, and also perceive more clearly how certain material and ideational structures might support one norm over another in the sovereign debt regime. This still leaves unanswered, of course, the questions of which historical period is most relevant for an empirical study, and also of which factors are likely to be most influential in actually shaping outcomes in sovereign debt.

[12] The difference between 'state succession' and what I call regime change (or government succession) may well be disappearing in modern international law and practice. Indeed, Tai-Heng Cheng has argued that the traditional international legal division between the two should be rejected in light of the recent international practice of states, creditors, and other key global actors, which does not reflect the technical distinction. *State Succession and Commercial Obligation* (Transnational Publishers, Inc., 2006), pp. 37-38. I mention the two separately here largely to limit the universe of data for analysis. However, the arguments I make could well be extended from regime change as I define it to sovereign succession more broadly understood, and the analytical framework presented here should be applicable to a broader range of case studies.

The issue of where to begin asking historical questions is never easy, especially given that different ideas of sovereignty have existed in political and legal thought and practice for a very long time. In this book, I begin the discussion in the early twentieth century, when relatively broadly shared distinctions between legitimate and illegitimate forms of rule became more prevalent. The idea of odious debt itself developed in part out of admittedly self-interested U.S. actions following the Spanish-American war of 1898. The Spanish Crown argued that the U.S. should assume debts that the Crown had contracted on behalf of Cuba. The U.S. refused, insisting that the debts were contracted by the previous Spanish regime in its own interests, which were distinct from and even in opposition to the interests of the Cuban population. As such, the U.S. argued, the debts were illegitimate and should not be transferred to the Cuban population or its new U.S. protectors.

As the early twentieth century progressed, such non-statist conceptions of self-determination and popular sovereignty spread more widely. Particularly in the aftermath of World War I, the world witnessed a major overhaul of the organizing principles of international relations, including the beginnings of decolonization and a tentative universalization of some of the basic animating ideas of the American and French Revolutions. In particular, different visions of self-determination became ideals accessible – at least in theory – to all people for the first time. The new normative meta-framework was promoted by such ideologically divergent figures as Woodrow Wilson and the early leaders of the Soviet Revolution. This principled rejection of imperialism and internal forms of absolutism at the international level, along with a conception of sovereign equality applied globally, poses the strongest historical starting point for the questions of this book. The widespread emergence of non-statist approaches to sovereignty in the early twentieth century presses the issue of how they were received and developed in the realm of sovereign debt and reputation going forward.

As to which elements might be most influential in actually shaping possibilities in sovereign debt, I argue that both political-legal concepts and creditor interests, properly understood, are relevant. In particular, I contend that the historical record reveals that two interacting factors are especially important for understanding how odious debt ideas – contrasted with continuous repayment norms – emerged and declined in the decades since World War I. First, the *ways in which creditors are consolidated* in their interactions and risk interpretations affects the degree to which non-statist approaches are accepted in sovereign debt. To the extent that creditors view each other as part of the same group and so have a consolidated interpretation of risk, a strictly statist approach is likely to be dominant. In times when creditors are more disaggregated and they consider *each other* to be significant risks, the definition of sovereignty in international economic relations will be subject to greater contestation. Thus, although creditor uniformity is not a theoretical given, the degree of creditor uniformity at any given historical moment remains a relevant factor. As the second key element, shifts in *broader norms of sovereignty* in the international arena affect the concept of sovereignty that underlies the sovereign debt regime. A strictly statist framework of sovereignty in the world at large will support a similar approach in the area of debt, whereas non-statist sovereignty norms might problematize the doctrine of sovereign continuity in sovereign debt. Although they are not central in every instance, broader political and legal norms of sovereignty (be they statist or popular), political ideology, and insistence on principle are neither epiphenomenal nor merely 'cheap talk.'

Although I present both material and ideational elements as important in understanding the repayment norms of sovereign debt, their interaction and relative strength are necessarily

historically conditioned. One or the other may be dominant at any given moment, and these two aspects may work in tandem or oppose each other. It is also important to keep in mind that the same international actor – such as a major public or private creditor – may well have an effect through both arenas. Although it is common to think of private creditors as purely pragmatic and financially interested, they also exist in and are constructed by ideational contexts. Similarly, public actors such as major governments will have ideological and foreign policy goals but also frequently engage in sovereign lending and so have financial interests that conflict or coordinate with those of other creditors. I present a more extensive discussion of creditor dynamics, including particular issues relevant to public creditors, in the next chapter.

We can imagine that the mode of interaction between the two factors of sovereignty norm distributions and creditor interactions and interpretations of risk would take multiple forms. Private creditors working together may push for a more statist approach, while explicitly policy-oriented actors pay too little attention to the issue to provide a countervailing voice. Or, alternatively, an explicit policy commitment to governmental legitimacy on the part of powerful actors or broader social movements may result in more openness to odious debt ideas in sovereign debt and reputation. It is also possible that a normative or ideological commitment to a *statist* vision of sovereignty and sovereign continuity exists on the part of major international actors (including public creditors), which dampen any tendency toward a flexible approach in sovereign lending. The relative force and interaction of these explanatory elements is ultimately historically contingent, and as such it is difficult as a matter of general theory to make predictions on the balance between them. However the basic character of this interaction is presented schematically in Table 1:

TABLE 1:
Interaction between Creditor Risk Interpretations and Norms of Sovereignty

Interaction		**Broader Norms of Sovereignty in International Relations**	
		Statist Conceptions Dominant	**Alternative Norms Resonant**
Creditor Interaction / Risk Interpretations	**Consolidated** (Less flexible; likely to insist on continuity)	Norm of Debt Continuity Stronger *(Mid-twentieth Century)*	Ambiguous
	Disaggregated (more flexible)	Statist approach likely (Any default or repudiation likely made on different grounds)	More flexible treatment possible *(Post-WWI)*

A Quick Look at the Historical Record

What does this mean for thinking through the development of sovereign debt norms over the course of the twentieth century and into the twenty-first? Again, if the idea of odious debt throws into stark relief the competition between different possible approaches to sovereignty in

sovereign debt, a historical assessment of the treatment of arguably odious debt effectively offers a window into the development of key norms in international political economy. Although the instances of debt repudiation are not numerous, they do suggest that the dominant norm of statist repayment is not pre-determined. They also highlight the ways in which creditor interaction and broader norms of sovereignty play not necessarily a *causal* but rather an *enabling* role at key moments.

As I noted above, the tumult following World War I saw a rise in non-statist concepts of sovereignty in the international arena that would prove more welcoming to non-statist sovereign debt practices. And this greater ideational openness to odious debt-type arguments was joined by a higher likelihood that such arguments would not necessarily be uniformly rejected by creditors. In the early part of the twentieth century, the rise of new American banking houses injected fresh competition into the credit market. Surplus American capital in particular sought investment outlets, and relatively young U.S. banks – supported by expanding U.S. political interests – began to struggle for a piece of the credit market previously dominated by British and French capital. These creditors did not necessarily consider a loss to one as equivalent to a loss to all, and seemed more open to gaining a potentially reliable client even at the expense of a commitment to strict debt continuity.

Two early twentieth century cases illustrate how the newly emerging principles and market structures resonated in the world of debt claims. In 1918, the new Soviet Union annulled the foreign loans contracted by the Tsarist regime, arguing effectively that they constituted personal debts of the Tsar and not legitimate debts of the new Soviet republic and its people. Although this alienated European and especially French debt holders, several New York banks that were newer to international lending actually attempted to facilitate the issue of Soviet securities in the face of resistance from their own government. In 1920, Costa Rica repudiated the debts entered into by the previous dictator Frederico Tinoco, returning to constitutional rule after a two year aberration. U.S. Chief Justice Taft, ruling in an arbitration between Costa Rica and Great Britain, distinguished between debt contracted for 'personal' as opposed to 'legitimate government' purposes, and held that only the latter could exist past the downfall of a regime. The Costa Rican regime was not cut off from the international capital markets as a result of its repudiation or Justice Taft's decision. The victors of World War I also seemed to reference an odious debt idea when they included the repudiation of Polish debt in the Treaty of Versailles in 1919. The Treaty repudiated the debts that Germany had contracted on behalf of its colonies, particularly on behalf of Poland to fund the settling of ethnic Germans in Polish land. The Reparation Commission took the standpoint that "it would be unjust to burden the natives with expenditure which appears to have been incurred in Germany's own interest."[13]

This ideational and material background shifted in the post-World War II era. Creditors were harmed badly during the defaults of the Great Depression. In the cautious post-war economic recovery, creditors developed closer ties through the rise of international financial institutions such as the early World Bank, international private banking integration, and global loan syndications. Creditors became more consolidated in their interpretation of threat, such that questioning the doctrine of sovereign continuity under any *particular* circumstance seemed more like an assault on the rights of creditors *generally*. As to ideational elements, the concept of popular sovereignty and the efforts to distinguish legitimate and illegitimate government that dominated post-World War I discourse subsided in the destruction of World War II. Although

[13] Reply of the Allied and Associated Powers to the observations of the German delegation on the conditions of peace, Part IV, Section III (b), 16 June 1919 (London: Her Majesty's Printing Office, 1919): 20.

the new United Nations did support local sovereignty and self-determination, these terms during the Cold War emphasized a norm of non-intervention and ultimately leaned toward a statist viewpoint. In short, a closing in what constituted the interests of creditors was matched by a narrowing of the discourse surrounding sovereignty and sovereign debt.

The cases reflect this mid-twentieth century trend, and the era did not follow up on the potential turning point of the post-World War I period. The People's Republic of China repudiated the debt of its predecessors, but remained marginalized in the international credit markets for decades. A repudiation of many foreign financial contracts followed the 1959 Cuban revolution, and a similar pattern emerged here as well. The remainder of the Cold War era saw few of these claims of right associated with an odious debt idea. Following major social revolutions in Nicaragua and Iran in 1979, as well as after a series of democratizations during the 1980s debt crisis, countries ultimately adhered to the principle of debt continuity. The statist approach to sovereignty in sovereign debt, which came under question in the early twentieth century, reconsolidated its dominance.

The increasing breadth and depth of financial integration since the 1970s has arguably made 'international finance' something of a more singular force than in previous eras. Still, the post-Cold War decades have shown some movement toward greater flexibility in repayment norms. In the ideational arena, concepts of democracy and constitutionalism and more substantial attention to human rights have made headway. Furthermore, the shift to greater use of bonds rather than bank financing has disaggregated creditors somewhat (though certainly countervailing trends exist – notably the rise of credit rating agencies). In addition, new sources of financing such as south-south flows and sovereign wealth funds have disrupted the north-south financing divide of the late twentieth century. Although a definitive claim cannot yet be made, it is possible that the post-Cold War era and the beginning of the twenty-first century has witnessed a new opening in the conception of sovereignty underlying sovereign debt. The idea of odious debt has regained some of its earlier traction, and social activists have focused on the potentially problematic provenance of some of the developing world's debt today. Various countries' domestic courts may be offering some resistance to external demands for debt repayment and international arbitral awards. Perhaps the recent arguments being made that certain debt is 'odious' suggests that the historical trend over the last hundred years is more U-shaped than unidirectional.

THE BOOK IN OUTLINE

Much of the sovereign debt literature in economics and international political economy over the last three decades has treated the underlying meaning of sovereignty in debt and reputation as relatively unproblematic. But such popular inquiries as "is there a reputational effect in sovereign lending" would fail to be sensical without some embedded vision of sovereignty. In this book, I argue that neither the statist expectation of sovereign continuity nor the reputational interpretations of creditors are as monolithic or as inevitable as they first appear. This contingency opens the door to closer historical study, and I argue that the approach to sovereignty in debt and reputation has not been entirely consistent across the twentieth century. Moments existed in the post-World War I era from which alternative frameworks might have developed, and I suggest that both creditor interactions and broader norms of sovereignty shaped the emergence and outcomes of such cases. These two elements also affected the reduced flexibility in sovereign debt and reputation in the decades that followed, and are relevant for

thinking about how to structure economic governance in today's unsettled sovereign credit markets.

In Chapter 2, I fill out the key theoretical arguments outlined in this introduction. I begin by rejecting more thoroughly the assumptions of political neutrality, reputational stability, and creditor uniformity underlying the claim that indiscriminate debt repayment is a baseline rule for functioning sovereign debt markets. I contend that the inherently political philosophical concept of sovereignty acts as a principal-agent theory in the international arena, stabilizing debt contracts that would otherwise be unenforceable. I also demonstrate more fully how existing arguments about reputation are overly simplified in their insistence on repayment across all cases, and fail to acknowledge the flexibility present in the reputational mechanism. In addition, I detail more thoroughly the creditor dynamics at play in sovereign debt markets, including the unique dynamics of public creditors, which can give rise to more or less flexibility in regard to debtor claims about illegitimate debt. In the second part of this chapter, I look more closely at what multiple ideas of sovereignty really might mean in the sovereign debt arena, drawing out the ramifications for sovereign debt contracts of three alternative visions of sovereignty with deep roots in political philosophy and international law. Finally, this chapter briefly addresses the methodological issues involved in studying the openness or closure of sovereignty in debt and reputation, outlining more fully the genealogical approach I take in this project.

Chapters 3 and 4 begin the historical discussion with a closer look at two cases in the early twentieth century. I introduce chapter 3 by highlighting how major international actors championed new ways of understanding sovereignty and international relations in the post-World War I period, thus providing a conceptual opening for how sovereign debt might be viewed going forward. Through the major case studies of the project, I contend that an open moment existed in the early twentieth century from which an alternative approach to sovereign debt and reputation might have developed. Drawing from post-World War I diplomatic documents, legal case material, the correspondence of major U.S. financial houses, and an analysis of trans-Atlantic financial competition, I reinterpret the 1918 Soviet debt repudiation (Chapter 3) and the foundational 1923 *Tinoco* Arbitration between Great Britain and Costa Rica (Chapter 4) as offering potential historical alternatives to the norm of debt continuity.

Chapters 5 and 6 continue the historical analysis through the mid-twentieth century and into the 1980s debt crisis. In Chapter 5, I highlight the post-World War II importance of non-competitive public creditors such as the IBRD and the U.S. government and the entrenchment of a statist concept of sovereignty under the influence of the Cold War and decolonization. I argue that these trends all reconsolidated the norm of sovereign debt continuity that came under question in the post-World War I cases. As a result, efforts to challenge debt continuity generally led to a marginalization from international economic relations, as I note in brief discussions of post-revolutionary China and Cuba. In Chapter 6, I argue that private capital was relatively unified upon its return to international lending in the late 1960s and 1970s, leaving little space for alternative frameworks to take root. This continued the mid-twentieth century international hostility to non-statist norms in debt, and the principle of debt continuity was followed after major regime changes in Nicaragua, Iran, and the Philippines.

In Chapter 7, I conclude that the post-Cold War era and the turn of the twenty-first century may be witnessing an opening in the concept of sovereignty underlying the debt regime. I consider the circumstances and outcome of the recent Iraqi case, which has helped to mainstream odious debt discussions and normalize the broader idea that debt legitimacy may be relevant even in the absence of a unilateral repudiation. I also point out the heightened relevance

of non-statist norms of sovereignty in broader international relations, which have become manifest in international economics in the attention paid by major creditors to issues of governance, human rights, and corruption. This shift, in conjunction with changes in the underlying context of creditor interactions, may provide greater openness in how we think about sovereign debt and reputation in the coming decades.

OPEN QUESTIONS IN SOVEREIGN DEBT

Chapter 2

The very practically minded have tended to dismiss the question of 'sovereignty' in sovereign debt and international economic relations out of hand. Indeed, the multiple meanings of sovereignty have been largely ignored by mainstream international political economy in the late twentieth century. This dismissal, it seems, derives at least in part from intellectual path dependence. Without a closer look at the theory or the history, it is easy to suppose that current debt practices are the only ones available and truly workable for a functioning sovereign debt market. And without fully recognizing the degree to which theories of sovereignty are deeply contested, it is also easy to assume that these practices are ideologically neutral and therefore largely unobjectionable, even if they may lead to circumstances considered unfortunate by some.

While most of this book presents a new historical narrative of the development of debt continuity norms over the twentieth century, this chapter fills out the theoretical background for my argument. I begin by more fully dismantling the assumptions of political neutrality, reputational stability, and creditor uniformity underlying the claim that indiscriminate debt repayment is a baseline rule for functioning sovereign debt markets. I highlight how theories of sovereignty act as principal-agent theories in international relations, and emphasize that the (necessarily politicized) concept is essential for a any workable debt market. I also demonstrate how the mechanism of reputation is sufficiently flexible to incorporate non-statist approaches, and argue that – far from assuming creditor uniformity – we should expect to see some elasticity in creditor behavior given the complex dynamics at play in credit markets.

In the second part of this chapter, I look more closely at what multiple ideas of sovereignty really mean in sovereign debt. If we accept that debt mechanisms are indeed more open to non-statist approaches, what are the range of possibilities? I take this opportunity to draw out the ramifications for sovereign debt contracts of four alternative visions of sovereignty with deep roots in political philosophy and international law. This chapter also addresses how to think about case studies in understanding sovereignty in debt and reputation, building on the discussion of how odious debt offers a practical window into these broader questions. Some readers may already accept the basic openness of market principles in sovereign debt, the possibility of coherent debt practices drawn from multiple theories of sovereignty, and the feasibility of a careful historical study of these questions. This chapter is especially oriented toward those who need more convincing.

ADDRESSING THE CONVENTIONAL APPROACH

There is an easy supposition that the theoretical underpinnings of the contemporary sovereign debt market are fairly stable. In particular, the expectation that, as a starting point, states should repay debt regardless of its provenance or circumstances is essentially taken for granted. I suggested earlier that the seeming inevitability and inviolability of this baseline draws support from the assumption that the basic rule is politically neutral and supported by a single reputational mechanism and uniform creditor appraisals. While it is very possible, indeed likely, that other conceptual bulwarks for the approach exist, I consider these three to be both central and deeply problematic.

Indispensable Politics: Sovereignty as the Missing Agency Question

By necessity, the highly controversial concept of 'sovereignty' stands at the center of any discussion of the sovereign debt regime. Although efforts can be made to cordon off the political realm from international business and finance, politicized concepts and arguments eventually tend to slip through. Given that the international debate surrounding sovereign legitimacy is unlikely to die down, it makes sense for those involved in the international economic arena to address the question of sovereignty head on rather than risk being blindsided farther down the road.

This is not to say that a particular political vision of sovereignty is not already deeply embedded in the lending regime. Indeed, the strict rule of repayment depends upon a distinctly statist concept of sovereignty, which assumes sovereign continuity within the same territory and insists on the irrelevance of changes in internal rule for sovereign identity. Furthermore, there is no way for sovereign lending to exist without the unspoken adoption of one or another concept of sovereignty. To the extent that a sovereign debt contract exists at all, enforceable against future generations of a state's people, it must at least implicitly rest on an underlying theory of the relationship between that sovereign state government and its people. The fact that we choose to leave the nature of that relationship entirely unstudied does nothing to diminish its importance.

Perhaps unsurprisingly, many financial writers take a dim view of any impulse to define sovereignty – and therefore sovereign legitimacy – in the arena of international debt. The *Financial Times* preferred a more 'pragmatic' approach for Iraq, arguing that, "instead of embarking on a theological discussion of whether the debt contracted by Saddam Hussein is legitimate, creditors should swiftly reduce the country's debt-service obligations to manageable proportions."[14] The dominance of this ostensibly matter-of-fact approach has helped to address particular instances of debt restructuring, but leaves embarrassingly undertheorized very basic questions. Who actually constitutes the ultimate principal in a sovereign contract? If it is the people, what type of governmental authorization is needed to make such a contract binding? The seemingly abstract discussion of legitimacy in fact fills an important and surprising gap in our practical understanding of sovereign debt contracts. Whereas a relatively clear theory of agency and authority is central to the modern practice of domestic contract law, the dominance of short-term pragmatism has left us with long-term practical confusion in the international realm.

It would help if we recognized that different theories of sovereignty in fact act as alternative theories of agency in the international context, whether or not they are expressly recognized as such. Any valid domestic contract made on behalf of another entity is at least implicitly (and frequently explicitly) grounded in a theory of agency. And any theory of agency identifies the nature of the relationship between the agent – who acts or enters into the contract – and the principal, the entity against whom the contract is ultimately enforced. Agency theory specifies the conditions under which a principal will be forced to perform under the contract made by the agent. Usually the agent must be retained or acknowledged by the principal for its actions to be respected. For example, if a Chief Financial Officer (the agent) enters a contract on behalf of a company and ultimately the underlying shareholders (the principal), then the company is likely to be liable for that contract. However, any so-called 'contract' made by a deranged junior employee who has taken the company hostage is unlikely to be respected – unless the resurrected company later has the opportunity to affirm the contract – because there is no legitimate agency relationship in this scenario. This assumption of consent and ultimate

[14] Leader, *The Financial Times* (16 June 2003).

ownership also underpins the expectation that the principal (the shareholders, collectively) will be the residual claimant in any financial restructuring or bankruptcy proceeding, receiving only the leftovers once bona fide creditors have been satisfied.

If the relative simplicity of this distinction between legitimate and illegitimate domestic contracts falls apart when we move to the realm of transnational sovereign debt, it is largely due to the lack of a clear theory of agency in the international arena. The confusion would be as bewildering in domestic contract law if we insisted upon the validity of all debt contracts undertaken on behalf of 'The Coca-Cola Company' without specifying who could act on behalf of Coca-Cola and under what conditions. Just as we need a definition of who counts as 'Coca-Cola' to distinguish between legitimate and illegitimate Coca-Cola debt contracts, we need a definition of who counts as 'Ruritania' to distinguish between legitimate and illegitimate sovereign contracts signed in Ruritania's name. In short, what is missing from the current discussion of sovereign debt is a clear idea of who counts as 'sovereign' in a sovereign contract.

This is where the seemingly abstract discussion of sovereignty becomes immediate and concrete. Different theories of sovereignty effectively constitute different theories of agency in the international realm, with divergent ramifications for whether or not a sovereign contract is legitimately enforceable. A theory of agency specifies the nature of the relationship between the agent – who acts or enters into the contract – and the principal, against whom the contract is ultimately enforced. Similarly, a theory of sovereignty specifies the nature of the relationship between the sovereign government – the agent who acts or enters into a contract – and the principal, the people against whom the contract is ultimately enforced. Just as different theories of agency will result in differential enforcement of domestic contract obligations, different conceptions of sovereignty should result in differential treatment of sovereign contract obligations. Or from an alternative perspective, calling any given sovereign contract 'legitimate' necessarily implies and reinforces a given conception of sovereignty.[15]

In short, the current system of sovereign lending already, and necessarily, rests on a conception of sovereignty that takes the role played by agency theory in domestic contract law. It serves as an unacknowledged support in the otherwise somewhat mysterious act of complex, agent-based sovereign contract-making – i.e. the conversion of a fleeting promise by an

[15] In fact, there may be two interconnected principal-agent relationships here. The first is that linking the underlying population to the government or organs of the state, with the former being the principal (bearing the ultimate consequences of incurred debt through increased benefits but also at the time of repayment time through increased taxation or reduced benefits related to austerity measures) and the latter the agent in this scenario. The second is the relationship between the government and its officials, now with the government acting as principal and its officials acting as agent. Both relationships must exist, but my primary interest is in the first principal-agent relationship between the underlying population and the governmental state write large. In this, I differ from the approach that Deborah DeMott takes in discussing common law agency principles with respect to the odious debt doctrine in *Agency by Analogy: A Comment on Odious Debt*, 70 L. & CONTEMP. PROB. 157, 158, 160 (2007). DeMott relies on common law principles of agency, which assume the centrality of consent to the agency relationship. *Id*. at 158 (quoting the Restatement (Third) of Agency, § 1.01 (2006), "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act). As DeMott notes, the presumption of consent and popular control is far from valid in all sovereign states, limiting the applicability of analogies from common law formulations of agency on this front. *Id*. at 165-66. Nonetheless, in sovereign debt situations, the governmental regime (along with its officers) is *assumed* to act as an agent for the underlying population, such that even should the contracting regime fall and the population select a new and diametrically opposed government, the contracts of the ousted regime can still be enforced against the underlying population. My question is precisely *how* different theories of sovereignty construct and support that agency assumption in the international context.

individual or group of individuals into a permanent obligation for an entire collectivity. Failing to discuss the concept of sovereignty underlying sovereign debt contracts does nothing to eliminate this political choice entrenched at the very core of international economic law. It only leaves the system's analytical foundations unclear and undertheorized. Even if particular creditors do not deliberately choose one political theory over another, they participate in a collective practice that depends upon and reinforces a profoundly political judgment.

The Indeterminacy of Sovereign Reputation

Turning to reputation or creditworthiness does not aid an escape of this foundational puzzle. An implicit determination of sovereignty is just as embedded in any reputational assessment as it is in the appraisal of a sovereign debt contract's basic validity. And although an insistence on the strict rule of repayment seems to assume that only one analytical angle is possible, in fact the reputational mechanism is flexible enough to incorporate a range of concepts of sovereignty. Given the variety and placement of creditors, it would be surprising for only a single sovereign reputational assessment to emerge.

The Positional Aspect in Reputation

This is not to reject the importance of reputation itself. The specific question of why states repay debt has been taken up extensively in economics and international political economy, where arguments exist between those who contend that debt repayment results from a fear of direct retaliation,[16] and those who argue that it follows from concerns about reputation.[17] While an extensive literature review is not necessary, the evidentiary support for a general reputational effect seems to be strongest. In particular, Michael Tomz's work on reputation represents the leading recent account of sovereign reputation in international political economy, highlighting the centrality of reputational factors in ensuring continued cooperation between creditors and sovereign borrowers. Tomz argues that creditors consider both payment record and the situational context of repayment to develop beliefs about a borrower's type – i.e. whether they are a 'lemon' that will default without justification, a 'fair-weather' that will repay when times are good, or a 'stalwart' that repays in good times and bad. This belief on the part of international investors in turn constitutes the borrower's reputation, which guides their risk assessments and lending decisions.[18]

While Tomz provides a compelling argument for the centrality of sovereign reputation generally, he denies that the content of reputation depends on broader contexts that change across time, place, and creditor. He falls more neatly into arguing that the rule of repayment, as the core of debtor cooperation in the sovereign debt regime, serves as something akin to a

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[16] Charles Lipson, "The International Organization of Third World Debt," *International Organization*, vol. 35 (Autumn 1981): 603-31; Jeremy Bulow and Kenneth Rogoff, "Sovereign Debt: Is to Forgive to Forget?" *American Economic Review*, vol. 79, no. 1 (1989): 43-50; Kenneth Schultz and Barry Weingast, "Limited Governments, Powerful States," *Strategic Politicians, Institutions and Foreign Policy*, ed. R.M. Siverson (Ann Arbor: University of Michigan Press, 1998). Indeed, some scholars have argued that investors have paid little heed to past actions. See, e.g., Peter H. Lindert and Peter J. Morton, "How Sovereign Debt has Worked," *Developing Country Debt and Economic Performance: The World Financial System*, ed. Jeffrey Sachs (Chicago: University of Chicago Press for the National Bureau of Economic Research, 1989) 39-106; Erika Jorgensen and Jeffrey Sachs, "Default and Renegotiation in Latin American Foreign Debts in the Interwar Period," *The International Debt Crisis in Historical Perspective*, ed. Barry Eichengreen and Peter H. Lindert (Cambridge, Mass.: MIT Press, 1989).

[17] Tomz, *Reputation and International Cooperation*; Ozler, "Have Commercial Banks Ignored History?" See also Bulow and Rogoff, "Is to Forgive to Forget?"; William B. English, "Understanding the Costs of Sovereign Default: American State Debt in the 1840s," *American Economic Review*, vol. 86 (March 1996): 259-275

[18] Michael Tomz, *Reputation and International Cooperation*, 17, 23.

uniform and ahistorical market principle due to the mechanism of reputation. Tomz thus overlooks the ways in which the practice of assessing sovereign creditworthiness ultimately remains subjective and may well be contingent upon the assessor's position.

But as Ashok Vir Bhatia points out, the limited predictability of sovereign economic and political behavior, as well as the absence of widespread robust statistical testing, "leave[s] the task of credit ratings assessments poorly suited to formulaic straightjackets."[19] Market research into sovereign creditworthiness necessarily blends objective analysis with subjective debate. Even in theoretical studies from economics and finance, there have been questions as to the degree to which reputation-formation and perceptions of credibility are fully uniform and 'rational' in the traditional sense. Robert Frank, for example, has highlighted how emotion plays a key role in the formation of reputation, apart from any objective or material determinants.[20] James Forder points out that definitions and perceptions of 'credibility' are not a given across different professional groups.[21] Academic economists and central bankers, for example, have very different views on the importance and definitions of 'credibility,' and Forder contends that this has ramifications for the ways in which credibility as a concept can be abstracted for the purposes of both academic studies and policy proposals. Jonathan Mercer draws from the insights of psychological theory to suggest that reputation-formation fundamentally links to a human tendency to attribute only negative or undesirable outcomes to another actor's character or reputation. Desirable positive outcomes on the other hand become associated with the other actor's situational context and thus a 'good reputation' can never really develop.[22] Other literature suggests that social communication and established relationships condition perceptions of credibility.[23]

These studies of the micro-foundations of reputation question whether it is constant and objective in the sense assumed by much economic and political economic analysis, and suggest that we should be looking for something other than law-like generality in creditor action – admittedly, the preferred approach of many social scientists. It is not generally agreed upon that reputation is a stable factor with contours that remain uniform across time, context, or creditor. These analyses lay the groundwork for the argument that, even accepting creditors' basic profit orientation, more attention should be paid to their relative economic positions and larger social contexts. While creditworthiness may be uniformly important, its particular *content* vis à vis a

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[19] Ashok Vir Bhatia, "Sovereign Credit Risk Ratings Methodology: An Evaluation," IMF Working Paper WP/03/170 (2002) 12, http://www.imf.org/external/pubs/ft/wp /2002/wp021 70.pdf. Bhatia himself used to work for Standard & Poor's.

[20] Robert H. Frank, *Passions within Reason: The Strategic Role of the Emotions* (New York, N.Y.: W.W. Norton, 1988).

[21] James Forder, "'Credibility' in Context: Do Central Bankers and Economists Interpret the Term Differently?," *Econ Journal Watch*, vol. 1, no. 3 (2004): 413-426.

[22] Jonathan Mercer, *Reputation and International Politics* (New York: Cornell University Press, 1996). Tomz finds little evidence for this approach in his analysis of creditor assessments of sovereign borrowers. Tomz, *Reputation and International Cooperation*, 29, 230. While I am convinced by Tomz's argument that positive reputations can develop, my assessment of the Soviet case suggests that a creditor's interpretation of an outcome as less desirable (which may differ across creditors) may more likely result in a reputational or character-based rather than situational explanation being offered.

[23]Kathleen Valley, Joseph Moag, and Max H. Bazerman, "'A Matter of Trust': Effects of Communication on the Efficiency and Distribution of Outcomes," *Journal of Economic Behavior and Organization,* vol. 34 (1998): 211-238; see also Jennifer Halpern, "Elements of a Script for Friendship in Transactions," *Journal of Conflict Resolution*, vol. 41, no. 6 (1997): 835-868.

principle of sovereign continuity or odious debt will still be embedded in a historically contingent economic and ideational framework.

The Politics in Reputational Judgment

Privileging a conceptual framework that assumes plurality rather than homogeneity encourages a closer look at how different sovereignty concepts could lead to conflicting reputational assessments. Just as any claim about the validity of sovereign debt depends on an underlying political and legal theory, any claim about sovereign reputation implicitly rests on an idea of who constitutes the sovereign in sovereign borrowing. In particular, while a state could never develop a *positive* reputation after a repudiation on the basis of an odious debt principle, it is an open question as to whether a *negative* reputation should necessarily result. A creditor or other international economic actor could reasonably understand that the willingness of a new regime to repay a loan depends on the degree to which its population benefited from or authorized the loan.[24] If a previous obligation was used to oppress the population or was entered into in order to facilitate corruption, then a subsequent regime's willingness to repay this debt may not have much bearing on its willingness to pay legitimately contracted or publicly beneficial loans in the future.

Any acceptance of an odious debt idea, which might highlight the importance of authorization and/or public benefit, thus depends on a more open, non-statist idea of sovereignty in sovereign reputational analyses. If such an argument were made and accepted by a creditor after a regime change, the incoming regime would be treated not as a 'lemon' but rather as a new or unseasoned borrower. Conversely, a statist conception of sovereignty would not distinguish between legitimate and illegitimate debt in assessing a country's repayment record as part of its creditworthiness analysis. In fact, a strictly statist approach would be *most* hostile to repudiation on the basis of something like odious debt, given that there is no acceptable economic reason for the default.[25]

Shifting perspectives somewhat, the degree to which an implicit or explicit reputational assessment accepts or rejects an odious debt idea operationalizes the concept of sovereignty underlying sovereign reputation for any given creditor. The reputational interpretation and financial treatment of a borrower as new/unseasoned rather than as a lemon indicates the acceptance of a more open approach to sovereignty on the part of that creditor. Thus, while I agree that 'reputation matters,' such an assertion on its own is indeterminate for a range of politically, legally, and financially pressing questions, given that the meaning of reputation itself is more open than usually acknowledged. While many discussions of creditworthiness implicitly exogenize or set aside the actual theoretical content of sovereign reputation, I begin by endogenizing the idea of sovereign reputation itself and so locating it within broader theoretical and historical contexts.

Unpacking Creditor Interest

Related to the conjecture that there exists a uniform idea of reputation and a market principle of consistent repayment is the assumption of a unified 'creditor interest.' Certainly, capital market lenders should have significant interest in the definition of who counts as sovereign in debt and reputational assessments, given the sizable distributional consequences at

[24] The two standard components of risk or creditworthiness analysis are the 'ability' and 'willingness' of a country to meet its obligations.

[25] In Tomz's assessment, such countries would be interpreted as the worst 'lemons' and thus the most likely to be subject to strict credit rationing.

stake. What I call a strictly statist account of sovereignty, in which the *fact* of state control is sufficient regardless of the internal norm or mechanism of control, supports the repayment of debt despite any internal governmental illegitimacy. Disregarding any expectation of internal rule of law, legitimate borrowing purpose, or democratic legitimacy as a factor in lending and repayment would allow occasional windfalls to creditors. In asking why a statist rule of repayment has become so normalized as to appear inevitable, one immediate possibility therefore rests with the interest and power of creditors as a whole.

Such a hypothesis, while initially plausible, offers an insufficiently nuanced view of creditor interests. In particular, this 'creditor power' hypothesis fails to recognize that while creditors may at times have shared interpretations of interest and threat, tending toward a strict statist approach, such creditor consolidation is not inevitable. At certain historical moments, creditors may well identify other lenders as primary threats, and look more favorably upon potential borrowers. In such cases, the concept of sovereignty underlying sovereign lending is likely to be more receptive to sovereign debtor concerns. A more nuanced version of the 'creditor interest' argument would suggest that the degree to which creditors are disaggregated or consolidated – rather than creditor power in general – should affect the approach to sovereignty underlying the sovereign debt regime and the degree to which the rule of repayment is stable.

We often speak of 'creditors' as if they were a single roving pack, and to some degree this makes sense. Leaving aside public creditors for a moment, most creditors have analogous goals – to recoup investment expenses and make productive use of their capital – and are generally privy to the same types of information and analysis. Frequently, as Michael Tomz and others demonstrate, creditors will respond similarly to similar situations even in the absence of any collusion. However, it would be a mistake to ignore the fact that they – like all actors – are embedded in a collective world and are therefore both social and strategic. Their interpretations of default or repudiation should therefore reflect their strategic positions vis-à-vis other creditors and their general social proclivities. As such, I disagree that, in all instances, "If a government defaults without adequate justification, it acquires a lemonlike reputation not only in the eyes of current investors, but also in the estimation of other individuals and institutions around the world."[26]

In fact, there is little reason to expect that creditor interests in the arena of sovereign debt will be entirely uniform, given that they respond to two principal sources of risk. First, creditors as a whole face the threat of default and repudiation, and in this sense have a shared perspective vis-à-vis sovereign debtors. Debtors, however, are not the only, or even the most pressing, source of risk for creditors; other lenders constitute a second threat. A healthy credit market is driven partially by competition between suppliers of credit for the same borrowing client. The prospect of losing clients to competitors represents a second central problem for creditors.[27]

How might this framework inform the strength of the rule of repayment and the conceptions of sovereignty underlying sovereign debt? As long as major creditors identify non-repayment of loans as the central threat in the sovereign market, then a hegemonic insistence on

[26] Tomz, *Reputation and International Cooperation*, 26. Tomz continues, "These parties have no incentive to extend new credit, because each independently knows that lending to a lemon would be a money-losing proposition. Thus, my theory provides a convenient solution to the problems of credibility and collective action that were discussed in chapter 1." Ibid. 26.

[27] This vision primarily applies to bank lending, but the form of competition for bond issues may be somewhat different. The distinction between bonds and bank loans will be discussed in the historical chapters of this book.

the payment of *all* debt, including potentially 'odious' debt, makes sense.[28] This effectively adopts and strengthens the purely statist political framework of sovereignty that coincides with such a practice. This creditor approach should be more likely to emerge when the market is consolidated, i.e. when the underlying material and social structures of creditor interactions encourage more unified interests and risk interpretations. In this case, creditors consider their own fate to be intertwined with that of their fellow creditors, and the perceived threat of creditor competition recedes while that of sovereign state default becomes more dominant. As such, they will be more hostile toward debtors who refuse to pay previous loans and less solicitous of the views of potential borrowers. Borrowers facing a limited set of intermediaries for capital will have little recourse but to accept the terms set by these creditors working together. In a consolidated context in which the interest of one is the interest of all, creditors will have little incentive to accept claims based on a non-statist view of sovereignty. Even if one creditor considered the odious debt argument valid, its relationship with other creditors, including the discontented debt-holder, could prevent its acceptance of a more flexible approach. Although it is difficult to place a monetary value on the exclusive adoption of a concept, the dominant use of a statist definition of sovereignty – with its occasional windfalls to creditors – effectively grants a conceptual monopoly as financially valuable as any other monopoly. Over time, this conceptual monopoly can gain the appearance of naturalness or inevitability, including to creditors themselves, and achieve the stable status of a market principle. Such a status would eventually make alternative approaches seem impracticable and thus shape the underlying theoretical context of sovereign lending in the long run.[29]

However, this naturalization is not inevitable. We can imagine that in a more disaggregated market in which creditors view not only the sovereign debtor but also fellow creditors as risks, the preferred approach should not be so uniform. In this case, creditors may be more anxious to protect their links to existing clients and to lure new clients away from potential competitors. While the holder of a particular debt instrument will prefer a strictly statist repayment framework as to that instrument, other creditors hoping to attract the same borrower may be more flexible. A new creditor, in the hopes of displacing a competitor, may be indifferent as to whether a prospective client pays that competitor's arguably illegitimate debt. This underlying desire could reasonably lead to a more flexible perspective on who counts as the 'sovereign' in sovereign debt and a weaker insistence on the doctrine of sovereign continuity. So long as a potential borrower looks like a good credit risk overall, a new creditor – considering the new regime an unseasoned borrower rather than a lemon – may be willing to extend credit even after repudiation.[30] Thus, a more disaggregated credit market should be more lenient toward sovereign governments that repudiate arguably illegitimate debt.

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[28] Such creditors may include private financial houses, bank groups, international financial institutions, and major creditor governments. Credit rating agencies, organizations such as the Paris and London Clubs, and other institutions involved in the sovereign lending regime could also conceivably play a role in this dynamic of competition and consolidation.

[29] Although this presentation is set forth in rationalist terms, it is unlikely that creditor institutions self-consciously go through these steps of rationalization. In situations of consolidation, it is more likely that a statist view has been naturalized and assumed necessary.

[30] Repudiation on the ground of odious debt is not *necessarily* a large-scale repudiation of all the sovereign state's debt. It is possible that the "odious" label applies to only a portion of the public debt. Indeed, some debt cancellation advocates have proposed calculations of different countries' odious debt burdens. See, e.g., [L&CP issue articles]; Anaïs Tamen, "La Doctrine de la Dette 'Odieuse' ou: L'Utilisation du Droit International dans les Rapports de Puissance," Master's thesis in International Politics, l'Université Libre de Bruxelles (Dec. 11, 2003) 25,

How would this dynamic play out in practice? Creditors do incorporate the possibility of political instability and regime change when assessing country risk. In this context, lenders may pay attention to sovereign legitimacy if they believe that the debt contracts of less oppressive regimes will result in higher rates of repayment even in the absence of a clear odious debt mechanism. However, creditors as purely financial actors have no foundational need for a discussion of whether sovereign borrowers are internally legitimate. Under the statist background rules of the current financial system, lenders are entitled to the repayment of all debt. Therefore, they are unlikely to consider independently the explicit questions of sovereign legitimacy raised by different conceptual frameworks proposed in the international arena. The sovereignty issue in sovereign debt is likely to remain in the background until pressed by a sovereign government, either upon repudiation or when seeking to borrow after a repudiation or default. As such, a creditor's receptiveness to borrower government claims is a facet of how consolidation and disaggregation affect conceptions of sovereignty in international debt.

Starting from the premise of uncertain and potentially conflicting creditor interest, we would expect that the contingent features of any given historical moment – or any given country case – may intensify or mediate the degree to which creditors are disaggregated and thus receptive to alternative approaches. For example, as highlighted in the Soviet Union case, broader economic problems and a difficult market might heighten the belief that competitors (rather than borrowers) constitute a principal risk. The borrowing capacity or market power of a potential sovereign borrower can alter this calculus as well, deepening rifts between creditors in a given case. Geopolitical struggles often provide the backdrop for overseas lending, and competition or cooperation in the political arena can thus condition what is considered risky or logical in the economic realm. By contrast, expanded social and financial links between creditors, which could emerge through geographical integration and creditor cooperation in syndicated bank loans, for example, can enhance the degree of consolidation at any given moment. As a historical matter, each of these dynamics is relevant to the construction of sovereign reputation in the 20th century. We could imagine other elements that might become relevant over time as well.

Questioning the idea of a monolithic creditor interest in sovereign lending only makes more apparent how the sovereign debt regime's repayment rule, reputational underpinnings, and implicitly statist political ideology are more contingent than they initially appear. Two alternative logics exist for creditor preferences, depending on the nature of creditor interactions and interpretations of risk. The dominance of one or another logic should be a question of historical investigation rather than theoretical presupposition.

Considering the Role of Public Creditors

Although international creditors are frequently discussed as a single category, members of the group of public creditors have very different motivations and organizational structures.[31] These institutional frameworks in turn affect their lending purposes and interactions with other creditors and with borrowers. The distinctive goals and concerns of public creditors, in light of

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http://www.cadtm.org/spip.php ?article459 (calculating "dictator"-contracted debt burdens for twenty-three countries).

[31] For a recent argument that much of the debt owed to public creditors (particularly bilateral government debt) should not be considered as 'debt' in the conventional sense, see Anna Gelpern, "Odious, Not Debt," *Law and Contemporary Problems*, vol. 70 (2007): 81-114.

their dual role as both financial players and broader norm-propagating actors, can have a distinct effect on the norms and practices of international economic relations

Throughout the historical narrative, I highlight three features of public creditors that may affect the conceptions of 'sovereignty' in sovereign debt and reputation. Again, although these elements are presented with a view to understanding the acceptance of non-statist as opposed to statist views of sovereignty in international lending, their basic contours are applicable to issues of international economic governance more broadly. The three elements I identify as being particular to public creditors are (1) non-competitiveness relative to market actors, (2) public-mindedness, and (3) concern with the 'power of the purse' rather than with profit. While these features are not equally relevant to all public creditors, they can be considered characteristics of an 'ideal type' public creditor for the purposes of this analysis. In practice, as is evident in the historical discussion, these features may well interlace with each other. However, separating them out analytically helps to identify and clarify the pressures at work at any historical period.

Competition, Monopoly, and Attentiveness to Borrowers

One of the central features of a public as opposed to a private creditor is its different approach to competition, and particularly its lower competitiveness relative to market actors. The non-competitive pressures and preferences of these actors have potential ramifications for the understanding of 'sovereignty' in sovereign debt. In particular, the publicness of these lenders obviates the way in which market competition between creditors (in the absence of consolidative pressures to the contrary) encourages efforts to solicit and retain borrowers. Without this competitive sensibility, public creditors may, counterintuitively, be less attentive to borrower claims about the illegitimacy of their previous debt and its irrelevance to the borrower's own creditworthiness.

What drives this line of argument is the contention presented above that creditors will, in a properly functioning market, perceive other creditors as competitors for potentially profitable clients. Shifting the analysis to that of a *public* creditor, however, undermines this assumption from two angles. First, a public creditor's basic motivational relationship to profit is very different. The paradigmatic private creditor sees profit as an end in itself and judges risk accordingly. A public creditor's perspectives on both the analysis of borrower risks and competition risks will differ from that of private creditors. Public actors are established, at least in theory, not out of a profit motive but rather to instantiate some broader idea of the public good.[32] Any profit should only be subservient to this more essential purpose. Some public creditors, such as the World Bank, aim to recoup their expenses in order to remain viable as an organization. While a surplus allows such creditors more stable foundations and the opportunity to expand their operations, it is not viewed as an end in itself but rather as a means to the larger public goal. Other public creditors, including the post-World War II American government, have an even more attenuated link to profit. Although these creditors aim to recoup expenses, their lending is part of a much broader political target.[33] In the case of the U.S. government at least, losses do not spell the end of the lending institution, and can even be ignored if the larger ideological objectives are met.

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[32] There are situations in which a public or publicly owned actor engages in commercial activity (including lending) purely for profit, but these can be set aside for the purposes of this analysis.

[33] Discussing the odious debt context, Anna Gelpern argues that many loans made to sovereign governments by public actors such as the United States government should not be understood as debts, properly so-called, and thus should not be held to the same expectations of repayment. See generally Gelpern, "Odious, Not Debt." The issue of Iraq's debts to its Gulf neighbors, largely contracted during the Iran-Iraq War, touches upon similar issues. See the brief discussion in Chapter 8.

As such, public lending results in a different relationship with borrowers and with the sovereign credit market as a whole. With regard to their potential borrowers, these creditors' ideological perspective and relative lack of concern with profit will make them less inclined to court potential borrowers by giving greater credence to their independent viewpoints and claims. They may be less willing to think seriously about the degree to which reluctance to make payments on previous, possibly illegitimate debt actually predicts the likelihood that legitimate loans will be repaid in the future. Although public creditors (as with most international public actors) would like to keep borrowing countries within their policy circle, they may be less likely to moderate their own outlook or reconsider their ideological position as a result of borrower pressure. In short, the legitimate sovereignty claims and other substantive arguments of a borrower may, paradoxically, fall on less receptive ears.

In addition to this basic motivational difference, public creditors are rarely part of a very large market of similar actors, with similar goals, and providing similar services. Because of their distinct and sometimes highly individualized goals in lending, any competition between public creditors that does exist will take on a different cast. Public lenders (and public actors more generally) will be less concerned with the actions of other creditors as competitors for the same borrowers, although they may view such creditors as a threat to their own policies or goals and challenge them on this front.[34] This was the case to an important degree in successful U.S. governmental efforts to prevent American banks from financing the Soviet Union after its debt repudiation at the end of World War I. The normative position taken by public creditors may be enhanced and eventually naturalized if there is little competition from alternative, private sources of funding – as was the case in post-World War II international finance. Such oligopoly will make public creditors even less open to borrower claims, and thus can close off the likelihood that borrowers' concerns about sovereign legitimacy make headway.

Public Creditors as Norm Entrepreneurs and Ideological Actors

While 'publicness' may modify the basic competition and profit concerns of a creditor, it can also have even more important independent weight. Public creditors have a unique dual role in international lending, as both participants in the broader credit market and as norm-generating and norm-enforcing actors in their own right. While they are subject to the structural effects discussed above, they are ultimately able and expected to act as agents for a larger project. Although public and private actors alike can serve as 'norm-entrepreneurs,' the explicitly social outlook of public creditors makes them particularly well suited to promote a given concept of sovereignty. Or, alternatively, their ideological and policy visions (i.e. a commitment to communism or free market liberalism) may narrow discussion on the validity of different ideas of sovereign statehood.

The oligopolistic and non-competitive tendencies discussed above with regard to public creditors can render them less concerned with attracting borrowers and thus less open to claims based on legitimate sovereignty made by potential borrowers. This can increase their tendency to view all borrowers as basically similar, regardless of their internal form of government, and may produce a more statist conception of sovereignty in sovereign lending. However, public creditors' policy and ideological commitments can also encourage an *ex ante* commitment to ensuring that public resources benefit a state's underlying population, or to promoting rule of law

[34] This presentation of public creditors as largely non-competitive, or at least competitive in a different way, is over-simplified to some degree. (Although the basic hypothesis holds, the possibility of 'soft competition' will be highlighted in the historical chapter on the mid-twentieth century). Additionally, issues of mission-creep and institutional self-aggrandizement may shift creditor concerns from their original public purpose.

or more popular forms of sovereignty. In this case, their position as a non-competitive and even monopolistic or oligopolistic creditor would be overshadowed by a deeper commitment to a particular set of values. Thus, rather than understanding these actors as 'creditors' whose outlook is somewhat modified by their public characteristics, we could invert the modifier to focus on them first as 'public actors' whose credit activities serve their larger public goals. Although this dual potential is present in all public creditors, in practice creditors exist across a broad range and will manifest different levels and specificities of public vision. Furthermore, any given creditor's approach to sovereignty can shift over time, in response to changes in its stated goals, larger normative and ideological context, and personnel.[35]

The Power of the Purse

A private creditor balances the demands of its own investors (generally for higher rates of return) with those of the borrowers that constitute its client portfolio.[36] Public creditors are less concerned with the independent views or interests of borrowers, but the concern for continued funding remains. Thus the 'power of the purse' holds public creditors accountable to their funders, and may well shape their ultimate viewpoints.[37] This power is likely to be especially strong because the interests of borrowers are less of a countervailing force.

It is important to point out that the 'power of the purse' element does not necessarily fold into the 'public-mindedness' element. Those who initially establish a public lending institution do formulate its broad goals and definition of the public good. However, they may also establish a funding structure that ultimately makes the public creditor dependent on actors other than the founders for its continued existence. Thus, it is possible to imagine some tension existing between the stated goals for which the public creditor was established and the exigencies of its funding structure.[38] This is arguably the case with the IBRD, as will be discussed in the first part of Chapter 5. Again, the interaction of these elements will be specific to the character and contexts of the actors involved, and it is difficult to know in advance the final result. However, the power of the purse is an important causal mechanism to keep in mind for the purposes of understanding how conceptions of sovereignty develop and are accepted in international lending.

In short, to speak of creditors as a single group in sovereign lending is not only historically problematic but also theoretically untenable. Although greater uniformity may exist at particular moments, the competitive pressures on private creditors and the unique characteristics of public creditors mean that such moments should raise further empirical questions rather than simply solidify assumptions. Indeed, none of the three underpinnings I discussed for the market principle expectation of uniform debt repayment are fully defensible. Any discussion of sovereign debt and reputation – and any insistence that a particular debt

[35] It is important to point out that, although these actors are explicitly established to promote a vision of the public good, the strength of that vision and the resources at its disposal vary greatly. As such, it is difficult to know in theory the effect that public-mindedness will have on any given historical creditor.

[36] Although this formulation makes most sense in the case of private bank lenders, private institutions that facilitate securities issues are subject to similar balancing pressures between borrowers and investors.

[37] Of course, this presentation is a simplified ideal-type. To some degree, public actors can also shape the viewpoints of those who ostensibly control them, and shape the direction of future interests and policy.

[38] This is, I argue, part of what accounts for the IBRD's adoption of a strictly statist insistence on uniform debt repayment in the mid-twentieth century. This tension is not new or limited to the international arena, or to public 'creditors' as opposed to public actors more broadly. One example drawn from everyday life is the existence of public television stations that receive limited public funding and as such must turn to commercial sponsorship (with the risks and pressures that involves) to promote its larger goals.

contract is enforceable – cannot help but rest on some implicit political theory of sovereignty. And the mechanism of reputational judgment is more flexible than tends to be acknowledged, and would be consistent with statist or non-statist approaches to debt.

ALTERNATIVE SOVEREIGNTIES AND THEIR RAMIFICATIONS

In rejecting the notion that sovereign debt can possibly be apolitical, I highlighted the inevitably central role played by the contested term of 'sovereignty' in this international economic arena. A theory of sovereignty serves – implicitly or explicitly – as the principal-agent concept that makes any sovereign debt contract intelligible and enforceable. Thus, notwithstanding the *Financial Times*' dismissal of "theological" analyses of debt issues, the abstraction necessarily remains, understudied, at the heart of very practical financial and legal matters. If this is the case, what are the political-legal ideas of sovereignty that might be relevant to sovereign debt and what are their ramifications? In this section, I bring the understudied element of sovereignty into the light, looking more systematically at four central schools with very different outcomes for the debt regime. As the historical chapters demonstrate, each of these schools are manifest in twentieth century international political and economic relations. And each school, despite its divergent pronouncements on the appropriateness of debt continuity and cancellation, seems a viable contender for future approaches to the debt regime.

Preliminary Comments

Although the *Financial Times* used the term 'theological' dismissively in referring to discussions of Iraqi debt legitimacy, in many ways the term is accurate. Political theorists have pointed out that underlying the modern structure of international relations is a secularized theology or meta-theory of the sovereign state. Most famously, Carl Schmitt has claimed that, "all significant concepts of the modern theory of the state are secularized theological concepts."[39] Just as theology deals with the nature of god and its relationship to man, this secularized theology of the sovereign state specifies the nature of the state and its relationship to the people. Principal among these theological exports has been the idea of a unitary and omnipotent god, transformed into the absolutist or 'command' theory of a unitary and omnipotent sovereign state. The following discussion makes clear that this conception of sovereignty, a version of which underlies the doctrine of sovereign continuity, is not the only possible approach to sovereignty or sovereign contracting.

To fully lay out the potential analytical foundations for the sovereign lending system, we need to have a clear understanding of the different concepts of sovereignty available – that is, the contending formulations of the relationship that exists between rulers and ruled. While there are too many disciplines that deal with this question to provide a comprehensive overview, I categorize basic schools of thought on sovereignty and identify resonances across the disciplines of political theory, law, and international relations within these schools. I first flesh out what can be understood as strict *statism* (or absolutism), which conceives of the sovereign state as a secularized deity of sorts – the supreme power within its realm, subject to no law or higher

[39] He continues that this is the case, "not only because of their historical development … but also because of their systematic structure." Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Boston, Mass.: MIT Press, 1985) 36. Contemporary scholars such as Jean Bethke Elshtain have updated this 'theological' conception of the state as a patriarchal and supreme deity. Jean Bethke Elshtain, "Sovereign God, Sovereign State, Sovereign Self," *Notre Dame Law Review*, vol. 66 (1991): 1355 et seq.

authority and equal only to other states. I then introduce what might be called *rule of law* sovereignty, in which the sovereign state is empowered and limited by its internal law, whatever that may be. Finally, I present a third school of *popular* sovereignty, in which both the sovereign state and the laws it promulgates are only valid if they reflect the consent of the underlying people. Each presentation briefly highlights how these meta-conceptions of sovereignty imply theories of agency, which in turn lead to different expectations about the enforceability of sovereign contracts. A schematic presentation of this discussion is available in Table 2 (pages [x]-[x]). Ultimately, this discussion helps to provide a clearer framework for talking about the issues of sovereignty underlying the sovereign debt regime.

It is important to point out that each conception of sovereignty has both an internal and an external dimension. Thus far I have focused on internal sovereignty, or the "fundamental authority relation within states between rulers and ruled [which is usually defined by a state's constitution]."[40] However, these internal relations are in turn linked to an external dimension of sovereignty, or "a fundamental authority relation between states which is defined by international law."[41] To enter into an internationally enforceable contract, a sovereign must exist in both dimensions. It must have sufficient standing or recognition internationally to be considered a valid sovereign actor, able to make acknowledged promises on behalf of a state. It must also have the necessary relationship with the underlying people and territory to allow it to extract the resources (natural, financial, or human) to perform on a contract or repay a debt. Although these two elements are conceptually separate, in practice they frequently reinforce each other. A sovereign actor with a strong and clear relationship with the underlying people and territory should have fewer problems gaining international recognition and entering transnational contracts than a sovereign actor with only a tenuous link. However, the reverse channel of influence can also work: international recognition and resources may allow a government with only a tenuous internal link to strengthen its relationship of domestic control. In short, the way in which a sovereign actor is validated and dealt with at the international level does not only imply an external conception of sovereignty. It can also reinforce and alter the internal dynamics of sovereignty, in which the ruling body relates to the underlying people and territory. In classifying different schools of sovereignty, this section points out external and internal elements where appropriate but ultimately treats these dimensions as integrated.

Sovereign Action as Command: Statism in Contract-Making

The first and perhaps most common definition of sovereignty is an absolutist or what I call a statist conception: the 'sovereign' is the juridical body (usually a state) that has ultimate control and authority over a given people and territory. As I discuss in greater detail here, this statist conception of sovereignty necessarily underlies the dominant expectation of debt repayment across all circumstances. In this version, sovereignty lies with the body that issues commands, in the form of law and policy, within a bounded territory. This sovereign is functionally similar to other sovereigns, and the structure and legitimacy of its internal constitution are largely irrelevant to its external relations. In these external relations, the sovereign body is juridically equal to other sovereigns, and differences in size, power, culture, stage of development, and internal legitimacy are conceptually irrelevant. This framework is that which conceives of the sovereign state as a secularized deity – the supreme power within its

[40] Robert H. Jackson, "Sovereignty and World Politics: A Glance at the Historical and Conceptual Landscape," *Sovereignty at the Millennium*, ed. Robert H. Jackson (Oxford: Blackwell, 1999) 11.
[41] Ibid. 11

realm, subject to no law or higher authority and equal only to other states. It can also be understood as the latter-day incarnation of an older absolutist, divine, or militarist conception of rulership, updated to fit modern definitions of states as territorially bounded.[42]

Jean Bodin provided perhaps the first of these explicit accounts in political theory, by defining sovereignty as "the highest power of command" and "the absolute and perpetual power of a commonwealth."[43] This tradition is carried forward by Thomas Hobbes and Benedict de Spinoza, both of whom considered the sovereign as constituting the supreme law-making authority, free from limitation on its actions.[44] In legal and constitutional theory this tradition is represented by the classical positivism of John Austin, who understood law as simply the command of the sovereign backed by force.[45] In his formulation of positivist international law, Lassa Oppenheim similarly rejected the moral foundations and judgments implied by natural law accounts.[46] In denying the relevance of internal culture, religion, or political form, he sought to organize international law on the basis of sovereign equality and state consent. In the preferred metaphor of international relations theory, this account of sovereignty conceives of the state as a "unitary black box" whose internal machinations are irrelevant to its foreign interactions.[47] The policy recommendations associated with this macro-approach similarly tend to minimize the relevance of internal differences across states, assuming a basic similarity of state interests and strategic calculations.

A sovereign government, under this paradigm, should be recognized according to its effective command of a given territory and people. The degree of internal legitimacy or presence of internal political or military coercion would not be relevant to the basic existence of a sovereign government. In this view, it does not ultimately matter how the juridical body claiming sovereign status gains control and authority over the underlying territory and population. It may do so by liberal democratic means, by other constitutional or legal means, or

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[42] John Ruggie has argued that this traditionalist conception of the state drew from theories of sovereignty built on a paradigm of the rights associated with an absolutist version of private property rights. John G. Ruggie, "Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis," *Neorealism and its Critics*, ed. Robert O. Keohane (New York: Columbia University Press, 1986) 144-145.

[43] Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth*, trans. Julian Franklin (Cambridge: Cambridge University Press, 1992) 1.

[44] See, e.g., Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Hackett, 1994), 109. Spinoza similarly identified the sovereign as having "the sovereign right of imposing any commands he pleases." Benedict de Spinoza, *A Theologico-Political Treatise*, trans. R.H.M. Elwes (New York: Dover, 1951) 207. For Spinoza, as for Machiavelli, right effectively followed might or power.

[45] This is a common shorthand for Austin's conception of the law; another frequently used formulation is "the command of the sovereign backed by a sanction." In laying out the essential elements of "law properly so called," Austin highlights three key features: (1) a command from a determinate body, (2) a sanction or "eventual evil annexed to a command," and (3) the source of the command from a political superior. John Austin, *The Province of Jurisprudence Determined*, ed. David Campbell and Philip Thomas (Aldershot: Dartmouth, 1998) (1863): 101-102. Austin also makes clear that "the sovereign power is incapable of legal limitation . . . without exception." Ibid. 183

[46] Lassa Oppenheim, *International Law*, 2nd ed. (New York: Longmans, Green, 1912) 19-22. Although Oppenheim effectively allows for the internal conception of sovereignty suggested by this traditionalist school in political theory, it is important to distinguish him from Austin in the arena of international law. In particular, Austin felt that the absence of a sovereign in the international arena obviated the possibility for international law. Oppenheim, however, aimed to construct a unique vision of law for the international realm based on the principle of sovereign equality and state consent.

[47] Such a view is presented most clearly in neorealist works of international relations theory, which conceive of state structures and preferences as subservient to larger structural factors in explaining international conflict. See, for example, Kenneth Waltz, *Man, the State, and War: A Theoretical Analysis* (New York: Columbia University Press, 1959).

by force alone – the strictly statist requirements for sovereign action pay little attention. As Bodin makes explicit, "If [power is taken] by force, [the government] is called a tyranny. Yet the tyrant is nonetheless a sovereign, just as the violent possession of a robber is true and natural possession even if against the law, and those who had it previously are dispossessed."[48] Although Hobbes distinguished between sovereignty by force and sovereignty by voluntary institution, he insisted that "the rights and consequences of sovereignty are the same in both."[49]

This principle of recognizing sovereign governments on the basis of command or 'effective control' was accepted as a central principle of modern international law by early members of the Permanent Court of International Justice. For example, J.B. Moore, a prominent American jurist and member of the Court, wrote,

> The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties and its external obligations.[50]

This essential commitment to disregarding internal differences and the possibility of internal coercion is enshrined in the basic legal principles of twentieth century international relations – equal sovereignty and the doctrine of non-intervention, as highlighted on Article 2 of the U.N. charter. International or 'external' sovereignty in this statist approach is thus based on effective control and recognition by the community of states. As a consequence, it pays little attention to the potential internal dimensions of sovereignty.[51] The central contours of this framework have remained fairly stable into the turn of this century.[52]

How would this paradigm translate into a theory of agency or authority to enter into contracts? Authority should presumably derive from the conception of the sovereign as commander. This in turn implies that no real agency problem exists, because the state's population is not considered the 'principal' of the state in any true sense. The core relationship between the people and the government is not best characterized by the model of 'principal-agent' but rather, in the language of John Austin, as one of "sovereignty and subjection."[53] Regardless of the internal form of the state, the people under this theory of sovereignty are ultimately 'subjects' of the state. As such, and regardless of any internal political changes, they

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[48] Bodin, *On Sovereignty*, 6.
[49] Hobbes, *Leviathan*, 127.
[50] John Bassett Moore, *Digest of International Law*, vol. 1 (Washington, D.C.: Government Printing Office, 1906) 249, as cited by Justice Taft in *Tinoco Case*, 146 et seq., especially 150-51. This principle applied only to those states already recognized as members of the international community and therefore within the modernist sovereign equality paradigm. For states outside the 'family of nations' (most non-European states), considerations of internal civilization and barbarism were still permitted.
[51] 'Failed states' in this model are only those who lack a constitutional structure or ruling group able to impose a unified governing framework on the entire territory.
[52] Benedict Kingsbury cites the 1986 ICJ case of *Nicaragua v. USA* as evidence of the traction of Oppenheim's basic model well into the twentieth century. A world of "functionally and juridically similar territorial units implied that, provided the entity was treated internationally as a state, its domestic structure and type of regime did not matter." Benedict Kingsbury, "Sovereignty and Inequality," in *Inequality, Globalization, and World Politics*, ed. Andrew Hurrell and Ngaire Woods (New York: Oxford University Press, 1999) 74.
[53] John Austin, *The Province of Jurisprudence Determined*, 1863, eds. David Campbell and Philip Thomas (Aldershot: Dartmouth, 1998) 94. Hobbes similarly distinguished between sovereign and subject. Hobbes, *Leviathan*, 109.

can effectively become subject to the obligations of whichever government successfully claims sovereign command over them. Therefore, regimes that rule by force and fail to follow their own internal laws can still enter into international agreements, which may bind the population even after a regime change.

Continuity and Discontinuity in Statism: Two Approaches to Repudiation

The second key question in a statist or absolutist framework, then, is whether a succeeding regime *must* be bound to the prior regime's actions under this approach. Although any controlling government may enter into a contract under this absolutist account, does its successor still have a presumed right to repudiate? Here, there are two very different responses within this school of thought. The first approach, associated with late medieval or pre-modern political theory, insists on the eternal nature of the state and thus considers sovereignty to live forever, apart from any changes in actual rulership. The second approach, more closely associated with Hobbes and the high modernism of the Scientific Revolution, insists more explicitly on the sovereign's absolute right to do as it pleases, which would include contract repudiation.

The statist framework as presented by late medieval political theory explicitly insists on the continuity of sovereignty. In the early and high Middle Ages, the Christian conceptual universe had been divided into the eternal/transcendental and the temporal/profane realms. While the ruler derived legitimacy from the eternal divine, he himself was a temporal being. With the shift away from this dualist aspect of the late Middle Ages, however, space emerged for an intermediate arena in which earthly beings – such as states – might yet have eternal duration. Thus, previewing more contemporary jurists and financial actors, the late medieval legal theorist Baldus di Ubaldi argued, "A realm contains not only material territory but also the peoples of the realm… And the totality or commonweal of the realm does not die, because a commonweal continues to exist even after the kings have been driven away. For the commonweal cannot die… it lives forever."[54] Although Bodin is rightly cited as an early modern political theorist for insisting that sovereignty may be claimed by force rather than through divinity, on the question of sovereign continuity he hearkens back to an earlier age. Bodin considered both sovereignty and the status of the 'sovereign' to be perpetual, transferring to whoever gains effective control of a state's territory.[55] Jens Bartelson emphasizes that this combination of state continuity with ruler discontinuity is an essential aspect of what he calls the "proto-sovereignty" of the late medieval era. "The body politic could be accounted for as something ontologically separate from the existence of the ruler within it, yet as something continuous, transcending the life of the ruler in time and space." He continues that, "at this point, we witness the first steps towards a theory of inalienability, which implies a set of rights well separated from those of the individual king."[56] Along with these inalienable rights of the eternal state, it would seem, can come inalienable obligations. In this pre-modern framework of the 'eternal state,' sovereign obligations should remain even in the case of major regime change. Although medieval scholars

[54] Quoted in Bartelson, *Genealogy of Sovereignty*, 99

[55] Bodin, *On Sovereignty*, 1. Bartelson suggests more broadly that Bodin's conception of sovereignty displays "disturbing traces of a different age." He argues that, despite Bodin's insistence on the indivisibility of sovereignty, his effort to connect the theory of sovereignty to a divinely led harmonious order displays only a "superficial modernity." Bartelson, *Genealogy of Sovereignty*, 141-142.

[56] Ibid. 97.

intended this vision of sovereignty to be secular, to many contemporary political theorists it retains "a whiff of incense from another world."[57]

Despite this particular historicity and ontological provenance, the doctrine of sovereign continuity is very much alive in practice today. Echoing Baldus in the fourteenth century, J.B. Moore in the early twentieth clearly links the status of sovereign to the theory of sovereign sempiternity, and then to the continuity of contractual obligations:

> Changes in the government or the internal policy of a state do not as a rule affect its position in international law. . . . though the government changes, the nation remains, with rights and obligations unimpaired. . . . The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper.[58]

The *Financial Times* continues the trend into the late twentieth century in its insistence, without irony, that we avoid "theological" discussion and accept the eternal nature of states without attention to their internal modes of rulership. At least in contemporary international financial relations, the creativity of late medieval jurists lives on.

The question of sovereign continuity receives a different response if we move from the theoretical struggles of the late Middle Ages to the modernism of a theorist like Hobbes. Although he shared Bodin's indifference to competing forms of internal rule and the mechanism of gaining sovereign power, Hobbes very explicitly considered his work to stand upon a more materialist conception of the universe. Drawing inspiration from the revolution taking place in the natural sciences, Hobbes rejected both a religious foundation and a Platonic idea of eternal essences in formulating his political vision. He insisted that "every part of the universe is body, and that which is not body is no part of the universe."[59] Perhaps unsurprisingly, he took a fairly materialist view of sovereign existence and power, including in times of succession. Unlike the late medievalists and Bodin, Hobbes did not consider that sovereignty could exist forever, ungrounded from actual rulership. He was especially concerned with clarity in sovereign succession *precisely* because without this the choice would be uncertain, and "then is the commonwealth dissolved" and "the multitude [left] without any sovereign at all."[60] Hobbes joined this materialism with an insistence on the sovereign's indivisible right to determine the means necessary to promote the interests of the commonwealth and its subjects. Thus sovereign power is absolute, "as great as possibly men can be imagined to make it."[61] This is not to say that the sovereign cannot constrain its actions and encourage stable interaction by promulgating laws and binding itself through contracts. Although Hobbes was primarily concerned with the prospect of civil disorder and internal constraint, this ability to bind would presumably extend to

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[57] Ibid. 99, citing with approval Ernst Kantorowicz's turn of phrase in *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957) 299. Bartelson points out that, in addition to sovereign states, the inhabitants of the intermediate realm between the eternal divine and the temporal profane included angels and their earthly counterparts. Bartelson, *Genealogy of Sovereignty*, 97.
[58] Moore, *Digest of International Law*, 249, as cited by Justice Taft in *Tinoco Case,* 150-151.
[59] Hobbes, *Leviathan*, 459.
[60] Ibid. 124-125.
[61] Ibid. 135.

the realm of external contracts as well. However, these constraints are always contingent and subject to repudiation on the basis of sovereign status and power alone.[62]

The concept of sovereignty upon which the current lending regime is based has a clear pedigree in political thought, in which the capacity to enter into contracts is de-linked from internal forms of rule. Furthermore, in its legal and normative expectation that states never die, the main contemporary framework adopts the version of continuous statism associated with Bodin and late Medieval scholars. Each new ruler or regime is not granted a clean slate on which to make decisions (or build a new reputation), but rather is assumed to be the reincarnation of an ongoing sovereign existence. It is this philosophical perpetuity that gives rise to the doctrine of sovereign debt continuity considered essential for the contemporary lending regime.

Rule-of-Law Sovereignty: Sovereign Action Delimited by Law

While the principles of sovereign command and continuity have deep roots in international theory and practice, this approach to sovereignty is only one among several. Although the tension between strictly statist and popular conceptions of sovereignty is perhaps most well-known, an intermediate alternative exists in what might be called 'rule of law' or constitutional sovereignty. Like popular sovereignty, this school pays attention to internal modes of legitimation in recognizing valid sovereign action. However, it does not require that this internal authorization ultimately come from the underlying people. The sovereign state exists and is empowered and limited by its internal constitution or rule of law, whether or not it is democratic. Thus, an internal rule-of-law or constitutional framework that indicates a monarchical or other non-democratic political order would be sufficient to authorize valid sovereign action.

This conception of sovereignty is not as well-developed into a coherent school of political theory as strictly statist or popular sovereignty. However, it relates to Max Weber's basic insight that the use of force is not a means specific to states alone, and that therefore force cannot be the sole defining characteristic of statehood. Weber thus modified the basic definition of a sovereign state to include the element of legitimacy; a state in this view is "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory."[63] Unlike democratic or liberal theorists, Weber himself did not insist on any substantive internal requirements for this ultimate legitimacy, and considered that different types of domestic regimes would be consonant with legitimate statehood. In Weber's model, legitimacy or inner justification can derive from traditional forms (as in a monarchy), from charismatic authority, or from 'legality.'[64]

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[62] "But if the sovereign demand or take anything by pretence of his power, there lieth in that case no action of law, for all that is done by him in virtue of his power, is done by the authority of every subject, and consequently, he that brings an action against the sovereign brings it against himself." Ibid. 144.

[63] Max Weber, *Politics as a Vocation* (1918, 1921), reprinted in *From Max Weber: Essays in Sociology*, eds. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946) 78. Although Weber identified legality as only one among different potential sources of legitimacy, he considered that increased rationalization of the government and economy – in part through a strengthened rule of law – would be a (potentially problematic) corollary of modernity.

[64] Ibid. 78-79. Although Weber viewed all three of these as equally possible legitimations or inner justifications for state power, he considered that increased rationalization and bureaucratization – in part through greater reliance on 'legality' or the rule of law – would be a likely (and potentially problematic) corollary of modernity.

Perhaps the paradigmatic thinker of this approach is the legal theorist Hans Kelsen, who sought to identify and understand law as 'pure' – a separate and internally coherent order independent from politics and morality.[65] Kelsen follows John Austin in separating valid law from moral questions, but differs in that he does not consider law to be ultimately reducible to force. Rather, the promulgation of acts and statutes by a sovereign government can only be identified as 'legally valid' within the context of that state's internal norms or legal rules, which in turn build from the basic norm (*grundnorm*) or constitution of that polity. This basic norm itself "cannot be derived from a higher norm," but instead "constitutes the unity in the multitude of norms by representing the reason for the validity of all norms that belong to this order."[66] Kelsen sought to provide law with the clearest possible 'decision rule,' emphasizing law as an autonomous and internally coherent order and thus granting it objectivity and stability. In so doing, he hoped to insulate it from the subjectivity and uncertainty inherent in the concept of law as the sovereign command – whether the sovereign be an individual ruling by force or the people as a whole. In this, Kelsen foreshadowed Hannah Arendt's political commitment to a constitutional system of checks and balances, as well as her concern about the instability and potential extremism that could arise in both absolutist rule and pure popular sovereignty.[67]

The rule-of-law or constitutionalist conception of sovereignty as determined and limited by internal norms or rules of law can translate into the international realm as well. In this framework, international law and international affairs would remain interested in questions of internal state legitimacy. However, this approach would not investigate the substantive democratic legitimacy or internal human rights compliance of governments. Rather, it would focus on ensuring states' commitments to a more *procedural* vision of rule of law in both the domestic and international spheres. Conservative early twentieth century American lawyers, including former President and Supreme Court Justice William Howard Taft, were at the forefront of this rule-of-law approach in the international arena.[68]

How would this paradigm translate into a theory of agency or authority to enter into contracts? Authority should derive from a vision of the sovereign as constituted and limited by law, and a government actor can act on behalf of the state as a whole, including its people and territory, so long as it acts according to the domestic legal framework. Even a government official who promulgated the law under which he or she acts must stay within its purview, as *any*

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[65] Kelsen is considered the best example in legal philosophy of 'high positivism.' See especially Hans Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967), which originally appeared earlier as "Juristischer Formalismus und reine Rechtslehre," *Juristische Wochenschrift*, vol. 58, no. 23 (1929).

[66] Kelsen, *Pure Theory*, 195.

[67] "What else did Sieyès do but simply put the sovereignty of the nation into the place which had been vacated by a sovereign king? What could have been more natural to him than to put the nation above the law, as the French king's sovereignty had long since… meant the true absoluteness of legal power, a *potestas legibus soluta*, power absolved from the laws? And since the person of the king had not only been the source of all earthly power, but his will the origin of all earthly law, the nation's will, obviously, from now on had to be the law itself." Hannah Arendt, *On Revolution* (New York: Penguin, 1963) 156. Arendt's admiration for the American constitutional system lay in her view that the checks and balances of the U.S. Constitution effectively divided the power of an unfettered popular sovereign, which constituted the danger of the French system. "In this respect, the great and, in the long run, perhaps the greatest American innovation in politics as such was the consistent abolition of sovereignty within the realm of the body politic of the republic, the insight that in the realm of human affairs sovereignty and tyranny are the same." Ibid. 153.

[68] David Patterson highlights that the founders of this more conservative legalist element as coming initially from, "lawyers who wanted the United States to lead in the quest for pacific alternatives to international violence but were reluctant to have their nation join in boldly innovative schemes of world order." David S. Patterson, "The United States and the Origins of the World Court," *Political Science Quarterly*, vol. 91 (1976): 294.

actor is ultimately subject to the law itself. Kelsen presents this dynamic of law-making authority and subjection to law as follows: "Only a competent authority can create valid norms; and such competence can only be based on a norm that authorizes the issuing of norms. The authority authorized to issue norms is subject to that norm in the same manner as the individuals are subject to the norms issued by the authority."[69] Given this basic commitment to rule of law (or simple constitutionalism) as such – as distinguished from a commitment to liberal democratic constitutionalism, for example – neither the particular internal form of the state nor the substantive content of rules and laws are important. So long as internal rules are followed, the appropriate government official can act as an agent for the sovereign state, thus binding the territory and population under that state's legal framework.

In this conception, sovereign obligations exist and are continuous if they have been validly authorized under the internal legal framework, even if that internal framework is distasteful according to some moral standards. If the proper internal rules were followed, the sovereign obligation stands whether the previous regime was autocratic or democratic. Thus, a regime change in which a democratic government comes to power after a period of rule by other means should not alter the existence of a sovereign obligation, so long as that obligation was validly incurred under the internal rules of the previous contracting regime. Therefore, even a non-democratic regime may enter into international agreements that bind the underlying population, so long as it specifies and then follows its own laws. And if sovereignty is conceived through this rule-of-law framework, then creditors who lend to non-representative regimes may still expect repayment if they respect that regime's internal constitution and rule of law. In short, this conception of sovereignty allows for a modified version of the doctrine of sovereign continuity. Sovereign obligations persist, regardless of regime form or regime transformation, so long as the internal rule of law in place at the time of the contract is respected by both parties to the contract: the sovereign government and the external contracting party.

The Popular Sovereign: Authorization Grounded in the People

Perhaps the most vocal competitor to a statist conception of sovereignty today is the idea of popular or democratic sovereignty. Here sovereignty ultimately lies with a 'sovereign people,' whose consent provides legitimacy to the state and authority for its external interactions. Both the sovereign state and the laws it promulgates are valid only if they reflect the authorization and self-government of the underlying people. The mechanism by which this consent finds expression is not specified, and may be direct or through representation. The state as a secularized deity has been dethroned, and now is subject to the people, who are ultimately sovereign. This concept suggests that not all states are properly or equally 'sovereign,' and that the evaluation and recognition of true sovereignty requires the consideration of a regime's internal norms.

Jean-Jacques Rousseau stands as a central thinker in this approach. He conceived of a 'sovereign will' founded in a social contract as providing a form of government "by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before."[70] Emmanuel Joseph Sieyès followed in insisting on the unity of the nation with the people in the context of the French Revolution. "The Third Estate [the order of the common people as distinct from nobility and clergy] thus encompasses everything pertaining to the

[69] Kelsen, *Pure Theory*, 194.

[70] Jean-Jacques Rousseau, *On the Social Contract, or the Principles of Political Right*, reprinted in *The Basic Political Writings* , ed. Peter Gray, trans. Donald A. Cress (Indianapolis: Hackett, 1987) Bk. I, Ch. VI, 148.

Nation, and everyone outside the Third Estate cannot be considered to be a member of the Nation."[71] Thomas Paine, also reflecting upon the French Revolution, commented, "Monarchical sovereignty, the enemy of mankind, and the source of misery, is abolished; and sovereignty itself is restored to its natural and original place, the nation."[72] The commitment to basic self-legislation found expression in the work of Immanuel Kant as well, although Kant understood self-legislation primarily as 'freedom from tutelage' in the realm of thought.[73] This attentiveness to the relevance of a state's internal make-up resonates somewhat with the Liberal school of international relations theory, which explains the international behavior of states on the basis of their internal characteristics.[74]

The conception of a sovereign government as fundamentally grounded in the consent or authorization of the people can be translated into a principle of international law. In particular, a 'sovereign state' may be legally recognized – and thus capable of valid international action – only if the state is constituted by democratic constitutional means. Woodrow Wilson in particular is associated with this mode of international interaction, due to his commitment to the principle of self-determination in the League of Nations and his own administration's refusal to recognize governments claiming the title of sovereignty by force.[75] Although grounded in the limitations provided by state structures and territorial boundaries, this approach resonates with the cosmopolitan school of political theory and international law, which puts individual rights at the center of any legitimate polity or legal system.[76] The strong version of this theory presents a conception of consent, sovereignty, and human rights that is in tension with both the strict 'sovereign as command' and the intermediate 'rule of law sovereignty.' Modern day champions of a Wilsonian ideal of sovereign legitimacy continue to promote this view of a "new constitutive, human-rights based conception of popular sovereignty."[77] Some legal scholars,

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[71] Emmanuel Joseph Sieyès, *What is the Third Estate?*, reprinted in *Political Writings, Including the Debate between Sieyès and Tom Paine in 1791*, ed. Michael Sonenscher (Indianapolis: Hackett Publishing Company, 2003) 98.

[72] Thomas Paine, "The Rights of Man," *Complete Writings*, ed. Philip S. Foner (New York: Citadel Press, 1944) 342.

[73] See, e.g., Immanuel Kant, "What is Enlightenment?," *Perpetual peace and Other Essays on Politics, History, and Morals*, trans. Ted Humphrey (Indianapolis: Hackett Publishing Co., 1983) 41-48. Kant's eventual political goal was also more universalist and cosmopolitan, and he hoped that political organization would reach beyond the bounds of a territorial state. This is not to say that Kant exhibited no preference as to state form. Although he considered constitutional monarchy consonant with human freedom, he did argue that international peace is most likely to come about from a world of democratic republics. See Immanuel Kant, "To Perpetual Peace: A Philosophical Sketch," *Perpetual Peace*, 107-144.

[74] For a review of these different approaches, see Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization*, vol. 51, no. 4 (1997): 513-553. Immanuel Kant provides the most famous of these theories in his essay, "Perpetual Peace," which argues that world peace is most likely to come about from a federation of democratic states.

[75] One example of Wilson's non-recognition policy is his refusal to recognize these 'illegally constituted' governments in Central America. See, for example, George W. Baker, Jr., "Woodrow Wilson's Use of the Non-Recognition Policy in Costa Rica," *The Americas*, vol. 22, no. 1 (July 1965): 3-21. This project of linking particular requirements for internal sovereignty to the acceptance of sovereign states externally into the 'family of nations' was part of the central impetus toward regime reform after World War I. See Antony Anghie, "Colonialism and the Birth of International Institutions," *NYU Journal of International Law and Politics*, vol. 34 (2001-2002): 513, 535-38. This type of liberal constitutionalism may well be a more coherent vision in the American approach to international law. See, for example, Harlan Grant Cohen, "The American Challenge to International Law: A Tentative Framework for Debate," *Yale Journal of International Law*, vol. 28 (2003): 554-67.

[76] Immanuel Kant is the main proponent of this more cosmopolitan approach.

[77] See, e.g., W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *American Journal of International Law*, vol. 84 (1990): 866.

such as Thomas Franck, have gone so far as to insist that contemporary international law in fact contains an emerging right to democratic governance.[78]

This democratic or popular framework of sovereignty suggests a unique relationship between the people and the rule of law. Unlike in the conception of sovereign as command, in which law is imposed by force on a subject people, here the people themselves are sovereign and thus exist prior to the law. Rousseau makes clear that the people acting as sovereign are free even from the constraints of their own prior laws, as "it is contrary to the nature of the body politic that the sovereign impose upon itself a law it could not break."[79] Sieyès distinguished between a government and the underlying people or nation that provides the authorization for governmental action. "Government can exercise real power only insofar as it is constitutional. It is legal only insofar as it is faithful to the laws imposed upon it. The national will, on the other hand, simply needs the reality of its existence to be legal. It is the origin of all legality."[80] Thus, law and valid government action exist, but in a very different form than that found in other approaches to sovereignty.

How would this paradigm translate into a theory of agency or authority to enter into contracts? Authority should derive from the sovereign people – now properly understood to be the principal in any sovereign contract – either acting directly or through their representatives. Government officers act as their agents, and so long as they act according to the roles assigned to them or the mechanisms established by the underlying people, they have authority to bind the sovereign nation. In this framework, the people are subject only to those contracts that their authorized agents have entered, once the people have been constituted as 'sovereign.'

In this framework, sovereign obligations, properly understood, do not exist unless they have actually been properly authorized by the underlying sovereign people. A regime change in which a democratic sovereign government comes into being after a period of rule by other means would effectively constitute the first appearance of a legitimate sovereign government. The previously existing government would not in fact have comprised a proper sovereign state, but only a private form of rule imposed on the underlying and disempowered sovereign people. Therefore, regimes that rule by force cannot enter into international agreements that bind the population after their fall. And if sovereignty is conceived under this more democratic or popular framework, creditors who lend to such regimes cannot expect to be repaid after a regime change. This is not necessarily to say that all previously existing obligations will be repudiated. On the contrary, they would likely be evaluated by the newly empowered sovereign on a pragmatic basis. However, this pragmatic approach is very different from that implied by the doctrine of sovereign continuity, which assumes the perpetual nature of any sovereign obligation on the basis of a strictly statist approach to sovereignty.

Sovereignty as Outcome Orientation

The three schools discussed above present visions of sovereignty that are ultimately process-oriented – they interrogate the relationship between the ruler and the ruled in a given state and underscore the procedures of sovereign contracting that this relationship entails.

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[78] Thomas Franck, "Democracy as a Human Right," *Human Rights: An Agenda for the Next Century*, ed. Louis Henkin and John Lawrence Hargrove (Washington, D.C.: American Society of International Law, 1994) 73-101.
[79] Rousseau, *Social Contract*, Bk. I, Ch. VII, 149. It is important to point out that the sovereign, properly constituted, may still bind itself vis a vis other, external parties. "This does not mean that the whole body cannot perfectly well commit itself to another body with respect to things that do not infringe on this contract. For in regard to the foreigner, it becomes a simple being, an individual." Ibid. 149.
[80] Sieyès, *What is the Third Estate?*, 137.

However, a discussion about issues of sovereignty underlying sovereign debt may also focus on the *outcome* of such contracts. An outcome orientation in sovereign contracting would require that valid sovereign action be in the 'interests of the state.' This orientation is not at all exclusive to any one of the three different procedural or relational schools of sovereignty discussed above. Here, the internal procedures by which a sovereign action is decided or acted upon are irrelevant; the action could be undertaken according to absolutist or democratic means, either following or disregarding the internal rule of law. What matters instead is attentiveness to the ultimately intended outcome or beneficiary: the sovereign state.

This is not to suggest that this outcome orientation has no theoretical precursor. Although I have separated out the statist, popular, and rule-of-law accounts into three separate schools, they all may be understood as part of the larger meta-paradigm of sovereignty and statehood characteristic of the modern era. Each of them conceives of sovereignty as existing within a given territorial space and as limited to a territorial boundary. This geographical groundedness counters an earlier conception of a personalized sovereign ruler, unlinked to a clearly situated realm and unifying an essentially private domain of otherwise disconnected territories. This latter blending of the public and the private elements of rulership comprised a central feature of pre-modern approaches to sovereignty, and one effectively rejected by all three schools of sovereignty discussed above. The modern conception of sovereignty not only grounded sovereign statehood in a given territorial realm, but also attempt to strip the now explicitly *public* state from its association with rulership as private ownership.[81] In place of the language of personal domain, the modern discourse substitutes the language of commonwealth, public protection, and state interest. Hobbes, who insists on there being no distinction in the basic sovereign rights of an 'instituted' as opposed to an 'acquired' sovereign, postulates the initial existence of the sovereign state itself in terms of the security and order of the underlying commonwealth. Bodin, who is perhaps the most absolute of the traditionalist thinkers, shares this language of the sovereign state as 'commonwealth' rather than disconnected private domain. The concept of modern statehood as linked to internal responsiveness is even clearer in the popular and rule-of-law visions of sovereignty.

Several thinkers of the early to mid-modern period thought fairly explicitly about the relationship of sovereignty to sovereign debt through this model of basic responsiveness to underlying public interest. In particular, they warned that sovereign debt or 'public credit' could make government officials over-attentive to the needs and desires of creditors, and also enable them to embark upon understudied adventures. These outcomes would render the state less responsive to true public need and neglectful of the greater national interest. Sieyès, one of the key thinkers underlying the school of popular sovereignty, was hostile to the entire idea of sovereign debt and favored instead building public finance on a system of taxation. In fact, one of his central political writings on the French Revolution focused on the centrality of instituting a tax law. This law of taxation would allow the power of money to "be merged with and, so to speak, made to be identified with the nation so that it can never serve anything other than the general interest."[82] He considered the rejection of public credit so fundamental to a truly responsive constitutional government that he self-consciously called his proposed tax law nothing less than a "constitutional law of taxation."[83] This is not to say that Sieyès favored an

[81] See generally Ruggie, "Continuity and Transformation."
[82] Emmanuel Sieyès, "Views of the Executive Means Available to the Representatives of France in 1789," *Political Writings*, 58.
[83] Ibid. 57.

immediate repudiation of the monarchist debt; in fact, he felt it should be repaid on practical grounds.[84]

This concern with the potentially detrimental effects of sovereign debt or public credit on a nation's core responsiveness to public need was not limited to Sieyès, the paradigmatic popular sovereigntist. The monarchist David Hume famously claimed that, "either the nation must destroy public credit, or public credit will destroy the nation."[85] Istvan Hont has highlighted how Hume's deep suspicion of sovereign debt financing linked to his concern for national security in the face of potential international disorder. Hume felt that public credit tended to sacrifice the nation's long-term strategic interests for the short-term concern of maintaining financial stability, and also to embolden government officials to embark on capricious escapades. Hume was "quite ready to counsel sacrificing the property of thousands (he estimated that Britain had approximately 17,000 foreign and domestic creditors) on the altar of the nation's national security interests," and felt this much preferable "to the horrible political crime of sacrificing millions for the temporary safety of creditors."[86]

As Sieyès and Hume make clear, the argument that sovereign debt may be inherently antithetical to public responsiveness and the national interest is not a distinctly twentieth century, 'third-world' contention. Contemporary claims of lost 'economic sovereignty' are not at all new, and are in fact almost as old as the modern conception of statehood itself. The claim that a sovereign state, however it is internally constituted, should be attentive to the national interest, does not need to reach the extremes of Sieyès and Hume. This 'outcome orientation' could result in a separate requirement that government action should be responsive to the *public* needs of a state, whether those are defined in statist, rule-of-law, or popular terms. This impulse might be operationalized in a requirement that valid sovereign debt at least ostensibly serve the public interest of the state, as distinct from the merely personal interest of a ruling elite masquerading as a modern officialdom.[87]

Opening Space for Theoretical Reflection and Empirical Observation

This section has categorized four basic schools of thought on sovereignty – three process-oriented and one outcome-oriented approach – and identified resonances across the disciplines of political theory, law, and international relations within each school. Although this study focuses on issues of sovereignty underlying the sovereign debt regime, the general framework is relevant for different arenas of sovereign contract and obligation. The basic classifications and findings of this analysis are presented schematically in Table 2 (two pages).

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[84] See Emmanuel Sieyès, "Further Developments on the Subject of a Bankruptcy," appendix to "Views of the Executive Means," *Political Writings*, 60-67.

[85] David Hume, "Of Public Credit (1752)," *Essays: Moral, Political, and Literary*, eds. T.H. Green and T.H. Grose (New York: Longmans, Green, 1889) 360-361, as cited in Istvan Hont, "The Rhapsody of Public Debt," *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, Mass.: Harvard University Press, 2005) 325.

[86] Hont, "Rhapsody of Public Debt," 332.

[87] This insistence on legitimate purpose has a corollary in domestic business transactions. Although the officers and directors of a company or corporation may have considerable leeway in making decisions on the company's behalf, these decisions must at least ostensibly be in the best interests of the company itself. This constitutes the core of the "business judgment rule," which provides a bar against the use of corporate contracts to serve illegitimate or poorly considered ends. Perhaps the major legal case grounding this rule is *Sinclair Oil Corporation v. Levien*, 280 A.2d 717 (Supreme Court of Delaware, 1971). For a recent overview, see Kenneth B. Davis, Jr., "Once More, the Business Judgment Rule," *Wisconsin Law Review* (2000): 573 et seq., which discusses explanations for the business judgment rule and how it relates to the legal duty of care.

TABLE 2:
Sovereignty Frameworks and their Ramifications for Binding International Action

Discourse	Internal Sovereignty	External Sovereignty	Related Explanatory Framework	Ability to Make Binding International Contracts
Statist Sovereignty	Relationship of command. Sovereign government is supreme; stands above and makes the law. Pre-moderns & Bodin (continuous); Hobbes (discontinuous)	Sovereign government is recognized if it has effective control over a territory, regardless of the internal mechanisms of control. Oppenheim	The state is understood to be a 'unitary black box' whose internal machinations are irrelevant to foreign interactions. Waltz	Minimal requirement for competence/ agency. Even those that rule by force and fail to follow their own law may still be able to make international agreements. Continuous: Agreements bind successors Discontinuous: Sovereign retains repudiation option
Rule-of-Law Sovereignty	Sovereign government is both created/ legitimated and limited through rule of law. Weber; Kelsen; Arendt	Sovereign government is valid/recognized if it exercises control through law/legal mechanisms. Taft	Internal respect for rule of law/ constitutionalism may affect foreign relations (variants of Liberal theory).	International acts are valid and binding if they follow internal requirements for competence or ratification, even if those mechanisms are non-democratic.

Discourse	Internal Sovereignty	External Sovereignty	Related Explanatory Framework	Ability to Make Binding International Contracts
Popular Sovereignty	Sovereign government must reflect the consent or choice of the ultimate 'sovereign,' the underlying people. Rousseau; Sieyès; Paine	Sovereign government is valid/recognized if it is popularly authorized. Wilson	The internal governmental form or local interests are central to understanding state action (variants of Liberal theory, i.e. democratic peace). Kant	Sovereign action is internationally valid if the government is popularly authorized. Basic rule of law/constitutionalism alone is insufficient to bind if it does not reflect the people's underlying consent.
Outcome Orientation	Process of internal rule is irrelevant so long as it produces acceptable outcomes.	Government is externally valid/recognized if it produces positive outcomes for the state's population. Sieyès; Hume		Minimal agency/ competence requirements. Sovereign contract/ action is valid and binding if its (intended) outcome benefits the public.

Two caveats are important before going any further. First, this undertaking should not be misunderstood as an attempt to provide anything close to a sufficient interpretation of the thinkers mentioned. The theorists within each school disagree with each other in myriad ways and may on some questions have more in common with scholars I have categorized as belonging to a different approach. However, this first cut at categorization does highlight how different paradigms of sovereignty result in divergent expectations about both government competence for sovereign contracts and the subsequent continuity of those contracts.

Second, the preceding discussion should not be taken as a *normative* assessment of concepts of sovereignty in sovereign debt. While a sharper framework for talking about these issues enables clearer political and moral discussion – just as it should enable stronger empirical work – the formulations themselves are intended as *analytical* building-blocks. By noting the link between internal forms of sovereignty (the relationship between ruler and ruled) and external forms of sovereignty (involving the recognition and treatment of sovereignty in international relations), it is easier to see how the enforcement practice of any sovereign debt regime both depends upon and reinforces a given sovereignty paradigm. The doctrine of sovereign continuity, a central philosophical support for the current sovereign debt regime, rests

on and gives force to a statist conception of sovereignty. Laying bare the theoretical claims implicit in sovereign debt practices can sharpen our analysis of the lending system and provide the groundwork for more clear-eyed policy assessments for the future. Conceiving of these schools as 'ideal types' can also help to identify historical variation in the conceptual framework that underlies sovereign debt. In the historical discussion of the following chapters, I will use them as such to underscore the shifting claims made about sovereign debt in the twentieth century.

CASE STUDIES IN THE CONSTRUCTION OF THE SOVEREIGN DEBT REGIME

The impressive lineage of the alternatives to statist sovereignty in international relations only emphasizes the theoretical instability of a consistent repayment rule in the debt regime. Such openness emphasizes the need for the closer empirical study of the remainder of this book, which affirms that the current approach is far from historically consistent. I suggested above that the issue of odious debt offers some traction for studying the market structures and political concerns in the debt regime at any particular moment, laying bare the political question at its heart. And two factors in particular – the degree of creditor consolidation and broader sovereignty norms in the international arena – are likely to be central in any particular interaction. But among the many possible debt interactions that could raise odious debt issues, which would be most fruitful to study? And what role would the study of such interactions play in the larger argument?

The historical approach that I use in this project incorporates case studies to highlight the theories of sovereignty underlying sovereign debt issues at different points across the twentieth century. My larger goal is to ask how the statist conceptual and discursive framework in sovereign debt, along with its associated practice of continuous repayment, emerged and solidified over non-statist alternatives. In service of this goal, I highlight the importance of paying attention to the contingent historical factors that enable or disable certain possibilities at key historical moments. As such, different cases play very different roles in the study and thus are given varying weight and space in the analysis. Through the case studies of the Soviet Union and Costa Rica in Chapters 3 and 4, I argue that the early twentieth century constituted a potential turning point in the debt regime – an open moment in the conception of sovereignty underlying sovereign debt and reputation. These larger case studies reveal the possibility that an alternative discourse and practice could have been adopted more broadly. This is not to say that state and creditor decisions emanate directly from these larger structures; this gives insufficient weight to the agency of particular decision-makers and social groups. Rather, the focus is on how an action taken by a particular state – and perhaps a particularly brave or foolhardy state – was enabled by broader circumstances and in turn could have enabled further movement in a given discourse and practice.

The openness that these two cases reveal about the early twentieth century raises questions about why additional cases did not materialize in the mid- and late twentieth century. In Chapters 5 and 6, I provide a conceptual history to highlight how new material and ideational circumstances emerged in ways that undermined the early twentieth century potential. Part of the historical puzzle for my analysis is precisely the *absence* of cases that pose a serious challenge to the dominant discourse and practice. While my interest in studying this lacuna undermines the plausibility of a pure case study method, these chapters highlight several situations in which a challenge to the statist framework was either attempted or would have been

most likely to occur.[88] Just as state action can highlight the enabling potential of broader material and ideational frameworks, partial state action or the absence of state action where it might otherwise be expected can illustrate how a particular context closed off certain possibilities.

In studying a particular country case, therefore, my goal is not dispositively to explicate state or creditor action in the international economic arena. Rather, it is to understand how discursive frameworks and material conditions constitute certain behavioral possibilities and thus enable (or disable) the decisions of international actors. Martha Finnemore points out that, "analysis of this type is less directed toward answering the question 'why' than the question 'how,' or, more specifically, 'how possible'."[89] In other words, while some projects focus on why actors select one path over another, this approach focuses instead on the prior issue of how a potential pathway is constructed or closed off. In effect, a state's ultimate reason for taking a particular decision is less central, while the discursive framework and social conditions that make that decision conceivable or plausible constitute the core of my study.

In considering the degree to which a discourse and practice are at a turning point in a particular case study, I ask three sets of questions: First, to what degree are principles/claims presented and actions taken that challenge the dominant discourse and practice in a given issue area? Although such articulations will frequently be made by states themselves, this is not necessarily the case. While the expression of an insurgent claim may enable certain possibilities in state action, that claim may be made by other actors. Given that norms are "expectations of appropriate action shared by a community of actors," other 'members of the community' may well provide the enabling articulation for states. Second, what is the immediate argumentation or response by other relevant actors for a given issue? Such actors may include interlocutors in a particular claim or dispute, external decision-makers, and other relevant figures. Such a response may be hostile, receptive, or may vary across actors. The nature of the response is important as well. Are interlocutors hostile to the formulation of a claim, its practical effect, or both? Part of the claim may be rejected (i.e. the existence of a right to repudiate) while another part is implicitly accepted (i.e. that after repudiation a state should be treated as an 'unseasoned borrower' rather than a 'lemon'). Finally, what is the longer-term reaction of the relevant actors (i.e. creditors and government actors who serve as gatekeepers)? To what degree is this response uniform? In the case of sovereignty and odious debt treatment, is creditor willingness or unwillingness to lend a response to an assessment of creditworthiness (which implicitly suggests a theory of sovereignty, as discussed above) or are there other issues involved?

As should be clear from the foregoing, the particular characteristics that render a given moment more or less open are likely to vary across case and historical period. Just as the uniform repayment norm itself is more complex than it first appears, its historical study escapes easy simplification. I have identified creditor interactions and broader norms of sovereignty as key in shaping possibilities in sovereign debt and reputation. However, the particular historical

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[88] [*Possible here*: Note/Appendix on selection of particular cases. I've removed this from the text as it seemed too technical for the narrative but may include a shortened version as a footnote or the longer version as a brief appendix. Though I would welcome input on whether such a note is even necessary.]

[89] Finnemore, *Purpose of Intervention*, 15. For further discussions of this distinction, see also Alexander Wendt, "On Constitution and Causation in International Relations," *Review of International Studies*, vol. 24, no. 5 (1997): 101-117; Alexander Wendt, *Social Theory of International Politics* (Cambridge, UK: Cambridge University Press, 1997); James Fearon and Alexander Wendt, "Rationalism versus Constructivism: A Skeptical View," *Handbook of International Relations*.

contours of these factors – and the ways in which specific actors react to these larger structures – are necessarily specific to time and place.

DISTINGUISHING GENEALOGY FROM HISTORY

Mainstream approaches to international finance implicitly assume that it is theoretically untenable and impracticable to ask about the concept of sovereignty underlying debt and reputation, or to suggest alternatives to the current expectation of consistent repayment. These suppositions act as a bulwark against real engagement with proposals to alter the global debt regime in any significant way. However, the political theory and expected economic practice surrounding sovereign debt are not as unvarying as they initially appear. The assumptions of political neutrality, reputational stability, and creditor uniformity do not hold. And different concepts of sovereignty suggest alternative plausible approaches to debt obligations. As the following chapters emphasize, this theoretical openness is joined by historical variation, in that the practice and treatment of debt repayment over the twentieth century is also not uniform. The norm of debt continuity – even when it is dominant – is not an ahistorical market principle but rather is actively constructed and supported by changing market structures and broader political ideologies and norms of sovereignty.

The following chapters construct a genealogy of debt and reputation to the present day. This approach does not constitute a traditional narrative history of the sovereign debt regime, sovereign debt default, or the rise and fall of capital flows. Although the following chapters progress in roughly chronological order, they only briefly touch upon important topics that are well covered elsewhere (for example, the financial crises of the 1990s). As such, I make use of key historical events insofar as they are relevant to understanding the space for alternative practices and conceptions of sovereignty in debt and reputation. The next two chapters take a closer look at repudiations of arguably odious debt that took place in the post-World War I period – the Soviet repudiation of Tsarist debt and the Costa Rican repudiation of contracts signed by the dictator Frederico Tinoco. These cases highlight that there was indeed the potential for movement in the uncertainty of the post-World War I world. They also emphasize that the norm of debt continuity is historically under-determined and may be strengthened or weakened by political, economic, and ideological context.