Brooklyn Law Review

Volume 78 | Issue 4 Article 11

2013

Greece & the Odious Debt Doctrine

Evelyn D'Angelo

Greece & the Odious Debt Doctrine

INTRODUCTION

Sovereign debt and subsequent repayment problems are not recent phenomena. In fact, the first sovereign default may date as far back as "the fourth century B.C., when ten out of thirteen Greek municipalities . . . defaulted on [their] loans from the Delos Temple."[1] Sovereign default is not only an ancient occurrence, but it is also a historically pervasive and enduring one. While the sixteenth century observed a particular prevalence of sovereign debt restructurings and defaults,[2] the nineteenth century witnessed a significantly widespread and recurrent eruption of national debt crises.[3] Indeed, given the longevity and frequency of sovereign debt problems, it may be curious that our modern world still struggles to resolve these issues as much as it does.

When confronted with the problem of struggling sovereign debtors, perhaps one of the creditor's most challenging tasks is to determine where to demand one's dues and where to acquiesce. An annual report of the U.N. Commission for International Law reflects on this issue:

> A state cannot . . . be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what may be reasonably expected of a State in the same manner as with an individual.[4]

---

[1] FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 3 (2006) (citing MAX WINKLER, FOREIGN BONDS, AN AUTOPSY: A STUDY OF DEFAULTS AND REPUDIATIONS OF GOVERNMENT OBLIGATIONS 22 (1933)).

[2] *See id.*

[3] *See id.*

[4] Special Rapportuer on State Responsibility, *Addendum—Eighth Report on State Responsibility; The Internationally Wrongful Act of the State, Source of International Responsibility*, Int'l Law Comm'n, ¶ 25, U.N. Doc. A/CN.4/318/Add.5-7 (Feb. 29, 1980; June 10, 19, 1980) (by Robert Ago), *reprinted in* [1980] Y.B. Int'l Comm'n, 23-24, U.N. Doc A/CN.4/333 (Part 1) (citations omitted), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_315.pdf (comment from South African Government).

This touches upon a key issue: at the point when a creditor is dealing with a financially unstable sovereign debtor, the creditor must re-examine the *reasonableness* of its expectations of repayment and adjust accordingly.

Today, over two millennia after its Delos Temple event marked sovereign default history, the state of Greece steps back into the debt spotlight. The Greek debt crisis began to attract notice in late 2009, and by 2012, Greece had experienced a widening of bond yield spreads,[5] downgrading of their bond rating,[6] and two bailout loans from the International Monetary Fund ("IMF") and the Eurozone countries,[7] conditional on harsh austerity measures.[8] Before the last bailout loan took place, great concern existed that Greece would lose its already unstable economic footing and plunge into default by mid-March 2012.[9]

One theoretical solution to resolve Greek's debt crisis is the doctrine of odious debt, which has attracted significant attention from the internet and other media outlets.[10] While the

---

[5] GEORGIOS P. KOURETAS, THE GREEK DEBT CRISIS: ORIGINS AND IMPLICATIONS 2 (2012), *available at* http://www.frbatlanta.org/documents/cenfis/eventscf/11sov_debt_Kouretas.pdf; *see also* Dave Kansas, *Greek Bond Yield Spreads Widen, Restructuring Chatter Grows*, WALL ST. J. BLOG (Apr. 27, 2011), http://blogs.wsj.com/marketbeat/2011/04/27/greek-bond-yield-spreads-widen-restructuring-chatter-grows/.

[6] Deepa Babington & Harry Papachristou, *Fitch Downgrades Greece on Debt Swap Plan*, REUTERS (Feb. 22, 2012), http://in.reuters.com/article/2012/02/22/greece-fitch-idINDEE81L0CP20120222.

[7] The "Eurozone" refers to the collective body of European Union countries which have adopted the euro as their currency. As of June 2013, the Eurozone consisted 17 member states. *See generally* EUROZONE PORTAL, www.eurozone.europa.eu.

[8] *See* Katie Allen et al., *Eurozone Debt Crisis: Greek Timeline*, GUARDIAN (Nov. 17, 2011), http://www.guardian.co.uk/business/2011/oct/31/eurozone-debt-crisis-greece-crisis-timeline; *see also* Lesley Wroughton, *UPDATE 2-IMF Approves New Greek Bailout, Warns on Missteps*, REUTERS (Mar. 15, 2012), http://www.reuters.com/article/2012/03/15/imf-greece-idUSL2E8EF5DV20120315.

[9] Greece was scheduled to tender a bond payment on March 20, 2012, and prior to the second rescue package, there existed doubt that Greece would be able to honor this payment. *See* Adam Ewing & Marcus Bensasson, *Greece Is Insolvent, Will Default on Debt: Fitch*, BLOOMBERG (Jan 17, 2012), http://www.bloomberg.com/news/2012-01-17/greece-is-insolvent-will-default-on-its-debt-fitch-says.html. For example, Fitch Ratings, who had downgraded Greece's credit ratings "to CCC, seven levels below investment grade," was among these skeptics. *Id.* "The so-called private sector involvement, for us, would count as a default, it clearly is a default in our book," Fitch Ratings Managing Director Edward Parker reported, "[s]o it won't be a surprise when the Greek default actually happens and we expect it one way or the other to be relatively soon." *Id.*

[10] For example, proponents of cancelling Greece's debt have created Facebook pages to the cause. *See Cancel Illegitimate and Odious Debt: The Case for Greece*, FACEBOOK, https://www.facebook.com/pages/Cancel-Illegitimate-and-Odious-Debt-the-Case-for-Greece/102260499854294 (last visited June 29, 2013); *see also Greece Debt Free*, FACEBOOK, https://www.facebook.com/GreeceDebtFree (last visited June 29, 2013). An additional example is the book published by Jason Manolopoulos, advocating for Greece's adoption of the odious debt doctrine. *See generally* JASON MANOLOPOULOS,

odious debt doctrine has not yet formally entered the systems of international law,[11] it finds its momentum through its practical and moral principles.[12] The doctrine of odious debt is based on the concept that "the debt [that] despots incur should not form a continuing obligation for states emerging from the grips of a despotic government, at least to the extent that the debt did not benefit the population that existed under the prior regime."[13] The generally accepted definition of "odious debt" is debt which was incurred without the consent of the people, which did not benefit the people, and which the creditors knew was odious.[14] Accordingly, under the doctrine, if a debt is shown to be odious, it may be cancelled altogether.[15] This note seeks to analyze the odious debt doctrine within the context of Greece's debt crisis: that is, whether the odious debt doctrine should be applied at all, and if it should be, whether Greece's debt falls within the doctrine's meaning of "odious."

This analysis concludes that Greece should not be released of its repayment obligations under the odious debt theory, based on three primary findings: (1) at a universal

---

GREECE'S "ODIOUS" DEBT (2011). Also, the results generated by a Google search of Greece and odious debt demonstrate the plethora of news commentaries, periodicals, private blogs, and public forums that exist to debate the issue.

[11] *See* Bradley N. Lewis, *Restructuring The Odious Debt Exception*, 25 B.U. INT'L L.J. 297, 298 (2007); *see also* Robert Howse, *The Concept of Odious Debt in Public International Law* 6-7, 9 (United Nations Conference on Trade and Development, Discussion Paper No. 185, 2007), *available at* http://www.unctad.org/en/Docs/osgdp20074_en.pdf. The only international convention that addresses debt repayment is the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, which contemplated but ultimately rejected a proposal to incorporate "odious debt" into the Convention's definition of "State debt." *See id.* at 9*; see also* Report of the International Law Commission on the Work of Its Thirty-third Session, 36 GAOR Supp. No. 10, U.N. Doc A/36/10 (1981) *reprinted in* [1981] Y.B. Int'l L. Comm'n, 78-80, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 2). The International Law Commission rejected the proposal on the basis that "the definition of State debt should be limited to financial obligations arising at the international level, that is to say, between subjects of international law" and, in contrast, the "[d]ebts owed by a State to private creditors . . . fell outside the scope of the present draft." *Id* at 79-80. The International Law Commission concluded instead that it "was of the opinion . . . that the rules formulated for each type of succession of States might well settle the issues raised." *Id*. at 79.

[12] *See* Lewis, *supra* note 11, at 298.

[13] Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of A Functional Odious Debt Doctrine*, 49 HARV. INT'L L.J. 109, 109-10 (2008).

[14] *See* Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1218 (2007); *see also* Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605, 606 (2007) (citing Jeff King, *The Odious Debt Doctrine in International Law: Definition and Evidence*, *in* Ashfaq Khalfan, Jeff King & Bryan Thomas, *Advancing the Odious Debt Doctrine* 13-52 (CISDL Working Paper No. COM/RES/ESJ, 2003), *available at* http://www.cisdl.org/pdf/debtentire.pdf).

[15] *See* Buchheit et al., *supra* note 14, at 1218.

level, the odious debt doctrine should not be applied because of its critical inherent doctrinal and administrative failings; (2) even if the odious debt doctrine were applied, the serious policy risks that accompany its use mandate a narrow interpretation of the doctrine, so as to limit its reach to only exceptional cases; and (3) under a narrow interpretation of the odious debt doctrine, Greece would not be eligible to cancel its debt.

Parts I through III of this note will present the background information necessary for analyzing Greece's sovereign debt. Part I will examine some of the problematic characteristics of sovereign debt generally, which set the sovereign apart from other debtors. Part II will lay out a timeline of Greece's debt history. Part III will introduce the doctrine of odious debts by presenting the doctrine's elements, underlying principles, and history of use.

Parts IV, V, and VI will analyze the substance of the odious debt doctrine and its application to Greece's situation specifically. Part IV will first introduce the fundamental problems of the odious debt doctrine—its doctrinal deficiencies and administrative shortcomings—showing how the doctrine fails as a workable rule. These findings counsel against the use of the doctrine altogether. Part V will break down the doctrine into two categories—"odious debt" and "odious regime"—and will explain how those terms produce liberal and narrow applications of the doctrine. This Part will proceed to introduce the serious policy problems that a liberal approach implicates, and will conclude that therefore only the narrow interpretation is warranted. Lastly, Part VI will place this analysis within the context of Greece specifically. First, this Part will apply the narrow and liberal interpretations of the odious debt doctrine to Greece's situation, ultimately finding that Greece would not be eligible under the narrow interpretation and accordingly should not repudiate its debts. Finally, in offering some alternatives to the odious debt doctrine, this Part will recommend some other solutions for Greece to resolve its debt crisis.

I. THE CONUNDRUM OF THE SOVEREIGN DEBTOR

As one commentator points out: "[S]overeign debt is a very different 'animal' from normal debt."[16] IBISWorld, a

[16] "Kleingut," *Lessons to be Learned from the Greek Past*, BLOGSPOT (Jan. 24, 2012, 1:41 PM), http://klauskastner.blogspot.com/2012/01/lessons-to-be-learned-from-greek-past.html.

market research organization, opined that "there is no clear-cut solution to the problem" of the sovereign debt crisis.[17] What is the nature of sovereign debt such that it obscures clear-cut solutions from view and sets the sovereign apart from other debtors? This Part will investigate that question.

A. Enforcement Problems

One aspect of sovereign debt that makes the sovereign unique among debtors is the lack of an enforcement scheme for compelling a sovereign to repay. The following analysis will investigate two particular phenomena that restrict a creditor's ability to enforce repayment of a sovereign loan: namely, the doctrine of sovereign immunity and the sovereign's lack of seizeable assets.

First, the concept of "sovereign immunity" is a significant obstacle to compelling a sovereign to repay, because this doctrine essentially provides the state with a shield to ward off creditors from obtaining an enforceable judgment. Sovereign immunity is an "undisputed principle of customary international law,"[18] which generally immunizes a sovereign state from the jurisdiction of a foreign state's courts.[19] Since sovereign immunity generally protects the sovereign from both criminal and civil liability,[20] this doctrine presents a significant obstacle for creditors seeking satisfaction of their debts through judicial intervention.

Despite widespread recognition of the principle of sovereign immunity, no general consensus has been reached as to how it should be applied in international law,[21] and there is

---

[17] TOON VAN BEECK, BE AWARE AND PREPARED: A SOVEREIGN DEBT CRISIS IS NEAR 3 (June 2010), *available at* http://www.ibisworld.com/Common/MediaCenter/Special%20Report%20June%20Sovereign%20Debt.pdf.

[18] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, [Ch. 5, introductory note] (1986); *see also* TOM MCNAMARA, A PRIMER ON FOREIGN SOVEREIGN IMMUNITY 1 (2006), *available at* http://www.dgslaw.com/documents/articles/McNamara1.pdf.

[19] *See The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (finding that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself").

[20] Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 214. But many states have enacted restrictive versions of the sovereign immunity laws that limit the protection of criminal liability when the transgression involved a violation of human rights. For a more extensive discussion, see Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2687-2703 (2011).

[21] *See* Stephens, *supra* note 20, at 2691 (finding that "[t]he limited domestic and international codification [of sovereign immunity] exacerbates the lack of clarity as to the rules governing sovereign immunity," and that any existing domestic codifications vary between an "absolute" form and a "restrictive doctrine," the latter of

moreover very limited domestic codification of the rules governing this doctrine.[22] While two international treaties have been drafted on the subject, neither has received enough signatures to be enacted and enforced.[23] As a result, sovereign immunity principles are generally governed by "uncodified domestic rules, often focused on domestic interpretations of customary international law, as filtered through each [nation's] constitutional and judicial doctrines."[24] Thus, while the principle of sovereign immunity in itself presents an imposing obstacle in a creditor's way, the additional lack of uniformity among sovereign immunity codes further complicates repayment enforcement.

Although sovereign immunity creates a formidable hurdle for sovereign debt enforcement, other obstacles to collection exist that also serve to distinguish sovereigns from other debtors. For example, the recourse of seizing the debtor's assets is much more difficult and complicated with sovereign debtors. To illustrate this concept, consider the seizure of a corporate debtor's assets. If a corporation fails to repay its debt, unpaid creditors can seek satisfaction by dismantling the business entirely and using the proceeds to pay back the debts.[25] The result is similar in the context of an individual debtor, where a creditor can pursue repayment by acquiring a court order commanding the individual debtor to pay or permitting a seizure of the debtor's assets to satisfy the debt. But no parallel repayment scheme exists in the case of the sovereign debtor. While a corporation may be dissolved to satisfy debts, "no creditor has the ability to dismantle or liquidate a

---

which "has led to an 'extraordinary complexity and variety in the emerging rules,' with consensus 'only at a rather high level of abstraction'").

[22] *See id.* (finding that "[v]ery few states even have domestic statutes governing foreign sovereign immunity").

[23] One of these treaties, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, will come into force when thirty states have ratified it. *See* The United Nations Convention on Jurisdictional Immunities of States and Their Property, U.N. Doc A/59/38, Art. 30 Dec. 2, 2004; Stephens, *supra* note 20, at 2692 n.143. As of June 2013, only fourteen states had become parties to the treaty (Austria, France, Iran, Italy, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden, and Switzerland). For the status of ratifications, see U.N. Treaty Collection, *Multilateral Treaties Deposited with the Secretary-General*, http://treaties.un.org/pages/ParticipationStatus.aspx (last visited June 29, 2013). The other treaty, *The European Convention on State Immunity*, has been ratified by only eight states as of June 2013. For the status of its ratifications. *See* The European Convention on State Immunity, E.T.S. 074, 11 I.L.M. 470, May 16, 1972, *available at* http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG (last visited June 29, 2013).

[24] Stephens, *supra* note 20, at 2692.

[25] *See* Jonathan Sedlak, *Sovereign Debt Restructuring: Statutory Reform or Contractual Solution?*, 152 U. PA. L. REV. 1483, 1487 (2004).

country."[26] And unlike the seizure of an individual debtor's assets, the seizure of a sovereign's assets would involve an extremely political and complex—if not impossible—process.

B. Successive Debt & Non-Financial Priorities: An Unusual Combination

In addition to the enforcement problems associated with sovereign debt, another unique disadvantage for creditors is that sovereign debt features an unusual and problematic combination of individual and corporate debt characteristics. That is, on one hand, the sovereign debtor's priorities with respect to repayment resemble an individual debtor's, while the successive nature of sovereign debt reflects corporate debt. In order to demonstrate how this combination puts creditors at an unusual disadvantage, each of these features will be explained in turn.

In terms of the sovereign debtor's priorities when it comes to repayment, sovereign debt is more analogous to individual debt than to corporate debt.[27] Understanding this concept requires a look at corporate and individual debtors specifically. On one hand, a corporation is essentially an "investment vehicle" for its shareholders, meaning that the decisions for the life of the corporation are based entirely on the goal of obtaining investor returns.[28] For this reason, when faced with corporate bankruptcy, a corporate debtor would rather repay its debt by liquidating assets than face default.[29] An individual debtor, on the other hand, would likely prioritize her quality of life and would rather opt for an "opportunistic default" than give up certain benefits, such as decent shelter, a cell-phone plan, or clothing for her children.[30] Similarly, a sovereign state does not view its debt options through the lens of obtaining profits and investment returns like a corporation, but instead considers political, social, and economic consequences.[31] Like the individual debtor, the sovereign debtor will also likely choose an "opportunistic default" before turning to drastic

---

[26] *Id.* at 1487.

[27] Adam Brenneman, Comment, *Gone Broke: Sovereign Debt, Personal Bankruptcy, and a Comprehensive Contractual Solution*, 154 U. PA. L. REV. 649, 651 (2006).

[28] *See id.* at 658 & n.36 (citing Robert K. Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring*, 53 EMORY L.J. 1159, 1163 (2004) ("describing corporations as investment vehicles in a discussion that distinguished sovereigns and corporations")).

[29] *Id.* at 657-59.

[30] *Id.*

[31] *Id.* at 658-59.

measures to finance repayment such as cutting social programs or depleting environmental and cultural resources.[32]

In another respect, however, the sovereign debtor is most analogous to the corporate debtor, since both sovereign and corporate debt do not have the option of debt cancellation after an average adult life as individual debt does. In other words, Uncle Rob's gambling debts extinguish at his death and do not pass on to his successors. In contrast, corporate debts are "adhesive" in that the corporation's debts continue indefinitely until repayment, regardless how many times the board of directors changes management, the corporation changes shareholders, or the corporation is sold to another entity.[33] Similarly, no matter how many times power changes hands or the government changes forms, a sovereign's debt also persists.[34] Thus, sovereign debt is also remarkably adhesive and, in this way, more closely resembles corporate than individual debt.

This adhesiveness allows the sovereign debt to perpetually linger—even as the sovereign continues to borrow from other creditors—which poses some risks to the creditor. For example, the state of Kenya still owes debts that date back as far back as 1971 and which are not scheduled for full repayment until 2052.[35] The longevity of these debts span almost double the adult period of a human life;[36] thus, were the state of Kenya an individual debtor, the loans may have been cancelled twice over in that timeframe. Moreover, sovereign debtors may likely continue to accrue additional creditors by increasing their borrowing in order to meet public needs and existing obligations.[37] A creditor of sovereign debt, therefore, potentially faces increased competition for repayment, since

---

[32] *Id*.

[33] Buchheit et al., *supra* note 14, at 1207.

[34] *See id.*

[35] Alphonce Shiundu, *Kenya: Red Flag Raised Over Debts From Anglo-Leasing*, ALLAFRICA (Aug. 1, 2011), allafrica.com/stories/201108020085.html.

[36] For the purposes of this note, the "adult period of a human life" calculates to approximately 48-52 years. This is from the viewpoint that one's adult life begins around 20 years old (that is, when an individual is likely adult enough to contract a debt), and ends around 68-72 years old, which is the global life expectancy according to a 2011 study. *See* Tom Miles, *Global Life Expectancy: Life Spans Continue To Lengthen Around The World, WHO Says*, HUFFINGTON POST (May 15, 2013) www.huffingtonpost.com/2013/05/15/global-life-expectancy-span-world_n_3281211.html.

[37] For example, since 2009, five countries in the Eurozone—Greece, Ireland, Portugal, Spain, and Cyprus—have had to borrow money from other European countries and the IMF in order to avoid defaulting on their existing debts. *See* Associated Press, *Eurozone's 5 bailout packages at a glance*, FINANCIAL POST (Mar. 25, 2013), http://business.financialpost.com/2013/03/25/cyprus-bailout-eurozone-rescue/.

not only will the sovereign debtor be simultaneously repaying all loans, longevity thereof notwithstanding, but additional creditors may likely continue to accrue.

Thus, a creditor faces unusual risk by lending to a sovereign because repayment is threatened by the dual hazard of (1) the sovereign's increased disincentive to repay the debt because of the state's non-financial (e.g. social, cultural, environmental) priorities, a risk also not present with corporate borrowers, and (2) increased competition by other creditors because of the successive nature of the sovereign's debt, a risk that does not exist with individual borrowers. These challenges present an unusual conundrum for concerned creditors and struggling sovereign debtors as they seek solutions to debt repayment.

The doctrine of odious debt aims to tackle the problem of sovereign debt repayment, at least in part, by providing the state with an "easy way out" when the debts are "odious."

II. A TIMELINE OF GREECE'S DEBT

A sovereign debtor who has recently stepped into a media spotlight is the state of Greece. Before this note can consider Greece's economic situation through the lens of the odious debt doctrine, an understanding of Greece's debt crisis, especially the source and nature of Greece's debt itself, is required. This Part will begin by presenting a timeline of Greece's financial history, which introduces the origins and application of Greece's debts. These facts are especially important because they inform key elements of the odious debt doctrine. This Part will then recount Greece's interaction with the European Union (the "EU") on issues concerning Greece's deficit—namely, Greece's initial efforts to conceal the deficit from the European Union before ultimately revealing it—and then will conclude by describing the international and domestic reactions to Greece's attempts to resolve its debt crisis.

A. When and How Greece Used Its Debt: 1970–2009

Increased public debt has been a "feature of the Greek economy" since the late 1970s. At that time, public debt was only 25 percent of Greece's gross domestic product ("GDP"), and the government borrowed externally only for purposes of investment.[38] This changed in 1981, however, when a socialist

[38] *See* KOURETAS, *supra* note 5, at 4.

government came into power.[39] At that point, Greece began spending "to boost consumption in an effort to raise the living standard of Greeks."[40] During the same time, however, Greece was experiencing a period of stagflation caused by the 1979 oil shock,[41] which persisted from 1981-1983.[42] Because of the government's public spending during a period of stagnant economic growth, the Greece government resorted to heavy borrowing through the early to mid-1980s to stop the resulting rising deficits in the public sector.[43] Starting at 25% in 1980, the debt-to-GDP ratio reached 80% by the end of that decade.[44] "This upward trend continued" until it reached 110% during 1993, but then experienced a short plateau due to the Treaty of Maastricht's influence.[45]

By 1994, the Treaty of Maastricht (formally, the Treaty of Maastricht on European Union) had been in effect for two years, which called for the establishment of the European Monetary Union (EMU).[46] Under this treaty, the EU allowed only those states whose total sovereign debt fell below 60% of GDP to join the Eurozone, among other requirements.[47] In an effort to qualify, the newly-elected socialist government in Greece effected a stabilization program in 1994 to stop the rise of Greece's debt, resulting in a "steady public debt-to-GDP ratio at 110%" over the following five years.[48] In 2001, although Greece still did not meet the qualifying standards, Greece

---

[39] *Id.*

[40] *Id.*

[41] *See* George Alogoskoufis, *Greece's Sovereign Debt Crisis: Retrospect and Prospect*, 16 (Hellenic Observatory, European Institute, Hellenic Observatory Papers on Greece and Southeast Europe No.54, 2012), *available at* http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Publications/GreeSE/GreeSE-No54.pdf.

[42] *See id. at* 12.

[43] *Greece—Overview of economy*, ENCYCLOPEDIA NATIONS (last visited Apr. 17, 2013), http://www.nationsencyclopedia.com/economies/Europe/Greece-OVERVIEW-OF-ECONOMY.html.

[44] *See* KOURETAS, *supra* note 5, at 4.

[45] *Id.*

[46] *See* Joshua M. Wepman, *Article 104(c) of the Maastricht Treaty and European Monetary Union: Does Ireland Hold the Key to Success?*, 19 B.C. INT'L & COMP. L. REV. 247, 247 (1996).

[47] *See id.* at 251-52 & n.38, *see also* Treaty on European Union, 35 O.J.E.C. 92/c 224/01, 224/35 & 24/120 (Aug. 31, 1992), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1992:224:FULL:EN:PDF (stating that "Member States shall avoid excessive government deficits" by not exceeding a "reference value," subject to some exceptions, and providing "reference values" to be "3% for the ratio of the planned or actual government deficit to gross domestic product at market prices;" and "60% for the ratio of government debt to gross domestic product at market prices").

[48] *See* KOURETAS, *supra* note 5, at 4.

managed to join the Eurozone nonetheless by deceitfully submitting incorrect statistics.[49]

Generally, adoption of the euro proved to be particularly beneficial to the interest rates of countries like Greece, who hitherto had experienced "high levels of inflation and a lack of economic policy credibility."[50] The ability to borrow in euros produced substantially lower interest rates. For example, during the 1990s, Greece faced interest rates between 10% to 18%, but after Greece's entrance to the Eurozone, interest rate fell dramatically to 2%–3%.[51] Taking advantage of these significantly lower interest rates, the Greek government started borrowing heavily in the years following its admission to the Eurozone while at the same time increasing government spending.[52] Between 2001 and 2009, the Greece government "ran fiscal deficits of 6% of GDP on . . . average,"[53] while its debt-to-GDP ratio remained around 100%, which was abnormally high for a Eurozone member.[54] Among other increases to social programs, the Greek government used these funds to almost double public sector workers' wages.[55] Considering that Greece's public sector accounts for about 40% of GDP and that wages in Greece's public sector are on average almost one and half times higher than in the private sector, these wage increases reflected substantial government spending.[56] Also, Greece provided the public with a pension equating to 92% of their pre-retirement salary, "one of the most generous pension systems in the world."[57] Additionally, Greece was spending a substantial percentage of its GDP on its military.[58]

The 2004 Athens Olympic Games also accounted for significant government spending. In preparation for this world

---

[49] *See* Allen et al., *supra* note 8.

[50] *See* KOURETAS, *supra* note 5, at 2.

[51] *See* Harry Wallop, *Greece: Why Did Its Economy Fall So Hard?*, TELEGRAPH (Apr. 28, 2010), http://www.telegraph.co.uk/news/worldnews/europe/greece/7646320/Greece-why-did-its-economy-fall-so-hard.html.

[52] *See Q&A: Greece's Economic Woes*, BBC NEWS (May 2, 2010), http://news.bbc.co.uk/2/hi/business/8508136.stm.

[53] *See* KOURETAS, *supra* note 5, at 3.

[54] *See* Alogoskoufis, *supra* note 41, at 11.

[55] *See* Wallop, *supra* note 51; Kent Osband, *Greece's Toxic Cure*, EUR. FIN. REV. (Apr 17, 2012), http://www.europeanfinancialreview.com/?p=5014.

[56] *See* CIA, *Greece*, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/gr.html (last updated Mar. 20, 2012); Greece Program, *IMF Board Approves 28 Billion Loan for Greece*, INT'L MONETARY FUND (Mar. 15, 2012), http://www.imf.org/external/pubs/ft/survey/so/2012/CAR031512B.htm.

[57] *See* Wallop, *supra* note 51.

[58] In 2005, an estimated 4.3 percent of GDP accounted for military expenditures, the twenty-second highest in the world. *See* CIA, *supra* note 56.

event, the Greek government improved Athens's infrastructure,[59] funded increases in exceptionally strong security systems (given the heightened security alarm due to the recent 9/11 tragedy), and made the traditional effort to out-do previous hosts in terms of the Games' presentation.[60] As a whole, the government spending involved in the Olympic project proved substantial, leading to Prime Minister Costas Karamanlis's bleak 2004 comment: "The public debt exceeds even the most pessimistic of estimations."[61]

By 2009, 54% of Greece's GDP was spent on general government expenses,[62] such as military defense, public order, hospital services, housing, and community amenities.[63] In fact, 21.6% of its GDP was spent on social security funds alone, a percentage slightly higher than that of major industrial countries such as Belgium and Germany.[64]

B. Greece and the Eurozone: Concealing and Exposing the Deficit

During its early membership of the EU, the Greek government used extensive and underhanded measures to hide the true extent of its deficit from the rest of the Eurozone. Starting in 2002, Greece's debt managers worked with bankers of U.S. investment bank Goldman Sachs to effect a complex "cross-currency swap, in which government debt issued in dollars and yen was swapped for euro debt for a certain period—to be exchanged back into the original currencies at a later date."[65] While such transactions are a traditional part of government financing, the Greek government "devised a special kind of swap with fictional exchange rates" that effectively

---

[59] Nick Malkoutzis, *How the 2004 Olympics Triggered Greece's Decline*, BLOOMBERGBUSINESSWEEK (Aug. 2, 2012), http://www.businessweek.com/articles/2012-08-02/how-the-2004-olympics-triggered-greeces-decline.

[60] *Greek Debt Spirals After Olympics*, BBC NEWS (Sept. 12, 2004), http://news.bbc.co.uk/2/hi/business/3649268.stm.

[61] *Id.*

[62] European Commission, *General Government Expenditure by Function (COFOG)*, EUROPEAN COMMISSION: EUROSTAT, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=gov_a_exp&lang=en (from drop-down menu "sector," select "general government") (last updated Sept. 5, 2013).

[63] European Commission, *Glossary: General Government Sector—Statistics Explained*, EUROPEAN COMMISSION: EUROSTAT, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:General_government#.

[64] European Commission, *supra* note 62 (from drop-down menu "sector," select "social security funds").

[65] Beat Balzli, *How Goldman Sachs Helped Greece to Mask its True Debt*, SPIEGEL (Feb. 8, 2010), http://www.spiegel.de/international/europe/0,1518,676634,00.html.

enabled the government to hide its liabilities from the rest of the Eurozone until a later date.[66]

In December 2009, George Papandreou's Socialists won a general election in Greece, a victory largely attributable to the people's anger at the previous government for its failure to effectively tackle public corruption and the sinking economy.[67] The same month, Fitch and Moody reduced the Greek debt rating from A- to BBB+, marking the first time in a decade that Greek sovereign debt rating dropped below A-.[68] In February 2010, George Pandreou revised the 2009 deficit from the previously under-reported 5% to a startling 12.7% of GDP.[69] The final revised calculation by Eurostat ultimately brought the number up even further to an alarming 15.8% of GDP.[70] The following April, Fitch and Moody nicked their rating of Greek sovereign debt down to BBB-, just one level away from "junk" status,[71] followed that same month by Standard & Poor, who slashed Greek debt to a stunning BB+ rating—the upper levels of "junk."[72] These reductions in Greek debt ratings incited alarm in the financial markets and led to high bond yields.[73]

Since 2010, both the Greek government and other agencies, such as the EU and the IMF, have taken measures to stabilize Greece financially. In 2010, Papandreou's administration announced the implementation of a number of austerity

---

[66] The "special kind of swap with fictional exchange rates" that Goldman Sachs devised for Greece "enabled Greece to receive a far higher sum than the actual euro market value of 10 billion dollars or yen. In that way Goldman Sachs secretly arranged additional credit of up to $1 billion for the Greeks. This credit disguised as a swap didn't show up in the Greek debt statistics." *Id.* For further information on how the "currency swap" works, see *id*.

[67] *See* Rachel Donadio & Anthee Carassava, *Greek Socialists Win in a Landslide*, N. Y. TIMES (Oct. 4, 2009), http://www.nytimes.com/2009/10/05/world/europe/05greece.html. Regarding corruption, a 2010 study by Transparency International (the Berlin-based global "corruption watchdog") found that the Greeks paid an average of 1,355 ($1,830) in bribes that year for services from the public sector. *See Greek Corruption Booming, Says Transparency International*, SPIEGEL (Mar. 2, 2010, 11:06 AM), http://www.spiegel.de/international/europe/0,1518,681184,00.html.

[68] *See* Graeme Wearden, *Greece Debt Crisis: Timeline,* GUARDIAN (May 5, 2010), www.guardian.co.uk/business/2010/may/05/greece-debt-crisis-timeline.

[69] *See A Very European Crisis*, ECONOMIST (Feb. 4, 2010), http://www.economist.com/node/15452594?story_id=15452594.

[70] *See Numbers in Action*, ECONOMIST NEWSWEEK BLOG (Nov. 29, 2011), http://www.economist.com/blogs/newsbook/2011/11/greek-statistics.

[71] *See* Gary Dorsch, *Greek Debt Wildfire Engulfs the Euro in Flames, Boosts Gold*, MKT. ORACLE (May 13, 2010, 11:08 AM), http://www.marketoracle.co.uk/Article19468.html.

[72] *See* Dorsch, *supra* note 71; Lefteris Papadimas & Dave Graham, *S&P Cuts Greek Debt to Junk, Downgrades Portugal*, REUTERS (Apr. 27, 2010), www.reuters.com/article/2010/04/27/us-greece-idUSLDE63P0LU20100427.

[73] *See* Dorsch, *supra* note 71; KOURETAS, *supra* note 5, at 2.

packages.[74] By 2011, the EU and the IMF had offered Greece two bailout loans, both conditional on harsh austerity measures for the county.[75] The second bailout loan was finally ratified in 2012 and was conditioned on restructuring packages from Greece's private creditors.[76]

C. *International and Domestic Reception to Greece's Debt Crisis*

Public fear of a default by Greece greatly increased just prior to Greece's first bailout package[77] and again after Greece failed to meet the goals set out in that package a year later.[78] According to the *Wall Street Journal*, in May 2010, the credit market found there was a 75% chance of Greece defaulting.[79] In September 2011, "a poll of more than 50 economists across Europe" gave Greece a 65% chance that it would default within twelve months.[80]

Following Greece's self-imposed austerity measures in early May 2010, the resulting cuts in public spending received widespread disapproval from the Greek population, leading to violent protests beginning in May 2010[81] and continuing through 2011[82] and into 2012.[83] Among the calls for action by these protestors, many objected to the bailout offers from the EU and IMF[84] and instead demanded a cancellation of Greece's

---

[74] *See* Allen et al., *supra* note 8.

[75] *See id.*; *see also* Wroughton, *supra* note 8.

[76] *See* Wroughton, *supra* note 8.

[77] Aaron Smith, *Greek Debt Fears Ease After EU Aid Request*, CNN MONEY.COM (Apr. 23, 2010, 10:08 AM), http://money.cnn.com/2010/04/23/news/international/greek_bonds_prime_minister.

[78] Emelia Sithole-Matarise, *Bond Market Sees High Risk of Eventual Greek Default*, REUTERS (June 13, 2011, 5:41 PM), http://uk.reuters.com/article/2011/06/13/uk-markets-greece-idUKTRE75C3HD20110613.

[79] Mark Whitehouse, *Number of the Week: 75% Chance of Greek Default*, WALL ST. J. BLOG (May 22, 2010, 5:00 AM), http://blogs.wsj.com/economics/2010/05/22/number-of-the-week-75-chance-of-greek-default.

[80] Jonathan Cable & Andy Bruce, *Greece Looks Likely to Default, But Keep Euro*, REUTERS (Sept. 16, 2011, 7:42 PM), http://in.reuters.com/article/2011/09/16/idINIndia-59386520110916.

[81] *Greece Police Tear Gas Anti-Austerity Protesters*, BBC NEWS (May 1, 2010), http://news.bbc.co.uk/2/hi/europe/8655711.stm.

[82] *See* Rachel Donadio & Niki Kitsantonis, *Thousands in Greece Protest New Austerity Bill*, N.Y. TIMES, Oct. 20, 2011, at A10, *available at* http://www.nytimes.com/2011/10/20/world/europe/greek-workers-start-two-day-anti-austerity-strike.html.

[83] *See* Helena Smith, *Greek Protesters Fight with Police as Parliament Agrees Cuts Deal*, GUARDIAN (Feb. 12, 2012), http://www.guardian.co.uk/world/2012/feb/12/greek-protesters-clash-parliament-austerity.

[84] *See Greece Police Tear Gas Anti-Austerity Protesters*, *supra* note 81.

debt altogether.[85] 2013 witnessed a less violent but nonetheless economically damaging protest as Greece's two main labor unions, representing about 2.5 million workers, called a 24-hour strike, affecting schools, public transportation, and hospital staff.[86] Nevertheless, the Greek government continued to work with the EU and IMF to avoid default despite these protests.[87]

At the time of the writing of this note, Greece has experienced some positive economic trends—including a striking increase in Greece's major stock index, a lift of Greece's seventeen-month ban on short-selling in stocks, and a positive direction for Greek corporate bond sales[88]—which may suggest a return of investor confidence in Greece.[89] In a February 2013 article, the Wall Street Journal proposed that such economic confidence in Greece may signal a "possible turning point in the country's three-year-long debt crisis."[90] Even then, however, the Wall Street Journal was reluctant to be too optimistic, observing that "[t]o be sure, it could all go sour again, should social or political tensions erupt anew and derail the fragile [reform program]."[91]

III. INTRODUCTION TO THE ODIOUS DEBT DOCTRINE

> If we were all responsible for the misdeeds of the governments that represent us, thought Isabel, then the moral burden would be just too great.[92]

The odious debt doctrine should be viewed most appropriately as a qualification on, or exception to, the general rule that sovereign entities must pay the debts of predecessor governments.[93] Before the odious debt doctrine, other exceptions

---

[85] *See id.*; *see also* Greek Debt Audit Campaign, *Greek Debt Audit Campaign Statement*, JUBILEE DEBT CAMPAIGN (Feb. 12, 2012), http://www.jubileedebtcampaign.org.uk/Greek3720Debt3720Audit3720Campaign3720statement+7476.twl.

[86] Niki Kitsantonis, *Greece: Strikers Protest over Austerity*, N.Y. TIMES, Feb. 21, 2013, at A10, *available at* http://www.nytimes.com/2013/02/21/world/europe/greek-unions-walk-out-in-austerity-protest.html.

[87] *See* CNN Wire Staff, *Greek Lawmakers Pass New Austerity Law Despite Protests*, CNN NEWS (Oct. 20, 2011, 2:35 PM), http://edition.cnn.com/2011/10/20/business/greece-austerity-strikes/index.html; *see also Greece Timeline*, BBC NEWS (Mar. 12, 2012, 12:50 PM), http://news.bbc.co.uk/2/hi/europe/1014812.stm.

[88] *See* Stelios Bouras & Philip Pangalos, *Foreign Money Is Revisiting Greece*, WALL ST. J. (Feb. 24, 2013, 7:39 PM), http://online.wsj.com/article/SB10001424127887323864304578320431435196910.html.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] ALEXANDER MCCALL SMITH, FRIENDS, LOVERS, CHOCOLATE 32 (2005).

[93] *See* King, *supra* note 14, at 607.

to this basic rule existed as well: for example, "hostile debts"[94] and "war debts."[95] In 1927, the notion of "odious debts" emerged and joined this list of exceptions.[96]

Alexander Sack, the world's "preeminent . . . scholar on public debt" during the late 1920s,[97] coined the term "odious debt" in 1927.[98] He contended that a sovereign debt is "odious" and should be cancelled if the following three elements are satisfied: (1) the regime that incurred the debt was despotic, (2) the purpose of the debt was against the needs or interest of the state, and (3) the creditors were subjectively aware of the first two factors at the time they granted the debt.[99] The first prong advocates on behalf of the people by shifting liability for the debt from the state to the ruler personally, being based on the principle that a ruler "who does not represent her subjects necessarily lacks the legitimacy to act on their behalf."[100] The second prong represents a causation requirement: not only must the despotic ruler fail to work on behalf of the people, but the people must have suffered from it. In contrast to the first prong, the third prong takes into account the interests of the creditors, by penalizing only those creditors "who actually knew prior to extending debt that the ruler was 'despotic' and that [the despotic ruler's] expenditures would not benefit the State."[101]

Although Sack was the first to create the term, several theorists have developed their own versions of the odious debt doctrine, differing from Sacks' definition to varying degrees.[102] Contemporary usage has focused on three basic factors: (1) whether the population consented to the debt, (2) whether the

---

[94] Generally, the idea of "hostile debts" is similar to that of "odious debt," although it predates the odious debt doctrine and is less doctrinally developed. *See* Buchheit et al., *supra* note 14, at 1214-16.

[95] "War debts" are debts contracted by government in order to defeat an enemy. If the enemy overthrows the government, then the enemy is not expected to pay back the debts that were intended to further its downfall. *See* Buchheit et al., *supra* note 14, at 1212-14.

[96] *See* Lewis, *supra* note 11, at 302.

[97] Sarah Ludington & Mitu Gulati, *A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts*, 48 VA. J. INT'L L. 595, 598 (2008).

[98] *See* Lewis, *supra* note 11, at 302.

[99] *See* PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 165-66 (1991).

[100] *See* Lewis, *supra* note 11, at 303 (citing Buchheit et al., *supra* note 14, at 1237-45 (finding that agency law can serve as a proxy for these concerns)).

[101] *See id.* (citing ADAMS, *supra* note 99, at 165). It should be noted that this note focuses on the first two prongs, since an inquiry into the *subjective* awareness of Greece's creditors would require new research which this investigation does not have the access to undertake.

[102] *See* King, *supra* note 14, at 621-33.

population received any kind of benefit from the debt, (3) and whether the creditor was aware of these facts.[103] While each of these elements may be interpreted individually in varying ways, this overall structure and these terms represent the doctrine's most common form as used in scholarly discourses today.

For over a century, a number of countries have invoked the doctrine of odious debt in some form. For example, in 1883, Mexico repudiated as odious all debts incurred between 1857 and 1860 and between 1863 and 1867.[104] Also, when the United States took control of Cuba from Spain in 1898, the US refused to pay Cuba's debts to Spain, claiming that the debts were odious because Spain had imposed the debt without the Cuban people's consent.[105] A form of the odious debt doctrine found its way to the International Court of Arbitration in 1923, when Britain brought Costa Rica to court over Costa Rica's *Law of Nullities*, a 1922 law "that cancelled all contracts undertaken by [its former dictator] from 1917 to 1919," including loans from a British bank.[106] Chief Justice Taft upheld Costa Rica's law on the basis that the funds from the loan were not put to a "legitimate use."[107]

Although the odious debt doctrine was most recently evoked in Iraq and Nigeria, both regimes ultimately declined to enforce the doctrine for policy reasons. In 2003, after the fall of Saddam Hussein, the United States originally declared Iraq's debt to be odious.[108] But the United States later decided this created a risky precedent and consequently dropped the odious debt claim, choosing instead to negotiate with the Paris Club for "an 80% cancellation of Iraq's debts."[109] In a similar turn of events, in early 2005, Nigerian President Olusegun Obsanjo faced a request from the Nigerian Parliament to repudiate the country's debt, which was incurred largely during military dictatorships. President Obsanjo decided instead to negotiate with the Paris Club for a 60% reduction of the debt.[110]

The odious debt doctrine has received recent attention in the context of Greece in light of its ongoing financial crisis.

---

[103] *Id.* at 630-31.

[104] *See* BENOÎT BOUCHAT ET AL., ECUADOR AT THE CROSS-ROADS: AN INTEGRAL AUDIT OF THE PUBLIC DEBT 11 (Elizabeth Anne et al. trans., 2007), *available at* http://cadtm.org/Ecuador-at-the-cross-roads.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 12.

[109] *Id.*

[110] *Id.*

Among those who claim that Greece should invoke the odious debt doctrine to cancel some or all of its staggering debt, the creators of the 2011 documentary film, *Debtocracy*, stand out with particular prominence.[111] According to its directors, *Debtocracy* received half a million views within a week of its release and approximately one million views within its first month.[112] The arguments advanced in this film fall primarily into two categories: (1) the "odious debt"-focused arguments, claiming that Greece's debt is "odious" because the state government spent the proceeds without benefit to the Greek people;[113] and (2) the "odious regime"-focused arguments, contending that the Greek government is "odious" for having made poor business decisions on behalf of the nation,[114] engaging in "shady deals,"[115] and enacting socially repressive measures against the people.[116] In conclusion, *Debtocracy* argues that this odiousness should permit the cancellation of Greece's debts under the odious debt doctrine.[117] The arguments advanced by *Debtocracy* will be discussed more in depth in Part VI of this note. As of the writing of this note, there is no sign that the Greek government has acknowledged the message from *Debtocracy*.

As explained in the Introduction, this note seeks to analyze the applicability of the odious debt doctrine within the context of Greece's economic crisis. This analysis will conclude that the odious debt theory should not be used to release Greece from its debts, based on three primary findings: (1) the odious debt doctrine fails as a workable rule due to its inherent doctrinal and administrative flaws, and therefore should not be applied in general; (2) even if the odious debt doctrine were applied, the serious policy risks that accompany its use mandate

---

[111] The film *Debtocracy* has been distributed online and is available on a number of websites. *See* Aris Chatzistefanou & Katerina Kitidi, *Debtocracy*, YOUTUBE (May 12, 2011), http://youtu.be/qKpxPo-lInk [hereinafter *Debtocracy*]; *see also* Aris Chatzistefanou & Katerina Kitidi, *Greece has Woken Up to Debtocracy*, GUARDIAN (July 9, 2011, 5:00 AM), www.guardian.co.uk/commentisfree/2011/jul/09/greece-debtocracy.

[112] *Id.*

[113] For example, *Debtocracy* criticizes the government for its excessive spending, including the amount of loan proceeds spent on the 2004 Olympic Games. *See Debtocracy*, *supra* note 111, at 1:02:00.

[114] *See infra* note 179.

[115] *See infra* note 180.

[116] For example, the documentary criticizes the government's implementation and acceptance of the number of financial austerity measures, describing the effect of these measures on the Greek people's quality of life. "[T]he government has turned against the people with harsh austerity measures." *See Debtocracy*, *supra* note 111 at 28:53.

[117] *See id.* at 1:08:00.

a narrow interpretation of the doctrine, so as to limit its reach to only exceptional cases; and (3) under a narrow interpretation of the odious debt doctrine, Greece would not be eligible to cancel its debt. The next three Parts will discuss each of those findings in turn.

IV. FUNDAMENTAL PROBLEMS OF THE ODIOUS DEBT DOCTRINE AS A WHOLE

This Part will show how the odious debt doctrine is plagued by doctrinal defects and administrative weaknesses, which strongly discourage the doctrine's general use altogether. It should be noted for sake of clarity that while diverging views exist as to the most appropriate interpretation of the odious debt doctrine (e.g. narrow or liberal), the next Part will introduce that discussion. Here, Part IV counsels against the doctrine's use as a whole, given its inherent flaws.

A. Doctrinal Weaknesses

Given that its key terms are inherently vague and unexplained, the odious debt principle is a doctrinally weak concept. For example, the very heart of the odious debt doctrine itself, the word "odious," remains remarkably undefined. The distinction between "odious debt" and the much broader concept of "*onerous* debt" is often confusing.[118] In particular, great difficulty arises in attempting to discern the line between debt that is "odious" and debt that is "'merely' . . . excessive, burdensome, and difficult or impossible to service."[119] Other key words in the odious debt doctrine are also ambiguous, including the terms "absence of consent" in the first element and "absence of benefit" in the second.[120] The gaping doctrinal holes left by these critical yet undefined terms make the odious debt doctrine susceptible to self-serving interpretations and lack of uniformity in application, among possible other dangers.[121] Altogether, given these fundamental defects, the odious debt doctrine fails as a workable and comprehensible rule.

---

[118] Ochoa, *supra* note 13, at 152.

[119] *Id.* (distinguishing between "odious" debt and "onerous" debt).

[120] *See infra* Part VI.A.

[121] Part VI will introduce the different ways the doctrine can be interpreted as a result of this vagueness.

B. Administrative Weaknesses

In the hypothetical case that the odious debt doctrine were sufficiently unambiguous to qualify as a rule of law, its enforcement would require some kind of authority to apply the doctrine to the merits of each sovereign debtor's case. As Buchheit observes, were we to leave the judgment in the hands of the lender, "the municipality of Rome would still be paying off Caligula's gambling debts."[122] The sovereign debtor is of course equally unqualified to consider the merits of its own odious debt claim, having "every economic motivation to paint its predecessor in an unflattering light."[123] In solution, Sack advocated the formation of an impartial, international tribunal to enforce the doctrine.[124] This analysis will show, however, how the administrative technicalities involved in such an adjudication process are exceptionally complicated—specifically the projects of choosing qualified judges, ensuring impartiality, and locating the necessary evidence.

One of the criticisms of Sack's "impartial, international tribunal"[125] proposal is that the task of finding qualified judges to assume such roles would be too difficult, if not virtually impossible. For example, Bradley Lewis denounces the odious debt doctrine as "judicially inadministrable[,] because it requires judges to answer inherently political questions . . . ."[126] Lewis found that judges "simply cannot systematically distinguish between odious and non-odious governments."[127] Similarly, the author Tai-Heng Cheng indicated that government successions are too political for a hard-and-fast rule like the odious debt doctrine.[128]

Another criticism is that the requirement for "impartial judges" may be a naïve expectation. In other words, not only would an "impartial, international tribunal" require finding judges qualified to be entrusted with international decision-making, but also without connections to the country in distress, the countries of its creditors, and any countries who might be adversely or beneficially affected by the result. Especially

---

[122] Buchheit et al., *supra* note 14 at 1229.
[123] *Id.*
[124] *Id.* at 1223.
[125] *Id.*
[126] Lewis, *supra* note 11, at 305.
[127] *Id.* at 308 (citing Patrick Bolton & David Skeel, *Odious Debts or Odious Regimes?*, 70 L. & CONTEMP. PROBS. 83, 90 (2007)).
[128] *See* Ochoa, *supra* note 13, at 123; *see also* Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 L. & CONTEMP. PROBS. 7, 21 (2007).

considering our modern global economy—not to mention the often international impact of sovereign bankruptcy—this presents a daunting, if not impossible, task. Moreover, especially given the uniqueness of every nation's interstate politics and economics, each new claimant under the odious debt doctrine may likely require a new and specialized search for impartial judges.

Moreover, a question arises as to who or what authority should decide those critical questions, initiate the process, and determine the impartiality of the judges. Impartiality presents an issue here as well, since allowing either the sovereign-debtor or the creditors to take over that managerial role may raise a bias concern.

Even if an impartial tribunal were successfully instated,[129] the adjudication process still presents other complications. For example, the need to show that a debt was used for odious purposes would require identifying the uses of the loan proceeds. But, as Christiana Ochoa points out: "[I]t has been nearly impossible to uncover forensic information about how despotic regimes actually finance themselves."[130] The difficulties involved in discerning this vital information, not to mention proving it to the tribunal, complicate this task significantly. Another potential evidentiary complexity relates to proof of the third prong of the odious debt doctrine: the creditor's subjective awareness of that the debts were for odious purposes.[131] The "subjectivity" of that element requires an inquiry into the mind of the creditor specifically, which presents a formidable evidentiary challenge for the sovereign-claimant. Absent any records of communication between the sovereign-claimant and the creditor exhibiting as much, the best or only proof of the creditor's "subjective" knowledge may be in the creditor's own files. Considering that the sovereign-claimant requires this evidence in order to prove a claim *against* the creditor, access to the creditor's files for this purpose may prove a nearly impossible task.

---

[129] As a point of interest, the author Jeff King finds the broad concern over the impartial tribunal concept to be overstated, believing there to be "ample precedents" of such tribunals. *See, e.g.*, King, *supra* note 14, at 653 & 666. King also dismisses the task of interpreting the doctrine's ambiguous terms as being "not beyond the competence of what courts or tribunals can do or in fact have done and continue to do in domestic law." *See id.* at 666.

[130] Ochoa, *supra* note 13, at 131.

[131] *See* PATRICIA ADAMS, ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY 165-66 (1991).

Notably, the impartial tribunal will likely confer a degree of deference on the financial decisions of the state officials who incurred the debt. The author King observes that a tribunal instated to adjudicate under the odious debt doctrine will probably use a standard of review that will "doubtless be deferential to the views of public officials" and will likely deem "only egregious examples of harmful conduct" as odious.[132]

Altogether, as with the doctrinal flaws, the administrative defects involved with the odious debt concept counsel against its use altogether, or at least favor its limited application.

V. POLICY PROBLEMS OF A LIBERAL INTERPRETATION

This Part will introduce the note's second finding: that the odious debt doctrine should be interpreted narrowly because liberal interpretations exacerbate serious policy concerns and increase the risk of dangerous precedents. Even its creator advocated for a restrictive application.[133] According to Lee Buchheit, Sack "would have recoiled at casually branding debts as odious," as some modern advocates attempt to do.[134] After investigating the serious policy risks that accompany a liberal interpretation of the odious debt doctrine, this Part similarly concludes in favor of a narrow application.

To this end, this Part first will explain how the odious debt doctrine is commonly viewed through one of two lenses: "odious regime" and "odious debt." This first section will continue to explain how these two approaches qualify as "narrow" or "liberal" interpretations of the doctrine: narrow, in that the interpretation would limit the doctrine to only a few, select situations, and liberal, in that the interpretation would apply the doctrine to a more expansive set of situations. The second section of this Part will advance some of the policy concerns associated with the odious debt doctrine, which increase dramatically as the doctrine is interpreted more liberally. Accordingly, this Part will conclude that because of the increased

---

[132] King, *supra* note 14, at 666.

[133] For example, when the Soviet government in 1918 claimed that it, a government of "workers and peasants," had the legal right to repudiate the debts incurred by the former Russian "landlords and bourgeoisie" governments, Alexander Sack openly balked at the proposal. *See* Buchheit et al., *supra* note 14, at 1223-24. Furthermore, sometime after he proposed his odious debt doctrine, Sack wrote that state public debts are a "charge upon the territory of the State"—that is, within the financial responsibility of the state. *Id.* (citing Alexander Sack, *The Juridical Nature of the Public Debt of States*, 10 N.Y.U. L. REV. 341, 357-58 (1932)).

[134] Buchheit et al., *supra* note 14, at 1223.

policy problems associated with a liberal interpretation, the doctrine should only be interpreted narrowly.

A. *Narrow vs. Liberal Interpretation of the Odious Debt Doctrine*

In order to examine the liberal and narrow interpretations of the odious debt doctrine, the analysis must first be divided into two parts: an "odious regime" and an "odious debt" analysis. This division is necessary due to some confusion about the very crux of the doctrine itself: the word "odious." The placement of this adjective has been a subject of disagreement among scholars. One view, and the traditional Sackian approach, would look for an "odious" *debt* and a "despotic" *regime*.[135] Despite this, recent scholarly discourse reveals a tendency among other scholars to shift the modifying "odious" adjective away from the word "debt" and instead towards the word "regime"[136]—which dramatically changes the application of the odious debt doctrine. Given these two diverging approaches, the details of the "odious regime" variation and those of the "odious debt" alternative will be discussed in turn.

1. The "Odious Regime" Variation: A Liberal Standard

The "odious regime" approach does not require an analysis of the sovereign's debt at all but instead focuses solely on the nature of the government, which allows this variation to cover a more expansive set of situations.[137] That is, if the state can show its previous government to have been an "odious" one, then all debts incurred by that odious government are liable to be lawfully repudiated, regardless of their uses.[138] Meanwhile, under this logic, debts incurred by a virtuous government and used for the same purposes would be upheld.

In short, by focusing exclusively on the nature of the government, this standard could potentially cancel both odious and non-odious debts, depending on the nature of the

---

[135] *See* ADAMS, *supra* note 99, at 165-66.

[136] *See* Buchheit et al., *supra* note 14, at 1223 (citing Anna Gelpern, *Sovereign Debt Restructuring: What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 393 (2005); Khalfan et al., *supra* note 14, at 47; Seema Jayachandran & Michael Kremer, *Odious Debt*, 96 AM. ECON. REV. 85-87 (2006)).

[137] *See* Buchheit et al., *supra* note 14 at 1222.

[138] *See id.*

government. This expansiveness shows the "odious regime" standard to be a very liberal one.

2. The "Odious Debt" Variation: Interpreted Both Liberally and Narrowly

The "odious debt" standard focuses on the debts themselves, and attempts to distinguish between loans beneficial to the people and loans used for personal enrichment.[139] This definition is more loyal to the original Sackian concept of the doctrine of odious debt.[140] This approach may also seem more logically cohesive than the "odious regime" approach, because the punishment (the cancellation of loans) has a direct, causal relation to the injustice (the loans not benefiting the people).[141]

The "odious debt" standard is more complex than its "odious regime" counterpart, because the elements of the "odious debt" version are subject to both narrow and liberal interpretations, while the alternative "odious regime" version remains only a liberal standard.

For example, the phrase "absence of consent" in the doctrine's first prong can be interpreted both narrowly and liberally. Sack meant to contain the odious debt doctrine to despotic regimes only[142]—thus under Sack's approach, since a despot "does not represent her subjects,"[143] the people's lack of consent is automatically presumed. His contemporary, Feilchenfeld, expanded the odious debt doctrine to include debts incurred without the population's consent by *any* form of regime but suggested the form of government may give rise to inference of consent.[144] For example, non-consent may be presumed in

---

[139] *See* Bolton, *supra* note 127, at 83, 88. It should be noted that even when applying the "odious debt" variation, the odiousness of the *regime* is still a relevant question, as it can inform other elements. For example, if it were established that the government was blatantly and prevalently known to be corrupt, this might shed light on the third element: whether the creditors knew that the proceeds of their loans were not serving the interests of the people. *See* Buchheit et al., *supra* note 14, at 1226.

[140] Sack himself stipulated that any debts contracted in furtherance of "the needs or . . . interest of the State" must be considered non-odious. ADAMS, *supra* note 99, at 165.

[141] In contrast, the "odious regime" approach punishes creditors with a cancellation of loans, even in cases where the government was odious for reasons other than the loan usage.

[142] *See* ADAMS, *supra* note 99, at 165-66.

[143] *See* Lewis, *supra* note 11, at 303 (citing Buchheit et al., *supra* note 14, at 1237-45 (finding that agency law can serve as a proxy for these concerns)).

[144] ERNEST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 704 (1931); *see* King, *supra* note 14, at 631 (analyzing what "absence of consent" might mean to different forms of government, not just despotic ones, in other words "parliamentary bod[ies] . . . elected on the basis of what are generally regarded as

dictatorial governments, but in democracies, the people's choice to elect officials may evince the people's "consent" to the elected officials' subsequent decisions.[145] Feilchenfeld's interpretation of the "absence of consent" element is narrow, given that it likely prevents democracies from invoking the odious debt doctrine.[146]

Alternatively, a liberal interpretation of "absence of consent" treats that element as automatically satisfied by a showing of the second element. In other words, proof of the "absence of benefit" prong creates a presumption that an "absence of consent" exists as well, based on the logic that a population would naturally refuse to consent to something that is not for their benefit.

This brings the discussion to the "absence of benefit" element. The question of determining whether people felt the "benefit" of a loan remains a subject of much discussion. Sack also advocated a narrow meaning of "absence of benefit,"[147] choosing to limit the term's meaning to instances of despotic self-enrichment: "When a despotic regime contracts a debt, not for the needs or in the interest of the state, but rather to

---

normal majority rules," "absolute government[s]," and "representative bod[ies] not elected by the application of fair and normal rules").

[145] FEILCHENFELD, *supra* note 144, at 704.

[146] Feilchenfeld's interpretation aligns with Sack's underlying principle for the odious debt doctrine: namely, that a ruler "who does not represent her subjects necessarily lacks the legitimacy to act on their behalf." Lewis, *supra* note 11, at 302-03. In other words, in a democracy, the elected officials are directly chosen by the people, thus such officials would represent the people whenever making decisions in their roles as such officials. *See* Thomas S. Wyler, *Wiping the Slate: Maintaining Capital Markets While Addressing the Odious Debt Dilemma*, 29 U. PA. J. INT'L L. 947, 967-68 (finding that "[i]f a democratically elected regime, for example, contracted a debt for some detestable purpose, it could not be deemed odious since it was not incurred by a despot"). In a democracy, the elected officials are directly chosen by the people, thus such officials would represent the people in perhaps the most direct way possible.

[147] Indeed, a strict reading of Sack's interpretation would constrain the odious debt doctrine to an even narrower context, given that Sack places emphasis on whether the debt was incurred for the benefit of the state, regardless of how the proceeds were in fact used. *See* Khalfan et al., *supra* note 14, at 15-16; *see also* Gèunter Frankenberg & Rolf Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts*, 12 INT'L J. SOC. L. 415, 428 (1984). In other words, in cases where the loan was "contracted for the benefit of a state and with general consent, but subsequently spent on items that are in fact of no benefit to the population," Sack would require the debtor state "to repay even in the absence of benefit, for the debts were in fact incurred for the benefit of the state." Khalfan et al., *supra* note 14, at 15-16. This approach finds the injustice of the "odious debt" to arise from an abuse of rights when the debt was contracted, and not from the excessive burdens to the regime successor. *See* Frankenberg & Knieper, *supra*, at 428. Nevertheless, this note has uncovered limited scholarly attention to this extremely strict reading of Sack's approach and therefore, for the purposes of establishing a narrow interpretation of the odious debt doctrine, rejects this strict reading in favor of a more popularly-used narrow approach.

strengthen itself, to suppress a popular insurrection, etc, [sic] this debt is odious . . . ."[148]

Similarly, authors Ashfaq Khalfan, Jeff King, and Bryan Thomas also suggest a narrow interpretation by proposing four pre-defined scenarios that would constitute *prima facie* cases of an absence of benefit:

> (1) where proceeds are spent for personal enrichment; (2) where the proceeds are spent on arms or military expenses used in a manner contrary to the interests of the population, (3) where the proceeds are spent on infrastructure distributed in a severely discriminatory manner; and (4) where the funds were used to promote oppressive institutions.[149]

Additionally, authors Omri Ben-Shahar and Mitu Gulati "point [out] that populations often do benefit" at least in part from the "debt incurred by despotic regimes."[150] To the extent that these populations have benefited, these authors conclude that the "populations and creditors should share liability" in a way that reflects the "relative blameworthiness and benefits of each."[151] By restricting the "absence of benefit" element to only pre-defined situations where the population received no benefit at all from the loan's proceeds, these authors advocate a narrow interpretation of the term.

Because this note sets out to analyze the odious debt doctrine through the lens of Greece's debts, this analysis requires an interpretation of "absence of benefit" that will be liberal enough to encompass the ways the Greek government used their loan proceeds, which include, for example, excessive spending on the public sector and expenditure for the 2004 Olympics. For this purpose, this note proposes a liberal interpretation of "absence of benefit" that includes the use of a debt in a way that proves to conflict with the long-term interests of the population, *even if* the population feels a short-term benefit from the loans. This is more expansive than previous interpretations because, traditionally, the odious debt doctrine was limited to cases where the people received no benefit at all from the loans. As will be discussed more in depth later, this

---

[148] Khalfan et al., *supra* note 14, at 14.

[149] *Id.* at 45. The author expands on a third scenario (where "the proceeds are spent on infrastructure distributed in a severely discriminatory manner") in a footnote, explaining that this is meant to mean "systematic discrimination such as apartheid, rampant nepotism or corruption such as in Indonesia." *Id.* at 45 n.181 (footnote omitted).

[150] *See* Ochoa, *supra* note 13, at 122; *see also* Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts?: A Framework for an Optimal Liability Regime*, 71 L. & CONTEMP. PROBS. 47, 48-49 (2007).

[151] *Id.*

liberal interpretation of "absence of benefit" would encompass Greece's situation because the government's spending, including that on the public sector and the 2004 Olympics, caused a long-term detriment to the Greek people, even though they initially felt the benefits of those expenditures.[152]

B. Policy Concerns Support a Narrow Interpretation

This section concludes that only a narrow interpretation of the odious debt doctrine should be adopted because of the serious policy concerns involved in the liberal versions. For example, the subjectivity of the "odious regime" standard threatens inconsistency in application, self-interested opinions permeating the adjudication, and an inappropriate authority deciding political questions.[153] The "odious debt" standard also comes with serious policy risks, including the risk of incentivizing sovereigns to mismanage the country or to exploit local resources as an alternative venue for financing, disincentivizing lenders to lend, and discouraging sovereigns from correcting the deficiencies in their regulatory systems that produced their financial crises in the first place.[154] While these policy problems apply to the odious debt doctrine in general, the risks increase dramatically as the doctrine is interpreted more liberally.

As such, this section will first address the policy problems with the "odious regime" variation of the doctrine and then will look at the policy concerns associated with the "odious debt" standard. Given the heightened policy concerns involved in the liberal odious debt standard, this section concludes that a liberal interpretation must be rejected in favor of a narrow one.

1. Policy Concerns Involving the "Odious Regime" Standard

The overarching problem with the "odious regime" variation is that it presents a dangerously subjective standard. This approach is subjective because it requires a discernment of what makes a regime "odious." As one author opined: "Odiousness—whether of regimes, individuals, or certain cooked

[152] *See infra* Part VI.A.2.
[153] *See infra* Part V.B.1.
[154] *See infra* Part V.B.2.

green vegetables—is a subjective concept."[155] As discussed further below, a subjective standard not only threatens inconsistent interpretations, but it also leaves the doctrine at the mercy of self-interested opinions.

First, a subjective standard, such as the "odious regime" approach, is undesirable because it threatens to yield inconsistent findings as to what is "odious." American civil and constitutional case law has approached subjective standards very warily because of the risk of inconsistent results, finding that subjective standards yield results "as variable as the length of the foot of each individual."[156] Toward this end, some authors have suggested installing an impartial, international tribunal to ensure consistent results across the board.[157]

However, even if an impartial tribunal were chosen to promote some kind of uniformity in the "odious regime" interpretation, the subjective judgment behind this standard still risks self-interested opinions pervading the adjudication. For example, leaving the definition of "odious" to subjective impressions requires judges to make determinations about the inherently political issues of diverse countries.[158] This presents the risk of ethnocentrism entering into the equation.[159] For example, to what extent may "odious" findings be based on the principles of the judge's culture? That is, if a government mandates or encourages cultural practices that are criticized in other societies, such as public beatings or female circumcision, is that in itself enough to make the government "odious"? Are all dictatorships automatically odious?[160] Also, are certain civil rights required of a non-odious government, and if so, which ones?[161] By requiring individuals to cast judgments on the

---

[155] Buchheit et al., *supra* note 14, at 1228.

[156] *See* Vaughan v. Menlove, 132 Eng. Rep. 490 (3 Bing. N. C. 468, 475) (1837) (Tindle, J. concurring) (choosing an objective standard over a subjective one, stating: "Instead . . . of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe"). Also, American constitutional law has struck down legislation that has based culpability on "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," such as whether the defendant's behavior was "annoying" or "indecent." *See* United States v. Williams, 128 S. Ct. 1830, 1845 (2008). Arguably, the word "odious" might have an even less universal meaning than those impermissible examples provided.

[157] *See supra* Part IV.B.

[158] *See* Lewis, *supra* note 11, at 305 (citing Bolton & Skeel, *supra* note 127, at 83, 90).

[159] *See* Buchheit et al., *supra* note 14, at 1228.

[160] *See id.*

[161] *See id.* at 1229.

practices of a society that is not their own, cultural biases will likely play a role.

Altogether, given the purely subjective basis of "odious regime" variation and its accompanying risks, these serious policy concerns require rejection of this standard in favor of an alternative interpretation.

2. Policy Concerns Involving the "Odious Debt" Standard

Like the "odious regime" variation, the "odious debt" approach involves significant policy risks, which increase dramatically as the standard is interpreted more liberally.

One policy concern is that the odious debt doctrine incentivizes despotism or government mismanagement. Through its third prong, the doctrine directs the punishment for a government's odious spending on the lenders, a third party. Thus, an international implementation of the odious debt doctrine could easily strip from a corrupt ruler any lingering incentives to refrain from contracting and spending loans for self-enrichment purposes. In other words, despite the doctrine's moral and normative goals, the doctrine ironically encourages despotic governments to continue their self-serving expenditures at the people's expense. Greece's situation exemplifies this risk. If Greece were permitted to cancel its debts through the odious debt doctrine, this may promote moral hazard among other sovereigns.[162] That is, such precedent would incentivize devious state officials to "work the system" by borrowing money recklessly while at the same time either maintaining fiscally unsound economic policies or deliberately overspending in confidence that their mismanagement will ultimately entitle the country to a cancellation of the loans. These risks call for a very narrow interpretation of the odious debt doctrine so as to eliminate these incentives.

Since the odious debt doctrine would discourage lending to despots, another policy concern is that despots alternatively will turn to "funds from sources that may harm" the country.[163] By placing a burden on creditors, the odious debt doctrine would prove a strong deterrence for lenders from engaging in

[162] *Cf.* A. Mechele Dickerson, *A Politically Viable Approach to Sovereign Debt Restructuring*, 53 EMORY L.J. 997, 1010 (2004) (finding a similar moral hazard risk is involved in IMF lending and support packages).

[163] *See* Ochoa, *supra* note 13, at 110.

transactions with governments known to be despotic. If a despot is deprived of borrowing from lenders, it may likely resort to domestic means of financing its interests: for example, sale of land or other valuable state assets,[164] natural resource extraction contracts, and other forms of foreign direct investment (FDI).[165] Such exploitations by the despotic government would likely harm the country's economic resources, natural environment, and population at least as much as the debt would.[166] "Given the odious debt doctrine's moral imperatives and normative goals," Ochoa writes, "it seems unreasonable to develop a functional odious debt doctrine that will give despots cognizable incentives to make yet more use of these (potentially more harmful) methods of financing their regimes."[167] Thus, while purporting to be a remedial measure, the odious debt doctrine runs the risk of being equally or more destructive than the situation it would attempt to circumvent. If Greece were allowed to invoke the odious debt doctrine, the resulting precedent would set the stage for this policy concern to become a reality.

Additionally, just the "absence of benefit" element alone provides a substantial disincentive to lenders when interpreted liberally. As defined earlier, a liberal application of "absence of benefit" prong would expand the doctrine to encompass situations where the population actually felt the benefits, so long as these benefits eventually turned into long-term detriments.[168] The expansiveness of this term, however, would place an enormous burden of foreseeability on lenders. In other words, the liberal interpretation of the "absence of benefit" prong requires lenders not only to predict how the borrowing state will potentially use the loans but additionally to forecast the possible long-term impact of those potential uses—a very demanding burden. Given the high liquidity of the international lending market,[169] lenders would likely be easily dissuaded by this high risk of investment loss and would choose to put their money elsewhere.

---

[164] *See id.* at 131 n.115.

[165] *See id.* at 131. For more information about FDI, see *id.* at 136.

[166] For a more in-depth examination of these harms, see *id.* at 130-52.

[167] *Id.* at 110.

[168] This is exemplified by Greece's "decade-long consumer and public sector spending boom": a series of short-term benefits to the people, all of which eventually drove the country into bankruptcy. MANOLOPOULOS, *supra* note 10, at 21; *see also supra* Part II.

[169] *See* Albert H. Choi & Eric Posner, *A Critique of the Odious Debt Doctrine*, 70 L. & CONTEMP. PROBS. 33, 36 (2007), *available at* http://scholarship.law.duke.edu/lcp/vol70/iss3/4 (commenting on the high liquidity of the international lending market, such that "investors should be able to find nearly as good opportunities" if dissuaded from lending to dictatorial regimes).

On a related note, these lender disincentives caused by the odious doctrine would also negatively affect other countries' financial opportunities.[170] Countries "often need to finance significant amounts of investment to foster the level of economic and social development they desire"[171] but usually cannot afford such investments merely using domestic funds.[172] These problems exist even more acutely for developing countries. As such, opportunities to borrow in the private sector play a very important role for these countries.[173] A liberal interpretation of the odious debt standard, however, critically threatens these opportunities. As mentioned earlier, the third element of the odious debt doctrine places a responsibility on the creditor to detect and withhold funds from seemingly odious governments.[174] If the odious debt doctrine were interpreted liberally, a widespread application would dramatically increase the risk of investments in sovereign debt. Lenders would likely respond to this increased risk by either refusing to extend loans or by charging higher interest rates,[175] which would likely deprive other countries of advantageous borrowing opportunities.[176]

---

[170] Jayachandran & Kremer, *supra* note 136, at 1 (finding that the risk presents when lenders, discouraged by illegitimate governments, stop lending to "legitimate" governments as well).

[171] *See* Brenneman, *supra* note 27, at 652.

[172] Brenneman explains this further: "Savings rates are often low in such countries, and export revenue is usually insufficient to meet financing needs. Often, tax receipts do not cover budgetary outlays." Also, while the World Bank and other such entities offer "official development assistance" to an extent, "this source of resources has been shrinking for many years." *Id.* (citing César Calderón et al., "Determinants of Current Account Deficits in Developing Countries" 28 tbl.2 (World Bank, Policy Research Working Paper No. 2398, 2000), available at http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2398; Derek Huang Chiat Chen, *Intertemporal Excess Burden, Bequest Motives, and the Budget Deficit*, at 48 fig.2.1 (World Bank, Policy Research Working Paper No. 3086, 2003), available at http://go.worldbank.org/IC5I4ZMQ40.

[173] *See* Brenneman, *supra* note 27, at 652 (*citing* Inaamul Haque & Ruxandra Burdescu, *Monterrey Consensus on Financing for Development: Response Sought from International Economic Law*, 27 B.C. INT'L & COMP. L. REV. 219, 246 (2004)).

[174] *See* ADAMS, *supra* note 99, at 165-66.

[175] Choi & Posner, *supra* note 169, at 35.

[176] Jayachandran & Kremer, *supra* note 112, at 83 (finding that "[i]f creditors anticipated [that they would not be] able to collect on [even] legitimate loans, the debt market would shut down"). These authors present an interesting solution to the policy problems of the odious debt doctrine: instead of designating an impartial tribunal to adjudicate the matter after-the-fact, Jayachandran and Kremer propose empowering a committee to determine only whether *future* loans to a government would be odious. Thus, loans can be cancelled under the odious debt doctrine only if they were incurred despite being labeled "odious" by the designated committee in advance. This proposal, if adopted, would be too late for Greece's situation, but nevertheless advances an interesting theory.

Finally, the odious debt doctrine may diminish or eliminate the regime's incentive to restructure their budget and governmental system. In Greece's situation, for example, the need to pay its creditors will force the government to fundamentally restructure its system of public expenditure.[177] Allowing a release of debt could take away, or at least discourage, the government's incentive to do so.

Given the risks that accompany the odious debt doctrine, it logically follows that an increase in the doctrine's invocation would yield an increase in the risk of these policy problems. Since a liberal interpretation encompasses a more expansive set of situations, therefore only a narrow application of the odious debt doctrine is warranted in order to reduce of the threat of these policy concerns,.

VI. APPLICATION TO GREECE

Given the narrow and liberal interpretations of the odious debt doctrine, this section will demonstrate that Greece requires application of a liberal standard—that is, either the "odious regime" standard or the liberal interpretation of the "odious debt" standard—in order to qualify for release from its debts. On the other hand, Greece would not be eligible under the narrow interpretation of the "odious debt" standard.

A. Greece Requires a Liberal Interpretation to Qualify

To reach its the conclusion that Greece is only eligible under liberal interpretations of the doctrine, this Part considers the arguments advanced by the creators of the documentary film *Debtocracy*, who are foremost proponents of Greece invoking the odious debt doctrine.[178] As before, these arguments are most clearly introduced by analyzing them in turn under the "odious regime" standard and then under that of "odious debt."

---

[177] *See* Alberto Mingardi, *Greece and the National Moral Hazard Problem*, DAILY CALLER (July 1, 2011, 2:29 PM), http://dailycaller.com/2011/07/01/greece-and-the-national-moral-hazard-problem/ (finding that the Greek crisis constituted a "useful lesson" that will bring the population of Greece to "demand a fundamental restructuring of public expenditure," whereupon Greece, "[f]orced to face the truth, . . . might, paradoxically, end up better off five years from now than countries where the political classes are disguising the need for reform").

[178] *See* Chatzistefanou & Kitidi, *supra* note 113.

1. The "Odious Regime" Variation May Be Favorable to Greece

Some of the arguments in *Debtrocracy* in favor of Greece invoking the odious debt doctrine are based on the nature of the government rather than on the use of the loan proceeds, including evidence of the Greek government's poor business decisions,[179] involvement in corrupt transactions,[180] failure to correct the widespread corruption problem in the country,[181] and implementation of austere financial measures to the detriment of the people's quality of life.[182] These claims would find relevance only under the "odious regime" standard because they do not focus on the uses of the debt proceeds.[183] As discussed previously, the "odious regime" standard is a very liberal one, given that it encompasses a more expansive set of situations.[184]

The question presented in this section is whether these arguments would succeed under the "odious regime" approach. This is a difficult question to answer, because the "odious regime" standard turns on such a subjective term as "odious." Hypothetically speaking, on one hand, an impartial tribunal[185] might agree that underhanded transactions and administrative oversights might indeed make the government an "odious" one. Additionally, it is even less clear whether a judge would find that the Greek government was "odious" Greek government for having made detrimental business decisions, as a judge may be

---

[179] For example, the film addresses the Greek government's failure to maintain a budget, and criticizes the Greek government's decision to become a part of the EU, on the basis that Greece could not keep up with the competition between Eurozone countries. One spokesperson compared the competition between Greece and the more economically stable countries of the Eurozone to a "featherweight boxer" in the ring with "Muhammad Ali." *Id* at 13:05. The documentary also questioned the Greek government's decision to hire a former Goldman Sachs employee to lead the Greek Public Debt Management Agency, on the basis that an employee of Goldman Sachs was equivalent to a "criminal" and thus could not be relied on to handle Greece's financial affairs in the best interests of the state. *Id*. at 58:09. In another example, the film criticized the government's decision to import foreign military arms, especially from Germany, even when during the financial crisis. *Id.* at 59:43.

[180] *Id.* at 1:03:15. *Debtocracy* provides as an example the underhanded "cross currency swaps" made by the Greek government in collaboration with Goldman Sachs in order to hide the extent of Greece's deficit from the EU, *id.* at 56:51, which was discussed in Part II, *supra*. The film also mentions a scandal involving the German electronics company Siemens, who contracted with Greece for inflated contract prices, allegedly due to bribing certain Greek officials. *Id.* at 55:18

[181] *See Greek Corruption Booming, Says Transparency International*, *supra* note 67.

[182] *See* Chatzistefanou & Kitidi, *supra* note 113.

[183] *See supra* Part V.A.1.

[184] *See id.*

[185] For a discussion about the theory of creating an international, impartial tribunal to adjudicate the merits of each odious debt case, refer to Part IV.A, *supra*.

inclined to follow a kind of "business judgment rule" approach.[186] In other words, a judge might prefer to presume that the government's business decisions were based on "sound judgment,"[187] rather than to question whether the government engaged in "odious" breaches of its fiduciary duty to the people.

Even if a judge were to find the Greek government to be guilty of "odious" conduct based on these factors, she would be utilizing a very unconventional notion of "odious regime," since the term usually applies to despots or clearly self-serving leaders.[188] While some of the corruption may qualify as "self-serving," other aspects of the deceitful behavior reflect measures made for the advancement of the country, however misguided or unethical they may seem. For example, the elaborate spending on the public sector, in the form of public sector wages and social programs (as discussed in Part IV), reflects that loan proceeds went toward the needs of the people and not to the Greek officials themselves. Even the Greek government's 2001 illicit method of gaining membership into the Eurozone—while clearly underhanded—was performed to benefit the country by gaining the highly beneficial interest rates that the euro currency involved.[189] Thus, under a conventional notion of "odious" as described above, even this grievous instance of deceitful conduct might not be considered "self-serving" so as to qualify.

In short, since this standard remains an incredibly subjective one, it does not offer a strong answer either way. For the purposes of this examination, however, this note will assume that under the liberal "odious regime" standard, an impartial judge could subjectively conclude that Greece qualifies.

---

[186] For more discussion on the business judgment rule, see *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (holding that "[a] board of directors enjoys a presumption of sound business judgment" and therefore "[a] court . . . will not substitute its own notions of what is or is not sound business judgment"); *see also* Brazen v. Bell Atl. Corp., 695 A.2d 43, 49 (Del. 1997) (holding that courts will not examine "the wisdom of the [contested] decision itself," but only whether the decision was "reached by a proper process").

[187] Brazen v. Bell Atl. Corp. *supra* note 186 at 49.

[188] *See* Khalfan et al., *supra* note 14, at 14.

[189] *See supra* Part II.A.

2. While a Liberal Interpretation of the "Odious Debt" Variation Is Favorable to Greece, a Narrow Interpretation Is Not

As explained earlier, the "odious debt" standard involves greater complexity than its "odious regime" counterpart due to its potential for both liberal and narrow interpretations. This section will demonstrate that only a liberal interpretation of the "odious debt" standard would absolve Greece of its debt obligations.

Of the three elements of the odious debt doctrine, Greece would fail the "absent of consent" prong under Feilchenfeld's narrow interpretation." As discussed in Part V.A, Feilchenfeld finds that a democracy triggers a strong presumption of the people's consent.[190] Here, Greece was a democratic regime during the time it contracted the vast majority of its loans,[191] and therefore under Feilchenfeld's narrow interpretation, Greece likely fails the "absence of consent" requirement as a result of this presumption.

The next question is whether Greece would qualify under a liberal definition of "absence of consent." Under the liberal approach, as discussed previously, "absence of consent" is presumed when an "absence of benefit" is shown. Accordingly, this particular examination turns on an analysis of the differences between the narrow and liberal interpretations of the "absence of benefit" element.

Turning to "absence of benefit," the narrow interpretation would exclude Greece. Greece incurred the majority of its loans during the time that Greece's social government ran deficits to finance public sector jobs and social programs, such as pensions.[192]

---

[190] *See supra* note 146.

[191] *See* HELLENIC PARLIAMENT, THE CONSTITUTION OF GREECE, AS REVISED BY THE PARLIAMENTARY RESOLUTION OF MAY 27TH 2008 OF THE VIIITH REVISIONARY PARLIAMENT 7, 17 (Kostas Mavrias et al. eds., Xenophon Paparrigopoulos et al., trans., 2008), *available at* http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf (stating that in 1974, "Greece came out of [a] seven year long dictatorship" and entrusted the Fifth Revisionary Parliament "with the task to shape the modern features of the democratic regime [in the new Constitution]," which subsequently chose "as form of the democratic government that of a republic" and thereafter describing the current form of government as a "parliamentary republic" where "[a]ll powers derive from the People and exist for the People and the Nation"); *see also* FEILCHENFELD, *supra* note 144, at 704.

[192] *See infra* Part II. Regarding the "absence of benefit" prong generally, it should be noted that this examination considers Greece's debt situation as a whole, with particular emphasis on the arguments promoted by the creators of *Debtocracy* and other proponents of Greece's debt cancellation. A closer analysis might reveal some miscellaneous expenditures of which the population did not feel any benefit. But such an investigation would entail the intricate and complex task of tracking every

The years 2000–2009 reflected a time of particularly substantial borrowing for Greece, during which Greece experienced "a decade-long consumer and public sector spending boom."[193] Because the government spent the proceeds of these loans *directly* on the people, including via social welfare and public sector wages,[194] the population indeed felt the benefits of these loans. Thus, a strict reading of "benefit"—as promoted by Sack, Ben-Shahar, Gulati, and other theorists—would reject a claim that Greece's debts are odious.

The spending on the 2004 Athens Olympics merits individual analysis under the narrow "absence of benefit" interpretation. *Debtocracy* and other proponents of Greece invoking the odious debt doctrine argue that the government's elaborate spending for 2004 Olympics reflects an odious use of loan proceeds without benefit to the people. But a significant portion of the 2004 Olympics expenses went toward city infrastructure development, including a new metro system, a new airport, a tram, a light railway network, and a bypass highway.[195] These costs, as well as the expenses of the security systems, undoubtedly conferred benefits upon the Greek people more than anyone else. Other Olympics expenses, including the construction of buildings and arenas, served a greater purpose of improving the economy through tourism, one of Greece's primary industries[196]—which would create enough of a benefit to qualify under the narrow interpretation of the doctrine.[197] In any case, the excesses spent on the Olympics clearly do not resemble the narrowly-defined examples of "personal enrichment" or "oppressive institutions" intended by Sack and

---

transaction by the Greek government over a large span of years—which information this examination is unable to procure. As such, this note will instead choose to focus on the aforementioned arguments advanced by *Debtocracy*.

[193] *See* MANOLOPOULOS, *supra* note 10, at 21.

[194] *See* Wallop, *supra* note 51.

[195] *See* Derek Gatopoulos, *Greek Financial Crisis: Did 2004 Athens Olympics Spark Problems In Greece?*, HUFFINGTON POST (June 3, 2010), http://www.huffingtonpost.com/2010/06/03/greek-financial-crisis-olympics_n_598829.html.

[196] Of the seven industries listed on the *Greece* webpage of the reference site *World Factbook*, "tourism" is listed first and reportedly accounts for 15% of the nation's GDP. *See* CIA, *supra* note 56. Also, according to a 2010 report by the United Nations World Tourism Organization, Greece hosted 14.9 million international tourists in 2009, and is ranked as the seventh most visited country in the EU and sixteenth in the world. *See* U.N. WORLD TOURISM ORG., WORLD TOURISM BAROMETER, Vol. 8, no. 2 (June 2010), *available at* http://www.unwto.org/facts/eng/pdf/barometer/UNWTO_Barom10_2_en.pdf.

[197] If a greater purpose of aiding tourism were not sufficient to justify any elaborate expenses for Olympic events, then practically every host of the Olympic games could routinely cancel their debts related to the games after the fact.

other theorists.[198] Altogether, Greece's situation would not qualify under the narrow definition of "absence of benefit."

On the other hand, Greece would likely prevail under a liberal interpretation of "absence of benefit." Given that the government's lavish spending ultimately proved disastrous to the people,[199] this long-term detriment, despite the initially-felt benefit, would qualify under a liberal interpretation of "absence of benefit" element.

Furthermore, under the liberal approach, satisfying the "absence of benefit" prong means that the "absence of consent" element is also likely fulfilled. As discussed a few paragraphs earlier, the liberal interpretation of the doctrine would find the "absence of consent" prong satisfied upon an adequate showing under the "absence of benefit" prong.

Altogether, because of the nature of Greece's debt, Greece requires either the liberal "odious regime" standard or the liberal "odious debt" standard in order to successfully invoke the odious debt doctrine. This analysis also shows that a narrow interpretation of the "odious debt" standard would exclude Greece from its protection. Therefore, since this note favors the application of the narrow interpretation exclusively, Greece should not use the odious debt doctrine to repudiate its debt.

B. Alternatives to the Odious Debt Doctrine

While this note argues that Greece should not be permitted to invoke the odious debt doctrine, countries that are "weighed down by a history of imprudent borrowings [are] not, however, wholly without recourse."[200] Thus, this Part will advance three alternatives to invoking the odious debt doctrine.[201]

One option, and perhaps the most obvious one, is simple debt repayment. Of course, this seemingly perfunctory suggestion may be impossible in some situations, but it remains nonetheless a possible solution for countries whose debt, though onerous, is not odious. Currently, the Greek government has manifested its intent to repay its debt,[202]

---

[198] *See* Khalfan et al., *supra* note 14, at 45.

[199] *See supra* Part II.

[200] Buchheit et al., *supra* note 14. at 1261.

[201] Perhaps not all of these options are possible for Greece or in Greece's best interests, but a separate, more extensive study would be warranted to make that determination.

[202] *See* Allen et al., *supra* note 8.

although it has required the cooperation of its creditors in terms of time extensions[203] and rescue packages.[204]

A restructuring of the debt is a second viable solution for resolving debt repayment problems.[205] As one commentator points out, "[s]ince a sovereign's creditors cannot liquidate or seize assets to satisfy the debt," as discussed previously in this note,[206] "[the creditors] must wait until the sovereign has sufficient assets to satisfy its obligations," which would entail restructuring its payment of principal and interest.[207] This method also has its pitfalls, predominantly creditor holdouts, moral hazard, and lack of coordination, which may impede an effective restructuring.[208] On the other hand, because restructuring involves independent and private transactions—as opposed to international dispute resolutions—it does not set any precedent and avoids the risks associated with that effect.

A third alternative would be to declare bankruptcy without invoking the odious debt doctrine. Although this recourse avoids the dangerous precedent-setting risks of the odious debt doctrine, it also involves numerous other complexities and policy concerns. For example, in Greece's case, one author rejects the idea of a beneficial default, finding that

> [Greece] would then no longer pay debt interest, but it would have to close its primary fiscal deficit (the deficit before interest payments), of 9-10 [percent] of GDP, at once. This would be a far more brutal tightening than Greece has now agreed. Moreover, with default, the banking system would collapse.[209]

---

[203] *See* Reuters, *Greece Says Still Seeking More Time to Pay Off Debt*, FOX BUS. (Oct. 4, 2012), http://www.foxbusiness.com/news/2012/10/04/greece-says-still-seeking-more-time-to-pay-off-debt/#ixzz2PUz3ff88 (reporting that "[t]he Greek government has asked for more time to implement painful reforms" and "allow euro zone rescue funds to be used to recapitalize its banks" before repaying its debt).

[204] *See* Abdul Ahad, *EU-IMF Audit to Resume in Greece*, BUS. RECORDER (Apr 3, 2013, 8:55 PM), http://www.brecorder.com/world/global-business-a-economy/113590-eu-imf-audit-to-resume-in-greece.html (reporting that Greece's "bailout, initiated in 2010, is over 20 times higher" than a "10-billion-euro ($12.8-billion) bailout" that the EU, the IMF, and the European Central Bank discussed giving Cyprus in 2013).

[205] *See* Buchheit et al., *supra* note 14, at 1261-62 (finding that "[t]he sovereign debt restructuring process as it has evolved over the last twenty-five years is often not pleasant—indeed, it is frequently exasperating, contentious, and attenuated—but it is a recognized feature of the international financial system").

[206] *See supra* Part I.A.

[207] Brenneman, *supra* note 27, at 662.

[208] For a more extensive examination of these pitfalls of restructuring, see *id.*, at 662-70.

[209] Martin Wolf, *A Bail-Out for Greece Is Just the Beginning*, FIN. TIMES (May 4, 2010, 8:13 PM), http://www.ft.com/cms/s/0/de21becc-57af-11df-855b-00144feab49a.html#ixzz1qNw4Y2N7.

On the other hand, an investigation by Borensztein and Panizza showed that the economic effects of a default are actually short-lived, limited to at most a few years,[210] which would suggest that the economic costs of default for Greece may not be as severe as commonly thought.[211]

These three options reflect just three of many possible viable alternatives to the odious debt doctrine as solutions for Greece's situation. The years to come likely will prove which of any possible solutions will serve Greece the best.

CONCLUSION

This note has set out to analyze the odious debt doctrine within the context of Greece's financial debt crisis and ultimately arrived at three primary findings: (1) at a universal level, the odious debt doctrine should not be applied because of its critical inherent doctrinal and administrative failings; (2) even if the odious debt doctrine were applied, it should be interpreted narrowly, since a liberal interpretation of the doctrine involves increased policy risks; and (3) under a narrow interpretation of the odious debt doctrine, Greece would not be eligible to cancel its debt. Therefore, Greece should not be permitted to invoke the protection of the odious debt doctrine and should instead resort to other solutions to resolve its debt crisis.

Evelyn D'Angelo[†]

---

[210] For example, this study found that while default episodes are associated with credit damage and a drop in bilateral trade, both of these events tend to be short lived, spanning only a few years. Similarly, while default episodes are also associated with a decrease in output growth in the following year, no significant growth effect is noted in years subsequent. *See* Eduardo Borensztein & Ugo Panizza, *The Costs of Sovereign Default* (Int'l Monetary Fund, Working Paper No. 081238, 2008).

[211] Although, as an author from Forbes points out, Borensztein and Panizza's study only used examples in which "economic recovery was helped by exchange-rate depreciation," which "does not seem to be an option for countries that belong to the Eurozone." "VoxEU," *What Will Happen if Greece Defaults? Insights from Theory and Reality*, FORBES (May 7, 2010 4:00 AM), http://www.forbes.com/sites/davos/2010/05/07/what-will-happen-if-greece-defaults-insights-from-theory-and-reality/.

† J.D., Brooklyn Law School, 2013; M.A., Bowling Green State University, 2009; B.A., University of Notre Dame, 2007. I wish to thank the *Brooklyn Law Review* editorial staff, whose incredible dedication and effort left a defining mark on this project, as well as my classmates at Brooklyn Law School, especially Yekaterina Blinova, whose continual support and friendship left a defining mark on my law school experience as a whole. This work is dedicated to my brother John Gabriel D'Angelo.